Federal Rules of Evidence 413-415:
Struggling to Keep Old Traditions Alive Within New Rules

Sharon Swietek-Madden
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Professor Revelos
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Advisor: Professor Bitensky
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I. Introduction

The Violent Crime Control and Law Enforcement Act of 1994 was a political hot button in Congress. Most members agreed that a crime bill in some form needed to be passed, but there was considerable debate as to what that form should be. As the time for a final vote drew near, the bill's proponents realized that they needed a few more Republican votes in their corner in order for the bill to pass. Enter House Representative Susan Molanari. She and others, particularly Senator Robert Dole, had been attempting since 1991 to pass three new federal evidence rules. Representative Molanari had vowed to vote against the crime bill because it did not include these new rules. At the end of a marathon weekend of negotiations in mid-August of 1994, the Democratic leadership gave in to Molanari's demand in exchange for a few votes. As a result, Federal Rules of Evidence 413, 414, and 415 were included in the Violent Crime Control and Law Enforcement Act of 1994 which was signed into law by President Clinton on September 13, 1994.

These rules allow evidence of similar past conduct to be used for propensity purposes in criminal and civil sexual assault and child molestation cases. The use of prior misconduct to prove an accused acted in conformity with his character on a particular occasion is a drastic departure from the traditional ban on character evidence for propensity purposes, and specifically

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6 Duane, supra note 3, at 96 (1994).
overturn Federal Rule of Evidence 404(b) in this regard. Due to the rules’ drafting, there were unanswered questions regarding the rules’ applicability and their interaction with other federal evidence rules. Are the rules constitutional? Does Federal Rule of Evidence 403 apply to the rules or is the evidence’s admissibility mandatory? It is these questions in particular which the Federal Courts of Appeals have been addressing over the past five years.

This paper will first give an overview of the historical ban on the use of character evidence in general and its eventual codification in the Federal Rules of Evidence (hereinafter “FRE”). The next section reviews the legislative history of FRE 413-415, outlining the arguments for and against their adoption. The final section contains an exploration of the federal appellate courts’ treatment of cases involving FRE 413-415 evidence and a review of changes which have been proposed to these rules.

II. The Admissibility of Character Evidence Prior to the Enactment of FRE 413-415

A. Historical

One of the basic tenants of our jurisprudence system is evidence of a specific act by the accused is not admissible in order to prove that the accused acted in conformity with her character on a particular occasion. This ban first appeared as a formalized rule in the late seventeenth century. The policy underlying exclusion of character evidence is the concern that

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8 The first sentence of FRE 404(b) reads: Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. Fed. R. Evid. 404(b). It is only this language of FRE 404(b) which FRE 413-415 negate in regards to sexual assault and child molestation cases.
jurors will give too much weight to this evidence.\textsuperscript{12} As the eminent evidence scholar John Wigmore noted, "it is because of the indubitable relevancy of specific bad acts showing the character of the accused that such evidence is excluded. It is objectionable not because it has no appreciable probative value but because it has too much. The natural and inevitable tendency of the tribunal is to give excessive weight to the vicious record of crime."\textsuperscript{13} This can generally occur in two ways.

First, if evidence of similar prior bad acts by the defendant were presented, a jury might conclude that if the defendant committed the act before, then he probably committed it this time.\textsuperscript{14} For example, assume the prosecution was permitted to present five witnesses who all swore the defendant had robbed them at some point in the past. The jury would reason that five other people could not be mistaken as to whether it was the defendant who robbed them and therefore, the witnesses are believed.\textsuperscript{15} Based on their testimony alone, the jury may convict the defendant. Since he committed previous robberies, he probably acted in conformity with his character and committed the robbery with which he is currently charged.

Second, the jury may conclude the defendant is simply a bad person who needs to be punished.\textsuperscript{16} The danger of this occurring is particularly likely if the evidence is of past uncharged misconduct. The jury may believe that the defendant has gotten away with other crimes and therefore, the jurors are not going to let that happen this time, even if there is reasonable doubt as

\textsuperscript{12} Edward J. Imwinkelried, \textit{The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition}, 51 Ohio St. L.J. 575, 581 (1999).
\textsuperscript{14} Imwinkelried, \textit{supra} note 12, at 581-82.
\textsuperscript{15} This evidence (the witnesses' testimony) would be inadmissible if offered to prove the defendant acted in conformity with his character. However, the same evidence could be admissible if offered under FRE 404(b) to prove identity. See Fed. R. Evid. 404(a) & (b).
\textsuperscript{16} Imwinkelried, \textit{supra} note 12, at 580.
to whether he committed the crime charged.\textsuperscript{17} His current conviction is punishment for his past conduct.

B. Under the Federal Rules of Evidence

In 1975, Congress enacted the Federal Rules of Evidence.\textsuperscript{18} FRE 404 codified the common law prohibition of using uncharged character evidence\textsuperscript{19} by creating a presumption against admissibility.\textsuperscript{20} Despite this general ban, exceptions were recognized.\textsuperscript{21} In particular, under FRE 404(b), character evidence may be admissible for non-character purposes such as proof of motive or intent.\textsuperscript{22} However, admissibility of character evidence is not automatic. It is within the court’s discretion to exclude the evidence if it’s unfairly prejudicial to the opposing side.\textsuperscript{23}

Prior to the enactment of FRE 413-415, federal jurisdictions worked within the confines of FRE 404(b) in order to admit evidence of an accused’s prior uncharged sexual misconduct.\textsuperscript{24}

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\textsuperscript{17} Id. at 580–81.
\textsuperscript{19} See, e.g., United States v. Lynn, 856 F.2d 430, 434 (1st Cir. 1988) (court recognized that Federal Rule of Evidence 404 essentially codified the common law prohibition against uncharged misconduct evidence); United States v. Mocca, 681 F.2d 61, 63 (1st Cir. 1982) (addressing notion that FRE 404 codified common law doctrine forbidding use of propensity evidence); David P. Leonard, The Federal Rules of Evidence and the Political Process, 22 Fordham Urb. L. J. 305, 316–17 (1995) (noting that the Advisory Committee’s proposed rules governing character evidence were virtually identical to those at common law).
\textsuperscript{20} Fed. R. Evid. 404(a).
\textsuperscript{21} Character evidence may be admissible for propensity purposes in four circumstances. Three are contained within FRE 404(a)(1)-(3), which states as follows:

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\item Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
\item Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
\item Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.
\end{enumerate}

Character evidence of a person may also be admissible for propensity purposes when the character of that person is an essential element of a charge, claim, or defense. Fed. R. Evid. 405(b).
\textsuperscript{22} Fed. R. Evid. 404(b).
\textsuperscript{23} The court applies the balancing test delineated in FRE 403. The evidence’s probative value is weighed against its prejudicial effect towards the opposing party. Fed. R. Evid. 403.
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FRE 404(b) states that evidence of other crimes, wrongs, or acts is admissible if used for “other purposes” (any non-character purpose), “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Of these, motive, intent, plan, and identity were the non-character purposes most often proffered when a party sought to admit evidence of uncharged misconduct in a sex offense case. However, the distinction between a character and non-character purpose is often blurry.

