Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403

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DEVIANCE, DUE PROCESS, AND THE FALSE PROMISE OF FEDERAL RULE OF EVIDENCE 403

Aviva Orenstein†

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INTRODUCTION

Eleven years ago, in a stark departure from centuries of legal tradi-
tion, Congress enacted federal evidence rules permitting the prose-
cution to introduce evidence of prior sexual offenses committed by
defendants charged with rape and child molestation.1 Federal Rule of
Evidence 413, concerning sexual assault,2 and Federal Rule of Evi-
dence 414, concerning child molestation,3 allow evidence of the ac-
cused’s prior sexual misconduct to be “considered for its bearing on
any matter to which it is relevant,” most notably propensity.4 This

1 Congress passed Federal Rules of Evidence 413–415 as part of the Violent Crime
bypassing the regular rulemaking process. For a history of the process, see 25 CHARLES
ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5411 (2005
URB. L.J. 305 (1995), and infra note 60.
2 FED. R. EVID. 413. In relevant part, Rule 413—Evidence of Similar Crimes in Sex-
ual Assault Cases—provides: “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 mat-
ter to which it is relevant.” FED. R. EVID. 413(a).
3 FED. R. EVID. 414. Rule 414—Evidence of Similar Crimes in Child Molestation
Cases—provides in relevant part: “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 mat-
ter to which it is relevant.” FED. R. EVID. 414(a). Rule 414 applies Rules 413 and 414 to civil actions. FED. R. EVID. 415. I focus almost exclusively on the criminal rules.
4 Except where directly relevant, I leave civil cases (which concern mostly sexual harassment)
for others to consider.

4 United States v. Tyndall, 263 F.3d 848, 850 (8th Cir. 2001) (“Although Federal Rule of Evidence 404(b) generally excludes the admission of evidence of other crimes to show the propensity to commit a particular crime, Congress excepted sexual assault cases from this rule when it enacted Federal Rule of Evidence 413.”); United States v. Gabe, 237 F.3d 954, 959 (8th Cir. 2001) (“Evidence of prior bad acts is generally not admissible to prove a defendant’s character or propensity to commit crime. However, Congress altered this rule in sex offense cases when it adopted Rules 413
means that the prosecution may introduce evidence of past sexual offenses to show that the accused has the character and predatory tendencies of a sexual offender. Jurors are invited to use the prior sexual misconduct evidence circumstantially, inferring that because the accused acted as a sexual predator on a previous occasion, the accused might have done so again and was therefore more likely to have committed the crime charged. The prior offenses prosecutors may introduce need not have resulted in convictions, or even arrests, and in some cases prosecutors have even introduced previously acquitted conduct. The standard for proving the prior offense is whether a jury could believe by a preponderance of the evidence that the offense occurred. Rules 413 and 414 also require timely notice, and failure to so provide may lead to exclusion of the evidence.

To apply Rules 413 and 414, the prosecutor must demonstrate that (1) the defendant is accused of an offense of sexual assault or molestation, (2) the proffered evidence pertains to the accused's commission of another sexual assault or child molestation, and (3) the evidence is relevant. See United States v. Stamper, 106 Fed. Appx. 833, 835 (4th Cir. 2004); United States v. Fitzgerald, 80 Fed. Appx. 857, 863 (4th Cir. 2003); Doe v. Glanzer, 232 F.3d 1258, 1268 (9th Cir. 2000); United States v. Guardia, 135 F.3d 1326, 1328 (10th Cir. 1998).

I refer to these rules as the "new rules" (although with the passage of time this moniker becomes increasingly less apt) or as the "sexual offense rules" or as the "propensity rules." Also, I frequently refer to prior sexual offenses, but it is clear from the plain text of the rules, and the few cases that have considered the issue, that uncharged offenses that occurred after the charged conduct are also admissible under these rules. See United States v. Sioux, 362 F.3d 1241, 1244–47 (9th Cir. 2004) (holding that the language and logic of the rules apply to post-charged conduct); United States v. James, 60 M.J. 870, 873 (A.F. Ct. Crim. App. 2005) ("[T]he fact that propensity evidence occurs after the dates of the charged offenses is not a barrier to its admission."); United States v. Wright, 53 M.J. 476, 486 (C.A.A.F. 2000) (Sullivan, J., concurring) (questioning the majority’s admission of conduct that occurred nearly six months after the charged offense as inconsistent with Military Rules of Evidence).

This notion of “once a rapist, always a rapist” serves as the title to an influential feminist critique of Rule 413. Katharine K. Baker, Once a Rapist? Motivational Evidence and Relevancy in Rape Law, 110 Harv. L. Rev. 563 (1997).

A few cases, involving state versions of the new rules, admit as propensity evidence conduct that resulted in an acquittal for the accused. See Hess v. State, 20 P.3d 1121, 1124, 1129 (Alaska 2001) (admitting evidence of the defendant’s prior sexual assault, but holding “that it was error not to inform the jury of [the accused’s] acquittal”); People v. Mulens, 14 Cal. Rptr. 3d 534, 549–50 (Ct. App. 2004) (holding that it was error to exclude evidence of acquittal of other sexual molestation offenses used for propensity purposes).

See, e.g., United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998) (“The district court must make a preliminary finding that a jury could reasonably find by a preponderance of the evidence that the ‘other act’ occurred.”); Wright, 53 M.J. at 483 (explaining that Rule 413 requires “the judge to conclude that the jury could find by preponderance of the evidence that the offenses occurred”). But see infra Part IV.B.1 (criticizing the standard).

Section (b) of both Rules 413 and 414 provides:
matter, given that rape and child abuse are usually prosecuted as state crimes, almost all of the nonmilitary federal cases interpreting these Rules arise in Indian Country.9

By focusing on past behavior and allowing the admission of past sexual offenses as propensity evidence, Rules 413 and 414 represent a doctrinal and theoretical departure from traditional evidence rules—although precisely how much of a departure is debatable. Rules 413 and 414 contravene limitations on character evidence that were until now considered axiomatic. Traditionally, propensity evidence was disfavored on the grounds that people should be tried for their charged acts and not for their past deeds or personalities. Admitting evidence of the prior bad acts was feared to encourage the worst in jurors, allowing jurors to convict based on a perception that the accused is bad or dangerous, rather than because the jurors were convinced beyond a reasonable doubt that the accused actually committed the charged offense. Additionally, information about prior bad acts has traditionally been seen as confusing and distracting to the jury, undermining jurors’ already precarious allegiance to the presumption of innocence. This concern seems particularly true when the prior bad acts are of a sexually predatory nature.

In Part I, I briefly review the landscape of the Federal Evidence Rules, discussing how character evidence works generally and illustrating the changes wrought in sex offense cases by the new rules. Part I also briefly outlines the philosophical, constitutional, procedural, and rule-based concerns surrounding Rules 413 and 414. Others have ably done this work, so I only summarize the rich debate.

Part II focuses on two linked doctrinal issues regarding Rules 413 and 414: (1) the new rules’ potential violation of due process, and (2) the role of Federal Rule of Evidence 403 in limiting the unfairness of propensity evidence admitted under Rules 413 and 414. Courts, in some cases angst-ridden and in others cavalier, have rejected due process challenges to the new rules. Rule 403, which provides a balancing test whereby a trial judge may exclude evidence when the probative

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.

FED. R. EVID. 413(b), 414(b); see United States v. LeCompte, 99 F.3d 274, 276 (8th Cir. 1996) (rejecting government admission of evidence under Rule 414 where notice was provided only “[o]n the eve of trial”).

9 The significance of the fact that the Federal Rules of Evidence has disproportionately affected American Indians is the subject of my separate essay entitled Lustful Jurisdiction: Indian Country as an Unseemly Choice for an Evidence Experiment (unpublished manuscript, on file with the author).
value of that evidence is substantially outweighed by unfair prejudice, confusion, distraction, or waste of time, is touted as a remedy for any due process or fairness concerns. According to the courts, Rule 403 serves as a bulwark against any fundamental unfairness presented by Rules 413 and 414.

Part III examines the role of Rule 403 in recent case law from the Eighth and Tenth Circuits. Overwhelmingly, these cases demonstrate that the courts’ process of applying Rule 403 to the new sexual propensity rules is markedly different from the way courts apply (or at least ought to apply) Rule 403 to the admissibility of uncharged conduct admitted for impeachment or for other nonpropensity purposes. The balancing test of Rule 403, upon which the constitutionality of these sexual propensity rules purportedly rests, is a shadow of its true self in these instances. The Eighth Circuit, in particular, has rendered Rule 403 toothless and ineffectual. To those who might argue that Rule 403 was already defanged, I would concede that the courts’ application of Rule 403 has been uneven, but would nevertheless point to many instances in which Rule 403 has shielded the accused from unfair prejudice.

Within the context of 404(b), the balancing test of Rule 403 has served as a meaningful check on the erroneous introduction of prior bad acts evidence, even in the child abuse context. State v. Aakre, 2002 MT 101, ¶¶ 31–38, 46 P.3d 648, 649–50, 655–56 (affirming a district court decision granting Aakre’s motion for a new trial on the grounds that evidence of sexual assaults over a two-year period against two stepdaughters from a previous marriage, sixteen years earlier, was erroneously admitted where a Rule 403 balance was incorporated in the Rule 404(b) analysis); Major Bruce D. Landrum, Military Rule of Evidence 404(b): Toothless Giant of the Evidence World, 150 MIL. L. REV. 271 (1995) (arguing that Military Courts have abandoned the application of Rule 404(b) to exclude evidence and that any exclusion will come under Rule 403).
overvalue the probative value of the propensity evidence, while disre-
garding serious dangers of unfair prejudice, confusion, distraction, 
and waste of time.

By relying on the legislative history of the new rules and announc-
ing a presumption of admissibility, courts have forsaken the tradi-
tional operation of Rule 403. They have thereby limited, and in some 
cases abandoned, their traditional role as gatekeepers. Ironically, and 
seemingly oblivious to the irony, these same courts nevertheless tout 
Rule 403 as the guarantor of due process. This guarantee is hollow, 
given the acontextual and rote application of Rule 403 in many of the 
cases involving the new sexual propensity rules.

Many judges, lawyers, and law professors have expressed serious 
and well-founded reservations about Rules 413 and 414. However, 
the academy and the evidence establishment cannot just sit back and 
enjoy the cold comfort of having correctly predicted a criminal rights 
disaster. Rather than decry the current rules, it is essential that we 
find ways to reinvigorate Rule 403. We must advocate concrete solu-
tions to deflect the prejudice, avoid the confusion, limit the distrac-
tions, and curtail the waste of time, all triggered by the admission of 
prior sexual offenses. Therefore, Part IV proposes new ways for courts 
to consider and apply Rule 403 in the context of Rules 413 and 414, so 
that Rule 403 will serve as a meaningful check on the admission of 
unfair evidence. Confronting the reality that the sexual propensity 
rules are here to stay, I designed my proposals as realistic guides for 
trial and appellate courts. The proposals permit courts to follow 
the new course charted by Congress—in allowing sexual propensity evi-
dence—without entirely abandoning the basic evidentiary guarantees 
of fairness built into Rule 403, and without derogating the vital discre-
 tionary powers of the trial judge in determining admissibility on a 

case-by-case basis.

In Part IV, I reject the approach of the Eighth Circuit, which has 

applied what I call “403-lite,” an uncritical standard that it believes is
commanded by the legislative history of Rules 413 and 414. I suggest concrete ways to limit the dangers of sexual propensity evidence by intelligent and meaningful application of Rule 403.  Specifically, I suggest that courts analyze the probative value and the prejudice in context, focusing on the least prejudicial means to introduce the evidence, screening more carefully for juror confusion and distraction, and avoiding waste of time. Additionally, I recommend rethinking the standard of proof for admitting such evidence, which, particularly under the increased admissibility of sexual propensity evidence, presents too easy a hurdle for prosecutors. Finally, I propose specific ways in which trial courts can adhere to the new rules while still limiting some of the unfair prejudice.

I

NEW CHARACTER RULES FOR THOSE ACCUSED OF SEX CRIMES

A. A Challenge to the Old Regime

To understand the significance of the new rules, compare the following two examples. The first example illustrates the traditional approach to evidence of similar bad acts by the accused. I have chosen a drug charge as the template, but this first example would have applied to sexual crimes as well until Rules 413 and 414 were enacted. The second example illustrates the stark difference between the traditional approach and the special sexual propensity rules.

Example #1: Smith is on trial for illegal drug use, a highly recidivistic crime. His past drug use, however, is not admissible if the theory for introducing the past drug use is that Smith has a propensity for using drugs. In fact, the first line of Rule 404(b) specifically commands that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”

16 I support such an application of Rule 403 generally, but think it is especially necessary when applying Rules 413 and 414.

17 FED. R. EVID. 404(b). Rule 404(b) provides in full:

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.

Id.
Rule 404(b) allows the accused’s uncharged misconduct\textsuperscript{18} to be admissible for a purpose other than propensity, such as to show absence of mistake.\textsuperscript{19} But the need for the other purpose would have to be strong, such as Smith’s claiming that he thought he was smoking oregano when, in fact, the substance was marijuana. Given such a defense, the ostensible reason for introducing the evidence is not propensity (once a drug user always a drug user), but proof of some element of the offense, in this case, knowledge or absence of mistake (past drug use indicates that Smith would not mistake oregano for marijuana).

Articulating a nonpropensity purpose is not in itself sufficient for the admission of other purposes under Rule 404(b), because the accused could raise a Rule 403 objection. Applying Rule 403, the trial court would have to find that unfair prejudice in allowing the jury to hear about Smith’s prior bad acts outweighs the probative value.\textsuperscript{20} Thus, Rule 403 guards against the danger of impermissible propensity arguments unfairly influencing the jury.\textsuperscript{21} Under limited circumstances, therefore, the prosecutor may introduce evidence of prior wrongs, but such evidence would not be automatically admissible and the court may instruct the jury not to use the prior bad acts as circumstantial evidence of the accused’s character or proclivities.\textsuperscript{22}

\textsuperscript{18} The term “uncharged misconduct” is often used to describe the “other crimes, wrongs, or acts” admissible under Rule 404(b) and under impeachment Rules 608 and 609. See generally I Edward J. Imwinkelried, Uncharged Misconduct Evidence § 1:01 (rev. ed. 2004) (referring to “uncharged misconduct” as offenses that are not actually charged in the case for which the accused is on trial). The term “uncharged misconduct” is apt in our context, too, where it means any sexual offense committed by the accused that is not the subject of his current prosecution. That prior misconduct could have been charged in another case and could have, but need not have, resulted in a conviction.

\textsuperscript{19} Absence of mistake is one of the “other purposes” listed in Rule 404(b). See supra note 17. There is no finite list for other purposes, so proving modus operandi and demonstrating capacity also fall under Rule 404(b)’s permissible use of other wrongs or acts. Occasionally, courts mistakenly call Rule 404(b) evidence an exception to the propensity rule. See, e.g., United States v. Wright, 48 M.J. 896, 900 (A.F. Ct. Crim. App. 1998) (“[A] number of exceptions [to the ban on propensity evidence], such as those contained in Mil.R.Evid. 404(b) and its federal equivalent, Fed.R.Evid. 404(b), have developed.”). However, it is crucial to emphasize that such other purposes are not exceptions to the propensity rules, but rather examples where the evidence is being used for purposes other than propensity (even if jurors may, in fact, misuse the evidence for propensity).

\textsuperscript{20} Fed. R. Evid. 403.

\textsuperscript{21} In other words, the court could conclude that the evidence is admissible despite the possibility of unfair prejudice. See supra note 10 and accompanying text (setting out Rule 403); see also United States v. Best, 250 F.3d 1084, 1090 (7th Cir. 2001) (holding that the district court did not abuse its discretion in “concluding that the evidence [of prior drug activity] was probative of [defendant’s] intent, knowledge, and absence of mistake with respect to the charged offense, and that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice”).

\textsuperscript{22} If Smith was convicted of a felony related to drugs, past drug use may be admitted to impeach Smith’s credibility if he takes the stand. However, it is unlikely that a prior similar activity not related to honesty would be admitted for impeachment purposes. Furthermore, such evidence must be of a conviction (not merely arrests or other bad acts),
Example #2: Jones is accused of rape. Under Rule 413, any prior sexual offenses (not necessarily convictions or arrests), including twenty-year old offenses\textsuperscript{23} and offenses committed as a juvenile,\textsuperscript{24} would be admitted into evidence for any relevant purpose.\textsuperscript{25} Rule 413, therefore, allows the prosecution to demonstrate Jones’ propensity to sexually attack women, and to argue that Jones acted in conformity with this character trait and committed the rape for which he is being tried.\textsuperscript{26} This is true even if Jones never takes the stand, and even if Jones had been acquitted of the prior sexual offense.\textsuperscript{27} These two examples illustrate the tremendous changes that the new rules—with their overt rejection of the ban on propensity evidence—introduced into the theory and application of the evidence rules.

B. The Debates over Rules 413 and 414

Rules 413 and 414, drafted by Congress, rejected by the Federal Judicial Center, and excoriated by the evidence establishment, have generated much discussion. Most of the reaction, but certainly not and must be a felony. Rule 609 admits evidence that an accused has been convicted of a crime “punishable by death or imprisonment in excess of one year . . . if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.” \textit{Fed. R. Evid.} 609(a). This standard reverses the presumption of Rule 403 and allows admission only when the prosecution can demonstrate that probativeness outweighs unfair prejudice. See generally \textit{28 Charles Alan Wright} \& \textit{Victor James Gold, Federal Practice and Procedure} § 6134 (1993 & Supp. 2005). Smith can avoid entirely the issue of his drug use for impeachment purposes if he decides not to take the witness stand.

If Smith were to raise the issue of his character and, for instance, argue that he is not the type of person who could ever use drugs, only then could the government rebut the same, and also ask questions on cross-examination pertaining to Smith’s specific acts of prior drug use. See \textit{Fed. R. Evid.} 404(a)(1) (permitting the accused to raise pertinent character traits and allowing prosecution to rebut the same), 405(a) (delineating how such exceptions to character evidence may be admitted as reputation or opinion evidence).

\textsuperscript{23} See, \textit{e.g.}, \textit{United States v. Drewry}, 365 F.3d 957, 960 (10th Cir. 2004) (concluding that the district court did not abuse its discretion in admitting testimony concerning a prior act of child molestation from twenty-five years earlier); \textit{United States v. Gabe}, 237 F.3d 954, 959–60 (8th Cir. 2001) (permitting evidence of a prior uncharged sexual assault that was over twenty years old, where the witness was seven years old at the time of the alleged assault).

\textsuperscript{24} See, \textit{e.g.}, \textit{United States v. LeMay}, 260 F.3d 1018 (9th Cir. 2001) (admitting evidence relating to the defendant’s prior juvenile rape conviction).

\textsuperscript{25} \textit{Fed. R. Evid.} 413(a).

\textsuperscript{26} As I argue later in the Article, Rule 403, though still applicable, plays a different role in sexual propensity cases. See \textit{infra} Parts II.C, III.A.

\textsuperscript{27} See \textit{supra} note 6; \textit{infra} note 228.
all, has been critical. This Article briefly outlines below the arguments in favor of and opposed to the new rules.

1. Arguments in Favor of the New Rules

Rules 413 and 414 seem to be an appealing solution to the horror of sexual offenses and the difficulty of proving such offenses in court. The increasing adoption by states of similar rules, or their


29 Throughout this Article, I consider Rules 413 and 414 together. Courts have barely differentiated them, and their language and legislative histories are almost identical. To the extent that Congress intended both rules to shore up the credibility of individual victims who tend to be disbelieved and make their stories seem more credible, the theories behind Rules 413 and 414 seem similar. I note with some dismay that I am following this tendency to lump rape and child molestation together. Elsewhere, however, I have dubbed this the “lifeboat syndrome,” wherein women and children are herded together to be rescued, in this case from sexual predators. See Aviva Orenstein, No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials, 49 Hastings L.J. 663, 695 (1999). I am reminded of the famous line in A Passage to India: “They had started speaking of ‘women and children’—that phrase that exempts the male from sanity when it has been repeated a few times,” E.M. Forster, A Passage to India 183 (1924).

Making special rules just for women and children seems to signal their membership in the club of vulnerability and victimhood, and arguably disempowers adult women by implying that they need special protection. The notion that “our” women and children are in jeopardy suggests that women and children are objects, or at least that they are the responsibility of those in power, and not the powerful ones themselves. This argument is valid even if women, such as Rep. Susan Molinari, participate in the process. Patriarchy as a controlling ideology is capable of expression and enforcement even by those whom it presumably controls. See Michel Foucault, Discipline and Punish: The Birth of the Prison 26–27 (Alan Sheridan trans., 1977) (asserting that the effect of power “is manifested and sometimes extended by the position of those who are dominated”).

There are several obvious and important differences between women and children as witnesses, which the new federal rules ignore. One difference arises because children, given their age, language skills, perception, memory, and experience, tend to make easy-to-discredit witnesses. Another difference is that there is no consent defense to child molestation, so the credibility contest is one that surrounds the identity of the perpetrator, his or her capacity or inclination to be sexual with a child, and the motive and accuracy of the child’s testimony. This is different from the he-said/she-said nature of acquaintance rape cases, in which the issue is consent. One consequence of this difference is that some states have adopted a special propensity rule only for child sexual abuse. Similarly, other states have special common-law rules or special applications of 404(b) for child molestation cases only.

30 I am on record as a critic of Rules 413 and 414, albeit for slightly unusual reasons, having argued that despite their feminist patina, the rules are subtly antifeminist in philosophy and potentially unhelpful in protecting women and children. See generally Orenstein, supra note 29 (discussing these concerns).
retention of common-law doctrines making a special exception for propensity in sexual cases, indicates the popularity of such rules.31 An appreciation of the good that these rules will sometimes accomplish is necessary to any critique. This appreciation is particularly necessary here, where I hope to suggest a means of tailoring the rules’ application to where they are most needed and least likely to cause unfairness to the accused.

A sophisticated argument in favor of the new rules acknowledges the potential unfair prejudice of propensity evidence,32 but focuses on its probative value. If the probativeness is indeed high, then to support the admission of the evidence one need not scuttle all of the presumptions and traditions of evidence law. Rather, one should


States which have acknowledged a “lustful disposition” exception to 404(b) include Rhode Island and Washington. See, e.g., State v. Greene, 823 A.2d 1129 (R.I. 2003); State v. Rice, 755 A.2d 137 (R.I. 2000); State v. Kilgore, 53 P.3d 974 (Wash. 2002). States that affirmatively exercise a liberal extension of state counterparts to 404(b) or offer wider “latitude” in sexual assault cases include Alabama, Arkansas, Colorado, Delaware, Georgia, Iowa, Kansas, Kentucky, Louisiana, Maine, Oklahoma, and Wisconsin. (Research on file with author.) I only include in this list states where there are more than three cases in the past five years demonstrating a strong trend towards relaxing propensity thinking, and where an appellate-level court has expressed this standard. Some states do not affirmatively acknowledge a liberalized standard, but clearly engage in one. See Jill C. Legg, Note, State v. Ondrick: Admission of Prior Bad Acts, the Exception or the Rule?, 42 S.D. L. REV. 165, 165 (1997) (discussing a South Dakota Supreme Court case in which a twenty-year-old rape was admitted to prove intent and common scheme or plan, and arguing that the broad admission under South Dakota’s version of Rule 404(b) creates a “danger of overwhelming the general rule of exclusion”). Even among the states that appear to retain a prohibition on propensity evidence, the new federal rules have been influential. See, e.g., Hart v. State, 57 P.3d 348, 353 n.3 (Wyo. 2002) (admitting prior uncharged misconduct not to show propensity, but for plan, modus operandi, and identity, and specifically citing Federal Rules of Evidence 413–15 to substantiate the decision).