“Motive” evidence reveals the state of mind or emotion that influenced the defendant to desire the result of the charged crime.” In United States v. Sangrey, a woman named Junia testified that Sangrey had raped her just prior to raping the victim. The court stated that Sangrey’s statement as he was getting off Junia, that he was going over to the other girl, was probative of defendant’s state of mind as he was heading towards the victim. Since the testimony was for a non-character purpose, it was admissible. However, as one scholar has noted, “[c]ourts that admit the evidence of acts against third parties on a motive theory are really using ‘motive’ as a euphemism for character.”

In order to admit prior misconduct under FRE 404(b) to prove intent, intent must be at issue. This could occur when the accused denies touching the victim or admits to contact, but denies it was meant in a sexual manner or if intent is an element of the charged offense. In United States v. Cuch, the defendant attempted to establish that he did not intend to sexually

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25 Fed. R. Evid. 404(b).
26 Bryden & Park, supra note 24, at 541.
27 Id.
28 586 F.2d 1312 (9th Cir. 1978).
29 Id. at 1314.
30 Id. at 1315.
31 Bryden & Park, supra note 24, at 544.
32 Id. at 552.
33 Id.
34 See United States v. Hadley, 918 F.2d 848 (9th Cir. 1990).
35 842 F.2d 1173 (10th Cir. 1988).
assault the victim, only kidnap and rob her.\textsuperscript{36} The court upheld the admissibility of a witness’s testimony, relating how the defendant had previously raped her.\textsuperscript{37} The court stated that the evidence shed light on what Cuch intended to do to the victim in the charged case when he took her out of the convenience store.\textsuperscript{38}

In \textit{United States v. Hadley},\textsuperscript{39} the district court allowed the testimony of two boys who stated that Hadley had also sexually abused them.\textsuperscript{40} Because the statute under which Hadley was charged required the prosecution prove intent, the court reasoned the evidence was properly admitted to prove the defendant’s intent on gratifying his sexual desires when assaulting the victim.\textsuperscript{41} This analysis, however, borders on admitting evidence for the purpose of proving that the accused acted in conformity with his character. The inference of intent depends on the fact finder making an underlying inference that the defendant has a propensity to commit the crime.\textsuperscript{42}

A few federal jurisdictions appeared to have stepped outside the boundaries of FRE 404(b), admitting what amounted to propensity evidence in sex offense cases by \textit{essentially} recognizing a lustful disposition exception.\textsuperscript{43} This exception permits the admission of propensity evidence in order to prove an accused’s proclivity for committing a certain type of sexual crime.\textsuperscript{44} In \textit{United States v. Yellow},\textsuperscript{45} the defendant was convicted of sexually assaulting both his

\begin{flushleft}
\textsuperscript{36} \textit{Id.} at 1177.
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} \textit{Id.} at 1176.
\textsuperscript{39} 918 F.2d 848 (9th Cir. 1990).
\textsuperscript{40} \textit{Id.} at 850.
\textsuperscript{41} \textit{Id.} at 851.
\textsuperscript{42} \textit{Bryden & Park, supra} note 24, at 551.
\textsuperscript{44} \textit{McCormick on Evidence, §190} (Edward W. Cleary gen. ed., 3d ed. 1984). This exception was widely used at common law, both in state and federal courts. For a discussion of the historical use and growth of the lustful disposition exception see \textit{Thomas J. Reed, Reading Guilt Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases}, 21 Am. J. Crim. L. 127 (1993).
\textsuperscript{45} 18 F.3d 1438 (8th Cir. 1994).
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brother and sister despite his denials.\textsuperscript{46} The court admitted testimony by both the brother and sister regarding past sexual abuse under the rubric of proving intent, a non-character purpose.\textsuperscript{47} While this is a permissible exception to FRE 404(b), the Eighth Circuit reiterated its general rule that “evidence of prior sex offenses committed upon the victim of the charged offense is relevant and admissible at trial.”\textsuperscript{48} The Court further stated “[a] though this general rule in its broadest articulations goes beyond the limiting language of FRE 404(b), federal courts have consistently held that such evidence is relevant under one or more of the permissible purposes enumerated in the Rule.”\textsuperscript{49} Such language is a recognition that some courts are willing to turn a blind eye to the evidence’s true purpose, the introduction of character evidence.

So, even before FRE 413-415 were passed, federal jurisdictions have admitted evidence of prior uncharged sexual misconduct in sexual offense cases, albeit under the veil of a non-propensity purpose. As David J. Karp has noted, “[t]he history is one of on-going tension between an early-established rule against admitting this type of evidence, and the desire to admit it anyway because of its obvious relevance and probative value in many circumstances. The result has been rules which instruct the jurors to pretend that they know nothing about a defendant’s criminal propensities, but which ensure that jurors often have information whose probative value on this point is manifest.”\textsuperscript{50}

III. The Great Debate Surrounding FRE 413-415

First introduced in Congress in 1991,\textsuperscript{51} the final version of Federal Rules of Evidence

\textsuperscript{46} Id. at 1439.
\textsuperscript{47} Id. at 1440.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Karp, supra note 11, at 30.
\textsuperscript{51} Senator Robert Dole and Representative Susan Molanari initially proposed FRE 413-415 as part of the Women's Equal Opportunity Act in February of 1991 and re-introduced them in 1993. The Senate passed them in November of 1993 by a vote of 75 to 19 as an amendment to President Bush's violent crime bill. The House approved the
413, 414, and 415 remained virtually unchanged. FRE 413 provides in pertinent part: "(a) In a
criminal case in which the defendant is accused of an offense of sexual assault, evidence of the
defendant's commission of another offense or offenses of sexual assault is admissible, and may
be considered for its bearing on any matter to which it is relevant." FRE 414 provides that
evidence of the defendant's commission of another offense or offenses of child molestation is
admissible in criminal child molestation cases and FRE 415 permits this evidence to be
admitted in civil sexual assault or child molestation cases.

These rules effectuated a seachange in modern codified federal evidence law. They
"authorize admission and consideration of evidence of an uncharged offense for its bearing 'on
any matter to which it is relevant.' This includes the defendant's propensity to commit sexual
assault or child molestation offenses, and assessment of the probability or improbability that the
defendant has been falsely or mistakenly accused of such an offense." Therefore, evidence of
specific instances of prior bad acts may be used to prove the accused acted in conformity with
his character when he committed the crime charged. FRE 413-415 lift the ban on using character
evidence in sexual offense cases, overriding FRE 404(b)'s current prohibition.

A. All in Favor ...

The proponents of these rules stated that lifting the ban on character evidence in sexual
offense cases was necessary for several reasons, first and foremost was the protection of

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33 Fed. R. Evid. 413.
34 Fed. R. Evid. 414.
35 Fed. R. Evid. 415.
society. Many speeches stressed the appalling frequency of violence against women and children and the need for stronger laws. It was felt that by making it easier for the prosecution to present evidence of uncharged sexual misconduct, fewer defendants would escape conviction. Lifting the ban was also justified because of the type of character evidence which prosecutors sought to admit. Senator Dole argued that a history of similar acts by the accused in a child molestation case is exceptionally probative because it shows “an unusual disposition of the defendant ... that simply does not exist in ordinary people.” FRE 413-415 were viewed as a triumph, particularly “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.”

Supporters of the rules also noted that credibility is often an issue in sexual assault and child molestation cases, where the word of the victim is pitted against the word of the defendant. Bolstering the victim’s credibility and providing corroboration for their testimony by admitting evidence of other sexual misconduct were two additional motives for enacting the rules. Senator Dole rationalized using character evidence in this manner stating, “[k]nowledge

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77 In the early 1990's, the media reported many cases about defendants being acquitted as the result of “technicality” rulings. The media coverage of two cases in particular, the prosecution of Mike Tyson and William Kennedy Smith, served to inflame the public's outrage. Calls rang out for greater admissibility of an accused's uncharged misconduct in sexual offense cases. It is against this backdrop that Rules 413-415 were debated. See Jeffrey Waller, Federal Rules of Evidence 413-415: "Laws Are Like Medicine; They Generally Cure a Evil by a Lesser ... Evil", 30 Tex. Tech. L. Rev. 1503, 1505-06 (1999); Edward J. Imwinkelried, A Small Contribution to the Debate Over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions, 44 Syracuse L. Rev. 1125, 1126-27 (1993).
82 140 Cong. Rec. S12990-01, S12990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole); Karp, supra note 11 (this is a reprint of an address given on behalf of the Justice Department to the Evidence Section of the Association of American Law Schools and is considered an authoritative part of FRE 413-415's legislative history. 140 Cong. Rec. S12990-01, S12990 (Sept. 20, 1994) (statement of Sen. Dole)).
that the defendant has committed rapes on other occasions is frequently critical in assessing the relative plausibility of these claims and accurately deciding cases that would otherwise become unresolvable swearing matches."\textsuperscript{64}

In addition, the need to provide uniformity among the courts regarding the admissibility of uncharged misconduct in sexual offense cases was cited by in support of the rules.\textsuperscript{65} When the Federal Rules of Evidence were created a majority of the states adopted evidence codes substantially similar to the federal rules.\textsuperscript{66} However, as of 1993, twenty-nine states had retained some form of their lustful disposition exception.\textsuperscript{67} Thus, there was a wide variation in the authoritative law amongst state courts on this issue. It appears Congress' main goal in changing the federal evidence rules was to effectuate change in the state courts.\textsuperscript{68} "The establishment of clear, general rules of admission, as set out in proposed FRE 413-415 ... would provide a model for comparable reforms in state rules of evidence."\textsuperscript{69} "Once the Federal rules are amended, it's possible- perhaps even likely- that the States may follow suit and amend their own rules of evidence as well."\textsuperscript{70}

The overriding rationale for allowing propensity evidence in sexual assault and child molestation cases posited by FRE 413-415 supporters was that these cases are simply different. Senator Dole summed up this feeling in the following statement given prior to the rules' passage:

\textsuperscript{64} Id.
\textsuperscript{65} Karp, supra note 11.
\textsuperscript{66} Imwinkelried, supra note 57, at 1127.
\textsuperscript{67} Reed, supra note 44, at 128.
\textsuperscript{68} All of the cases cited during the debates on Rules 413-415 were state court decisions. The proponents' advocacy of the rules was directed at ensuring that these "adverse" results did not continue to occur. See, e.g., 140 Cong. Rec. S12990-01, S12990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole); 140 Cong. Rec. H8991-92, H8991 (daily ed. Aug. 21, 1994) (statement by Rep. Molanari); Karp, supra note 11.
“It is time that we recognize that sex-crime cases are unique, requiring special standards and special treatment in the Federal Rules of Evidence. When evidence of guilt is available to the trial court, it should not be excluded because of evidentiary technicalities, nor should convictions be overturned because of a restrictive application of these technicalities.”\(^7\)

B. All Opposed ...

The opposition to FRE 413-415 was strong within the legal community. Its arguments focused on two main concerns: 1) unfair prejudice to the defendant and 2) inconsistency with the rape shield law. Most of the arguments proffered were a reiteration of the traditional rationales against the use of character evidence, falling under the umbrella of “too prejudicial to the defendant.” Use of character evidence in this manner allows a jury to engage in the following reasoning:

Evidence: The defendant previously committed a sexual assault.

Inference: The defendant is the type of person who commits sexual assaults.