32 Some supporters of the new rules argue that the potential unfair prejudice of the rules is exaggerated. David Karp, chief architect and defender of the new rules, maintains that the concern about unfair prejudice reflects the antijury assumption “that the ordinary people who serve on juries will behave unreasonably, if they are allowed to have this type of information and to accord it its natural probative value.” See David J. Karp, Evidence of Propensity and Probability in Sex Offense Cases and Other Cases, 70 CHI.-KENT L. REV. 15, 27 (1994).
treat this as a special case in which propensity evidence of the character of the accused is uniquely probative and the 403 balancing test (which only excludes evidence when the unfair prejudice substantially outweighs the probative value) should not operate to exclude that evidence.

The contention that prior sexual offenses are particularly probative stems from three related arguments. First, and most persuasive, women and children often suffer a credibility gap in our society. Women are sometimes perceived as hysterical and vindictive, children as fanciful and manipulative. Evidence of prior misconduct by the accused allows the triers of fact to be less dismissive of the victims’ claims in a trial that often becomes a credibility contest between the accused and the victims. Therefore, the prior sexual offenses of the accused should be admissible to address this credibility gap.

Admitting evidence of the accused’s prior acquaintance rapes addresses the vexing problem of a sexual predator’s serial attempts to discredit each individual victim by creating reasonable doubt as to consent, or in the case of a child victim, to create doubt as to the perception, memory, and credibility of the child. Focusing on the fact that women tend to be disbelieved in charging rape, some feminists argue that these propensity rules level the playing field between the victim and the accused.

33 This credibility gap is premised on the supposed psychological difference of women from men, and can be traced in its modern lineage from classical psychoanalysis. In this context of prejudice and stereotype, women are more prone to psychological disease, hysteria, and practical failure. See, e.g., Sander L. Gilman et al., Hysteria Beyond Freud 286 (1993) (“Throughout its history, of course, hysteria has always been constructed as a ‘woman’s disease,’ a feminine disorder, or a disturbance of femininity, [and] this construction has usually been hostile.”). As transposed onto the new evidence rules, woman can be seen as needing a “corrective”—a “talking cure”—in order to substantiate and level the “inherently” uneven playing field of life and law. A paternalism similar to that reflected in the works of Freud and Breuer is thus evidenced in the promulgation of these new rules and demonstrates a continuing “credibility gap” in the stories women tell.

34 The private nature of these crimes evokes the (false) dichotomy of public and private behavior that implicates the realms of women and children and their power within them. See, e.g., Leslie Bender, Feminist (Re)torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities, 1990 Duke L.J. 848, 872 (“For the legal system to deal appropriately . . . we must abandon the false dichotomies of public/private . . . . We must create feminist (re)torts.”); Frances Olsen, Comment, Unraveling Compromise, 105 Harv. L. Rev. 105, 113 (1989) (“[T]he public/private dichotomy is false—the state is implicated in the ‘private’ sphere. Created by the ‘public,’ the ‘private’ suffers from a serious power imbalance.”).

35 The power of women testifying together is undeniable. For instance, in 1987 Alex Kelly fled to Europe after the judge had ruled that both of Kelly’s rape charges would be tried together. Kelly’s attorney told him that a joint trial would surely result in his conviction. See George Judson, New Image Is Sought in a Trial: Ex-Fugitive Wants to Control Content, N.Y. Times, May 2, 1996, at B5.

36 See Debra Sherman Tedeschi, Federal Rule of Evidence 413: Redistributing “The Credibility Quotient,” 57 U. Pa. L. Rev. 107, 124–27 (1995). While I acknowledge the force of this argument and its appeal, the opposite inference is also possible: That Rules 413 and Rule
Second, supporters of the new rules claim that sex offenders are notoriously recidivistic.\textsuperscript{37} Therefore, prior similar acts are highly probative of the likelihood that the accused committed the offense charged.\textsuperscript{38}

Third, even without relying on recidivism per se, supporters of Rules 413 and 414 argue that the probative value of the prior sex crimes is high because the sexual aggressiveness and proclivities of the defendants are unique.\textsuperscript{39} Few people, the argument contends, have the inclination and utter baseness to be sexual predators. The fact that someone has committed such a crime once, crossing that line of decency, indicates that he or she is morally and temperamentally capable of such activity—thus, prior sex crime evidence is highly probative.\textsuperscript{40}

414 reinforce the notion that one woman or one child is not to be believed and that each needs a cohort to support his or her claims. \textit{See} Orenstein, \textit{supra} note 29, at 694 ("Rule 413 provides an opportunity for this type of vouching, which may make an individual woman seem more credible, but it operates at the cost of reinforcing our suspicion of all women.").

Rule 413 seems particularly appealing in adult consent defense rape cases, though it is clearly not so limited. Consent cases seem to be an especially appropriate forum for offering evidence of the propensity of the accused, because the personality and tendencies of the accused may inform the swearing contest between the alleged perpetrator and the alleged victim. Professor Roger Park has argued that where identification is not the issue, but rather sexual contact is admitted and the question is consent, there is a strong policy argument in favor of admitting prior similar sexual attacks. \textit{See} Roger C. Park, \textit{The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right About Consent Defense Cases}, 22 \textit{Fordham Urb. L.J.} 271, 271–72 (1995).

\textsuperscript{37} \textit{See} Karp, \textit{supra} note 32, at 25 (noting with no substantive support that "rapists and child molesters frequently commit numerous crimes before being apprehended and prosecuted"). \textit{But see} R. Karl Hanson \& Monique T. Buissiere, \textit{Predictors of Sexual Offender Recidivism: A Meta-Analysis} (Ottawa Dep’t of the Solicitor Gen. of Can., Rep. No. 1996-04, 1996) (reporting, cautiously, an average rate of 13.4% for sexual recidivism and 36.3% rate for general recidivism); Robert A. Prentky et al., \textit{Risk Factors Associated with Recidivism Among Exofamilial Child Molesters}, 65 \textit{J. Consulting & Clinical Psychol.} 141, 148 (1997) (reporting that known recidivism rates for child molesters tend to be very low); Ræder, \textit{supra} note 13, at 350 (noting that recidivism rates are not particularly high for sex offenses and that "the relevant question is not simply whether sexual offenders have high recidivism rates, but is character evidence of sexual crimes more predictive than character evidence of other crimes?").

\textsuperscript{38} \textit{See id.}

\textsuperscript{39} \textit{See} R. Karl Hanson et al., \textit{A Comparison of Child Molesters and Nonsexual Criminals: Risk Predictors and Long-Term Recidivism}, 32 \textit{J. Res. in Crime & Delinqu.}, 325–36 (1995) (concluding that it is possible to isolate distinct groups of child molesters who tend to recidivate).

Proponents also justify the rules on the basis of a raw need for the evidence.\textsuperscript{41} Pragmatic arguments, based on feminist and crime prevention concerns, include the importance of keeping potential victims safe and encouraging those who have suffered sexual offenses to testify.\textsuperscript{42} Rape and child molestation are notoriously hard to prove because the crimes often occur in secret, under circumstances with no witnesses and little physical evidence; the victim, due to shame and fear, may be reluctant to report them.\textsuperscript{43} Therefore, without prior act evidence, juries will not believe victims and prosecutors cannot win concerning an accused who committed similar acts, contending that “evidence showing that the defendant has committed sexual assaults on other occasions places him in a \textit{small class of depraved criminals}, and is likely to be highly probative in relation to the pending charge.” Id. at 24 (emphasis added); \textit{see also} People v. Falsetta, 986 P.2d 182, 186 (Cal. 1999) (“The Legislature ‘declared that the willingness to commit a sexual offense is not common to most individuals; thus, evidence of any prior sexual offenses is particularly probative and necessary for determining the credibility of the witness.’” (quoting Pamela J. Keeler, \textit{Review of Selected 1995 California Legislation}, 27 Pac. L.J. 761, 762 (1996))).

\textsuperscript{41} See Falsetta, 986 P.2d at 188 (“As the legislative history indicates, the Legislature’s principal justification for adopting section 1108 was a practical one: . . . [S]ex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence.”).

\textsuperscript{42} Relying on social policy is in itself not antithetical to the structure of the Federal Rules of Evidence. Other evidence rules are clearly based on extrinsic values. \textit{See, e.g.}, Fed. R. Evid. 407 (excluding remedial measures to prove negligence in order to achieve the social policy of encouraging repair), 408 (excluding evidence of offers to compromise to prove liability in order to encourage negotiated settlements), 412 (exempting prior sexual history of the victim in order to encourage reporting and prosecutions of rape).

\textsuperscript{43} \textit{See Falsetta}, 986 P.2d at 186 (“[T]he need for this evidence is ‘critical’ given the serious and secretive nature of sex crimes and the often resulting credibility contest at trial.” (quoting People v. Fitch, 63 Cal. Rptr. 2d 753, 759 (Cal. App. 1997))). Because of the way these crimes are perpetrated, rape and child molestation rarely have corroboration in the form of eye witnesses or physical evidence. \textit{See, e.g.}, United States v. Charley, 189 F.3d 1251, 1256 (10th Cir. 1999) (noting that a lack of evidence of anal or vaginal intercourse or any disruption to the hymen of two girls is not inconsistent with child molestation because children’s tissues repair quickly); United States v. Enjady, 134 F.3d 1427, 1431 (10th Cir. 1998) (noting that in sexual assault cases, “[p]rosecutors often have only the victim’s testimony, with perhaps some physical evidence”). In fact, when passing Rule 413, Congress believed it was necessary to lower the obstacles for admission of propensity evidence in a defined class of cases. Congress’s rationale for doing so in sexual assault cases includes the assistance such evidence provides in assessing credibility. \textit{See 140 Cong. Rec. S12990} (daily ed. Sept. 20, 1994) (statement of Sen. Dole).
convictions. Consequently, women will be unsafe and sexual predators will go free.

In addition, allowing testimony about prior sexual offenses might sensitize our society to the prevalence of rape and child abuse. Increased conviction rates, and even the increased prosecution rates, would assist in general deterrence, alert society to the widespread nature of the sexual violence problem, and signal our seriousness about prosecuting these crimes.

Furthermore, the new rules arguably empower women by allowing victims to speak out with confidence, knowing that they will be supported in their assertions and treated with respect by the jury. Representative (now Senator) Jon Kyl, a supporter of Rule 413, argued that the rules would “go a long way toward neutralizing the psychological damage a rape victim often experiences going through the judicial process.” In applying Rule 413 against a serviceman accused of rape, the United States Court of Appeals for the Armed Forces observed: “This is the type of case in which [prior sexual misconduct] evidence was designed to be admitted. The victim was too traumatized, intimidated, and humiliated to file a complaint in the first instance. It was not until [the complainant] filed her complaint that [another victim] followed with hers.”

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44 See Fingar, supra note 28, at 510 (arguing that “every 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”). Senator Robert Dole justified the new rules as follows: “[E]vidence of this type is frequently of critical importance in establishing the guilt of a rapist or child molester, and . . . concealing it from the jury often carries a grave risk that such a criminal will be turned loose to claim other victims.” 137 CONG. REC. S4927-28 (daily ed. Apr. 24, 1991) (statement of Sen. Dole) (quoting a letter from W. Lee Rawls, Assistant Attorney General for Legislative Affairs).

45 It is unquestionable that this anticrime rationale was a crucial impetus for the passage of the rules. See 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) (stating that the new rules are crucial in protecting the public from sexual predators: “The enactment of this reform is first and foremost a triumph for the public—for the women who will not be raped and the children who will not be molested because we have strengthened the legal system’s tools for bringing the perpetrators of these atrocious crimes to justice”); 140 CONG. REC. S10276 (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.”); 140 CONG. REC. H5437–38 (daily ed. June 29, 1994) (statement of Rep. Kyl) (stating that the new rules will secure more convictions).

46 See Orenstein, supra note 29, at 687–88.

47 140 CONG. REC. H2246 (daily ed. Apr. 13, 1994) (statement of Rep. Kyl) (noting that even when victims are “too traumatized intimidated or humiliated to file a complaint and go through the full procedure of a criminal prosecution,” such victims “are often willing to bear the burden of testifying when they find out that the person who marred their lives has also victimized others”).

One could argue that the sexual propensity rules respect jurors’ common sense and enrich the context in which the jury makes decisions. A related argument in favor of the propensity rules is that they imbue verdicts with popular support. As one military court explained, “The new rules allow the public to accept jury verdicts and controls [sic] to some extent the legitimacy and acceptability of acquittals in criminal cases.”

Finally, and with some justification, supporters argue that the courts have never strictly applied the rules of propensity in cases of sexual violence. Historically, the common-law doctrine of “lustful disposition” provided a formal exception to the rules against propensity. Even without such a doctrine, courts sometimes have stretched Rule 404(b)’s nonpropensity use beyond recognition by allowing the admission of prior bad act evidence, especially in child molestation cases.

As a practical matter, the extension of Rule 404(b)’s other purposes (such as providing evidence of motive, identity, and plan) often leads to greater admissibility of prior bad acts in sexual misconduct crimes. Therefore, a more honest, direct, and predictable approach

49 Elsewhere, I have made that argument from a feminist perspective. See Orenstein, supra note 29, at 688–89. One might also rely on the Supreme Court’s dicta in Old Chief v. United States, which argues that a "syllogism is not a story," and that evidence, to be believed, needs "evidentiary depth." 519 U.S. 172, 189–90 (1997). However, courts repeatedly reiterate their commitment to avoid unfair prejudice under Rule 403 and to limit the full story in order to avoid the dangers of propensity evidence. See infra Part III.A.

50 Wright, 53 M.J. at 480.

51 See People v. Falsetta, 986 P.2d 182, 188 (Cal. 1999) (“[S]ome authorities have observed that courts have been considerably more ‘ambivalent’ about prohibiting admission of defendants’ other sex crimes in sex offense cases.”).


53 Critics and supporters of the new rules have observed that courts apply Rule 404(b) more expansively in sex offense cases, particularly in cases involving children. See, e.g., Miguel A. Mendez & Edward J. Imwinkelried, People v. Ewolt: The California Supreme Court's
FEDERAL RULE OF EVIDENCE 403

would be to make a specific exception for propensity in those types of crimes.\textsuperscript{55} The new rules admit evidence that is possibly admissible by stretching rule 404(b), but dispense with the “protracted legal battle”\textsuperscript{56} involved in admitting evidence by that route.

There is certainly truth in the allegation that some courts extend 404(b) too far in order to admit some prior act evidence in sexual offense cases.\textsuperscript{57} However, there is also ample counterevidence that some courts strictly apply Rule 404(b) and do not use it as a back door to admit propensity evidence in sex offense cases.\textsuperscript{58}

\textit{About-Face on the Plan Theory for Admitting Evidence of an Accused’s Uncharged Misconduct}, 28 \textit{Loy. L.A. L. Rev.} 473, 478–80 (1995) (criticizing the expansion of Rule 404(b) in a case charging child molestation); \textit{see also} State v. Weatherbee, 762 P.2d 590, 591 (Ariz. Ct. App. 1988) (admitting acts of child molestation that occurred nineteen to twenty-two years earlier to show “common scheme” and “ongoing emotional propensity for sexual aberration”); State v. Cotton, 351 S.E.2d 277, 279 (N.C. 1987) (noting that North Carolina’s appellate courts have been “markedly liberal in admitting evidence of similar sex offenses by a defendant for the purposes now enumerated in Rule 404(b”)).

\textsuperscript{55} See Landrum, \textit{supra} note 14, at 315 (“One of the arguments in favor of the new rules was that they allow more intellectual honesty in admitting this type of evidence, rather than expecting judges to stretch or twist Rule 404(b) to admit the evidence.”); \textit{see also} Karp, \textit{supra} note 32, at 23 (asserting that “the same practical result is often achieved by stretching the existing rules”); Orenstein, \textit{supra} note 29, at 690 (“[A]dvocates of the new rules argue that the stretching of current doctrine proves the inadequacy of the character rules in dealing with the unique principles of rape and child molestation.”).


\textsuperscript{57} \textit{Cf. supra} note 14.

\textsuperscript{58} \textit{See}, e.g., United States v. Thomas, 58 F.3d 1318, 1321 (8th Cir. 1995) (stating that if, with “sufficient clarity,” a defendant mounts a defense that consists “solely of a denial of the criminal act rather than a denial of the criminal intent,” Rule 404(b) evidence on the issue of intent is not admissible); United States v. Fawbush, 900 F.2d 150, 151–52 (8th Cir. 1990) (holding that prior acts of child sexual abuse were inadmissible to show propensity under Rule 404(b)); Craun v. State, 762 N.E.2d 230, 237–38 (Ind. Ct. App. 2002) (reversing the accused’s convictions for two counts of child molestation, and holding that the trial court erred in admitting evidence of prior bad acts under Indiana Evidence Rule 404(b) since the evidence, “if relevant at all, shows a propensity for [child molesting], which is precisely what is prohibited by the Rules of Evidence” (quoting Ortiz v. State, 741 N.E.2d 1203, 1208 (Ind. 2001))); State v. Aakre, 2002 MT 101, ¶31 & n.2, 46 P.3d 648, 655 & n.2, 656 (affirming a district court decision granting the defendant a new trial, and holding that evidence the defendant had earlier pled guilty to continuous sexual assaults against his two stepdaughters was inadmissible as evidence of common scheme, plan, absence of mistake, or accident, and noting that if Montana wished to admit such evidence, it could pass state versions of Rules 413 and 414).

Another indication of the restrictiveness of Rule 404(b) is the fact that some states passed their own versions of Rule 413 and 414 to avoid the limitations of Rule 404(b) and openly admitted to this purpose. \textit{See} Warlow v. State, 2 P.3d 1238, 1246 (Alaska Ct. App. 2000) (noting that the new state rules in Alaska were adopted “in direct response to decisions of this court that limited the State’s ability to introduce evidence of a defendant’s prior sexual crimes”); State v. Williams, 02-1030 (La. 10/15/02), 830 So. 2d 984, 986 (recounting that the Louisiana rule

was prompted primarily by two decisions of this Court ... involve[ing] prosecution for aggravated rape in which the state sought to introduce evidence
2. Arguments Opposed to the New Rules

Scholarly and judicial opposition to the sexual propensity rules was—and continues to be—widespread.\(^{59}\) One set of criticisms dealt with the political manner in which Congress adopted the rules in circumvention of the procedures set forth in the Rules Enabling Act.\(^{60}\) This procedural circumvention made the rules’ adoption seem politically motivated—designed to serve a subset of victims with political and popular appeal.\(^{61}\)

\(^{59}\) See supra note 15 and accompanying text.

\(^{60}\) The history of the sexual propensity rules dates back to 1991. The sexual propensity rules were included in the proposed “Women’s Equal Opportunity Act,” and again in 1993 as part of a larger crime bill. The measures eventually made their way into the Violent Crime Control and Law Enforcement Act of 1994, with the caveat that the new rules would not become law for 150 days, thereby allowing the Judicial Conference to respond to the new rules. See 23 WRIGHT & GRAHAM, supra note 1, § 5411, at 360–61. Ultimately, the Judicial Conference urged Congress not to adopt Rules 413–15. JUDICIAL CONFERENCE REPORT, supra note 15, at 2140. Moreover, the American Bar Association House of Delegates also passed a resolution opposing Rules 413–15. See RAEDER, supra note 15. Congress ignored both these recommendations.

There was also much criticism of the manner in which Rules 413–15 came to Congress, “bypassing” the normal Rules Enabling Act procedure and thereby “evading the longstanding process designed to promulgate rules only after extensive thoughtful review by the entire legal community.” See id. at 344; see also WEISSENBERGER & DUANE, supra note 4, at 186 n.1 (“[The] existing rule-making process involves a minimum of six levels of scrutiny or stages of formal review. This has gone through none. This is an amendment offered on the floor of the Senate after about 20 minutes’ debate, without very much thought, and it is procedurally and substantively flawed.” (quoting 113 CONG. REC. H5439 (statement of Rep. Hughes))).

Particularly, there was hostility to the role of David Karp, a senior counsel for the United States Department of Justice, Office of Policy Development, in writing and promoting the rules, and scripting comments for the legislative sponsors. The ideas for the new rules originated in the Department of Justice, and Karp was one of the original drafters. Karp packaged the rules as necessary and logical boons to fighting dreadful crimes. Senators and Representatives then championed the new rules under the banner of crime control and protection of women. Therefore, according to the sponsors of Rule 413, David Karp’s law review article has the force of legal history. See Karp, supra note 32. For a scathing description of Karp’s role, see 23 WRIGHT & GRAHAM, supra note 1, § 5411.

The criticisms of Congress’s adoption of the new rules, and of Karp’s role in the process, are not merely sour grapes on the part of evidence professors who feel left out of the rulemaking loop. It is absolutely reasonable to argue that the circuitous method by which Congress formed the rules should influence the courts’ use of the legislative history. Therefore, to the extent that one believes that one man in the Justice Department scripted the rules and their legislative history, one might be willing to look at the value of that legislative history with a more jaundiced eye. See infra Part IV.C.

\(^{61}\) See supra note 55.
Commentators leveled a second set of criticisms at the parochial nature of the rules, questioning the wisdom of having special evidence rules for certain types of cases. The fear driving this criticism was that crime-specific rules of evidence would undermine the unified and transsubstantive nature of the Federal Rules of Evidence.\textsuperscript{62}

Judges and scholars raised a third criticism concerning constitutional questions of due process and equal protection. These critics argued that the new rules disrupt the basic presumption of innocence by making defendants answer for prior acts in addition to the crime charged.\textsuperscript{63} Part II considers the courts’ treatment of the due process issue, arguing that courts too readily dismiss due process concerns by relying unrealistically and, in some cases, disingenuously on the saving grace of Rule 403.\textsuperscript{64}

A fourth and related set of criticisms dealt with the wisdom and fairness of departing from the ban on propensity evidence. Critics fretted that the new rules were a foot in the door to allowing propensity evidence generally.\textsuperscript{65} Even outside of strictly constitutional arguments, critics challenged the rules as dangerous and radical departures from traditional evidence law axioms, as being without empirical support,\textsuperscript{66} and as wildly unfair and potentially disruptive to the course of trials.\textsuperscript{67}

\textsuperscript{62} \textit{Cf.} Tome v. United States, 513 U.S. 150, 166 (1995) (acknowledging that courts must be sensitive to the special challenges of prosecuting child abuse cases, but noting that “‘[t]his Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases’” (quoting United States v. Salerno, 505 U.S. 317, 322 (1992))).


\textsuperscript{64} \textit{See infra} Part H.C.

\textsuperscript{65} \textit{See} 23 \textit{Wright & Graham, supra} note 1, at 83; \textit{Raeder, supra} note 15, at 351 (“If Rules 413–415 are promulgated, they may become the first volley in a larger attempt to reject the ban against character evidence.”).


\textsuperscript{67} The California Supreme Court presented some of these arguments in considering the constitutionality of California’s version of Rules 413 and 414:

\begin{quote}
What reasons underlie a rule aimed at excluding relevant evidence? We discern three separate reasons supporting the general rule against admis-
\end{quote}
Fifth, and finally, commentators criticized actual drafting of the sexual propensity rules, raising questions about how the new rules would apply and interact with the rest of the evidence rules. Specifically, critics raised unanswered questions concerning the interrelation of the new rules and the courts’ use of the Rule 403 balancing test, the application of the hearsay rule, and the standard by which other acts must be proven.68

II

JUDICIAL INTERPRETATIONS OF THE NEW RULES

A review of cases that have applied the new rules indicates that these sexual propensity rules raise interesting problems, many of which the bench and the bar anticipated before the rules’ passage. This review focuses on the Eighth and Tenth Circuits, the two main federal courts that have considered Rules 413 and 414. Where helpful, this analysis also considers military court cases69 and other circuit cases.70

The new rules are clearly affecting some verdicts. A stark example of this effect is United States v. LeCompte, where a case on retrial resulted in a conviction.71 The sole difference between the original case and the retrial was the admission, pursuant to Rule 414, of prior sexual offenses by the accused.72 Additionally, defendants charged
with sexual offenses certainly understand that the new rules make a difference. For instance, in *United States v. Curry*, after a mistrial for failure to disclose exculpatory evidence, the accused opposed the prosecution’s motion for a new trial, arguing that the court did not consider the advantage the prosecution would have in a second trial “including the government’s opportunity to introduce additional Rule 413 evidence.”


On retrial, the district court, following the Eighth Circuit’s opinion in the first reversal, granted the accused’s motion *in limine* to exclude the evidence of the prior uncharged conduct on Rule 403 grounds, determining that the evidence’s unfair prejudicial effect substantially outweighed its probative value. In reaching this decision, and following the Eighth Circuit’s guidance, the district court noted some small differences in the charged acts and the prior offenses and found that the probative value of the prior misconduct was therefore somewhat limited. Additionally, the trial court held that under Rule 403 the risk of unfair prejudice was very high because of the stigma against child abuse in American society. See *LeCompte*, 131 F.3d at 768–69.

Again, this time on a special appeal of the motion *in limine* in the second trial, the Eighth Circuit reversed the trial court decision for excluding the very same uncharged sexual offenses. See *LeCompte*, 131 F.3d at 770. In round two, the court of appeals ruled that the trial judge wrongfully excluded the very same evidence which it had held should not have been admitted in the first trial. In deeming the trial court’s *exclusion* of the prior bad act evidence to be an abuse of discretion, the court noted the significant differences between the old regime and the new propensity rules. See *id. at 769*. The court cited the legislative history of Rules 413 and 414 and quoted Rep. Molinari, who asserted that the “new rules will supersede in sex offense cases the restrictive aspects of Federal Rule of Evidence 404(b).” *Id.* (quoting 140 CONG. REC. H8992 (daily ed. Aug 21, 1994) (statement of Rep. Molinari)).

In light of the highly deferential standard of review granted to trial courts in making such discretionary decisions, these differences in the evidence regimes are startling and widespread. See *United States v. Sumner*, 119 F.3d 658, 660–62 (8th Cir. 1997) (rejecting the 404(b) argument of the district court and noting the weakness of the evidence, but remanding for consideration under Rule 414); People v. Frazier, 107 Cal. Rptr. 2d 100, 108 (Ct. App. 2001) (“The charged and uncharged crimes need not be sufficiently similar that evidence of the latter would be admissible under section 1101 [California’s equivalent to 404(b)], otherwise Evidence Code section 1108 would serve no purpose.”).

According to the accused, “[T]he mistrial afforded the government a significant advantage from which improper prosecutorial intent should be inferred.” *Id.* The court was unconvinced by the accused’s arguments, noting that “[a]lthough the government’s case may well be strengthened by the additional Rule 413 evidence, a new trial may also expose significant weaknesses in the government’s proof. The district court determined that the government violated *Brady* by failing to disclose impeachment evidence relating to the credibility of a witness.” *Id.*

Another set of circumstances where the new rules disadvantage defendants involves situations where the court failed to sever separate claims with potentially prejudicial overlap. The courts have rejected the arguments for severance because, under the new rules, the jury would get to hear about all related claims anyway under Rules 413 and 414. See, e.g., *United States v. Fox*, No. C403-90, 2004 WL 115003, at *2 (D.N.D. Jan. 21, 2004) (denying severance in a case involving three separate assaults because the prior acts would be admissible in all three cases under Rule 413 anyway); *Bear Stops v. United States*, 204 F. Supp. 2d 1209, 1213 n.1 (D.S.D. 2002) (holding trial counsel’s failure to sever harmless, in part because Rule 414 applies on retrial so the jury would hear the prior bad acts evidence anyway).
Juries today often convict defendants of sexual offenses on thin evidence, and the defendants’ prior sexual criminal behavior is the key to these convictions. Although this development is not news and is entirely in line with the dire predictions of many of the rules’ critics, it is nevertheless of concern.

In many cases, it is hard to argue that the additional character evidence admitted under Rules 413 and 414 changes a trial’s result—prior victims’ testimony of the accused’s propensities are often just icing on the cake of a conviction. However, even in such cases, in which noncharacter evidence alone is enough to prove an accused’s guilt, there is still reason to be suspicious about the breadth and consequences of the new character rules. The new rules depart from settled principles of evidence, and may subtly reinforce and perpetuate biases and stereotypes about rapists and child molesters, affecting future cases and the quality of justice outside the courtroom. Applying the new rules in easy cases, in which guilt is not hard to prove, paves the way for their application in closer cases. These factors reinforce the importance of a judge’s performing a Rule 403 balance seriously.

If nothing else, these new rules provide an interesting opportunity to observe how evidence law changes and is assimilated by the courts. This is especially true here, where the rules in question and their promulgation—bypassing the normal rulemaking procedure—represent a serious departure from tradition.

Both the substance and tone of the courts’ application of the new rules indicate some underlying hostility, balanced by a resigned com-

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74 See, e.g., United States v. Charley, 189 F.3d 1251, 1257–59 (10th Cir. 1999) (upholding conviction on six of seven counts despite accused’s presentation of credible alibi and that

[n]one of the law enforcement officers were able to discover any direct evidence of the reported incidents. There were no eyewitnesses; there was no physical evidence; and Defendant denied the accusations. However, from the outset of the girls’ disclosures, everyone involved, including those providing treatment, was aware that Defendant had been convicted in 1994 for sexually abusing his five-year-old granddaughter.

); R. Wade King, Comment, Federal Rules of Evidence 413 and 414: By Answering the Public’s Call for Increased Protection from Sexual Predators, Did Congress Move Too Far Toward Encouraging Conviction Based on Character Rather than Guilt?, 33 Tex. Tech. L. Rev. 1167, 1188–89 (citing United States v. Mann, 193 F.3d 1172 (10th Cir. 1999), as a “frightening example” of the potentially dangerous impact of the new rules).

75 See, e.g., People v. Falsetta, 986 P.2d 182, 195 (Cal. 2000) (noting that the victim “accurately described” the accused and his car to the police and pointed out the accused in a lineup). In such situations, there is little incentive to pay close attention to the process or effect of Rules 413 and 414 evidence. The overwhelming evidence of guilt indicates that any admission of the propensity evidence was harmless error. See, e.g., Darn v. Knowles, No. C 02-2892 SI (PR), 2003 WL 21148412, at *10 (N.D. Cal. May 14, 2003) (noting that compelling circumstantial evidence and the defendant’s confession that he committed forceful rape “all persuasively established that the sex was nonconsensual. Therefore, even if there was an error in the admission of Darn’s prior sexual assault, the error was harmless.”).
mitment to congressional intent. Evidence of judicial leersiness of the new rules is apparent from some courts’ long and remarkably unflattering presentations of Rules 413 and 414’s history, and the courts’ emphasis on the rules’ political nature.76 One court refused to apply the rules retroactively.77 Most importantly, courts have seriously considered constitutional objections to the sexual propensity rules.78

Initially, the courts’ application of Rules 413 and 414 created confusion, which is understandable, particularly given the complicated nature of character rules and the abandonment of the traditional propensity ban.79 During this initial period, as the courts shaped the new rules’ application while deciding real cases with real people (not just some abstract caricature of sexual predators envisioned by legislators), the courts revealed not only problems with the rules, but with their own interpretive processes, biases, and allegiances. In applying Rules 413 and 414, the courts also relinquished too much of their discretionary and supervisory roles.80

Ultimately, Rules 413 and 414 entered the evidence canon not only as statutorily mandated evidence rules, but also as products of court interpretation. Increasingly, the system has adapted, and fewer

76 See, e.g., United States v. Meacham, 115 F.3d 1488, 1492 (10th Cir. 1997) (“The rule [414], however, was not developed through the usual Judicial Conference rulemaking process, but by Congress itself.”); United States v. Wright, 53 M.J. 476, 481 (C.A.A.F. 2000) (“The new Rules reflect a political decision that there should be a greater range of admissible evidence in criminal and civil actions involving specific sexual assault crimes.”). For further discussion, see United States v. Enjady, 134 F.3d 1427, 1431–32 (10th Cir. 1998); United States v. Sumner, 119 F.3d 658, 661–62 (8th Cir. 1997); United States v. Larson, 112 F.3d 600, 604 (2d Cir. 1997).

77 The rules caused a skirmish between Congress and the courts concerning timing and applicability. Initially, Congress provided that Rules 413–15 would apply “to proceedings commenced on or after the effective date” of the new rules. Violent Crime Control and Law Enforcement Act of 1994, § 320935(e), Pub. L. No. 103-322, 108 Stat. 1796, 2136 (1994). The Court of Appeals for the Tenth Circuit held that the new rules would apply only to trials initiated after the effective date of the rules. See United States v. Roberts, 88 F.3d 872, 878–79 (10th Cir. 1996). In response, in September 1996, Congress amended the rules, clarifying that the rules applied even if the case had commenced before the new rules had become law. See Omnibus Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 30009-25 (1996). Because the new rules are rules of pleading and proof they can be applied at any point in the trial before final judgment has been entered. See Enjady, 134 F.3d at 1429–30 (holding that the application of the new rules to such cases is constitutional).

78 See, e.g., Johnson v. Elk Lake Sch. Dist., 283 F.3d 138, 155 & n.12 (3d Cir. 2002) (taking note of the Judicial Conference Report, supra note 15, and the possible constitutional due process issue raised by the new rules); Enjady, 134 F.3d at 1430 (“We agree that Rule 413 raises a serious constitutional due process issue.”); Wright, 53 M.J. at 481 (“The Rule [413] would be fundamentally unfair if it undermines the presumption of innocence and the requirement that the prosecution prove guilt beyond a reasonable doubt.”).

79 See, e.g., Meacham, 115 F.3d at 1491 (noting that “there is some confusion whether the [district] court admitted [the stepdaughters’ evidence of similar uncharged sexual misconduct] under Fed.R.Evid. 404(b) or 414, and, indeed, concerning which rule should apply”).

80 See infra Part III.A.
courts publish opinions because the initial constitutional and rule-based questions have been resolved. As the case law develops, a second body of unpublished opinions has emerged, purporting not to create any new law, but merely to apply established law. These opinions tend to be shorter and less policy-based, reciting precedent without offering extensive reasoning. In their own way, however, these unpublished opinions paint a revealing picture of how courts apply Rules 413 and 414 and how defendants are faring under these rules.

In analyzing the jurisprudence, I focus on two crucial and related issues: (1) whether Rule 403 applies to Rules 413 and 414, and (2) whether Rules 413 and 414 violate due process.

A. Does Rule 403 Apply?

A recurrent and vehement criticism of the sexual propensity rules focuses on the poor draftsmanship of the rules’ language. Most importantly, scholars and judges have decried the ambiguity of the new rules in relation to Rule 403. Specifically, critics were concerned with whether Rule 403 modifies the new rules or whether the new rules override Rule 403. While some commentators predicted that Rule 403 did not apply at all, others raised the question seriously but did not opine one way or the other.

In considering the facial challenges to the sexual propensity rules and finding the new rules constitutional, appellate courts, including military courts, have uniformly held that Rule 403 does indeed apply. As will be seen below, the existence and application of Rule 403

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83 See, e.g., Natali & Stigall, supra note 56, at 2 (“The rules are mandatory in that they state without qualification that propensity evidence is admissible. Thus, the rules require admission of propensity evidence without regard to other rules of evidence, particularly the prejudice/probativeness balancing test set forth in Rule 403.”) (emphasis added)).

84 See, e.g., Judicial Conference Report, supra note 15 (noting that advisory committee believed the above position—that propensity evidence must be admitted—to be “arguable”); 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.” (footnote omitted)); Tedeschi, supra note 36, at 122 (explaining that the new rules do not indicate whether their broad language trumps the judge’s Rule 403 discretion to exclude evidence that is substantially more prejudicial than probative).

85 See, e.g., United States v. Fool Bull, 32 Fed. Appx. 778, 779 (8th Cir. 2002) (“Rule 413 reflects Congress’s decision to relax the standard of admissibility for propensity evidence in sex offense cases, but the evidence remains subject to the requirements of Rule 403.” (citing United States v. Mound, 149 F.3d 799, 802 (8th Cir. 1998)); United States v. Enjady, 134 F.3d 1427, 1431 (10th Cir. 1998) (“Even without reference to the legislative history, we agree . . . that adoption of this rule without any exclusion of or amendment to
(which measures probative value against unfair prejudice, confusion, distraction, and waste of time) is crucial in assuring fundamental fairness, thereby allowing the new rules to pass constitutional muster. In fact, one district court opinion, later reversed on appeal, actually held Rule 414 unconstitutional because the court believed that Rule 403 did not apply.86

Technically, there is a nonfrivolous textual interpretation of Rules 413 and 414 that the trial judge lacks discretion to use Rule 403 to exclude evidence under the new rules. Arguably, the language, “is admissible,” referring to evidence of prior offenses, represents an unmodified command to admit the evidence, thereby prohibiting judges from exercising their discretion to balance between probative value and unfair prejudice.87 One strong argument for the notion that Rule 403 does not apply to the sexual propensity rules stems from Rule 609(a)(2), which contains a similar (though not identical) command. Rule 609(a)(2) provides that impeachment evidence regarding convictions for crimes of dishonesty shall be admitted.88 Most courts and commentators have said that the absolutist language of Rule 609(a)(2) deprives the trial judge of the discretion to conduct a Rule 403 balance.89 However, the argument in the context of Rule 609(a)(2) is strengthened by the fact that Rule 609(a)(1) refers to

86 See Sumner, 119 F.3d at 661 (discussing and reversing the district court’s opinion that Rule 414 is unconstitutional because it “allows ‘any kind of evidence to show propensity’ without allowing for the application of the Rule 403 balancing test”).

87 In fact, the state of Louisiana adopted a version of Rules 413 and 414 with the deliberate modification of the “is admissible” language. As the Louisiana Supreme Court explained, “Federal Rule of Evidence 413 provides that 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.’ Conversely, Louisiana’s counterpart, Article 412.2 provides that the evidence ‘may be admissible . . . subject to the balancing test provided in Article 403.’” State v. Williams, 02-1030 (La. 10/15/02), 830 So.2d 984, 986–87.

88 Fed. R. Evm. 609(a)(2) (“For the purpose of attacking the credibility of a witness, . . . evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.”).

89 See, e.g., United States v. Guardia, 135 F.3d 1326, 1329 (10th Cir. 1998) (arguing that “Rule 403 applies to all evidence admitted in federal court, except in those rare in-
Rule 403 and includes a variation on the Rule 403 balancing test.\(^{90}\)

The absence of reference to any type of Rule 403 balancing is therefore conspicuous in Rule 609(a)(2), especially after its amendment in 1990.\(^{91}\) However, there is no analogous context for such a reading of Rules 413 and 414, both of which fail to mention Rule 403.

A comparison of the new rules with Rule 412, the rape shield rule, provides another argument that Rule 403 does not apply to Rules 413 and 414. In some very limited circumstances, Rule 412 allows evidence of prior sexual behavior and states that such evidence “is admissible, if otherwise admissible under these rules.”\(^{92}\) One can argue that because Rules 413 and 414 do not include the “if otherwise admissible” clause, the rules are mandatory and are not subject to any Rule 403 balancing.\(^{93}\)

However, both tradition and legislative history support the notion that Rule 403 applies to Rules 413 and 414. Rule 403 represents a key organizing principle for understanding the practical application and ethos of the Federal Rules of Evidence.\(^{94}\) Rule 403’s centrality to evidence law derives from the fact that it modifies almost every rule, with

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\(^{90}\) Fed. R. Evid. 609(a)(1) provides:

(a) General rule. For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to Rule 403 . . . [and] if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused. . . .

\(^{91}\) See Green v. Bock Laundry Mach. Co., 490 U.S. 504, 525–26 (1989) (interpreting prior version of Rule 609, and explaining that “Rule 609(a) states that impeaching convictions evidence ‘shall be admitted.’ With regard to subpart (2), which governs impeachment by crimen falsi convictions, it is widely agreed that this imperative, coupled with the absence of any balancing language, bars exercise of judicial discretion pursuant to Rule 403.” (footnote omitted)).

\(^{92}\) Fed. R. Evid. 412(b)(1).

\(^{93}\) This argument is presented in Guardia, 135 F.3d at 1329. In Guardia, the court made an additional flawed argument, stating that “[m]ost importantly, Rule 402, the rule allowing admission of all relevant evidence and a rule to which the 403 balancing test undoubtedly applies, contains language no more explicit than that in Rule 413. The rule states simply that ‘[a]ll relevant evidence is admissible.’” Fed.R.Evid. 402 (emphasis added). “Id. However, because Rule 402 is modified by the phrase “except as otherwise provided by these rules,” the court’s analogy is inapposite. Fed. R. Evid. 402.

the exception of Rule 609(a)(2), and it epitomizes the trial judge’s vast discretion in admitting or excluding evidence, a hallmark of our judicial system.

As to legislative history, comments from the new rules’ sponsors, Representatives Susan Molinari and Jon Kyl and Senator Robert Dole, specifically recognize the applicability of Rule 403 to Rules 413 and 414. Rep. Kyl explicitly noted “that the trial court retains the total discretion to include or exclude this type of evidence.”95 Furthermore, Rep. Molinari explained: “In other respects, the general standards of the rules of evidence will continue to apply, including . . . the court’s authority under evidence rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect.”96

In addition to the structure of the rules and the legislative history, perhaps the most compelling argument that Rule 403 balancing applies to Rules 413 and 414, as noted above, is that the constitutionality of the new rules seems to depend on it.97 One important theory of statutory interpretation commands that when one interpretation of a statute would vouchsafe it as constitutional, but another would render

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95 United States v. Enjady, 134 F.3d 1427, 1431 (10th Cir. 1998) (quoting 140 CONG. REC. H5437-03, H5438 (daily ed. June 29, 1994) (statement of Rep. Kyl)); see also United States v. Larson, 112 F.3d 600, 604 (2d Cir. 1997) (discussing congressional intent to apply Rule 403); Summer, 119 F.3d at 662 (“The sponsors’ statements about the congressional presumption favoring admissibility is further evidence that the applicability of the Rule 403 balancing test was intended . . . .”).


97 See infra Part II.C.
it unconstitutional, the interpretation that preserves the statute’s constitutionality must prevail.\footnote{See Green v. Bock Laundry Mach. Co., 490 U.S. 504, 524 (1989).}

**B. Due Process Challenges**

Defendants who challenged the new rules raised due process arguments, claiming that reliance on prior acts to prove propensity is so out of step with evidence norms that by doing so, the new rules violate principles of fundamental fairness.\footnote{Courts have uniformly dismissed the argument that the new rules violate principles of equal protection because they provide different treatment to people accused of sexual crimes. See, e.g., United States v. LeMay, 260 F.3d 1018, 1030–31 (9th Cir. 2001) (explaining that because “[s]ex offenders are not a suspect class” and the introduction of prior bad sex acts does not burden a fundamental right, a rational basis for treating evidence of such crimes differently exists, and therefore Rule 414 does not violate equal protection); United States v. Mound, 149 F.3d 799, 801 (8th Cir. 1998) (“Because Rule 413 does not ‘burden[]’ a fundamental right, and because sex-offense defendants are not a ‘suspect class,’ we must ‘uphold the legislative classification so long as it bears a rational relation to some legitimate end.’” (alteration in original)); United States v. Wright, 48 M.J. 896, 901 (A.F. Ct. Crim. App. 1998) (“The appellant has not identified, nor are we aware of any holding by the Supreme Court, or any other court for that matter, which identifies sex offenders as a ‘suspect class.’”); cf. Enjady, 134 F.3d at 1433–34 (applying a rational basis standard for upholding the constitutionality of Rule 413).} In *United States v. Enjady*, the defendant argued that “the Due Process Clause safeguards the ‘right to a fair trial in a fair tribunal,’”\footnote{Brief for Appellant at 27, *Enjady* (No. 96-2285) (on file with author) (citations omitted).} that fundamental fairness is measured by “[h]istory and widely shared practice,”\footnote{Id.} and that Rules 413 and 414 undermine courts’ historical aversion to propensity evidence.\footnote{The ban on propensity evidence can be traced back to the seventeenth century. See Landrum, supra note 14, at 274 (tracing the principle of no prior act evidence back to Charles I era reforms limiting the prosecution to crimes charged and not other acts). In the United States, the principle has been traced back to an 1810 case, *Rex v. Cole*, which held that “in a prosecution for an infamous crime, an admission by the prisoner that he had committed such an offence at another time and with another person, and that he had a tendency to such practices, ought not to be admitted.” *Id.* at 276 (citing Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 Harv. L. Rev. 954, 959 (1933)); see also People v. Falsetta, 986 P.2d 182, 187 (Cal. 1999) (“From the standpoint of historical practice, unquestionably the general rule against admitting such evidence is one of long-standing application. . . . ‘The rule excluding evidence of criminal propensity is nearly three centuries old in the common law.’” (quoting People v. Alcala, 36 Cal. 3d 604, 630–31 (1984))).} Quoting the Supreme Court’s famous language in *Michelson v. United States*, the accused argued that propensity evidence has historically been rejected despite its relevance because “it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.”\footnote{*Enjady*, 134 F.3d at 1430 (quoting Michelson v. United States, 335 U.S. 469, 475–76 (1948))).
new rules, this traditional ban on propensity, grounded in protection of the accused, rises to constitutional magnitude. Quoting Dowling v. United States, the accused in Enjady alleged that the new rules deprive the trial of fundamental fairness by violating those “fundamental conceptions of justice which lie at the base of our civil and political institutions.”

Although entertaining the argument, courts have uniformly rejected such due process challenges to Rules 413 and 414. In Enjady, the Tenth Circuit responded to the historical argument opposing the new rules by countering that just because “the practice is ancient does not mean it is embodied in the Constitution.” The Eighth Circuit in United States v. Mound quoted Enjady extensively and held: “We too believe that it was within Congress’s power to create exceptions to the longstanding practice of excluding prior-bad-acts evidence.”

One indication of the closeness of the due process fairness question regarding the propensity rules is Judge Morris Arnold’s dissent—joined by three other judges on the Court of Appeals for the Eighth Circuit—to the denial of rehearing en banc in Mound. Judge Morris Arnold’s full name to distinguish him from his brother on the bench (literally and figuratively), Richard Arnold, who wrote the majority opinion in Mound.
Arnold argued that the full court needed to look carefully at the constitutionality of the new rules. He observed:

Fed R. Evid. 413 runs counter to a centuries-old legal tradition that views propensity evidence with a particularly skeptical eye. The common law, of course, is not embodied in the Constitution, but the fact that a rule has recommended itself to generations of lawyers and judges is at least some indication that it embodies “‘fundamental conceptions of justice.’”

Furthermore, Judge Morris Arnold believed that the full court should hear the case because the Eighth Circuit “might well conclude that the common-law rule against propensity evidence has as distinguished a legal pedigree as, say, the rule that guilt must be proved beyond a reasonable doubt.”

Plenty of dicta discusses the dangers of propensity evidence. The Supreme Court, however, has never squarely addressed this issue. Nevertheless, the Court has cautioned that it is rare that unfairness rises to the level of a due process violation.

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109 See id. at 1153–54.

110 Id. at 1153 (quoting Dowling v. United States, 493 U.S. 342 (1990) (quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935))). Judge Morris Arnold’s disenchantment with the new rules could not be clearer. He wrote:

It also cannot be irrelevant that the members of two committees, consisting of 40 persons in all, and appointed by the Judicial Conference of the United States to examine Fed. R. Evid. 413 before its passage, all but unanimously urged that Congress not adopt the rule because of deep concerns about its fundamental fairness.

111 See id. at 1153–54; see also Charles William Hendricks, Note, 100 Years of Double Jeopardy Erosion: Criminal Collateral Estoppel Made Extinct, 48 Drake L. Rev. 379, 396–97 (2000) (discussing Dowling and the court’s reluctance to find a violation of fundamental fairness).