Conclusion: The defendant must have committed the sexual assault for which he is currently charged.\(^2\)

The jury is presuming the defendant is guilty based on a prior bad act, which is contrary to our judicial process. The loss of the presumption of innocence was of great concern.\(^3\) For this reason, Senator Biden responded to the initiative to enact FRE 413-415 by stating, “[T]n terms of protecting the innocent in order to ensure that we get the guilty, this is a very dangerous

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\(^2\) Leonard, supra note 19, at 337.
amendment," noting that it would “stand on its head ... 800 years of English jurisprudential thinking on admissible evidence."\(^7\)

Supporters of the rules countered this argument by relying on the doctrine of chances.\(^7\) This theory states that if it is shown the accused committed similar offenses in the past, then there is a high improbability that he is falsely accused of the offense charged.\(^7\) Proponents concluded that therefore adoption of FRE 413-415 was justified. However, this reasoning is precisely why the prohibition on propensity evidence exists. In addition, as Professor Imwinkelried posited, the doctrine of chances is non-character theory.\(^7\) Since FRE 404(b) already permits this evidence to be introduced, generally under the proof of intent exception, there was no need to adopt the new rules.\(^7\)

In addition, opponents argued the rules’ use of character evidence was too prejudicial because it would allow a jury to convict the defendant on the impermissible basis that he is a bad person.\(^9\) Proponents contended the rules’ safeguards would prevent this because only uncharged misconduct which is of the same type as the crime charged is admissible.\(^9\) Since evidence of an accused’s general bad character is not admissible, the danger of a jury convicting a defendant on the impermissible basis that he is a bad person is not heightened under the rules.\(^9\)

Furthermore, it was argued that FRE 413-415 should not be enacted because their language is too broad, permitting evidence of uncharged acts to be introduced regardless of when

\(^7\) Karp, supra note 11, at 20.
\(^7\) Imwinkelried, supra note 57, at 1136.
\(^9\) Id. at 1130-39.
\(^9\) See Pickett, supra note 73, at 889-902.
\(^9\) See id.
allegedly committed.93 As a result, a defendant's trial might actually be a series of mini-trials if he chose to rebut the uncharged misconduct, confusing the jury and distracting their focus away from the charge at bar.94 Opponents of the rules contended that whatever probative value the uncharged misconduct contained, it could not outweigh the prejudicial effect on the defendant.95

Members of Congress who opposed the rules were also greatly concerned about this risk of prejudice to the defendant, calling FRE 413-415 "very bad public policy."96 They were loathe to lift the ban on character evidence, stating the evidence rules work because "[t]hey get at the truth. ... [A]llow[ing] total, uncorroborated, unsubstantiated testimony about something that could have happened-anything-from the day before to 50 years before ... absolutely violates every basic tenet of our system."97 Representative Hughes echoed this belief saying, "this is the kind of measure that does not belong in a system where we talk about freedom, where we talk about due process."98

The rules' supporters asserted that while FRE 413-415 do not provide for a time limit on the uncharged acts, this need not be of concern.99 The rules provide pre-trial notice be given to the defendant regarding any uncharged acts which the opposing party will seek to introduce at

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93 Karp, supra note 11, at 24.
95 Scholars are divided as to what is the actual probative value of uncharged misconduct, a discussion of which is beyond the scope of this paper. For a cursory understanding of the psychological theories supporting a strong probative value see Karp, supra note 11. Compare Inwinkelried, Some Comments about Mr. David Karp's Remarks on Propensity Evidence, 70 Colum. L. Rev. 37 (1994).
96 See Pickett, supra note 73, at 901; see generally Leonard, supra note 19, at 340.
100 Debra Sherman Tedeschi, Federal Rule of Evidence 413: Redistributing "The Credibility Quotient", 57 U. Pitt. L. Rev. 107, 118 (1995) (noting that FRE 404(b) does not have a time limit for non-character evidence either).
trial. Consequently, there is no element of unfair surprise. Additionally, the proponents argued the evidence is probative "notwithstanding substantial lapses in time" and there is no justification for arbitrary temporal limitations.

Moreover, the proponents argued that the fact courts historically allowed in uncharged misconduct evidence in sexual offense cases proves its strong probative value. However, Professor Imwinkelried countered that this argument is fundamentally flawed. "It is one thing to demonstrate that there are many cases straining to justify the admission of uncharged misconduct in sex offense cases, but it another matter to infer a widespread judicial perception that character is highly predicative of conduct."

Despite all the criticism, proponents continued to state that the probative value of this type of evidence is "not [outrightly] outweighed by any risk of prejudice" because inclusion of uncharged misconduct is not mandatory. It is still within the court's discretion to exclude the evidence after applying FRE 403's balancing test. Advocates did admit though, that courts would probably admit the evidence since the rules' presumption is in favor of admission.

Opponents also raised the issue that FRE 413-415 are inconsistent with the rape shield law. The argument is that since a victim's sexual history is generally not admissible, neither should the defendant's past sexual misconduct. The rules' supporters attacked this argument

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91 Fed. R. Evid. 413(b), 414(b), & 415(b).
94 Karp, supra note 11, at 23, 34-35 (noting that courts have been inclined to admit evidence of other sex crimes notwithstanding the general ban on propensity evidence, with some state courts even carving out a lustful disposition exception).
95 Imwinkelried, supra note 85, at 43.
97 id.
98 id.
on two fronts. One, the rape shield law furthers important public policy. It encourages victims to come forward by protecting their privacy. Proponents argued that there were “no comparable policies for supporting non-disclosure of the defendant's acts.” Two, there is a significant difference in probative value. Inquiry into a victim’s past sexual behavior typically has little probative value in regards to the charged offense. Conversely, “evidence showing that the defendant had committed sexual assaults on other occasions places him in a small class of depraved criminals, and is likely to be highly probative in relation to the pending charge.”

The third major argument against the adoption of FRE 413-415 was made by Senator Joseph Biden and his like-minded brethren in Congress. It was two-fold. First, despite their opposition, they were sympathetic to the rules’ supporters. Senator Biden noted “any amendment anyone would bring to the floor that has anything to do with child molestation or sexual offenses is likely to get 51 votes, no matter what it is because everybody is against those heinous crimes.” Nevertheless, opponents urged their fellow Congress members to reject the rules. Responding to FRE 413-415’s advocates’ efforts to “strengthen laws against sexual violence,” the opponents in Congress correctly noted that changing the evidence rules was not the appropriate method. “This is not a question of whether you are being tough enough on criminals or protecting the victims. This is a question of protecting our system of justice and fair trials.”

Secondly, there was already a process in place for making changes to the Federal Rules

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1. Id.
2. Id.
3. Id.
4. Id.
5. Karp, supra note 11, at 17.
of Evidence, under which proposed changes to the evidentiary laws originate in the federal courts, not in Congress. This process was authorized by Congress through the Rules Enabling Act. The governing body of the Federal Judicial Conference of the United States develops and proposes rule changes which must be approved by the Supreme Court before being submitted to Congress. The changes go into effect six months after submission unless rejected or modified by the Congress. … The committees set up by the Judicial Conference which propose these rule changes are appointed by the Chief Justice of the Supreme Court and include federal judges, state court justices, constitutional scholars and outstanding members of the bar.”

This process involves a minimum of six levels of formal review, of which FRE 413-415 went through none. Opponents in Congress believed these evidence laws should not be adopted without at least first having been reviewed by the Judicial Conference. Senator Biden noted that since the “constitutiolality and effect of amending rule 404 are unclear” Congress should obtain guidance from the Judicial Conference before even attempting to enact the rules. Additionally, Representative Hughes declared that it was “the height of irresponsibility” for Congress to try to change the Federal Rules of Evidence by “totaling abandoning the process [Congress has] set up.”

These members realized “meticulous care in drafting amendments” to the federal evidence rules is required because of the substantial impact the rules have on the judicial process. The process established by the Rules Enabling Act ensures that changes are only

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made after careful consideration by those with expertise in this area. Senator Biden correctly noted that many members of Congress simply did not fully understand the significance of FRE 413-415 and that was reason enough to postpone voting on the rules' adoption until an opinion could be heard from the Judicial Conference.116

In response to this procedural objection, advocates of the rules agreed to give the Judicial Conference 150 days to submit a report to Congress containing its recommendations regarding FRE 413-415,117 but specifically exempted it from being subject to the Rules Enabling Act.118 Therefore, the Judicial Conference's report did not undergo the "exact ing review procedures" which are required under the Rules Enabling Act.119 Instead, the Judicial Conference's Advisory Committee on Evidence sent out notices to "all federal judges, about 900 evidence law professors, 40 women's rights organizations, and 1,000 other individuals and

116 During the debates on FRE 413-415, Senator Biden consistently spoke out against lifting the ban on character evidence, stating that its use is too prejudicial to the defendant. While addressing the Senate on August 2, 1994, Senator Biden, in an effort to educate his fellow senators as to the importance of protecting the rights of the accused, stated the following:

What do you think would happen if there was no Fifth Amendment and I came on the floor of the U.S. Senate and submitted an amendment to the Constitution called the Fifth Amendment? … How many votes do you think that would get on the floor of the Senate? … [I]f I walked on the floor in this atmosphere today and offered the Fourth Amendment … I wonder how many votes I would get. … I ask those of you on the floor, what do you think would happen if we had a referendum on this floor on the Bill of Rights? How many people would vote for them? Then I ask you this serious question: What country would this be if there were no Bill of Rights? When you start changing fundamental Rules of Evidence, you start affecting fundamental questions that, on the surface are awfully hard to explain. For how could I be against allowing Mary Smith, who said, "John Doe did that to me too," from coming into court and saying that? … How can I be against that? … The same way I could be for a fifth amendment. The same way I could be for a fourth amendment. But the public "ain't" ready for that today, because they all want instant answers, instant answers, instant answers.

117 FRE 413-415 were already included in the Violent Crime Control and Law Enforcement Act of 1994 at this point. The 150-day time period ran from September 13, 1994, the date of the bill's passage in Congress. The bill provided that Congress would then be able to modify FRE 413-415 if it so desired after reviewing the Judicial Conference's report. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §320935(c), 108 Stat. 1796, 2136 (Sept. 13, 1994).

118 Id.

119 Judicial Conference Report, supra note 9, at 52.
interested organizations.” On February 9, 1995, the Judicial Conference issued its report containing two recommendations.

The Judicial Conference’s first recommendation, by a nearly unanimous vote, was that enactment of FRE 413-415 was not prudent and it urged Congress to reconsider. The report noted the two main objections to the rules: one, admission of character evidence was unfairly prejudicial to the defendant and two, there were many potential problems as a result of the drafting language and structure. In addition, the report also stated that the current rules of evidence, particularly FRE 404(b), adequately addressed the concerns expressed by the rules’ proponents in Congress while safeguarding the rights of the accused. Other scholars have also asserted this argument. For example, those in favor of FRE 413-415 contended there was a special need for evidence of a defendant’s pattern of sexual misconduct to be admitted, given the type of crime charged. However, FRE 404(b) already allows “pattern” evidence to be admitted.

Alternatively, the Judicial Conference recommended creating FRE 404(a)(4) and 405(c). These changes were suggested “in order integrate [FRE 413-415] both substantively

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120 Id.
121 Id. at 52-57.
122 All members of the Standing and Advisory Committees opposed FRE 413-415, except for the representatives from the United States Department of Justice. Id. at 53.
123 Id.
124 Id. at 52.
125 Id. at 52-53.
126 See Rice, supra note 84; Duane, supra note 3; Imwinkelried, supra note 85.
128 Fed. R. Evid. 404(b).
129 FRE 404(a)(4) & (b) and 405(a) & (c) were suggested to read as follows: Rule 404(a)(4) Character in sexual misconduct cases. Evidence of another act of sexual assault or child molestation, or evidence to rebut such proof or an inference therefrom, if that evidence is otherwise admissible under these rules, in a criminal case in which the accused is charged with sexual assault or child molestation, or in a civil case in which a claim is predicated on a party’s alleged commission of sexual assault or child molestation.

(A) In weighing the probative value of such evidence, the court may, as part of its rule 403 determination, consider:
and stylistically with the existing Rules of Evidence; to illuminate the intent expressed by the principal drafters of the measure; to clarify drafting ambiguities that might necessitate considerable judicial attention if they remained unresolved; and to eliminate possible constitutional infirmities. 130 FRE 404(a)(4) reflected the legislative intent of FRE 413-415, while explicitly providing that the other rules of evidence applied to it, such as the hearsay rules and FRE 403. 131 FRE 404(a)(4) also provided a list of factors for the court to consider in addition to those listed in FRE 403 when applying that rule's balancing test. 132 FRE 405(c) was

(i) Proximity in time to the charged or predicated misconduct;
(ii) Similarity to the charged or predicated misconduct;
(iii) Frequency of the other acts;
(iv) Surrounding circumstances;
(v) Relevant intervening events; and
(vi) Other relevant similarities or difference.