112 See, e.g., Old Chief v. United States, 519 U.S. 172, 181–82 (1997). The Ninth Circuit has found that propensity evidence violates fundamental fairness when it comes under the guise of “other purposes” in Rule 404(b). See McKinney v. Rees, 993 F.2d 1378, 1380 (9th Cir. 1993) (“The use of ‘other acts’ evidence as character evidence is not only impermissible under the theory of evidence codified in . . . the Federal Rules of Evidence (Fed.R.Evid. 404(b)), but is contrary to firmly established principles of Anglo-American jurisprudence.”).

113 In Estelle v. McGuire, 502 U.S. 62, 75 (1991), the Court found that a California instruction did not violate due process because it was similar to Rule 404(b). But, in a footnote, the Court left the propensity question open: “Because we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of ‘prior crimes’ evidence to show propensity to commit a charged crime.” Id. at 75 n.5. In Spencer v. Texas, 385 U.S. 554, 564 (1967), one reason the majority upheld the validity of Texas statutes admitting prior offenses was that “it has never been thought that [the Court’s Due Process Clause fundamental fairness] cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure.” Obviously, Rules 413 and 414 do not raise the federalism concerns of Spencer, in that the Court would not be called upon to overrule state procedure.

114 See Dowling, 493 U.S. at 352 (“Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate ‘fundamental fairness’ very narrowly.”).
I am in great sympathy with the due process arguments raised in opposition to Rules 413 and 414. I believe that it is beyond the capacity of even the most open-minded juror to hear propensity evidence without being overly influenced by it. As Justice Cardozo wrote more than seventy years ago, “It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed.”115 This observation is particularly true when the prior conduct involves a sexual attack that will offend and disturb the jury. Yet Congress swept aside these concerns in its anticrime agenda. Courts, though perhaps less cavalierly, have also rejected these arguments. However, it is still possible that some brave judges, such as Judge Morris Arnold in his dissent in Mound, may raise the constitutional fairness issue. But it would be foolish for those who are concerned about the reach of these rules, and the copycat state rules they have inspired, to count on a successful due process challenge.116

Rather than expect to successfully challenge propensity evidence as constitutionally suspect, those concerned about the reach of these new rules must address the rules’ application. Having lost the major point of constitutionality, civil libertarians and scholars concerned about the new rules must attack them as applied, creating a legal culture of skepticism with regard to the fairness and utility of propensity evidence. The only possible vehicle for accomplishing this goal is Rule 403.

C. Rule 403 as Due Process Guarantor

In considering the due process challenges, all courts have recognized the potential unfairness of propensity evidence, but they have concluded that such potential does not rise to the level of fundamental unfairness.117 Rule 403, which courts cite as a means of assuring due process, has significantly eased the courts’ struggle with the new rules’ constitutionality. Without exception, courts assert that Rule 403 will preclude the admittance of fundamentally unfair evidence.118


116 There is some evidence that certain members of the Supreme Court are hostile to the special constitutional compromises that seem to be made in order to convict child molesters. For instance, in Maryland v. Craig, Justice Scalia, in a blistering dissent, chided the Court for limiting the Sixth Amendment confrontation right when children are the victims. 497 U.S. 836, 860 (1990) (Scalia, J., dissenting). He decried the subordination of explicit constitutional text to currently favored public policy. Id. Although it is probable that Justice Scalia would not perceive due process rights to be as clear as the confrontation right was in Craig, such open scorn for bending constitutional rules because of the “hysteria” over child abuse or the status of children as victims de jour might conceivably tempt Court members to take the due process challenges to Rules 413–15 more seriously.

117 See, e.g., United States v. Enjady, 134 F.3d 1427, 1432 (10th Cir. 1998).

118 See, e.g., id. at 1434; accord United States v. Mound, 149 F.3d 799, 800–02 (8th Cir. 1998) (holding that Rule 413 does not violate fundamental fairness so long as it is modi-
ccording to every federal appellate court that has considered the issue, and all the state courts applying analogous state evidence legislation, Rule 403 (or its state equivalent) provides the mechanism for handling due process concerns. As long as that mechanism remains in place, the argument goes, on a case-by-case basis judges can eliminate any unfairness introduced by Rules 413 and 414.119 As the Tenth Circuit explained: “Rule 414 is not unconstitutional on its face, ‘because Rule 403 applies to Rule 414 evidence,’ and ‘[a]ppllication of Rule 403 . . . should always result in the exclusion of evidence that’ is so prejudicial that it violates a defendant’s due process right to a fair trial.”120 Courts have anointed Rule 403 as a guardian of fairness, a defender against prejudice, and the obvious retort to any due process objection.

III

CONDUCTING THE 403 BALANCE IN THE CONTEXT OF RULES 413 AND 414

Rule 403 thus emerges as a crucial factor in the new rules’ application—a guarantor of their constitutionality. Yet, because of the radical departure presented by the new rules, it is reasonable to question whether Rule 403, even while technically still in force, has the power to exclude unfair Rule 413 and 414 propensity evidence and to protect the rights of the accused.

Before the advent of these new rules, the bold and unapologetic use of the accused’s former similar offenses for propensity would have constituted unfair prejudice. Use of evidence solely for propensity simply violated the rules, and even nonpropensity use of prior bad acts was prohibited if the unfair prejudice of the propensity evidence substantially outweighed the probative value of the nonpropensity evidence.

119 Cf., e.g., People v. Falsetta, 986 P.2d 182, 189–90 (Cal. 1999). The Falsetta court stated, “[W]e think the trial court’s discretion to exclude propensity evidence under section 352 [California Rule 403 analog] saves section 1108 [California Rule 413 analog] from defendant’s due process challenge.” Id. at 190. The court “believe[d] section 352 provides a safeguard that strongly supports the constitutionality of section 1108. By reason of section 1108, trial courts may no longer deem ‘propensity’ evidence unduly prejudicial per se, but must engage in a careful weighing process under section 352.” Id. at 189.

120 United States v. Charley, 189 F.3d 1251, 1259 (10th Cir. 1999) (alteration in original) (quoting Castillo, 140 F.3d at 883–84); see also United States v. LeMay, 260 F.3d 1018, 1026 (9th Cir. 2001) (“We conclude that there is nothing fundamentally unfair about the allowance of propensity evidence under Rule 414. As long as the protections of Rule 403 remain in place[,] . . . the right to a fair trial remains adequately safeguarded.”).
use. By passing Rules 413 and 414, Congress announced that henceforth, in rape and child molestation cases, propensity thinking would be encouraged as a form of circumstantial reasoning. Propensity shifted from being the quintessential example of unfair prejudice to being a permissible—and indeed officially endorsed—method of proving guilt. Consequently, it became unclear what exactly was left of Rule 403 and what exactly trial judges were expected to do with regard to unfair prejudice.

A. The Advent of “403-lite”

Under the new regime, Rule 403 is applied in odd and troubling ways to Rules 413 and 414. In the face of the “sea change in the federal rules’ approach to character evidence,” the Tenth Circuit in United States v. Guardia aptly described the interpretive dilemma it faced in attempting to avoid what it rightly perceived to be two potential misapplications of the Rule 403 balancing test. On the one hand, the Guardia court tried to avoid the temptation of “exclud[ing] the Rule 413 evidence simply because character evidence traditionally has been considered too prejudicial for admission.” On the other hand, it strove to resist performing “a restrained 403 analysis because of the belief that Rule 413 embodies a legislative judgment that pro-

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121 Propensity evidence has traditionally been considered to possess only slight probative value. Past specific instances do not shed much light on what the accused did on the occasion in question. Whatever probative value was attributed to propensity evidence, courts traditionally saw it as substantially outweighed by the intolerable level of unfair prejudice caused by that evidence. The Court in Old Chief summarized the impropriety of propensity evidence under Rule 404(b) by explaining the danger of the jury’s generalizing a defendant’s earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventative conviction even if he should happen to be innocent momentarily). As then-Judge Breyer put it, “Although . . . ‘propensity evidence’ is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary evidence. Old Chief v. United States, 519 U.S. 172, 180–81 (1997) (alteration in original) (quoting United States v. Moccia, 681 F.2d 61, 63 (1st Cir. 1982)).

122 In discussing the unfair prejudice of allowing a jury to hear about an accused’s prior convictions and rebutting the argument that the prosecutor should be allowed to prove a predicate felony even when the accused has agreed to stipulate felon status, the Court observed: “This would be a strange rule. It would be very odd for the law of evidence to recognize the danger of unfair prejudice only to confer such a degree of autonomy on the party subject to temptation, and the Rules of Evidence are not so odd.” Id. at 183–84. Old Chief concerned 404(b) evidence and its potential propensity use, but did not involve sexual crimes. The case is interesting on many levels, not the least of which is its outspoken concern about the dangers of propensity evidence. The use of “odd,” however, stands on its own as a reminder that rules of evidence must make not only internal sense, but must comport with real-world wisdom and experience.


124 Id. at 1330.
\end{footnotesize}
penalty evidence regarding sexual assaults is never too prejudicial or confusing and generally should be admitted.”

In practice, despite their dicta to the contrary, the courts have weakened Rule 403 by tending to admit evidence of prior sexual offenses automatically under a pro forma approach to Rule 403. Thus, the courts discuss Rule 403, but in the same breath undermine its applicability.

The early cases set the trend. The most extreme examples emerge from the Eighth Circuit. In *United States v. LeCompte*, the court held that Rule 403 must be read “to give effect to the decision of Congress, expressed in recently enacted Rule 414, to loosen to a substantial degree the restrictions of prior law on the admissibility of such evidence.” The Eighth Circuit conceded that Rule 403 applied, but instructed that “Rule 403 must be applied to allow Rule 414 its intended effect.” Ultimately, *Le Compte* reversed the district court’s exclusion of the accused’s prior sexual offenses, explaining that “[i]n light of the strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible, we think the District Court erred in its [Rule 403] assessment that the probative value of [other sexual offense] testimony was substantially outweighed by the danger of unfair prejudice.”

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125 *Id.*

126 131 F.3d 767, 768 (8th Cir. 1997); see *United States v. Meacham*, 115 F.3d 1488, 1492 (10th Cir. 1997) (holding that “clearly under Rule 414 the courts are to “liberally” admit evidence of prior uncharged sex offenses”); see also *United States v. Koruh*, No. 99-2138, 2000 WL 342252, at *4 (10th Cir. Apr. 3, 2000) (unpublished opinion) (quoting *Meacham*).

127 See *LeCompte*, 131 F.3d at 769. This language has been very influential and has been quoted often. See, e.g., *United States v. Tyndall*, 263 F.3d 848, 850 (8th Cir. 2001) (“In considering evidence offered under Rule[,] 413 . . ., a trial court must still apply Rule 403, though in such a way as “to allow [Rule 413 its] intended effect.”” (quoting *United States v. Mound*, 149 F.3d 799, 800 (8th Cir. 1998) (quoting *LeCompte*)); *United States v. Withorn*, 204 F.3d 790, 794 (8th Cir. 2000) (“[C]ourts must balance probative value against potential for unfair prejudice “in such a way as to allow the new rules their intended effect.”” (quoting *Mound*, 149 F.3d at 800)).

128 131 F.3d at 769 (citations omitted). This language is frequently cited. See, e.g., *United States v. Tyndall*, 263 F.3d 848, 850 (8th Cir. 2001) (“There is in this kind of case a ‘strong legislative judgment’ that evidence of prior sexual crimes ‘should ordinarily be admissible,’ and we see no reason to hold that such evidence was not admissible here.” (citation omitted) (quoting *LeCompte*)); *United States v. Gabe*, 237 F.3d 954, 959 (8th Cir. 2001) (“A court considering the admissibility of Rule 414 evidence must first determine whether the evidence has probative value, recognizing the ‘strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible.’” (quoting *LeCompte*)); *United States v. Withorn*, 204 F.3d 790, 794 (8th Cir. 2000) (holding that the district court was obligated to take into account Congress’s “‘strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible’” (quoting *LeCompte*)); *United States v. Walker*, 261 F. Supp. 2d 1154, 1157 (D.N.D. 2003) (“A court considering the admissibility of Rule 414 evidence must first determine whether the evidence has probative value, recognizing ‘the strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible.’” (quoting *LeCompte*)).
In *United States v. Sumner*, the Eighth Circuit explained that “[t]he presumption is in favor of admission. The underlying legislative judgment is that the evidence admissible pursuant to the proposed rules is typically relevant and probative, and that its probative value is not outweighed by any risk of prejudice or other adverse effects.”\(^{129}\) The Eighth Circuit has also provided that prior sexual offense evidence is admissible under Rules 413 and 414 so long as the evidence does not present “any danger of unfair prejudice beyond that which all propensity evidence in such trials presents.”\(^{130}\)

Similarly, in *United States v. Meacham*, the Tenth Circuit explained that “the courts are to ‘liberally’ admit evidence of prior uncharged sex offenses” under Rule 414.\(^{131}\) In *Enjady*, another Tenth Circuit case, the court cautioned that “the exclusion of relevant evidence under Rule 403 should be used infrequently, reflecting Congress’ legislative judgment that the evidence ‘normally’ should be admitted.”\(^{132}\) The court further remarked that although courts must engage in Rule 403 balancing, “the district court must recognize the congressional judgment that Rule 413 evidence is ‘normally’ to be admitted.”\(^{133}\)

Only in *United States v. Guardia*,\(^{134}\) the same court that identified the interpretive dilemma,\(^{135}\) did the Tenth Circuit resist applying a weakened Rule 403 balancing and specifically eschewed special presumptions of admissibility. The Tenth Circuit panel in *Guardia* held

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\(^{129}\) 119 F.3d 658, 662 (8th Cir. 1997) (quoting 140 CONG. REC. H8992 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari)); see also 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.”).

\(^{130}\) See *Withorn*, 204 F.3d at 794–95 (8th Cir. 2000) (quoting *Mound*, 149 F.3d at 802).

\(^{131}\) 115 F.3d 1488, 1492 (10th Cir. 1997). Courts in the Tenth Circuit have followed this doctrine of “liberal admission.” See, e.g., *United States v. Mann*, 193 F.3d 1172, 1173 (10th Cir. 1999) (“[C]ourts are to ‘liberally’ admit evidence of prior uncharged sex offenses, but cannot ignore the balancing requirement of Rule 403.” (alteration in original) (quoting *Meacham*); *United States v. McHorse*, 179 F.3d 889, 898 (10th Cir. 1999) (quoting *Meacham*); *United States v. Peters*, No. 96-2286, 1998 WL 17750, at *2 (10th Cir. Jan. 20, 1998) (“We review decisions to admit evidence of prior acts for abuse of discretion, mindful that Rule 413 evidence should be liberally admitted.” (citation omitted) (citing *Meacham*); see also *King*, supra note 74, at 1191–92 (arguing that “courts’ almost complete deference to legislative intent” resulted in “[e]ffectively [r]emov[ing] Rule 403’s [a]pplication”).

\(^{132}\) 134 F.3d 1427, 1433 (10th Cir. 1998).

\(^{133}\) Id. at 1434. The military courts, after some uncertainty, have applied a Rule 403 balancing test similar to the Tenth Circuit’s approach. See United States v. Wright, 53 M.J. 476, 482–83 (C.A.A.F. 2000). The military courts have explained that in “reviewing a decision to admit evidence under [Rule] 413, ‘the [Rule] 403 balancing test is to be applied in a broad manner which favors admission.’” United States v. Valentin-Nieves, 57 M.J. 691, 694 (N.M. Ct. Crim. App. 2002) (quoting United States v. Dewrell, 52 M.J. 601, 609 (A.F. Ct. Crim. App. 1999)).

\(^{134}\) 135 F.3d 1326 (10th Cir. 1998).

\(^{135}\) See supra notes 123–25 and accompanying text.
that “a court must perform the same Rule 403 analysis that it does in any other context,” albeit “with careful attention to both the significant probative value and the strong prejudicial qualities inherent in all evidence submitted under 413.”136 The Guardia court noted that Rule 413 “contains no language that supports an especially lenient application of Rule 403,” and instructed that “[w]hen balancing Rule 413 evidence under 403, then, the district court should not alter its normal process of weighing the probative value of the evidence against the danger of unfair prejudice.”137 Guardia rejected “a lenient 403 balancing test,” noting that “courts apply Rule 403 in undiluted form to Rules 404(a)(1)-(3), the other exceptions to the ban on propensity evidence,” so there is no reason to do otherwise for Rules 413 and 414.138

It is worth observing that Guardia is unique even in the Tenth Circuit.139 Guardia involved a civilian gynecologist on a military base, charged with unprofessional and impermissible touching of the women he examined.140 Given the policies behind the new rules—such as shoring up victims’ credibility by allowing prior bad acts to illustrate the propensities of the accused and demonstrate that the victim did not just imagine the harm or maliciously lie about it—Guardia seems like an odd case in which to decide that Rule 413 evidence should not be admitted. The stature of a doctor in an inherently ambiguous situation such as a gynecological exam would seem to cry out for the admission of other similar acts. Perhaps one woman could have mistaken an appropriate medical procedure for an impermissible touching, but six? And yet, Guardia, one of the two non-Indian cases in the Tenth Circuit,141 is the only Tenth Circuit case to hold that Rule 403 excludes sexual propensity evidence because of lack of similarity and waste of time.

136 135 F.3d at 1330.
137 Id. at 1331.
138 Id. The argument based on Rules 404(a)(1)–(3) is not as strong as it appears, in part because Rule 403 is rarely used to exclude propensity evidence introduced under Rules 404(a)(1) and 404(a)(2), and because the latter rules are both triggered by the accused’s initiation of character evidence, rather than by the prosecution. Furthermore, Rule 404(a)(3) incorporates Rule 609(a)(2), which precludes a Rule 403 balance.
139 Guardia is one of the few non-Indian cases in the Tenth Circuit and one of only three appellate cases to employ Rule 403 to reject sexual propensity evidence. The other cases are United States v. Blue Bird, 372 F.3d 989 (8th Cir. 2004), and United States v. Berry, 61 M.J. 91 (C.A.A.F. 2005) (reversing a conviction for forcible sodomy and holding that that evidence of defendant’s sexual offense as a thirteen year old had not been subject to proper Rule 403 balancing and would in any case fail the balance because of distraction, intervening circumstances, and the passage of time).
140 See Guardia, 135 F.3d at 1327–28.
141 The other case is United States v. Meacham, 115 F.3d 1488 (10th Cir. 1997) (involving a defendant charged with transporting a minor in interstate commerce with the intent that she engage in sexual activity).
Many circuit courts list a series of factors for district courts to consider in conducting a Rule 403 balancing test for prior sexual offenses. On the probative value side of the balancing scale, courts include the following factors: (1) “the similarity of the prior acts to the acts charged,” (2) “temporal proximity,” (3) “the presence or lack of intervening circumstances,” (4) “the frequency of the prior acts,” (5) the strength of proof of the prior act, (6) the “relationship between the parties,” (7) the need for the evidence, and, relatedly, (8) the potential for less prejudicial evidence. Looking to the “probative dangers” enumerated in Rule 403, courts list the following factors to balance against the probative value of the evidence: (1) the likelihood such evidence “will contribute to an improperly-based jury verdict,” (2) “the extent to which such evidence will distract the jury from the central issues of the

142 See Guardia, 135 F.3d at 1331 (“Propensity evidence, however, has indisputable probative value. That value in a given case will depend on innumerable considerations . . . “); see also People v. Falsetta, 986 P.2d 182, 189–90 (Cal. 1999) (considering remoteness in time and explaining that courts should consider various factors “[r]ather than admit or exclude every sex offense a defendant commits”); United States v. Wright, 53 M.J. 476, 482 (C.A.A.F. 2000) (providing a list of factors).

143 United States v. LeMay, 260 F.3d 1018, 1028 (9th Cir. 2001) (quoting Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1268 (9th Cir. 2000)); Guardia, 135 F.3d at 1331; Falsetta, 986 P.2d at 190. Sometimes courts denote this similarity factor as the probative value of the evidence. See, e.g., United States v. Mann, 193 F.3d 1172, 1174 (10th Cir. 1999) (explaining that the Enjady factor of “how probative the evidence is of the material fact it is admitted to prove” is a question of similarity); United States v. LeCompte, 131 F.3d 767, 769 (8th Cir. 1997).

144 United States v. Wright, 53 M.J. 476, 482 (C.A.A.F. 2000) (citing Guardia, 135 F.3d at 1331). All courts that set out factors for the Rule 403 balance mention the timing issue. See, e.g., LeMay, 260 F.3d at 1028 (“closeness in time of the prior acts to the acts charged” (quoting Glanzer, 232 F.3d at 1268)); Guardia, 135 F.3d at 1331; Falsetta, 986 P.2d at 190 (“possible remoteness”).

145 LeMay, 260 F.3d at 1028 (quoting Glanzer, 232 F.3d at 1268); Wright, 53 M.J. at 482.

146 LeMay, 260 F.3d at 1028 (quoting Glanzer, 232 F.3d at 1268); Guardia, 135 F.3d at 1331; Wright, 53 M.J. at 482. Although many courts mention this factor, I have yet to see it come into play. Cf. People v. Sullivan, Nos. H023715, H025386, 2003 WL 1785921, at *6 (Cal. Ct. App. Apr. 3, 2003) (noting that the fact of only one prior sexual offense does not affect admissibility under California’s section 1108).

147 See, e.g., Mann, 193 F.3d at 1174 (“how clearly the prior act has been proved?” (quoting Enjady, 134 F.3d at 1433)); Wright, 53 M.J. at 482 (distinguishing “conviction versus gossip” (citing Guardia, 135 F.3d at 1331); Falsetta, 986 P.2d at 190 (“the degree of certainty of its commission”).

148 Wright, 53 M.J. at 482 (citing Guardia, 135 F.3d at 1331).

149 See, e.g., LeMay, 260 F.3d at 1028 (“the necessity of the evidence beyond the testimonies already offered at trial” (quoting Glanzer, 232 F.3d at 1268)); Guardia, 135 F.3d at 1331 (“the need for evidence beyond the testimony of the defendant and alleged victim”).

150 See, e.g., Mann, 193 F.3d at 1174 (“whether the government can avail itself of any less prejudicial evidence” (quoting Enjady, 134 F.3d at 1433)); Wright, 53 M.J. at 482.

151 Enjady, 134 F.3d at 1433.

152 Id.; accord Mann, 193 F.3d at 1174 (quoting Enjady, 134 F.3d at 1433).
(3) “how time consuming it will be to prove the prior conduct,”154 (4) “its likely prejudicial impact on the jurors,”155 and (5) “the burden on the defendant in defending against the uncharged offense.”156

In adopting a balancing test for its state versions of Rules 413 and 414, the California Supreme Court also included as a factor the “availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant’s other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.”157 Interestingly, the Eighth Circuit, which performs the most cursory, admission-happy Rule 403 balance, has not even set out the elements of a balancing test and instead stresses the presumption of admissibility. However, even when courts, such as the Tenth Circuit, have delineated an extensive checklist for a Rule 403 balance and have required that the district courts apply that balance, the message has clearly been that “Rule 403 should be used infrequently, reflecting Congress’ legislative judgment that the evidence ‘normally’ should be admitted.”158

B. Assessing the Probative Value of Prior Uncharged Acts

In discussing the probative value of the past offense evidence, courts tend to rely on the legislative history of Rules 413 and 414 extensively. In United States v. Charley, the court quoted a statement by Representative Molinari that “‘a history of similar acts tends to be exceptionally probative because it shows an unusual disposition of the defendant—a sexual or sadosexual interest in children—that simply does not exist in ordinary people.’”159 Besides the legislative history, courts rely on the inherent nature of sexual crimes to show the probativeness of prior sexual offenses. As the Tenth Circuit opined in Guardia, “Propensity evidence has a unique probative value in sexual assault trials,” in part because of the “lack of any relevant evidence beyond the testi-
mony of the alleged victim.”160 When viewed in context, however, not all such evidence is “exceptionally” or “uniquely” probative, and I next examine prior sexual offenses in light of some of the factors mentioned (but rarely grappled with) by the courts.

1. Time Lag and Intervening Circumstances

The probative value of prior sexual offenses is affected by the length of elapsed time between the current charges and the prior bad acts. Some evidence rules have built-in time limits. For instance, impeachment of a witness by evidence of a prior conviction is generally available only within ten years of the conviction or release, whichever is later.161 Evidence of any staler convictions must pass a very high, nearly insuperable, barrier.162 However, Rule 404(b), which allows prosecutors to introduce crimes, wrongs, and acts for purposes other than propensity, has no time limit. Neither does Rule 608, which, in the discretion of the trial judge, admits prior bad acts for impeachment of a witness’s honesty.163 Rule 403, however, limits both Rule 404(b) and Rule 608, and the lapse in time between the current action and prior uncharged conduct is a factor that courts use to assess the probative value of prior conduct those rules cover.

Courts considering past sexual misconduct under Rules 413 and 414 have allowed evidence of offenses occurring more than twenty years before the charged conduct.164 Courts repeatedly have noted

160 United States v. Guardia, 135 F.3d 1326, 1330 (10th Cir. 1998).
161 Fed. R. Evid. 609(b).
162 The test for impeaching with a conviction more than ten years old is a “reverse” Rule 403 balancing test. Rather than being a rule of exclusion requiring the party opposed to admission of the evidence to prove that the unfair prejudice, distraction, confusion, or waste of time substantially outweighs the probative value, Rule 609(b) puts the affirmative burden on the party proposing to use the impeachment evidence. The proposing party must demonstrate in “the interests of justice, that the probative value of the [impeachment evidence] supported by specific facts and circumstances substantially outweighs its prejudicial effect.” See id. Not surprisingly, very few cases meet this high standard for admission.
163 Rule 608 allows all witnesses, at the discretion of the trial judge, to be impeached on specific acts (other than convictions, which are covered by Rule 609) that reflect on their honesty. Fed. R. Evid. 608. Rule 608 originally contained a reference to passage of time, which was deleted in favor of a phrase emphasizing judicial discretion. It was clear, however, that staleness of the prior act would be a factor for the judge to weigh. See H.R. Rep. No. 93-650, at 10 (1973).
164 See United States v. Drewry, 365 F.3d 957, 959–60 (10th Cir. 2004) (holding that the trial court did not abuse its discretion in admitting twenty-five-year-old acts of molestation under Rule 414), vacated on other grounds, 125 S. Ct. 987 (2005); United States v. Gabe, 237 F.3d 954, 959–60 (8th Cir. 2001) (holding that the trial court did not abuse its discretion by admitting evidence of child molestation occurring over twenty years before the trial under either Rule 404(b) or Rule 414); United States v. Larson, 112 F.3d 600, 602 (2d Cir. 1997) (admitting uncharged sex abuse evidence occurring sixteen to twenty years before trial under Rule 414). But see People v. Harris, 70 Cal. Rptr. 2d 689, 697 (Ct. App. 1998) (excluding a twenty-three-year-old, violent incident proven by graphic testimony).
that the legislative history supports admitting evidence without a time limit.\textsuperscript{165}

Two potential problems exist with an extensive time lag: (1) victims’ memories can grow stale, making it difficult to prove or disprove facts from long ago,\textsuperscript{166} and (2) perpetrators who evolve into different, less predatory people, will not receive credit for their rehabilitation. Meacham illustrates both of these concerns.\textsuperscript{167} Meacham was convicted of transporting a minor in interstate commerce with the intent that she engage in sexual activity.\textsuperscript{168} On appeal, Meacham asserted that the court erred in admitting evidence that he molested two of his stepdaughters more than thirty years before.\textsuperscript{169} During the trial, Meacham’s attorney argued:

This is so long ago, and it’s so unlike the events that we’ve been talking about that it ought to be excluded for both those reasons. There’s absolutely no way that I can go back and now have a mini-trial and dredge up witnesses to say what the ladies are saying isn’t the case, for something that happened before maybe many of these jurors were even born.\textsuperscript{170}

To be fair, sometimes the time lag includes jail time, when the accused had no opportunity to engage in such offenses. See United States v. Eagle, 137 F.3d 1011, 1016 (8th Cir. 1998) (“Eagle’s claim that the conviction had little probative value because it occurred ten years before is seriously weakened by the fact that he had spent six of those years incarcerated for that crime.”); United States v. LeCompte, 131 F.3d 767, 769–70 (8th Cir. 1997) (noting that the time lapse between incidents “may not be as significant as it appears at first glance, because defendant was imprisoned for a portion of the time between 1987 and 1995, which deprived defendant of the opportunity to abuse any children.” (quoting the district court’s order)); see also People v. Robins, No. B158439, 2003 WL 103609, at *4 (Cal. Ct. App. Jan. 13, 2003) (“Defendant was incarcerated for a number of the intervening years. Therefore, the eight-year period between offenses does not reflect a change in defendant’s character, but rather a lack of access to women.”). There is, of course, the irony that by serving their sentences, the accused unwittingly undermine any argument that they have changed or are rehabilitated.

\textsuperscript{165} Gabe, 237 F.3d at 960 n.4 (“[E]vidence of other sex offenses by the defendant is often probative and admitted, notwithstanding very substantial lapses of time in relation to the charged offense or offenses.” (quoting 140 Cong. Rec. H8992 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari))); United States v. Meacham, 115 F.3d 1488, 1492 (10th Cir. 1997) (noting that the “language of Rule 414 does not address the question of staleness,” but that “the historical notes to the rules and congressional history indicate there is no time limit beyond which prior sex offenses by a defendant are inadmissible” in relation to the charged offense or offenses).

\textsuperscript{166} See United States v. Koruh, No. 99-2138, 2000 WL 342252, at *4 (10th Cir. Apr. 5, 2000) (“[T]he defendant argues under the Rule 403 balancing test, the evidence concerning his daughter was not probative because it involved events which allegedly occurred 16 to 19 years ago, was only recently disclosed, was not investigated, and was not sufficient to prove the prior acts.”). Issues of fading memories and lost evidence do not present a problem where the prior offenses are convictions. See infra Part IV.A.1.

\textsuperscript{167} See 115 F.3d 1488.

\textsuperscript{168} Id. at 1490.

\textsuperscript{169} Id.

\textsuperscript{170} Id. at 1493. The court observed, however, that “[n]o time limit is imposed on the uncharged offenses for which evidence may be admitted; as a practical matter, evidence of
In response to the first concern, regarding the staleness of the evidence, courts have emphasized that a sexual offense is the kind of event a victim "is not likely to forget." With regard to the argument that the accused has reformed and is no longer the person he was thirty years ago, courts have found that given the "special" nature of sexual crimes, prior similar acts are especially probative. In justifying the admission of a twenty-nine-year-old prior incident of molestation, the prosecutor in *Meacham* explained: "[P]eople that have an aberrant sexual behavior, such as the defendant does, you don't get over that. . . . [W]ith things like sexual orientation towards children, a sexual interest in children, that doesn't change unless you get some intervention."  

Courts give lip service to the notion of change, but in no case could I find "intervening circumstances" (such as getting counseling or finding religion) that influenced a court's assessment of the evidence. In fact, in *Meacham*, the court conceded that the prosecutor's assertion that "a sexual interest in children . . . doesn't change unless you get some intervention," coupled with the prosecutor's assertion that "I don't think there's any indication that the defendant ever had any intervention after his first incidents," may have been particularly misleading. Meacham's pre-sentence report indicated that he did receive counseling in connection with the earlier incident involving his stepdaughters. The court noted, however, that "[n]o evidence of intervention or counseling was introduced at trial."  

2. *Similarity to Crime Charged*

Obviously, the closer in kind the prior offense is to the charged offense, the more probative the evidence. For example, in the case of an alleged child molester, evidence that the accused encourages his nieces to fondle him when he is babysitting them or when he is playing hide-and-seek with them is much more probative than evidence

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171 *Id.* at 1492.

172 *Id.* at 1492 (quoting from the transcript in the district court).

173 *Id.*

174 *Id.* at 1493 (quoting from the transcript in the district court).

175 *Id.* at 1493 n.2.

176 *Id.*

177 *Id.*

178 See People v. Banjo, No. B147527, 2002 WL 1752829, at *8 (Cal. Ct. App. July 30, 2002) ("In balancing the equities under section 352, 'the probative value of 'other crimes' evidence is increased by the relative similarity between the charged and uncharged offenses . . . .' ").
that merely demonstrates that the accused attacks children. The specificity of the prior bad acts makes it seem more likely that the accused possesses a particular trait of character. This is true even if the similarity between the two offenses would not qualify as independent evidence of identity or *modus operandi* under Rule 404(b). In addition, when the prior sexual offense is substantially similar to the charged offense, there is less chance that the evidence of the prior bad act will prejudice the jury. Because the prosecution will have already exposed the jury to the heinousness of the charged conduct, the jury will be less horrified when learning the details of the prior similar offense.

Not all cases involve prior bad acts that are very similar to the presently charged offense. In fact, some courts have admitted evidence of prior bad acts even though the prior acts seem markedly different from the charged offense. For instance, in *United States v. Eagle*, the defendant was accused of abusing his eight-year-old niece, and the government introduced evidence that the accused had “pleaded guilty in May of 1987 to a federal crime of carnal knowl-

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179 See United States v. LeCompte, 131 F.3d 767, 768–69 (8th Cir. 1997) (admitting evidence based on these facts); see also United States v. Gabe, 237 F.3d 954, 959 (8th Cir. 2001) (admitting prior act evidence when “[b]oth [victims] were young girls of six or seven years at the time of the offenses; both were related to Gabe; and the sexual nature of the offenses was similar”); United States v. Withorn, 204 F.3d 790, 794 (8th Cir. 2000) (“The victims were approximately the same age at the time of the rapes, and both assaults involved force and occurred after Withorn had isolated the victims from others. Both victims also testified that immediately after the incident Withorn threatened them not to inform anyone what had occurred . . . .”); United States v. Walker, 261 F. Supp. 2d 1154, 1157 (D.N.D. 2005) (admitting evidence and noting “striking similarities” in the age of the victims and the nature of the attacks); People v. Sullivan, Nos. H023715, H025286, 2003 WL 1755921, at *6 (Cal. Ct. App. Apr. 3, 2003) (admitting prior bad acts when “[b]oth children were both very young when defendant assaulted them; defendant was in a parental relationship to both, and they both lived in defendant’s household and their mother was out of the house when the touchings occurred”); Banjo, 2002 WL 1752829, at *9 (The sexual offenses were all similar to the charged offense. Each incident involved an initially consensual encounter that escalated into a sexual assault. [The sodomy incident used for propensity] was almost identical to the charged offense in that defendant encountered both women walking on Sunset Boulevard, offered them a ride, then drove them into the Hollywood Hills and sexually assaulted them).

180 Compare LeCompte, 131 F.3d at 768–70 (holding that the prior bad act was admissible as propensity evidence under Rule 414), with United States v. LeCompte, 99 F.3d 274, 278–79 (8th Cir. 1996) (holding that the prior bad act was not admissible to show *modus operandi* under rule 404(b)).

181 See Gabe, 237 F.3d at 960.

182 *Id.* (noting that “[b]ecause the evidence [of prior abuse] was so similar to [one of] the acts charged, it would not be so facially inflammatory as to unduly divert attention from the issues of the case” (second and third alterations in original) (quoting United States v. Butler, 56 F.3d 941, 944 (8th Cir. 1995))).

183 See, e.g., United States, v. Eagle, 137 F.3d 1011 (8th Cir. 1998).
edge,’ or ‘engaging in sex with a child under sixteen.’”

The fourteen-year-old victim of the prior offense was actually the defendant’s common-law wife at the time of the trial. Although the court allowed the jury to learn about the subsequent marriage, it is still debatable whether the two crimes were sufficiently similar.

Some courts exercise caution when determining whether to admit a defendant’s prior sexual offenses, making sure that the prior offenses are substantially similar to the charged offense. These courts admit only some of the uncharged misconduct and exclude acts which they deem to be too dissimilar from the charged conduct.

Focusing on the similarity between the offenses makes sense up to a point. Courts’ careful parsing of the various prior offenses demonstrates that they are at least trying to draw lines and imbue Rule 403 with some consequence. Certainly, differences of degree, such as between exhibitionism and unpermitted touching, or differences of kind, such as between rape of an adult woman and sodomy of a young boy, raise questions of the probative value of the evidence. Occasionally, however, the focus on the similarity of facts seems macabre and dismissive of the pain of prior victims. Such extensive dissections

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184 Id. at 1013.
185 Id. at 1016.
186 Id. at 1015–16.
187 For instance, in United States v. McHorse, the Tenth Circuit approved the district court’s admission of similar acts by the accused against other children, but it did not admit the evidence of acts involving the accused’s half-sister because they were deemed too dissimilar, remote, and potentially confusing. 179 F.3d 889, 899 (10th Cir. 1999); see also Carpentino v. State, 38 P.3d 547, 553–54 (Alaska Ct. App. 2002) (holding that the trial court did not abuse its discretion when it excluded the accused’s prior sexual assault on the victim’s older brother because the sexual abuse of the eleven-year-old brother lacked sufficient similarity to the abuse of the eight-year-old sister).

Similarly, in Mound, although the Eighth Circuit’s opinion seemed to routinize the balancing process and favor admissibility, the court did not reverse the district court, which distinguished between two types of prior sexual offense evidence. See United States v. Mound, 149 F.3d 799, 801–02 (8th Cir. 1998). The first concerned a prior similar offense for which there had been a conviction and about which an FBI agent testified as to the facts of the offense. Id. at 800–02. The second offense was less similar to the facts of the crime charged, and the charges had been dropped. Id. at 800, 802. The district court did not allow evidence of the second count on the grounds that it did not pass the Rule 403 balancing test, and the Eighth Circuit affirmed. Id. at 800.

188 For instance, in United States v. Dewrell, a military case, the court permitted evidence that the accused had forced two girls between the ages of ten and fifteen to touch his penis and manually stimulate him, but did not admit evidence that he had forced one of the girls into a bathroom in order to attack her in the same way. 52 M.J. 601, 606 (A.F. Ct. Crim. App. 1999). Similarly, in Guardia, the court found that the testimony of the alleged victims “differs significantly in some respects from the testimony of the Rule 413 witnesses. For instance, one of the witnesses complains that Dr. Guardia improperly touched her breasts, not her pelvic area. Another complains of the defendant’s use of a medical instrument, not his hands.” 135 F.3d 1326, 1327–28 (10th Cir. 1998). Although I admire any attempt to limit the evidence to only the most probative, these limitations seem (1) nonsensical within the scheme of the new rules, (2) vaguely disrespectful to the victims, and (3) at odds with congressional intent. Surely the probative value lies in the fact that the accused is
seem pointless. Although, admittedly, I do not favor the new rules, I believe that some of the dissections of prior acts are troubling because they seem to trivialize the experiences of the victims.

3. The Need for the Evidence

Assessing the need for the evidence of the prior offense, that is, determining how crucial it is to the case, uncovers an interesting conundrum. On the one hand, if there is no need for evidence of prior sexual molestation because the other evidence in the case is so strong, the probative value of the prior sexual molestation evidence decreases. For instance, if the victim is sure of her identification of the assailant, there is DNA evidence, or the act was videotaped, little is gained by admitting evidence that the accused has raped children before. Yet, if admitted, it will probably be harmless error because conviction seems likely anyway. On the other hand, if the evidence in the case seems particularly weak (e.g., a self-contradicting, tentative-sounding victim with no corroborating evidence), the evidence of the accused’s prior rape of a child may be crucial for conviction. Therefore, this evidence will seem both more necessary and more probative.

Yet, evidence of a prior offense in the latter case also seems more troublesome, particularly when the issue is one of identity. If the child is unsure who molested him, suggestible, unreliable, or confused, the prior act evidence could be instrumental in securing a conviction. If the accused was identified by rounding up the usual suspects that is, people with previous molestation accusations against them, a potentially innocent person with little hard evidence against him, but with a damning past, might be convicted. When the evidence is weak, the prior offenses take on increased significance, and the jury may be more likely to convict the accused merely to keep him off the streets or to punish him for past deeds, both impermissible reasons for conviction.

willing to attack young girls, not in precisely how he attacked them, or that a doctor takes liberties in a medical exam, not precisely which body part he assaulted. Courts that overdo the need for similarity may be resisting the rules themselves (a sentiment I can admire), but I am hesitant to adopt this approach for limiting evidence that is dissimilar in trivial and vaguely sexist ways. The courts’ contrast-and-compare approach sometimes reads like a review of a porno film. Although anything that limits prior bad acts evidence seems desirable, requiring a repeat molester or serial rapist to replicate each move precisely seems pointless and almost announces to the victims that if the accused did not follow the exact pattern, it does not count—or worse, it did not happen.

189 The idea of rounding up the usual suspects is most provocatively expressed in the classic film Casablanca. See Richard O. Lemert et al., A Modern Approach to Evidence 327 (3d ed. 2000) (“Like Claude Rains in the closing scene of Casablanca, the police may, for good and obvious reasons, focus their attention on ‘the usual suspects’—people who have prior records or known ‘bad character.’”).
Hence, evidence under Rules 413 and 414 is best introduced and most faithful to the intent of bolstering witnesses’ credibility when there is strong evidence that the accused committed the crime charged, but because of secrecy, embarrassment, fear, misogyny, or the poor demeanor of witnesses, the evidence looks less credible to the fact-finder than it should. If, however, the evidence is needed because there is no other credible evidence in the case, admission under Rules 413 and 414 is very troubling.

C. Assessing the Dangers of Uncharged Sexual Offenses

Rule 403 always requires a balance. Even when evidence is deemed highly probative, it can still be excluded under Rule 403 if the probative value is nevertheless substantially outweighed by unfair prejudice, distraction of the jury, confusion of the issues, or waste of time. The advisory committee’s notes to Rule 403 explain: “Unfair prejudice” within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. The tricky question in applying Rules 413 and 414 is this: What actually counts as unfair prejudice when the rules of the game have been altered so much, and the jury learns the highly prejudicial and emotional information that the accused has raped or molested a child before?

The new rules alter basic precepts about both sides of the Rule 403 equation, but they especially change the understanding of what constitutes unfair prejudice. The Eighth Circuit in United States v. Gabe emphasized that “[b]ecause propensity evidence is admissible under Rule 414, this is not unfair prejudice.” What used to be considered the ultimate danger under the previous interpretation of Rule 403 is now a perfectly permissible inference. Even if one acknowl-

190 FED. R. EVID. 403.
192 See United States v. Gabe, 237 F.3d 954, 960 (8th Cir. 2000) (“[T]he testimony is prejudicial to Gabe for the same reason it is probative—it tends to prove his propensity to molest young children in his family when presented with an opportunity to do so undetected.”); United States v. Guardia, 135 F.3d 1326, 1330 (10th Cir. 1998) (“If Rule 413 evidence were always too prejudicial under 403, Rule 413 would never lead to the introduction of evidence. Therefore, Rule 413 only has effect if we interpret it in a way that leaves open the possibility of admission.”); United States v. LeCompte, 131 F.3d 767, 769–70 (8th Cir. 1997) (reversing the decision of the trial court, which excluded the prior sexual offense evidence because “child sexual abuse deservedly carries a unique stigma in our society; such highly prejudicial evidence should therefore carry a very high degree of probative value if it is to be admitted.” and explaining that such “danger is one that all propensity evidence in such trials presents. It is for this reason that the evidence was previously excluded, and it is precisely such holdings that Congress intended to overrule.”).
193 Compare LeCompte, 131 F.3d at 769–70 (noting the highly prejudicial nature of the prior offense evidence, but finding that it was nonetheless admissible under Rule 413, even
edges that propensity itself is no longer unfair prejudice, there are other dangers, which should be deemed unacceptable, even under this new regime.

In Old Chief v. United States, a majority of the Supreme Court held that a district court abused its discretion when it rejected the accused’s offer to stipulate to a prior conviction. Instead of forcing the prosecution to accept the stipulation, the district court admitted the full record of a prior judgment even though the nature of the prior offense raised the risk of a verdict tainted by unfair prejudice. The evidence was admitted solely to prove the status of the accused as a felon, which made the accused’s alleged gun ownership a crime. In deciding that the district court had indeed abused its discretion, the Court explained that the term “unfair prejudice” in the context of a criminal case “speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.” In Old Chief, the majority explained that the prosecution may not introduce propensity evidence that “generaliz[es] a defendant’s earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily).”

Ironically, Old Chief expresses concerns about propensity evidence that directly conflict with Rules 413 and 414. Nevertheless, the Court’s recent proclamations about Rule 403 are relevant, and Old Chief is instructive about the vital role Rule 403 plays in assuring a fair trial. Although Congress has approved propensity reasoning, the collateral damage described by Old Chief—a verdict based on the jury’s desire to convict someone they perceive as evil or out-of-control, but who happens to be innocent of the particular crimes charged—still presents serious concerns.

In perhaps the most famous discussion of the rule against character evidence in criminal cases, Justice Jackson explained:

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 a probability of his guilt. . . . The inquiry is not rejected because character is irrelevant;

after performing a Rule 403 balance), with United States v. Fawbush, 900 F.2d 150, 152 (8th Cir. 1990) (noting that even if the prior sexual offense had been relevant to a material issue in the case, it still would not have survived a Rule 403 balance because “the prejudicial effect of this evidence outweighed any legitimate probative value it may have had”).

195 Id. at 177.
196 Id. at 174, 179.
197 Id. at 180.
198 Id. at 180–81.
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 a fair opportunity to defend against a particular
charge. The overriding policy of excluding such evidence, despite
its admitted probative value, is the practical experience that its disal-
lowance tends to prevent confusion of issues, unfair surprise and
undue prejudice.\footnote{Michelson v. United States, 335 U.S. 469, 475–76 (1948) (citations
and footnotes omitted). This language has been quoted extensively by courts and litigants in cases involv-
ing Federal Rules of Evidence 413 and 414. See, e.g., United States v. LeMay, 260 F.3d 1018, 1025
(9th Cir. 2001); United States v. Castillo, 140 F.3d 874, 880 (10th Cir. 1998); United
States v. Guardia, 135 F.3d 1326, 1328 (10th Cir. 1998); United States v. Enjady, 134 F.3d
1427, 1430 (10th Cir. 1998).}
In dissecting the quotation, it is apparent that some of its reasoning
regarding “overpersuasion” no longer applies to people accused of
sexual crimes. But other aspects of Justice Jackson’s critique still ap-
ply. So long as propensity evidence was forbidden, there was no need
to tease out, or as the postmodernists would say, “unpack,” the various
dangers and inquire whether the law could tolerate one (propensity
thinking) without necessarily incurring others (juror anger, distrac-
tion, or confusion). Today, Rules 413 and 414 require us to confront
this question. Courts can no longer conflate the various dangers asso-
ciated with propensity evidence. They must distinguish propensity—
which is now, by Congressional fiat, deemed admissible and fair—
from fellow-traveling dangers which remain forbidden. It is essential
to delineate the various types of potential prejudice and to limit them
as much as possible, consistent, of course, with the new rules’ intent to
allow propensity. Three separate concerns remain viable as important
and avoidable Rule 403 dangers: (1) verdicts based upon juror emo-
tions fueled by the prior sexual offenses, (2) distraction and confusion
of the jury by the other uncharged offenses, and (3) waste of time.

Rule 403 unfair prejudice may arise if the jurors become so horri-
fied by the prior acts admitted under Rules 413 and 414 that they
loathe the accused and desire to punish him for past deeds, even
though they may not believe he committed the currently charged
crime. More subtly, jurors could begin thinking of the accused as
guilty, finessing the standard of proof, and convicting him because
moral abhorrence of his guilty past assuages their reasonable doubts.
The court in Guardia, one of the very few cases to affirm a denial of
Rule 413 evidence under a Rule 403 balancing, expressed these
concerns:

While Rule 413 removes the per se exclusion of character evidence,
courts should continue to consider the traditional reasons for the
prohibition of character evidence as “risks of prejudice” weighing
against admission. For example, a court should, in each 413 case,
take into account the chance that “a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment.”