(B) In a criminal case in which the prosecution intends to offer evidence under this subdivision, it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(C) For purposes of this subdivision:
(i) "sexual assault" means conduct—or an attempt or conspiracy to engage in conduct—of the type proscribed by chapter 109A of title 18, United States Code, or conduct that involved deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person—regardless of whether that conduct would have subjected the actor to federal jurisdiction.
(ii) "child molestation" means conduct—or an attempt or conspiracy to engage in conduct—of the type proscribed by chapter 109A of title 18, United States Code, or conduct, committed in relation to a child below the age of 14 years, either of the type proscribed in chapter 109A of title 18, United States Code, or that involved deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person—regardless of whether that conduct would have subjected the actor to federal jurisdiction.

Rule 404(b) Other Crimes, wrongs, or acts. Except as otherwise provided in subdivision (a)...
Rule 405(a) Reputation or opinion. At end of first sentence add: except as provided in subdivision (c) of this rule.
Rule 404(c) Proof in sexual misconduct cases. In a case in which evidence is offered under Rule 404(a)(4), proof may be made by specific instances of conduct, testimony as to reputation, or testimony in the form of an opinion, except that the prosecution or claimant may offer reputation or opinion testimony only after the opposing party had offered such testimony.

Judicial Conference Report, supra note 9, at 54-57.

130 Id. at 55-56.
131 Id. at 55.
132 Id. at 55-56.
recommended in order to clarify that evidence of uncharged misconduct could only be in the form of specific acts of conduct.\(^\text{133}\)

Despite the Judicial Conference's recommendations, Congress took no further legislative action. Accordingly, FRE 413-415 became effective on July 9, 1995 in their originally enacted form.\(^\text{134}\) However, there was initially some confusion in the federal courts as to whether the rules applied to cases in which the indictment had been filed before the effective date. The enabling legislation of the rules provided for their applicability to "proceedings commenced on or after" July 9, 1995.\(^\text{135}\) The Tenth Circuit in United States v. Roberts\(^\text{136}\) was the only federal appeals court to consider this issue and determined that proceedings commenced upon indictment.\(^\text{137}\) Thus, according to the Tenth Circuit, FRE 413-415 would not apply to any case pending before July 9, 1995.\(^\text{138}\) As a result of the court's ruling in Roberts, Congress passed an amendment clarifying its intent regarding FRE 413-415's effective date.\(^\text{139}\) Hence, the amendment declared that FRE 413-415 applied to all trials commenced on or after July 9, 1995.\(^\text{140}\)

IV. The Aftermath

A. Cases Interpreting FRE 413-415

After the courts received clarification as to the rules' effective date, they got down to the business of interpreting them. Since Roberts, twenty-two cases have been presented to the Federal Appeals Courts in five circuits. Defendants have asked the courts to consider such issues

\(^{133}\) Id. at 57.
\(^{136}\) 88 F.3d 872 (10th Cir. 1996), aff'd on other grounds, 185 F.3d 1125 (10th Cir. 1999), cert. denied, 120 S. Ct. 1960 (2000).
\(^{137}\) Id. at 878.
\(^{138}\) Id. at 879.
as the rules' constitutionality, whether FRE 403 applies to the rules, and the interaction between FRE 412 and 413.

The Ninth Circuit in *United States v. Ramirez-Cruz* \(^{141}\) was the next federal appellate court to face an issue involving one of these new rules. The defendant argued on appeal that FRE 413 and 414 were unconstitutional. However, the court avoided addressing this issue by noting that the prosecution had offered the evidence of Ramirez-Cruz's prior bad acts under FRE 404(b), not FRE 413 or 414.\(^ {142}\) The court affirmed the defendant's conviction, finding that the evidence was properly admitted under FRE 404(b).\(^ {143}\)

The following day, in *United States v. Larson*,\(^ {144}\) the Second Circuit was faced squarely with the issue of whether FRE 403 applied to FRE 414.\(^ {145}\) At trial, the government sought to present two witnesses' testimony, Stevens and Walsh, which related to instances of prior uncharged molestation allegedly committed by Larson.\(^ {146}\) The district court considered the evidence to be relevant under both FRE 404(b) and FRE 414.\(^ {147}\) Stevens' testimony was admitted despite the fact the prior act allegedly occurred 16-20 years before the trial.\(^ {148}\) However, Walsh's testimony was excluded because the potential for unfair prejudice outweighed the evidence's probative value, given that the prior act had allegedly occurred 21-23 years before

\(^{141}\) 113 F.3d 1244, 1997 WL 218583 (9th Cir. Apr. 29, 1997), cert. denied, 522 U.S. 939 (1997).

\(^{142}\) *Id.* at *1*.

\(^{143}\) *Id.* (evidence of prior bad acts was admissible under FRE 404(b) in order to prove intent and the district court did not abuse its discretion in finding that its probative value outweighed any potential risk of undue prejudice to the defendant).

\(^{144}\) 112 F.3d 600 (2d Cir. 1997).

\(^{145}\) *Id.* at 604.

\(^{146}\) *Id.* at 602.

\(^{147}\) *Id.*

\(^{148}\) *Id.* at 603.
the trial. On appeal, Larson argued that Stevens' testimony should also have been excluded as too remote in time, constituting unfair prejudice.

Because the district court specifically noted that Stevens' testimony was relevant under FRE 414, the Second Circuit looked to the legislative history surrounding FRE 413-415 to determine if the evidence's admissibility was mandatory or subject to FRE 403's balancing test. Particularly noteworthy to the court were the identical statements of Senator Dole and Representative Molanari suggesting that FRE 403 was to apply and the Judicial Conference's comment that such evidence not subject to FRE 403 is both unreliable and highly prejudicial. The court concluded that Congress' intent was to apply FRE 403 to FRE 414.

In conducting its FRE 403 analysis, the Court looked to prior case law for guidance. It noted a federal case admitted prior acts of child molestation occurring 11-16 years before trial and a state court which allowed evidence of molestations occurring more than 20 years earlier. The Second Circuit also noted that FRE 414's legislative history "reveals that Congress meant its temporal scope to be broad, allowing the court to admit evidence of Rule 414 acts that occurred more than 20 years before trial [and] no time limit is imposed on the uncharged offenses for which evidence may be admitted."