Rule 403 includes other dangers in addition to unfair prejudice. For instance, prior uncharged acts might confuse and distract jurors who are uncertain of what the charges actually are and what evidence supports which proposition. The dangers with which I am concerned—punishing the accused for past misdeeds, finessing the standard of proof, using the present trial to achieve a preventive detention of someone who might be a menace but did not commit the acts currently charged, confusing the jury, or wasting time—will often appear in combination. For instance, evidence that is distracting might also be time-wasting. Yet, it is essential to view these dangers as important and distinct sources of concern. It is wrong to believe that once propensity rules have been passed, fretting over these other dangers is pointless. Under the new regime, it remains possible—and more desirable than ever—to limit prejudice if judges adequately dissect the evidence.

D. Process Required of the District Courts

At the very least, the courts must go through the motions of conducting a balancing test under Rule 403. Failure to do so is almost always reversible error. Interestingly, appellate courts often engage in the reverse inference and use the fact that the district court did not admit all of the prior bad acts as an indication that the trial court properly used its Rule 403 discretion. For instance, in *Mound*, the Eighth Circuit viewed the district court’s rejection of an uncharged

201 See id. (“A court should also be aware that evidence of prior acts can have the effect of confusing the issues in a case.”).
203 See, e.g., *Blind-Doan v. Sanders*, 291 F.3d 1079, 1083 (9th Cir. 2002) (reversing a verdict for a police officer because the trial court did not “disclose how it evaluated the factors, and its one-line order of exclusion [was] not ‘a clear record’ of why it decided as it did”); United States v. Velarde, 214 F.3d 1204, 1211–12 (10th Cir. 2000); United States v. Mann, 193 F.3d 1172, 1175 (10th Cir. 1999) (noting that a previous appeal “concluded that the district court’s explanation of its decision to admit the Rule 414 evidence was insufficient for our review”); United States v. Castillo, 140 F.3d 874, 884 (10th Cir. 1998) (finding that the district court judge’s conclusion that “if I have to make a finding under 403, then I find it’s relevant and the probative value is not substantially outweighed by any prejudice,” fell short of the minimum requirements).
204 See, e.g., *United States v. Tyndall*, 263 F.3d 848, 850 (2001) (“The district court, furthermore, was well aware of the requirements of Rule 403, since it excluded evidence of a prior rape conviction because of the potential for unfair prejudice.”).
offense as proof that the district court carefully weighed the Rule 403 factors and made considered judgments. 205

The actual process required varies significantly among the circuits. The Tenth Circuit demands a display of the process and the reasoning behind the district court’s Rule 403 balance. 206 Although no detailed findings are necessary, it is “particularly important for a district court to fully evaluate the proffered Rule 413 evidence and make a clear record of the reasoning behind its findings.” 207 Because courts must conduct the Rule 403 balance between probative value and unfair prejudice in the context of the actual facts of the case, the courts cannot inalterably decide the question of admissibility of evidence in limine. 208

205 United States v. Mound, 149 F.3d 799, 801–02 (8th Cir. 1998) (“At that time, [the district court] found that evidence of the uncharged offense was inadmissible under Rule 403, but the prior conviction was admissible . . . . Clearly, contrary to Mound’s assertion, the Court was aware of its duty to apply Rule 403, and performed it.”).

206 See United States v. Koruh, No. 99-2138, 2000 WL 342252, at *4 (10th Cir. Apr. 3, 2000) (“Because of the nature of character evidence, we require the district court to ‘make a reasoned, recorded statement’ of its balancing under Rule 403 when admitting evidence under Rule 414(a).”); see also Guardia, 135 F.3d at 1331 (“Because of the sensitive nature of the balancing test in these cases, it will be particularly important for a district court to fully evaluate the proffered Rule 413 evidence and make a clear record of the reasoning behind its findings.”); United States v. Dewrell, 52 M.J. 601, 609 (A.F. Ct. Crim. App. 1999) (“The Tenth Circuit appears to be the lone holdout attempting to adhere to the pre-413, 414 Rule 404(b)-type balancing test, its rhetoric to the contrary notwithstanding.”). For instance, in Castillo, 140 F.3d at 884, the Tenth Circuit reversed a conviction and remanded because the district court had failed to conduct a Rule 403 balance at all. It ruled that the district court’s ipse dixit finding that the probative value was not substantially outweighed by unfair prejudice, accompanied by the judge’s observation that “I’m not at all certain that under 413 I have to make a decision on 403,” was inadequate. Id.; see also Velarde, 214 F.3d at 1212 (The government agrees with Mr. Velarde that the record reveals no Rule 403 balancing of the Rule 414 evidence admitted in this case, and concedes that a remand to the district court is necessary . . . . On retrial, should the government seek again to present [evidence of a prior molestation by the accused], the court must, on the record, conduct the necessary Rule 403 balancing).

207 Castillo, 140 F.3d at 884 (“Because of the unique nature of character evidence, it is important that the trial court ‘make a reasoned, recorded’ statement of its 403 decision when it admits evidence under Rules 415–415.” (quoting United States v. Guardia, 135 F.3d 1326, 1332 (10th Cir. 1998))).

208 See United States v. Enjady, 134 F.3d 1427, 1434 (10th Cir. 1998) (“It is clear that the court deferred ruling on the admissibility of evidence until it ascertained at trial what other evidence the government would produce and, presumably, whether the [other sexual offense] evidence was needed. The court [correctly] forbade mention of the alleged prior rape in the government’s opening statement.”); see also United States v. King, No. 99-2363, 2000 WL 1028228, at *7 n.4 (10th Cir. July 26, 2000) (“Any final decision as to the admissibility of Rule 413 evidence depends on the outcome of the Rule 403 balancing test. This
All this would sound very encouraging, but for two things. First, it is clear that the Tenth Circuit’s approach is unique and not observed in other circuits. In fact, evidence in other jurisdictions’ case law suggests a rejection of the Tenth Circuit’s attempts to breathe some life into the Rule 403 balance. Second, what actually passes for balancing, including in the Tenth Circuit, is not always commendable.

Even in the Tenth Circuit, the Rule 403 balance can break down into canned formulas, circular reasoning, and empty gestures. In *United States v. Charley*, the court reiterated its commitment to conduct a “‘case-specific inquiry’ into whether the district court ‘should have excluded the Rule 414 evidence’ under Rule 403.” However, the balance appeared pro forma, and the district court seemed disinterested in the individual facts of the case. In conducting the Rule 403 balance, the *Charley* district court (with obvious approval from the Tenth Circuit panel quoting and affirming the district court’s balancing) simply quoted a statement by Rep. Molinari reprinted in the advisory committee’s note. The district court noted Rep. Molinari’s arguments regarding the high probative value of such prior acts evidence and the compelling need for such evidence in cases of child abuse. The district court then concluded: “‘So I have conducted that balancing test. As I previously stated to you I found it was more probative than not under 4[0]3.’”

Interestingly, the district judge subjected the uncharged misconduct to a higher standard than that required by Rule 403. To admit evidence under a Rule 403 balance, the judge need not believe that

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209 *See, e.g.*, Deurrell, 52 M.J. at 609 (noting that only the Tenth Circuit adheres to the standard of balancing applied before the rules).

210 *See* 189 F.3d 1251, 1259–60 (10th Cir. 1999) (quoting *Castillo*, 140 F.3d at 883–84).

211 *See id.* at 1260. The court noted:

By invoking the stated general reasons for the Rule’s enactment, the district court was implying that those reasons were particularly important in this case. Specifically, the district court alluded to the similarity between Defendant’s prior crime and the present charges, and to the fact that there was little direct corroborating evidence.

*Id.* The district court did not, however, explicitly note any of the facts of the case before it. *See id.* *See also* Major Victor M. Hansen, *New Developments in Evidence 1999*, *Army Law.*, Apr. 2000, at 54, 63 (critiquing the balancing in *Charley* and deeming it “a very cursory Rule 403 balancing by the trial judge”).

212 *See Charley*, 189 F.3d at 1260.

213 *Id.*

214 *Id.* (quoting from the record of the district court’s opinion with editorial amendment of the rule number by the appellate court).

215 *See id.* (“I find the testimony of the previous sexual activity by the defendant to outweigh any harm to come to him under 403.” (quoting from the record of the district court’s opinion)).
the evidence is more probative than prejudicial; the judge need only believe that the unfair prejudice does not substantially outweigh the probative value. At first blush, one could imagine that the judge in Charley was being extra scrupulous. However, I believe that the judge was just being sloppy, conducting a “balance” while ignoring the specific facts of the case and failing to imagine, let alone articulate, what the unfair prejudice might be.

In many courts, what should be a highly fact-based and contextual weighing of the relative merits of the evidence is instead transformed into pat incantation—a boilerplate intended to insulate the opinion from reversal on appeal. Courts conduct the balancing in an arid, acontextual environment, where the only necessary proof is abstract, general justification for Rules 413 and 414, often rooted not in the facts of the cases, but in the legislative history.

Courts also mention the use of limiting instructions as a procedural protection. Judges instruct jurors that they must focus on the evidence and may convict only if they are convinced beyond a reasonable doubt that the accused committed the crime charged.\footnote{See, e.g., United States v. Dewrell, 52 M.J. 601, 610 (A.F. Ct. Crim. App. 1999) ("[T]he military judge must be alert to instruct the members that they may not convict an accused solely on the basis of propensity, . . . and that, on the basis of all the evidence, they must be convinced of the accused’s guilt beyond a reasonable doubt."); Feld v. Gerst, 66 P.3d 1268, 1275 (Ariz. Ct. App. 2003) ("You are permitted to consider evidence of other similar sexual offenses by the defendant only to the extent they show a propensity for sexual molestation or sexual aberration. Such evidence should not be considered for any purpose other than the defendant’s state of mind.") (quoting Revised Arizona Jury Instructions 14.101)).

California has adopted its own version of Rules 413 and 414, and the California courts have engaged in significant discussion concerning the constitutionality of its limiting instruction. The current and third version of this limiting instruction clarifies that evidence that the accused committed a prior sexual offense “is not sufficient by itself to prove beyond a reasonable doubt that [she] committed the charged crime[s].” CALJIC No. 2.50.01. California provides the following limiting instruction when sexual offenses are offered for propensity:

If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that [he] [she] was likely to commit and did commit the crime [or crimes] of which [he] [she] is accused.

However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense[s], that is not sufficient by itself to prove beyond a reasonable doubt that [he] [she] committed the charged crime[s]. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime.

in *Mound*, the district court gave the jury the following fairly incomprehensible limiting instruction:

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.217

Courts seem sanguine about the healing powers of limiting instructions.218 In contrast, I hold little hope for their viability.219 Typically, juries do not understand the limiting instructions, which are usually as obscure as the above-quoted instruction. Did the jurors have a clue what limited purpose the *Mound* court had in mind? Furthermore, even if understood, such instructions are almost impossible to follow. Essentially, while the jurors are being asked to use the fact that the accused has raped other women as evidence that he is a rapist and has the character of a person who attacks women, they are also being told not to use the other sexual offenses admitted at trial to prove that the accused is a bad person or deserves to be locked away. The accused’s propensity to rape can be used circumstantially to prove he committed this rape, but the jury must be convinced beyond a reasonable doubt that he committed all elements of the crime charged. Not only are such instructions tough to understand and tougher to follow, but such instructions sometimes have the opposite of their intended effect, because they draw attention to the prior act evidence.220

217 Id. at 802 (omission in original).
218 See, e.g., United States v. Gabe, 237 F.3d 954, 959 (8th Cir. 2001) (noting with approval that “[t]he district court expressly applied Rules 413, 414, and 403 in admitting this evidence with a cautionary instruction”); People v. Banjo, No. B147527, 2002 WL 1752829, *9 (Cal. Ct. App. July 30, 2002) (“Moreover, any danger that the jury would misuse this evidence to punish defendant for the uncharged offenses was cured by jury instructions.”); People v. Frazier, 107 Cal. Rptr. 2d 100, 109 (Ct. App. 2001) (noting that the risk of juror prejudice “is counterbalanced by instructions on reasonable doubt, the necessity of proof as to each of the elements of a lewd act with a minor, and specifically that the jury ‘must not convict the defendant of any crime with which he is not charged’”).
219 See, e.g., Gov’t of Virgin Islands v. Pinney, 967 F.2d 912, 918 (3d Cir. 1992) (holding that in a trial for charged rape, the prior act of rape by the defendant was unduly prejudicial, despite the limiting instruction, and that a “realistic view of the capabilities of the human mind” requires courts to acknowledge that in some situations there may be an unacceptable risk that jurors cannot follow limiting instructions). But see Erik D. Ojala, Propensity Evidence Under Rule 413: The Need for Balance, 77 WASH. U. L.Q. 947, 976 (1999) (arguing that a “clearly written and effectively timed instruction from the judge” will help mitigate the damage of propensity evidence).
220 Cf. Molly Walker Wilson & Barbara A. Spellman, Objection! The Unintended Consequences of Attorney Interruptions (investigating the hypothesis that objections and interruptions highlight contested evidence and that jurors are unable to completely disregard inadmissible testimony), at www.fiu.edu/~apls2004/APLS%202004%20Abstracts.pdf. See generally J. Alexander Tanford, Thinking About Elephants: Admonitions, Empirical Research and
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Therefore, even clear limiting instructions that attempt to refocus the jury on the charged offense and remind the jurors of the burden of proof, may be worse than no instructions at all.

E. The Standard of Review

There is nearly universal agreement that the appellate standard of review for trial court Rule 403 determinations is abuse of discretion.221 Consequently, it is generally hard for an appellate court to overturn a district court’s decision if the district court judge bothered to conduct even a perfunctory balance.222 Indeed, according to my research, there is only one case in the Eighth and Tenth Circuits in which the appellate court has overturned a district court’s admission of prior act evidence under the new rules when the trial court actually conducted the required Rule 403 balance.223 Generally, the appellate court will allow the balance to stand, even when it would have balanced the evidence differently.224 There are, however, cases in which the refusal to admit such evidence is reversed as an abuse of discretion.225 Most often, though, given the standard of review, the expected result is affirmance. Thus, the power to administer the new rules rests with the trial court, as gatekeeper and weigher of evidence.

Legal Policy, 60 UMKC L. Rev. 645 (discussing the psychological futility of limiting instructions).

221 See, e.g., United States v. Withorn, 204 F.3d 790, 794 (8th Cir. 2000) (“We will not reverse a district court’s evidentiary rulings unless they constitute a clear and prejudicial abuse of discretion.”); United States v. Guardia, 135 F.3d 1326, 1331 (10th Cir. 1998) (“The decision to exclude evidence under Rule 403 is within the sound discretion of the trial court, and will be reversed only upon a showing of a clear abuse of that discretion.”); United States v. Valentin-Nieves, 57 M.J. 691, 694 (N-M. Ct. Crim. App. 2002) (“A military judge’s evidentiary rulings are reviewed under an abuse of discretion standard.”). But see United States v. Blue Bird, 372 F.3d 989, 991 (8th Cir. 2004) (Arnold, Morris, J.) (holding that “our review in cases like the present one is more accurately characterized as de novo rather than as an abuse of discretion, and applying that standard to the trial judge’s decision on sexual propensity evidence).

222 When the trial court neglects to conduct a sufficient balance (which happened particularly when Rules 413 and 414 were new), the appellate court remands, stressing that the balance must be performed by the trial court in the first instance. See United States v. Sumner, 119 F.3d 658, 662 (8th Cir. 1997) (“We decline to uphold the admission of the challenged evidence on the theory that it was admissible under 414, for we believe that it is for the district court to conduct the Rule 403 balancing test in the first instance, which it will do if the government chooses to offer the evidence under Rule 414 on retrial.”).

223 See Blue Bird, 372 F.3d at 994–96. Interestingly, Blue Bird was authored by Judge Morris Arnold, who also dissented to the denial of rehearing en banc in Mound. See supra notes 108–10 and accompanying text.

224 See, e.g., Feld v. Gerst, 66 P.3d 1268, 1273 (Ariz. Ct. App. 2003) (opinion ordered depublished by the Arizona Supreme Court) (questioning the court’s admission of a thirteen-year-old past act of sexual misconduct, for which the defendant was acquitted, but concluding that “[w]e will not, in this special action, substitute our judgment for that of the trial court concerning these issues”).

225 See, e.g., United States v. LeCompte, 131 F.3d 767, 769–70 (8th Cir. 1997).
F. Harmless Error

Appellate courts rely on harmless error and jury acquittal on some of the charges to prove that admission of prior sexual offense evidence did not result in unfair prejudice.\textsuperscript{226} However, even known perpetrators do not commit every atrocity of which they are accused. The fact that the jury was able to distinguish among various charges speaks well of the jurors’ deliberative process and indicates that they did not just throw the book at the accused because he had committed horrible deeds in the past. But this does not eliminate the possibility that unfair inferences infected the jurors’ thinking, making a shaky case more credible and feeding the jurors’ desire to convict on something in order to punish the accused for being such a bad, dangerous person. In fact, to the extent that the verdict appears to be a compromise, one can imagine a situation in which the evidence is shaky, but the jury, incensed by prior bad acts, agrees to convict on some of the charges.

IV

PROPOSALS FOR LIMITING THE UNFAIRNESS OF RULES 413 AND 414 AND REINVIGORATING RULE 403 TO MAKE IT A MEANINGFUL CHECK ON THESE NEW PROPENSITY RULES

Rules 413 and 414 are here to stay, and opponents of the new rules must not be tempted to make their loss more dramatic than necessary.\textsuperscript{227} Although the Supreme Court has not considered the sub-

\begin{footnotesize}
\textsuperscript{226} In \textit{United States v. Mann}, for instance, the court concluded that testimony concerning prior molestation created no danger of unfair prejudice because the accused was not convicted on all counts against him. \textit{See} 193 F.3d 1172, 1175 (10th Cir. 1999). As the court explained:

The jury convicted defendant on the charges involving S.Y., but acquitted him on the charges involving K.C. Thus, we agree that R.K.’s testimony did not cause the jury to improperly convict defendant based on his prior uncharged sexual abuse of R.K. or distract the jury from the central issues of the trial. \textit{Id.}

Courts tend to believe that in cases in which the jury acquits on some of the charges, the jury was not infected by unfair prejudice or otherwise did not compromise the standard of proof beyond a reasonable doubt. For example, in \textit{United States v. Gabe}, 237 F.3d 954 (8th Cir. 2001), the accused was tried for adult rape and child molestation in the same case. The district court admitted testimony of another sexual offense by the accused, similar to the charged offense against the adult victim. \textit{See id.} at 960. Gabe was convicted of the crime against the child and was acquitted of the charges against the adult woman. The court concluded that “obviously the jury was not unfairly prejudiced in considering the one count to which [prior sexual offense] testimony was relevant. That testimony could not have unfairly prejudiced Gabe’s defense of the totally unrelated charge that he sexually abused V.G. as a child.” \textit{Id.}

\textsuperscript{227} Occasionally, scholars making their recommendations regarding the new rules simply advocate abolishing them. \textit{See}, e.g., Landrum, supra note 14, at 337 (“Because these new rules are unnecessary, arguably unconstitutional, and alarmingly inquisitorial, I rec-
ject, given the unanimity of the appellate courts, the fight to declare that Rules 413 and 414 violate due process seems all but over. Propensity evidence that scholars and evidence mavens overwhelmingly believed to be unfair is now regularly admitted and praised by Congress as uniquely probative. However, this cannot mean that anything goes. In accepting the reality of the new rules, we must be vigilant in preventing unnecessary collateral damage to the accused. Below I suggest how courts can limit the unfairness of Rules 413 and 414 while remaining respectful of Congressional intent (but not necessarily the entire legislative history). In doing so, I will attempt to avoid attacks on prior offenses that rely on misogynistic or antichild assumptions.

A. Changes Congress Should (But Won’t) Make to Rules 413 and 414

There are many alterations that I would fashion to the new rules if I thought that I had a prayer of capturing Congress’ attention, interest, and will. Two important changes include limiting the application of the rules to prior convictions only, rather than to all prior offenses, and adding time limits, both of which I discuss in detail below.

1. Limiting Sexual Offense Evidence to Convicted Conduct

By allowing propensity evidence only where there is a prior conviction, we significantly enhance the likelihood that the prior offense occurred.228 To the extent that we insist that the accused face up to his past misdeeds, it seems more reasonable to do so when the accused received a formal judgment for those serious offenses. It is clear that courts feel more comfortable admitting convictions and that they value convicted conduct as highly probative.229

228 Currently, the law does not distinguish between prior convictions and prior uncharged sexual offenses that were not the subject of a conviction. See, e.g., People v. Sanchez, No. H022638, 2002 WL 31492732, at *5 (Cal. Ct. App. Nov. 7, 2002) (In Falsetta, the evidence consisted of prior convictions; here the evidence consists of recanted accusations of unprosecuted prior sexual misconduct. We disagree that this distinction makes the evidence inadmissible on due process grounds. The fact that there were no prior convictions is simply one additional factor the trial court must consider when applying the balancing test . . . .). See United States v. Granbois, 119 Fed. Appx. 35, 38 (9th Cir. 2004) (“Also weighing in favor of admitting the evidence of [the accused’s] prior conviction was the fact that the evidence was highly reliable because [the accused] had pleaded guilty to the charges.”);
Practically speaking, because convictions are easier to prove, limiting the admission of prior sexual offenses to those that resulted in convictions would avoid mini-trials about uncharged conduct. There could be no controverting the prior offense; hence, the process of proof would be quicker and less distracting because the evidence would usually be uncontested.\(^{230}\) Limiting prior act evidence to convictions would also relieve the accused of defending many different offenses at trial.\(^{231}\)

Most importantly, limiting the prior sexual offenses to convicted conduct would reduce the possibility of the jurors trying to punish prior bad acts of the accused. Because the accused has already been punished, the jury is less likely to want to punish him again.\(^{232}\) This is very different from what a jury might feel after hearing about unpunished, unconvicted conduct.\(^{233}\) Under this stricter standard, prosecutors might lose very credible evidence that only comes to light because of the current accusations, and hence was never the subject of a prior prosecution. Nonetheless, the guarantee of reliability of the conviction, as well as the administrative and time benefits of the stricter standard, warrant such an amendment.

People v. Falsetta, 986 P.2d 182, 190 (Cal. 1999) (“We [have] also observed that the prejudicial impact of the evidence is reduced if the uncharged offenses resulted in actual convictions and a prison term, ensuring that the jury would not be tempted to convict the defendant simply to punish him for the other offenses . . . .” (citing People v. Balcom, 867 P.2d 777, 785 (Cal. 1994))).

\(^{230}\) See id. (providing that introduction of convicted conduct ensures that “the jury’s attention [will] not be diverted by having to make a separate determination whether defendant committed the other offenses”); see also People v. Banjo, No. B147527, 2002 WL 1752829, at *8 (Cal. Ct. App. July 30, 2002) (quoting Falsetta).

\(^{231}\) See Falsetta, 986 P.2d at 189 (“[T]he present case involves only admission of defendant’s prior rape convictions arising from his guilty pleas in both cases. Accordingly, defendants in similar circumstances will not be burdened unduly by having to ‘defend’ against these charges.”).

\(^{232}\) See id. at 194–95 (pointing out that because of evidence of prior rape conviction “it is unlikely that the jury would be tempted to convict him again of these crimes”); cf. People v. Harris, 60 Cal. App. 4th 727, 738 (1998) (expressing concern that the jury would learn that the accused was not convicted for his prior sexual offense, introduced under Evid. Code § 1108, but was “merely convicted of burglary, leaving the rape victim unrevenged”).

\(^{233}\) See Banjo, 2002 WL 1752829, at *8 (“[T]he prejudicial impact of the evidence is reduced if the uncharged offenses resulted in actual convictions and a prison term, ensuring that the jury would not be tempted to convict the defendant simply to punish him for the other offenses . . . .” (alteration in original) (quoting Falsetta, 986 P.2d at 190)); see also People v. Ewoldt, 867 P.2d 757, 771 (Cal. 1994) (“[T]he prejudicial effect of this evidence is heightened by the circumstance that defendant’s uncharged acts did not result in criminal convictions[,] . . . increas[ing] the danger that the jury might have been inclined to punish defendant for the uncharged offenses, regardless whether it considered him guilty of the charged offenses . . . .”).
2. Adding a Time Limit

Although there are arguments against an absolute time limit, the current rules could be amended to resemble Rule 609. The new rules could apply only to offenses where more than ten years has elapsed since the date of the conviction or release (whichever is longer).\textsuperscript{234} Judges could admit older offenses only upon a very high standard, which would include the interests of justice and require the probative value to substantially outweigh unfair prejudice. This would be a tremendous change from the current system in which judges routinely admit prior offenses, some even decades old. Even though it is very clear that Congress rejected any formal time limits in drafting Rules 413 and 414,\textsuperscript{235} some states have provided such limits in their variations on these rules.\textsuperscript{236}

Courts applying the new rules seem unimpressed by the prejudice caused by the passage of time. For instance, in \textit{People v. Frazier} the court argued, without a trace of irony, that the passage of time enhanced the reliability of the propensity evidence, noting that “the evidence shows defendant has a pattern of molesting his young female relatives going back 20 years.”\textsuperscript{237} In addition, the court argued that the passage of time mattered less where there was no physical evidence anyway.\textsuperscript{238}

Changes such as requiring convictions or setting time limits are unlikely. Politically, victims are popular, even trendy,\textsuperscript{239} while sexual predators are despised and have no organized voice before Con-

\textsuperscript{234} See supra notes 161–62 and accompanying text (discussing Rule 609).

\textsuperscript{235} “No time limit is imposed on the uncharged offenses for which evidence may be admitted; as a practical matter, evidence of other sex offenses by the defendant is often probative and properly admitted, notwithstanding very substantial lapses of time in relation to the charged offense or offenses.” 140 CONG. REC. H8992 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari); see also 140 CONG. REC. S12990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole).

\textsuperscript{236} Alaska has a ten-year limit. See ALASKA R. EVID. 404(b). Arizona, under its common law, required the prior sexual offense to be close in time to the offense charged or, barring that, the prosecution had to present expert medical testimony that established the accused’s continuing emotional propensity to commit the act charged. See State v. Treadaway, 568 P.2d 1061, 1065 n.2, 1067 (Ariz. 1977) (A prior, separate sex offense (particularly a dissimilar one) with a different victim (possibly excepting a similar relationship between defendant and the victim, such as father-daughter) as remote as three years earlier is almost never admissible and especially not for the purpose of showing only defendant’s propensity to commit the crime charged.); see also Feld v. Gerst, 66 P.3d 1268, 1272 (Ariz. Ct. App. Div. 2003) (withdrawn and depublished) (quoting Treadaway).

\textsuperscript{237} 107 Cal. Rptr. 2d 100, 108 (Ct. App. 2001).

\textsuperscript{238} Id. at 108–09.

B. Changes Courts Can Make in Interpreting the New Rules

Reform of the new rules, if it is to come at all, must emerge from the courts. Some of the changes I recommend must come from the courts of appeals, and some must come from the district courts—most must involve both. I suggest two specific changes in the way the courts approach and interpret Rules 413 and 414 neither of which requires legislative action. First, I propose a new, more demanding standard of proof for demonstrating that the other offenses actually happened. Second, I implore the courts to reject the “403-lite” standard, and instead require that district courts conduct a genuine, fact-specific balance, as opposed to a test that is satisfied by merely uttering the magic words of Rule 403 with a bit of legislative history thrown in. In conducting this balance, courts must carefully weigh the probative value of the prior act evidence (taking into account issues of timing and method of proof) and screen this evidence to limit unfair prejudice, distraction, confusion, and waste of time.

1. Requiring a Higher Standard of Proof that the Other Offenses Occurred

In determining the standard of proof necessary to demonstrate that the prior sexual misconduct occurred, courts borrow the standard announced by the Supreme Court in *Huddleston v. United States*, a Rule 404(b) case. *Huddleston* held that the government need not prove the prior bad acts by a preponderance of evidence, but must provide “sufficient evidence to support a finding by the jury that the defendant committed the similar act.” The appellate courts have applied this *Huddleston* standard to Rules 413 and 414, a suggestion included in the legislative history. Thus, prior sexual offenses ad-

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240 See Scallen, supra note 15, at 861 (“Defendants who are accused of heinous crimes have a poor lobby in Washington.”).

241 485 U.S. 681 (1988). In *Huddleston*, the Supreme Court emphasized that the evidence must be relevant and must pass a Rule 403 determination of whether “‘its probative value is substantially outweighed by the danger of unfair prejudice.’” Id. at 687. The Court rejected the notion that the judge must first find that the prior act occurred by a preponderance of evidence and instead insisted that the question be left to the jury under Federal Rule of Evidence 104(b) (conditional relevance). Id. at 689–90.

242 Id. at 685; see United States v. Wright, 53 M.J. 476, 483 (C.A.A.F. 2000) (citing *Huddleston* and “requiring the judge to conclude that the jury could find by preponderance of the evidence that the offenses occurred”); United States v. Hughes, 48 M.J. 700, 715 (A.F. Ct. Crim. App. 1998).

243 See United States v. Beaulieu, 194 F.3d 918, 922 (8th Cir 1999) (“We observe that note five to the official commentary for Rule 414 states, ‘Evidence of uncharged child molestation is admissible if the prosecution provides enough evidence to support a finding, by a preponderance of the evidence, that the defendant committed the act.’”); United
missible under Rules 413 and 414 need not have resulted in a conviction or even an arrest. The evidence need not pass a clear and convincing standard, or even, in the judge’s assessment, a preponderance of the evidence standard, but need only be capable of being accepted by the jury as more probable than not.

It is vital that courts rethink this standard of proof for admitting prior offenses under Rules 413 and 414. Although the Huddleston standard arose in the context of Rule 404(b), so far courts have accepted David Karp’s suggestion that Huddleston should provide the standard of proof for the sexual offenses admitted under Rules 413 and 414. Although the analogy is a reasonable one, its consequences are unfortunate and unnecessary because there are ample grounds for distinction.

The revolutionary departure of Rules 413 and 414 from the traditional approach to prior act evidence also calls for new thinking in terms of the standard of proof. Rules 413 and 414 rest on the notion that despite the unfair prejudice that propensity evidence might generate (both in overvaluing the probativeness of past misdeeds and in the attendant dangers of jurors’ punitive desires, irrationality, confusion, and distraction), such evidence is justified by its high probative value. Given that we are offering the jury a window into the accused’s character and arguing that acts committed in the past are particularly probative in circumstantially proving guilt of the offenses charged, it is reasonable to demand a fairly high standard of proof that those prior acts actually happened. A judge’s belief that a jury could find, more likely than not, that the prior offense occurred is simply not sufficiently protective to shield the accused from rumor and unsubstantiated tales of misconduct.


As with many other questions concerning the new rules, the original force behind them, David Karp, is cited for the proposition that Huddleston applies. See Enjady, 134 F.3d at 1433 (“We agree with David Karp, who drafted Rule 413, that similar acts must be established by ‘sufficient evidence to support a finding by the jury that the defendant committed the similar act.’” (citing Huddleston)); Karp, supra note 32, at 19 (“While [Huddleston] was directly concerned with admission under Rule 404(b), its reasoning on these points is also applicable to the proposed new rules for sex offense cases.”).

244 In fact, the prior act evidence can be based on conduct resulting in an acquittal. See, for example, supra note 6, discussing state cases in which acquitted conduct was used to demonstrate sexual propensity.

245 Huddleston, 485 U.S. at 682.

246 See, e.g., Enjady, 134 F.3d at 1433.

Therefore, I propose that the courts require the higher standard of clear and convincing evidence before admitting other sexual offenses. Such a standard would enhance the probative value of the character evidence, if not in its logic and assumptions, at least in the facts upon which it is premised. The standard of proof is a quintessential judicial question. It does not subvert the theory or policy behind the new rules for courts to insist on a high standard of proof that the other offense actually occurred before tarring the accused with it.

This suggestion faces two strong objections, and I acknowledge that, in the words of my mentor and friend, Judge Edward R. Becker, I am charging up San Juan Hill on this one. The first argument against a heightened standard of proof emerges from the legislative history of Rules 413 and 414, which clearly cites the Huddleston standard with approval as the means for admitting evidence under the new rules. I will deal with this concern after presenting my second proposal for courts to adopt, which, not surprisingly, is also at odds with the legislative history.

With respect to the second objection, the Supreme Court, after Huddleston and an earlier case, Bourjaily v. United States, fixed the preponderance standard for all preliminary evidentiary questions in both civil and criminal cases. Indeed, in Huddleston, the Court rejected the petitioner’s argument—that the judge, not the jury, must be able to find that the accused committed the prior act by a preponderance—as “inconsistent with the structure of the Rules of Evidence and with the plain language of Rule 404(b).” The Supreme Court further observed: “Petitioner’s reading of Rule 404(b) as mandating a preliminary finding by the trial court that the act in question occurred

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248 Arizona, which adopted a sexual propensity rule in December 1997, requires that in criminal cases “the relevant prior bad act must be shown to have been committed by the defendant by clear and convincing evidence.” Ariz. R. Evid. 404 cmt. 1997 amendment (citation omitted).

249 Judge Becker, former Chief Judge of the Court of Appeals of the Third Circuit, and now on senior status, always used this historically evocative phrase to caution his clerks against making arguments that are sure to fail. I wish to acknowledge the problems with my suggestion and honor him, even though I may be ignoring his good advice.

250 As I argue below, the legislative history is not an insurmountable objection, both because there have been questions raised about the legislative history of evidence rules generally, and because in the case of Rules 413 and 414, the legislative history is particularly suspect. See infra Part IV.C.

251 483 U.S. 171, 175–76 (1987) (discussing the standard for proving evidence of conspiracy under Federal Rules of Evidence 801(d)(2)(E) and 104(a), in a case in which the petitioner did not challenge the standard of admissibility, and observing that there is “nothing to suggest that admissibility rulings have been unreliable or otherwise wanting in quality” under the standard of a preponderance of the evidence).

252 Huddleston v. United States, 485 U.S. 681, 687 (1988). The petitioner in Huddleston conceded that after Bourjaily the standard of review was preponderance of the evidence and merely argued that the judge rather than the jury should be charged with applying that standard. See id. at 687 & n.5.
not only superimposes a level of judicial oversight that is nowhere apparent from the language of that provision, but it is simply inconsistent with the legislative history behind Rule 404(b).\(^{253}\)

There are strong arguments for distinguishing the standard for admission of preliminary evidence in *Bourjaily* and *Huddleston* from that of admission under the sexual propensity rules. Without discussing whether it is fair in the Rule 404(b) context (sometimes it is not), I nevertheless propose that the *Huddleston* standard is particularly ill-suited to Rules 413 and 414. Rule 404(b) admits evidence under a regime that affirmatively eschews propensity.\(^{254}\) Indeed, the first line of Rule 404(b) explicitly prohibits propensity thinking, providing that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”\(^{255}\) Because of this built-in limitation, evidence admitted under Rule 404(b) is less likely to cause unfair prejudice to the accused.\(^{256}\)

*Bourjaily*, which involved traditional co-conspirator evidence, is even less persuasive as support for the standard of proof for evidence admission, because the issue concerning the standard of review was never contested.\(^{257}\) Instead, the Court merely assumed that the preponderance standard applied.\(^{258}\) Additionally, like *Huddleston*, *Bourjaily* involved a traditionally accepted type of evidence (co-conspirators’ statements), not the departure from tradition that marked Rules 413 and 414.\(^{259}\)

Furthermore, even if one reads *Huddleston* as announcing a general standard of admissibility for all evidence, so much has changed in the evidence landscape since the dicta in *Huddleston*—for surely it is merely dicta in the context of new rules that were not yet contemplated when *Huddleston* was handed down—that courts must rethink the standard. *Huddleston* was premised on a complex, but internally coherent, system of character evidence that provided internal controls

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\(^{253}\) *Id.* at 688.

\(^{254}\) As the Supreme Court in *Huddleston* explained: “The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character.” *Id.* at 686 (emphasis added).

\(^{255}\) FED. R. EVID. 404(b).

\(^{256}\) Under Rule 404(b), to allow proof of other crimes, wrongs, or acts, there must be a legitimate nonpropensity purpose to prove an independent fact element, such as motive, knowledge, or absence of mistake—any relevant purpose other than propensity. *Id.*

\(^{257}\) See *Bourjaily* v. United States, 483 U.S. 171, 175–76 (1987) (establishing a *Huddleston*-like standard for conspiracy cases, even though the petitioner never contested the lower court’s application of the preponderance of evidence standard).

\(^{258}\) *See id.*

\(^{259}\) Although there was debate about the scope of the co-conspirator exception in *Bourjaily*, the Supreme Court majority emphasized that it was applying rules firmly rooted in evidence tradition. *See id.* at 183 (describing co-conspirator evidence as firmly rooted). *But see* Becker & Orenstein, *supra* note 95, at 869–76 (criticizing the Court’s characterization of its holding regarding admission of co-conspirator evidence as firmly rooted).
(both via the antipropensity rule as well as Rule 403 balancing) against unfairness. Hence, *Huddleston*’s reliance on the “structure of the Rules of Evidence” for explanation does not apply with equal force to Rules 413 and 414, which represent a break with traditional evidence policy, presumptions, and structure. Relatedly, the rules applied in *Huddleston* had received careful vetting via an extensive rulemaking process. The argument for additional judicial oversight is therefore weaker for traditionally passed evidence rules than in the case of Rules 413 and 414, which did not go through the rulemaking process but instead arose directly from Congress, over vociferous objection from scholars, lawyers, and judges. Certainly, the federal courts have the power to demand the higher standard of clear and convincing evidence for sexual offenses introduced under Rules 413 and 414, and they should exercise it.

A variant on this proposal to use a higher standard than *Huddleston* would be to incorporate into the Rule 403 assessment of probative value a more demanding showing that the prior offense actually occurred. The theory is that the probative value of a sexual offense diminishes if it is less likely to have occurred. The level of certainty that the other acts occurred has occasionally been a contested issue in the case law. For instance, in *United States v. Hughes*, the court held that the military judge plainly erred by admitting statements regarding uncharged allegations of abuse against the witness’s nephew, niece, and friend’s child. The court reached this decision because the prosecution presented no evidence other than what Mrs. Hughes had heard to support a finding that the appellant had committed those purportedly similar acts.

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260 See *Huddleston*, 485 U.S. at 687.
261 See 140 CONG. REC. H8990 (daily ed. Aug. 21, 1994) (statement of Rep. Hughes) (discussing the Rules Enabling Act and the minimum of six levels of scrutiny normally involved in rulemaking compared to Rules 413–15, which were proposed as amendments with maybe twenty minutes of debate).
262 See supra Part I.B.2.
263 Some circuit courts, prior to *Huddleston*, did demand a higher showing of proof for admissibility of evidence, even under Rule 404(b). See, e.g., United States v. Leight, 818 F.2d 1297, 1302 (7th Cir. 1987) (discussing 404(b) challenges with respect to child abuse prosecutions and the circuit’s four-part test to determine admissibility, including a requirement that the evidence be clear and convincing); United States v. Weber, 818 F.2d 14 (8th Cir. 1987) (noting that evidence of prior drug transactions is admissible under 404(b) if there is clear and convincing evidence); United States v. Vaccaro, 816 F.2d 443, 452 (9th Cir. 1987) (noting that for the admission of other criminal conduct the evidence must be clear and convincing); United States v. Lavelle, 751 F. 2d 1266, 1276 (D.C. Cir. 1985) (similarly applying the clear and convincing standard).
264 Johnson v. Elk Lake Sch. Dist., 283 F.3d 138, 155–59 (3d Cir. 2002) (applying a Rule 403 balance under Rule 415 in a civil case and incorporating uncertainty about whether other acts of harassment occurred into the Rule 403 balance).
266 *Id.*
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If the courts refuse to depart from the current understanding that all prior act evidence is subject only to a standard of jurors’ ability to find by a preponderance, and refuse to factor the likelihood that the crime actually occurred into the calculus for probative value, then any change in the standard would indeed have to come from Congress. Like those who battled for the Alamo, proponents’ chances are slim.

2. Requiring a More Rigorous and Contextualized Rule 403 Balance

The trial judge determines credibility, evaluates demeanor, and sits in the best position to judge all of the evidence in context, including the probative value and unfair prejudice of the accused’s prior sexual offenses. The trial judge’s power to do so predates the Federal Rules of Evidence; Rule 403 merely codified a long and venerable tradition of judicial discretion exercised by courts in the admission of evidence. 267

Courts must abandon the notion that Rules 413 and 414 dilute, or render inconsequential, the Rule 403 balance. Not only is the observation that the Rule 403 balance should “normally” lead to admissibility268 (what I call “403-lite”) incorrect, but it is also subversive of the courts’ authority and independence.269 The “403-lite” approach strips the courts of their quintessential discretionary role as arbiters of fairness.

For instance, in United States v. Withorn, the Eighth Circuit explained that courts are “obligated to take into account Congress’s policy judgment that Rule 413 was justified by the distinctive characteristics of the cases it will affect,” and that Rule 414 evidence is ‘exceptionally probative’ of a defendant’s sexual interest in children.”270 By focusing on Congressional intent and looking to the “distinctive characteristics”271 of rape cases and the “exceptionally probative” Rule 414 evidence in child molestation cases, the Eighth

267 See Shepard v. United States, 290 U.S. 96, 104 (1933) (noting the extent of judicial discretion to admit or exclude evidence: “When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.”).

268 See, e.g., Karp, supra note 32, at 19 (“It is not expected, however, that evidence admissible pursuant to proposed Rules 413-15 would often be excluded on the basis of Rule 403.”) (quoting an unpublished analysis statement for the Proposed Sexual Assault Prevention Act)).

269 A very fine student comment makes the point that deferential application of Rule 403 “complete[s] the circuitous adoption of Rules 413 and 414, effectively removing any judicial influence in the drafting, adoption, or implementation of these rules.” King, supra note 74, at 1192.


271 Mound, 149 F.3d at 801.
Circuit makes a crucial mistake: It confuses the justifications for the deviation from the traditional antipropensity rule with the valid method of applying that deviation. It is one thing to announce a rule change based on a broad policy consideration that a group of offenders is so different from others that propensity arguments are particularly probative. It is quite another, however, to use this legislative judgment to bypass what must be a highly contextualized, case-based analysis of the probative value of the evidence versus its dangers. The Tenth Circuit in *Meacham* observed this phenomenon, but seemed inadequately alarmed or outraged, and ultimately upheld the district court’s understanding of Congressional intent: “[E]vidence admissible pursuant to the proposed rules is typically relevant and probative, [and] its probative value is normally not outweighed by any risk of prejudice or other adverse effect. That’s a judicial decision to be made. But they have made that as a legislative generalization.”

When federal appellate courts give district judges abstract instructions about how prior sexual offense balancing tests should come out, they are sending those judges the wrong message. The Eighth Circuit, in particular, has adopted an approach that misconstrues the role of the district judge and misleads the district courts into believing that only in truly exceptional cases should they exclude prior sexual offenses. Similarly, military appellate courts have instructed that the Rule “403 balancing test is to be applied in a broad manner which favors admission.” The Tenth Circuit’s approach is better, insofar as it requires that district judges engage in a specific balance, considering various factors that might mitigate against the probative value or exacerbate the unfair prejudice. Nevertheless, there is ample evidence that, even in the Tenth Circuit, the balance is insufficiently contextual.

The “403-lite” presumption of admissibility is quite separate from the observation that, as a practical matter, the Rule 403 standard tends to favor admission. Although it is true that Rule 403 only

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272 See *United States v. Meacham*, 115 F.3d 1488, 1493 (10th Cir. 1997).
274 See, e.g., *United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998); *United States v. Guardia*, 135 F.3d 1326, 1331 (10th Cir. 1998).
275 See *supra* note 158 and accompanying text.
276 Professor Scallen explains: [It simply makes no sense to speak of a presumption of admissibility when Rule 403 is applied to evidence being considered under Rules 413-415. Rule 403 is already “tilted” in favor of admissibility; there is no need to
excludes evidence when the unfair prejudice substantially outweighs the probative value, the test assumes that, in conducting that balance, the district court will look at the evidence in the case, not at the abstract, general directive of Congress. One cannot presume, based on legislative judgment, how the balance will come out in any individual case or category of cases.\textsuperscript{277} The appellate courts’ didactic use of “403-lite”—their presaging how the balance should come out—reflects a serious flaw in the understanding of the role of Rule 403.

On the probative value side of the Rule 403 balance, courts must continue to insist on similarity between the prior offenses and the crimes charged. In addition, although a concrete time limit on prior act admissibility would have to come from Congress, courts should still consider the lapse of time between the current charges and the prior offense as a serious factor in assessing the probative value of the evidence. If the district court performs its obligations—assessing the evidence in context of the nature of the evidence—the judge can weigh whether older convictions are too stale. Currently, the courts are simply playing a numbers game; when the accused attempts to argue that the prior offense is too old, the court cites a case that admitted an even older offense.\textsuperscript{278}

Furthermore, in assessing the dangers of propensity evidence, judges must use Rule 403 to shield the accused from preventable dangers. Instead of the “403-lite” approach, courts must carefully screen for avoidable unnecessary “unfair prejudice” (as opposed to the unavoidable congressionally mandated variety).\textsuperscript{279} The fact that propensity evidence used to serve as the quintessential example of unfair prejudice, but now constitutes acceptable, even lauded, evidence, does not mean that all arguments against unfair prejudice must be abandoned.\textsuperscript{280} If courts are careful in dissecting the evidence, they can distinguish prior sexual offenses that are admissible from those

\textsuperscript{277} This point was also forcefully made by Professor Scallen, who argued that “[t]he crucial point” is that Rule 403 demands a “case-specific, fact-intensive balancing process that the drafters of Rule 403 thought should be left to the one impartial expert in the courtroom—the trial judge.” \textit{Id.} at 882.

\textsuperscript{278} See, \textit{e.g.}, United States v. Gabe, 237 F.3d 954, 960 (8th Cir. 2001) (admitting evidence of the defendant’s twenty-year-old offense and citing the twenty-five- to thirty-year-old prior offenses admitted in \textit{United States v. Meacham}, 115 F.3d 1488, 1485 (10th Cir. 1997), and the sixteen- to twenty-year-old offenses admitted in \textit{United States v. Larson}, 112 F.3d 600, 605 (2d Cir. 1997)).

\textsuperscript{279} Unnecessary unfair prejudice in this context is like unnecessary roughness in football. Some unfair prejudice, just like some roughness, is to be expected, but should be limited to no more than necessary.

\textsuperscript{280} As I discussed above, there has been a tendency to see all the evils of propensity as inexorably bundled together. See supra Part III.C.
that are not, because some prior act evidence will present additional dangers that may result in unfair prejudice beyond the given prejudice caused by propensity-type thinking. One such additional danger is the emotional reaction of the jury—wanting to jail a bad, dangerous person, not because the jurors believe he is guilty of the crime charged, but for retribution or safety of the community.\footnote{Not surprisingly, the prosecution sometimes encourages such misuse of propensity evidence. \textit{See}, e.g., United States v. Peters, No. 96-2286, 1998 WL 17750, at *3 (10th Cir. Jan. 20, 1998) (noting the defendant’s claim that “in closing argument the prosecutor improperly referred to defendant,” whose prior sexual offenses had been admitted under Rule 413, “as a ‘serial rapist who must be stopped’”).}

Courts must also carefully screen for the related dangers of distraction, confusion, subversion of the jury’s ability to focus on the specifics of the charges, and waste of time.