In reviewing the trial court's application of FRE 403 to Stevens' testimony, the appellate

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149 Id. at 602.
150 Id. at 603.
151 In two separate statements, both members of Congress stated that "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. 140 Cong. Rec. S12990-01, S12990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole); 140 Cong. Rec. H8968-01, H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molanari)."
152 Larson, 112 F.3d at 604.
153 Id. at 604-05.
154 Id. at 605 (citing United States v. Hadley, 918 F.2d 848, 851 (9th Cir. 1990)).
155 Id. (citing State v. Plymate, 345 N.W.2d 327 (Neb. 1984)).
156 Id.
court agreed that the similarities between the crime charged and the prior uncharged act demonstrated the probative value of Stevens' testimony. Therefore, Stevens' testimony was not too remote in time as to constitute unfair prejudice and Larson's conviction was affirmed.\textsuperscript{157}

It is apparent from its holding that the Second Circuit gave great weight to the probative value of the alleged prior child molestation. Beyond this specific issue, however, the court gave no indication as to whether FRE 403 should be applied more leniently to FRE 414 evidence.

Since Larson, both the Eighth and Tenth Circuits have held that FRE 403 is applicable to FRE 413 and 414. In United States v. Meacham,\textsuperscript{158} the Tenth Circuit's analysis mirrored that of the Second Circuit in Larson. The court reviewed FRE 414's legislative history\textsuperscript{159} and held "[u]nder Rule 414 the prior acts evidence must still be relevant and followed by a Rule 403 balancing."\textsuperscript{160} The court also decided that FRE 414 does not have a temporal limit beyond which prior sex offenses are inadmissible.\textsuperscript{161} In applying FRE 403 to the proffered evidence, the court held that the witness' testimony regarding an alleged incident more than 30 years prior to the trial did not constitute undue prejudice.\textsuperscript{162} Therefore, it appeared that in the Tenth Circuit, when considering the potential prejudicial effect of FRE 414 evidence time was not a factor.

The Tenth Circuit followed its analysis in Meacham seven months later when it held in United States v. Guardia\textsuperscript{163} that FRE 403 applies to FRE 413.\textsuperscript{164} It also responded to scholars who contended that since FRE 413 states evidence which meets its criteria "is admissible,"\textsuperscript{165} the

\textsuperscript{157} Id.
\textsuperscript{158} 115 F.3d 1488 (10th Cir. 1997).
\textsuperscript{159} Id. at 1491-92.
\textsuperscript{160} Id. at 1495.
\textsuperscript{161} Id. at 1492.
\textsuperscript{162} Id. at 1495.
\textsuperscript{163} 135 F.3d 1326 (10th Cir. 1998).
\textsuperscript{164} Id. at 1330.
\textsuperscript{165} Fed. R. Evid. 413.
language of FRE 413 itself excepted it from FRE 403’s applicability.\textsuperscript{166} The court dismissed this contention, noting that “when the drafters of the federal rules of evidence alter the 403 balancing test or make it inapplicable to certain evidence, they use language much more explicit than that found in Rule 413.”\textsuperscript{167} Additionally, though, the court also held that in applying FRE 403 “careful attention [must be given] to both the significant probative value and the strong prejudicial qualities inherent in all evidence submitted under 413.”\textsuperscript{168} While FRE 413 favors admission, the court warned there is nothing in the rule’s language to warrant an especially lenient application of FRE 403.\textsuperscript{169} This directive is particularly noteworthy given the court’s FRE 403 analysis in \textit{Meacham}, where the potential prejudicial effect of lapse of time between the prior misconduct and trial appeared to have been given little consideration.\textsuperscript{170}

In \textit{United States v. Sumner},\textsuperscript{171} the Eighth Circuit overruled the trial court which had determined FRE 414 was unconstitutional because it did not mandate the application of FRE 403.\textsuperscript{172} In fact, the trial court believed that applying FRE 403 to FRE 414 was contrary to Congress’ intent.\textsuperscript{173} In support of its holding, the court cited the Second Circuit’s analysis in \textit{Larson} and stated “it is logical that Rule 403 applies to Rule 414 as well, and nothing in the language of Rule 414 precludes the application of Rule 403.”\textsuperscript{174} However, the Eighth Circuit did not engage in a full constitutional analysis. The court dodged the issue by merely holding that

\textsuperscript{167} \textit{Guardian}, 135 F.3d at 1329.
\textsuperscript{168} \textit{Id.} at 1330.
\textsuperscript{169} \textit{Id.} at 1331.
\textsuperscript{170} \textit{Meacham}, 115 F.3d at 1495.
\textsuperscript{171} 119 F.3d 658 (8th Cir. 1997), aff’d, 204 F.3d 1182 (8th Cir. 2000).
\textsuperscript{172} \textit{Id.} at 661.
\textsuperscript{173} \textit{Id.}
\textsuperscript{174} \textit{Id.} at 662.
since FRE 403 does apply to FRE 414, the trial court’s ruling of FRE 414’s unconstitutionality based on FRE 403’s absence cannot stand.

Nearly one year later, the Eighth Circuit was presented with the issue of FRE 403’s applicability to FRE 413 in *United States v. Mound*. Consistent with its reasoning in *Sumner*, the court held that FRE 403 was applicable to FRE 413.

No federal appellate court has decided whether FRE 403 applies to FRE 415. However, three separate district courts have published opinions stating that it does apply. Given the appellate courts’ treatment of FRE 403’s applicability to FRE 413 and 414, I believe they will follow these district courts in holding FRE 403 applies to FRE 415.

The Tenth Circuit, in *United States v. Enjady*, was the first federal appellate court to decide a facial challenge to the constitutionality of one of these rules. Enjady was convicted of aggravated sexual abuse. On appeal, he contended that FRE 413 was unconstitutional.