Under Rules 413 and 414, some dangers are simply unavoidable. For example, under the new regime, it is very difficult to circumvent the danger that jurors will illogically overvalue the evidence, that is to say, give it more credence than it is worth. The challenge for the courts, however, is to analyze the particular dangers under the new regime and to separate those that are inevitable from those that, with careful judicial management and wise use of discretion, might be avoided. In teasing out these dangers, I will focus on three interconnected issues: (1) the potential emotional impact of the evidence introduced under Rules 413 and 414, (2) the manner in which the evidence is introduced, and (3) the potential for prior sexual act evidence to waste time and to confuse and distract the jury.

First, courts should evaluate probative value and prejudice on a case-by-case basis, assessing the emotional impact of the propensity evidence on the jury. Courts should deem as unfairly prejudicial prior offense evidence that is highly emotional, particularly gruesome, or more troubling than the charges against the accused. For instance, the Ninth Circuit in \textit{United States v. LeMay} admitted evidence that the defendant, who was accused of forcing two young relatives to perform oral sex on him, had, at the age of twelve, raped a toddler eight years earlier.\footnote{260 F.3d 1018, 1022–23 (9th Cir. 2001).} By admitting this prior act evidence through a highly emotional witness—the mother of the toddler LeMay had raped\footnote{\textit{Id.} at 1024.}—the court purported to even out the credibility contest between the accused and the young victims.\footnote{\textit{Id.} at 1028.} Although it is impossible to know what the jury might have found without the mother’s emotional testimony of the uncharged sexual misconduct, it is fair to speculate that the defendant’s chances of acquittal were hurt by the heart-rending prior acts evidence admitted under Rule 414. \textit{LeMay} thus illustrates
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the dangers of propensity evidence in that the emotional impact of the evidence may have led the jury to choose to punish the accused for the molestation of the toddler, and relatedly, may have distracted them from the case charged.

Some courts recognize the possibility that the nature of other sexual offenses can create unfair prejudice if those other offenses are significantly more upsetting or heinous than the charged offense. In admitting prior bad acts, courts will emphasize the prior act’s lack of emotional pull on the jury, and hence argue that the lack of prejudicial emotional impact favors admission under the Rule 403 balance.

Still, other courts seem wildly oblivious to the dangers that evidence of other, more troubling sexual offenses might present. In the extreme example of People v. Robins, involving the alleged sexual assault of a prostitute, a California court admitted prior act evidence that the accused raped, beat, attempted to silence, and threatened to kill his half sister. The court found that the “[d]efendant’s attack on [his half-sister] was not so much more brutal

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285 See, e.g., People v. Banjo, No. B147527, 2002 WL 1752829, at *8 (Cal. Ct. App. July 20, 2002) (“The prejudicial effect is increased if the uncharged crime is more serious than the charged offense. To reduce potential prejudice from admitting evidence of other sex offenses, the trial court may exclude irrelevant and inflammatory details surrounding the other offenses.” (citation omitted)); People v. Frazier, 107 Cal. Rptr. 2d 100, 109 (Ct. App. 2001) (conceding the risk that “a jury might punish the defendant for his uncharged crimes regardless of whether it considered him guilty of the charged offense especially where, as here, the uncharged offenses . . . were much more serious than the charged offense”).

286 See, e.g., United States v. Granbois, 119 Fed. Appx. 35, 38 (9th Cir. 2004) (“The evidence of the prior acts was not introduced through emotional and highly charged testimony of a victim or a victim’s relative, but, rather, was conveyed through the testimony of a criminal investigator.”); United States v. Butler, 56 F.3d 941, 944 (8th Cir. 1995) (“Because the evidence [of prior abuse] was so similar to the acts charged, it would not be so facially inflammatory as to unduly divert attention from the issues of the case.”), quoted in United States v. Walker, 261 F. Supp. 2d 1154, 1157 (D.N.D. 2003); United States v. Valentinidad, 57 M.J. 691, 694–95 (N-M. Ct. Crim. App. 2002) (admitting evidence of the accused’s sexual grabbing of another woman to prove rape of the victim, and explaining that because the grabbing was “relatively minor in nature,” the victim of the prior act seemed “more angered and disgusted by the accused’s alleged behavior than anything else,” and because a limiting instruction was given, the unfair prejudice would be minimal). All of these examples involve cases in which the court approves of the evidence, noting that it does not contain the deficiency of overly appealing to juror horror or emotion. This is different from excluding evidence that does so.

287 For instance, in Frazier, 107 Cal. Rptr. at 108, the accused unsuccessfully argued that uncharged evidence admitted— sodomy and forced oral sex with a relative fifteen or sixteen years earlier—was unfairly prejudicial because, among other reasons, “the alleged crimes were far more serious than the crimes for which he was presently charged.” The court’s answer to the accused’s concern was nonresponsive, observing that under the new propensity rule, charged and uncharged prior crimes need not be sufficiently similar to qualify for admission under California’s version of Rule 404(b). See id. The court, in essence, reaffirmed the probative value of the prior act evidence without even addressing the issue of unfair prejudice. See id. at 109.

than his attack on [the prostitute] as to blind the jury to the task before them.”

Remarkably, the court failed to consider the potential effect of the accused’s relationship with his prior victim. It is unfathomable that a jury would not be more outraged by an incestuous rape than by rape of a prostitute. However, the court’s only response to this difference was a procedural one, noting that the “defendant did not suggest at trial, and does not argue on appeal, that a less prejudicial alternative existed, such as limiting the details of the attack on Deanna or excluding the fact Deanna was defendant’s half-sister.”

Second, and relatedly, courts should carefully consider the manner in which prosecutions introduce Rule 413 and 414 evidence. Propensity evidence should be presented in the most neutral form possible; the focus must remain on the fact of the accused’s character and tendency to be a sexual predator, not on the specific emotional or physical harm suffered by victims of the other acts. If, for instance, a prior conviction exists, the fact of that conviction alone should be sufficient. Additionally, rather than face live testimony about other incidents, the courts should always allow the accused to stipulate to prior sexual offenses. Finally, where the offense is disputed, trial courts should go out of their way to ensure that the uncharged offense testimony is presented as neutrally as possible, and not, unless absolutely necessary, with a tearful witness on the stand. This approach is in harmony with the Supreme Court’s holding in *Old Chief v. United States*: “If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk.”

In *United States v. Fool Bull*, the Eighth Circuit addressed the scope of the *Old Chief* holding. The accused, relying on *Old Chief*, argued that prior offenses could have been proven less prejudicially, in a way

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289 *Id.* at *5.
290 More troubling, but undoubtedly true, the jury (or the trial court itself) would probably be less concerned with the rape of a prostitute than the rape of an ordinary stranger, let alone a sibling. *Cf.* Sherry F. Colb, *When a Prostitute Kills: The Execution of Aileen Carol Wuornos* (“Wuornos was at best a prostitute who refused to retreat from danger. For too many people, that is still not good enough for her to deserve the law’s protection from rape.”), available at http://writ.corporate.findlaw.com/colb/20021023.html (last visited July 28, 2004).
292 *See, e.g.*, United States v. Peters, No. 96-2286, 1998 WL 17750, at *5 (10th Cir. Jan. 20, 1998) (“Potential prejudice was reduced by excluding details that would most likely inflame a jury, such as information about the victims’ physical injuries.”).
other than by calling witnesses to testify about them. In the unpublished opinion, the Eighth Circuit deemed the accused’s reliance on *Old Chief* as “misplaced.” The *Fool Bull* court held that, absent the abstract question of felon status that was presented in *Old Chief*, propensity evidence should not be limited by an accused’s insistence that the prosecutor present the evidence in a less prejudicial manner since it “tells [a] colorful story with descriptive richness.”

It is correct to say that *Old Chief*’s precedential value is affirmatively limited to the narrow question of a defendant’s ability to stipulate to his status as a felon in cases in which felonious status is an element of the offense. However, I believe that the Eighth Circuit was incorrect in summarily dismissing the notion that the policy of *Old Chief* applied. *Old Chief*’s concern with avoiding unnecessary prejudice, while still informing the jury of essential facts, seems particularly apt in Rule 413 and 414 cases, where the essential information for the jury is the accused’s status as a sexual predator. While evidence of the number of prior offenses can be relevant to show the accused’s propensity more convincingly than stipulation, multiple witnesses describing numerous prior offenses, in explicit detail, may emotionally affect the jurors and confuse them as to which incidents are on trial.

Third, courts should be particularly careful to ensure that the evidence of prior sexual offenses, by their sheer number or time taken to prove, do not overwhelm the trial, thus wasting time, and confusing and distracting the jury. Especially in California courts, defendants have raised the “waste of time” balancing factor, which is specifically mentioned in Rule 403. The California courts have struggled with the question of how much prior offense evidence is too much. For example, in *People v. Frazier*, the court held that 182 pages (or, by its calculation, twenty-seven percent of the total trial transcript) devoted to propensity evidence of uncharged sexual offenses did not constitute an undue consumption of time. The court conceded that

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295. Specifically, the accused argued that the information about his prior offenses and propensities could have been introduced via the victim of the current charged offenses. Therefore, the other five witnesses to the accused’s propensity did not have to testify. See id. at 779.

296. See id. (citing United States v. Hill, 249 F.3d 707, 712 (8th Cir. 2001), and explaining that *Hill* stands for the proposition that “absent stipulation going to [the] fact of felon status, [the] rationale for [the] limited rule of *Old Chief* disappears, as defendant’s stipulation cannot give government everything evidence could show”).

297. See id. at 780.

298. See generally Duane, supra note 66, at 124 (“That danger of wasting time and jury confusion would rarely be greater than it will inevitably be under the new rules, which allow evidence that a defendant has committed similar crimes of sexual assault in the past.”).

299. 107 Cal. Rptr. 2d 100, 109 (Ct. App. 2001).
“[c]onceivably a case could arise in which the time consumed trying the uncharged offenses so dwarfed the trial on the current charge as to unfairly prejudice the defendant.”

Nevertheless, the court concluded that the accused failed to demonstrate unfair prejudice, and explained that it could not “say spending less than a third of the total trial time on these issues was prejudicial as a matter of law.” The court in People v. Banjo came to a similar conclusion, holding that 317 pages of the trial transcript devoted to other sex offenses (which the court estimated to constitute thirty-three percent of the transcript) was not prejudicial.

In People v. Falsetta, the court raised another potential concern implicating the “waste of time” factor. The court acknowledged that “[j]udicial efficiency theoretically could suffer if the courts permitted trials to be unduly sidetracked while the parties litigated allegations that defendants had committed other sex offenses.” However, it expressed confidence that “trial courts will exercise sound discretion under section 352 [California’s equivalent to Rule 403] to preclude inefficient mini-trials of this nature.” Thus, California courts have taken judicial efficiency, as well as unfair prejudice to the accused, into consideration in conducting the propensity evidence balance, but have yet to find propensity evidence to be a waste of time.

In addition to lengthening the trial, prior sexual offense evidence may confuse the jury as to what the actual charges are or distract the jury from what should be its main focus. United States v. Guardia is illustrative of these concerns. In Guardia, the court excluded evidence of four other women willing to testify about a doctor’s sexual improprieties. The district court, using Rule 403 to reject admission of evidence under Rule 413, indicated that “its overriding, if not exclusive, concern was the danger that the proffered testimony would confuse the issues in the case, thereby misleading the jury.” The Tenth Circuit court also expressed concern that the evidence would complicate the case exponentially, because of the need for expert testimony on the nature of proper gynecological examination and the differ-

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300 See id.
301 See id.
303 986 P.2d 182 (Cal. 1999).
304 Id. at 189.
305 Id.
307 135 F.3d 1326 (10th Cir. 1998).
308 Id.
309 Id. at 1331.
ences in the types of improper touching the various women alleged. 310 Additional witness testimony presenting new narratives unrelated to the charged acts may particularly confuse and distract the jury. 311 These concerns may also arise when longer jury instructions and admonitions are given for evidence admitted under Rules 413 and 414. 312

C. Limiting the Role of Legislative History

I concede that my two suggestions for how courts can improve their application of the new rules—a higher standard of proof and the rejection of “403-lite”—both disregard the legislative history of Rules 413 and 414, upon which the courts rely heavily. 313 Both the Huddleston standard and the application of “403-lite” arise out of the courts’ slavish adherence to comments in the legislative history of the new rules. Yet, perhaps legislative history is not that important after all. Members of the Supreme Court, particularly Justice Scalia, have expressed much distrust of legislative history and reliance on advisory committee notes in general, and on the notes accompanying the evidence rules in particular. 314 There is a strong argument for supporting a plain meaning approach to interpreting the Federal Rules of Evidence. The Rules are generally considered clear and have been subject to modification when Congress was sufficiently interested. 315 Therefore, since Congress can always change the rules if courts are mistakenly interpreting them, the advisory committee notes and legis-

310 See id. at 1332.
311 In Fool Bull, 32 Fed. Appx. 778, 779 (8th Cir. 2002), the accused argued that the court erred by allowing five witnesses to testify under Rule 413, because the alleged uncharged acts discussed were dissimilar and old, and the testimony was prejudicial and confusing.
312 See People v. Harris, 70 Cal. Rptr. 2d 689, 696 (Ct. App. 1998) (“[T]he actual testimony occupies but twenty-five pages of transcript and therefore cannot, standing alone, be viewed as protracted. But the evidence necessitated lengthy instructions and admonitions and occupied a good portion of the closing arguments.”).
313 See King, supra note 74, at 1191 (criticizing the courts’ “[c]xtreme [d]eference to the [l]egislative [i]ntent [c]oncerning Rules 413 and 414”).
314 In Tome v. United States, Justice Scalia argued:

More mature consideration has persuaded me that [it] is wrong [to consult advisory committee notes]. Having been prepared by a body of experts, the Notes are assuredly persuasive scholarly commentaries—ordinarily the most persuasive—concerning the meaning of the Rules. But they bear no special authoritativeness as the work of the draftsmen, any more than the views of Alexander Hamilton (a draftsman) bear more authority than the views of Thomas Jefferson (not a draftsman) with regard to the meaning of the Constitution.

315 See Becker & Orenstein, supra note 95, at 867–68 (stating that the Federal Rules of Evidence are generally considered clear and well-written, but asserting that “[w]here Congress purposefully left a point open or vague, attempts to justify various interpretations by resort to plain meaning are disingenuous”).
Distrust of legislative history in evidence interpretation is particularly apt when considering Rules 413 and 414. The legislative history of the new rules purports to instruct judges on how to perform their discretionary judicial functions. This instruction borders on intrusion and, if taken too far, raises separation of power concerns. Furthermore, the legislative history in this instance is truly troubling both in its content and origin. There is strong reason to doubt the integrity of how Congress generated the legislative history of the new rules. Statements made from the floor of the House and the Senate by the main sponsors of the new rules have a surreal sameness about them, mimicking the actual language and arguments of David Karp’s law review article. Perhaps the height of the chutzpah surrounding the engineering of this legislative history is Rep. Molinari’s statement that David Karp’s speech to the Evidence Section of the Association of American Law Schools constitutes part of the Rules’ legislative history. Remarkably, some courts have accepted this startling and un-

316 For instance, after United States v. Roberts, 88 F.3d 872 (10th Cir. 1996), Congress amended Rules 413–415 to clarify their applicability. See supra note 77.

317 Professor Scallen identified the problem as appellate courts’ interference with the discretion of the trial courts, arguing that particularly in the context of Rules 413–15, “[t]he appellate courts should respect the discretion of trial judges . . . leaving them alone to do what they do best.” See Scallen, supra note 15, at 883. Professor Scallen believes that the discretion placed in the hands of the trial courts reflects a proper balance of power. She notes that it is plausible that by not specifically creating a special 403-type balancing test for the new rules, “members of Congress realized that federal district court judges, who do not have to run for re-election, would retain the discretion to make the hard calls—the decisions to exclude evidence in situations where it will be politically unpopular, but legally and practically correct to do so.” See id.

318 Compare Karp, supra note 32, at 35 ("Prior offenses of this type by the defendant show an unusual disposition—a sexual or sado-sexual interest in children—that does not exist in ordinary people."); with 140 Cong. Rec. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) (“In child molestation cases . . . a history of similar acts tends to be exceptionally probative because it shows an unusual disposition of the defendant—a sexual or sado-sexual interest in children—that simply does not exist in ordinary people.”). Senator Dole repeated Rep. Molinari’s above statement verbatim in 140 Cong. Rec. S12990 (daily ed. Sep. 20, 1994) (statement of Sen. Dole). See also 23 Wright & Graham, supra note 1, § 5412 n.12 (calling the congressional sponsors “mouthpieces” and observing that comparing the various statements provides convincing evidence that statements from the House and Senate floors “are potted legislative history” and the sponsors “are reading from the same script”).

319 Chutzpah comes from the Yiddish language and means audacity, but not always in a complimentary way. It often has the connotation of brazenness or gall. See Bryan A. Garner, Garner’s Modern American Usage 146 (2003) (defining chutzpah as “a curious word, having both negative and positive connotations”); see also Alex Kozinski & Eugene Volokh, Lawsuit Shmalawsuit, 103 Yale L.J. 463, 463 (1993) (noting the proliferation of Yiddish in published opinions and stating that a LEXIS search retrieved 112 reported cases that used the term chutzpah).

320 Rep. Molinari said that David Karp’s statement “provided a detailed account of the views of the legislative sponsors and the administration concerning the proposed reform,
supported assertion.\textsuperscript{321} If we dare to observe how this sausage was made,\textsuperscript{322} we must wonder about the inordinate influence one individual exercised in conceiving, drafting, and shepherding these new controversial rules and the judicial instructions on how to interpret them. It is a dangerous practice to import controls over judicial discretion through the placement of some scripted comments in a legislative history.

\textbf{CONCLUSION}

Judicial application of Rules 413 and 414 is subject to the following parody, which is uncomfortably close to the truth, especially in the Eighth Circuit: (1) There is no facial due process problem with Rules 413 and 414 because Rule 403 prevents fundamental unfairness. (2) If the district court judge takes the trouble to conduct a Rule 403 balance (reciting some legislative history will do), as a practical matter, such evidence will never be excluded; this is so because, by definition, evidence of prior offenses is highly probative, and what used to count as unfair prejudice—propensity—is now the \textit{raison d'être} of the evidence. (3) Therefore, all admissions of prior sexual offenses pass Rule 403 muster and none violate due process. Under this line of reasoning, Rule 403 begins to look less like a bulwark and more like a perpetually open door for the admission of propensity evidence. The so-called guarantee against fundamental unfairness stemming from Rule 403 rings hollow. Furthermore, the appellate courts' reliance on “403-lite” also annuls the trial courts' essential function of monitoring evidence admission through the exercise of discretion.

In assessing and fine-tuning Rules 413 and 414, even critics must acknowledge the rules' potential utility and popular appeal. Therefore, it is imperative that we analyze the application of these rules carefully, honestly, and realistically. The best case for allowing the admission of prior sexual offenses under Rules 413 and 414 arises when there is a credibility gap between the accused and the victim, and when the more powerful or presentable accused may rely on rape.


\textsuperscript{322} It is unthinkable that there could be a law review article discussing legislative history that does not allude to Bismarck’s famous dictum. \textit{See} Tracey E. George & Robert J. Pushaw, Jr., \textit{How Is Constitutional Law Made?}, 100 MICH. L. REV. 1265, 1265 & n.1 (beginning the article by quoting Bismarck’s remark: “Laws are like sausages. It’s better not to see them being made.” (citing 1,911 BEST THINGS ANYBODY EVER SAID 232 (Robert Byrne ed., 1988))).
myths or discredit a troubled, traumatized child. Rules 413 and 414 present the jury with evidence that the accused is among the subset of the population (number unknown and subject to dispute) that is willing to prey sexually on often weaker individuals. Jurors can use that information to counter their inappropriate suspicion of victims and their inaccurate sense that the powerful and respectable-looking accused is incapable of committing such a horrible act. This scenario is the best possible face one can put on Rules 413 and 414, and it is essential that courts strive to limit the rules’ application to attain these benefits, while screening for the dangers that tend to accompany propensity evidence.

In promoting a realistic response consonant with the Congressional mandate, I have proposed concrete measures, some requiring action from Congress (restriction to convictions and time limits) and some that can be implemented by the courts themselves. Indeed, the key to any successful outcome in the controversy surrounding these rules will stem from the behavior of the district courts. While respecting Congressional intent, courts, especially the trial courts, must take a brave stand and use their wide discretion to limit the damage of these new rules.

The issues raised by Rules 413 and 414 are significant not only in protecting the accused, but also in ensuring the integrity and power of the courts. Courts must not abandon their duty to act as gatekeepers and guarantors of fairness. While Congress can pass new rules of evidence, it cannot pre-balance prejudice and probative value in each case. District courts must exercise their discretion carefully and guard it vigilantly; appellate courts must insist that the trial courts do their jobs. This will help ensure that the trials of those accused of sexual crimes (not the most sympathetic or popular folks) are fair and constitutional. Given the highly deferential standard of review, if trial courts assert themselves, they can conduct meaningful Rule 403 balances that are fairly well insulated from reversal. They can limit the dangers of Rules 413 and 414 testimony by carefully monitoring the emotional aspects of the evidence and the methods of proof, and the time spent on such uncharged offenses, all with an eye to diminishing jury confusion, distraction, and prejudice.

I note with satisfaction that the outlook is not entirely bleak. Occasionally, trial courts have used Rule 403 to limit evidence under the new rules, and appellate courts have affirmed those decisions. In *United States v. McHorse*, for instance, the Tenth Circuit approved the

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323 Arguably, Congress could eliminate Rule 403 balancing altogether, as it apparently has in Rule 609(a)(2). See *supra* notes 88–89 and accompanying text. If Congress did so, however, then the courts’ determination that Rules 413 and 414 are not fundamentally unfair and do not violate due process would have to be revisited.
district court’s admission of similar acts by the accused against two children, but did not admit evidence regarding the accused’s half-sister because it was too dissimilar, remote, and potentially confusing.\footnote{179 F.3d 889, 894, 899 (10th Cir. 1999); see also United States v. Mound, 149 F.3d 799, 802 (8th Cir. 1988) (excluding evidence of other uncharged sexual abuse because “it would simply confuse the issues in this case, none of which are similar to the case of the witness,”) but permitting evidence of prior convicted conduct (quoting the district court); United States v. Walker, 261 F. Supp. 2d 1154, 1157–58 (D.N.D. 2003) (admitting some prior act evidence, but restricting evidence of other uncharged allegations of child molestation committed by the defendant against the victim, explaining that “[a]lthough relevant, the probative value of such evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and by other considerations enumerated in Rule 403 of the Federal Rules of Evidence”).}

And, of course, in United States v. Guardia, the court refused to allow admission of evidence from other women who claimed that the accused acted inappropriately during their gynecological exams.\footnote{135 F.3d 1326 (10th Cir. 1998).} The court excluded this evidence on the grounds of confusion, dissimilarity, and waste of time.\footnote{See supra notes 307–10 and accompanying text (discussing Guardia).} Additionally, state courts that have adopted their own versions of the new rules have, on occasion, excluded other sexual offense evidence under their versions of a Rule 403 balancing test. In People v. Harris, a California appellate court reversed admission of a violent rape committed twenty-three years earlier as an abuse of discretion because of the inflammatory nature of the graphic evidence, which was very different from the circumstances surrounding the charged offense.\footnote{See 70 Cal. Rptr. 2d 689, 695, 697 (Ct. App. 1998).}

Although I strongly disagree with the premises of Rules 413 and 414, I believe it is possible for courts to protect the rights of the accused while respecting Congressional intent, if not all of the legislative history. By retaining the crucial judicial functions of weighing evidence and exercising discretion, courts can achieve a balance between the Congressional mandate to admit such evidence and the crucial judicial role of ensuring a fair trial.