Enjady first argued that FRE 413 violated his due process rights by denying him a fair trial. At trial, the government sought to present the testimony of witness B in order to prove the defendant had a propensity to rape. Under FRE 413, B was allowed to testify and stated the defendant had raped her two years prior to the incident charged. Enjady contended the

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175 149 F.3d 799 (8th Cir. 1998), reh’g denied, 157 F.3d 1153 (8th Cir. 1998), cert. denied, 525 U.S. 1089 (1999).
176 Id. at 800-01.
179 Id. (court upheld constitutionality of FRE 413).
180 Id. at 1429.
181 Id. at 1430.
182 Id.
183 Id. at 1429.
184 Id. (court’s decision to allow B’s testimony was made only after conducting a FRE 403 balancing test, determining the probative value of B’s statement outweighed any potential prejudice to the defendant).
admission of propensity evidence allowed for the possibility that the jury convicted the defendant merely because they thought he was a bad person. Enjady asserted that such evidence, therefore, undermines the presumption of innocence and permits conviction on less than reasonable doubt.

In order to prove FRE 413 constitutes a due process violation, the defendant must show the rule "fails the 'fundamental fairness' test and 'violates those fundamental conceptions of justice which lie at the base of our civil and political institutions.'" The court began its analysis with a review of the historic ban on propensity evidence, determining that while this type of evidence is usually prohibited there have been exceptions, most notably the exceptions to FRE 404(b). The court correctly noted that merely because a practice is ancient does not mean it is embodied in the Constitution, and time honored traditions, such as the evidence rules, have been changed without being held unconstitutional. The court also observed that Congress' intent in passing FRE 413 was to "lower the obstacles to admission of propensity evidence" in sexual assault cases. Therefore, the main issue before the court was whether FRE 413's presumption in favor of admission is a violation of fundamental fairness.

The court admitted that if FRE 403 were not to apply to FRE 413, the rule would be unconstitutional. However, looking to its legislative history and holdings in other cases, the

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185 Id. at 1430.
186 Id.
187 Id. (quoting Dowling v. United States, 493 U.S. 342, 352-53 (1990)).
188 Id.
189 In this portion of the analysis, the court failed to make a distinction between the general ban on using prior bad acts to prove propensity and the exceptions to FRE 404(b), which technically allow prior bad acts to be used only for non-character purposes. Therefore, the court appears to have conceded the fact that FRE 404(b) evidence, despite the rule's language, is used for propensity purposes.
190 Enjady, 134 F.3d at 1432.
191 Id. at 1430.
192 Id. at 1431.
193 Id.
194 Id. (citing United States v. Sumner, 119 F.3d 658, 661-62 (8th Cir. 1997); United States v. Larson, 112 F.3d 600 (8th Cir. 1997); United States v. Mencham, 115 F.3d 1488, 1492 (10th Cir. 1997)). It is curious that the court does
court concluded FRE 403 does apply to FRE 413 since there was no amendment to FRE 403 excepting FRE 413 from the application of its balancing test.\textsuperscript{195}

However, the court instructed that “the exclusion of relevant evidence under Rule 403 should be used infrequently, reflecting Congress' legislative judgment that the evidence ‘normally’ should be admitted.”\textsuperscript{196} Nevertheless, the trial judge must weigh the probative value of the evidence against the potential for unfair prejudice before admitting the evidence.\textsuperscript{197}

The court concluded that because of the safeguards provided by FRE 403 and the notice provision of FRE 413(b) requiring the government to disclose to the defendant at least fifteen days before trial the prior misconduct evidence it intends to offer, FRE 413 did not violate the Due Process Clause.\textsuperscript{198}

Enjady also argued FRE 413 was unconstitutional because it violated the Equal Protection Clause, allowing “unequal treatment of similarly situated defendants concerning a fundamental right.”\textsuperscript{199} The court applied the rational basis test to Enjady's equal protection claim.\textsuperscript{200} Under the rational basis test, FRE 413 need only bear a rational relation to some

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\textsuperscript{195} United States v. Guardia, 135 F.3d 1326, 1330 (10th Cir. 1998) in which it held two moths prior to Enjady that FRE 403 applied to FRE 413.

\textsuperscript{196} Enjady, 134 F.3d at 1431.

\textsuperscript{197} Id. at 1433 (court followed its decision in Meacham, 115 F.3d at 1492 that FRE 414 evidence should be liberally admitted subject to FRE 403’s balancing test).

\textsuperscript{198} Id.

\textsuperscript{199} Id. The opinion does not delineate the defendant's equal protection argument. However, several scholars have posited that FRE 413-415 violate the Equal Protection Clause. Most sex assault and child molestation cases are bring in state court. Defendants who are charged in federal court either committed their crimes in several states or are reservation-residing Native Americans. Of those charged in federal court with a sex offense, the overwhelming number of defendants fit into the latter category. Therefore, it is argued Native Americans are unduly prejudiced by FRE 413-415, which allow the use of propensity evidence in sex assault and child molestation cases, as compared to defendants charged in state court who are not necessarily subject to a similar rule. See Sheft, supra note 166, at 83-84; Duane, supra note 3, at 113-115.

\textsuperscript{200} The rational basis test applies when “the law neither burdens a fundamental right nor targets a suspect class.” United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998) (quoting Romer v. Evans, 517 U.S. 620, 625 (1996)). Since the court expressly determined in its due process analysis that FRE 413 did not affect a defendant's fundamental right to a fair trial and yet decided the rational basis test was appropriate, the court impliedly concluded that the defendant was not a member of a suspect class.
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The court held FRE 413 did not violate the Equal Protection Clause because "Congress' objective of enhancing effective prosecution for sexual assaults is a legitimate interest".

One week later, applying the same analysis as it had in Enjady, the Tenth Circuit upheld the constitutionality of FRE 414 in United States v. Castillo. In Castillo, the defendant asserted another constitutional argument which had not been raised before the Enjady court. Castillo contended that FRE 414 violated the Eighth Amendment prohibition against cruel and unusual punishment. The court, however, quickly disposed of this claim in holding that "Rule 414 ... does not impose criminal punishment at all; it is merely an evidentiary rule."

Since Castillo, FRE 414's constitutionality has been challenged in the Tenth Circuit in United States v. McHorse, United States v. Charley, and United States v. Velarde. Each time the Tenth Circuit rejected the defendant's challenge based on its decision in Castillo. The McHorse court did, however, specifically address defendant's claim that FRE 414 violated his equal protection rights because it applies disproportionately to Native Americans. The court stated that a law which is neutral on its face, but has a disproportionately adverse effect upon a racial minority is unconstitutional only if the effect is the result of a discriminatory purpose.

The defendant did not present and the court could not find any evidence that Congress had a

\[^{201} \text{Id. (quoting Romer v. Evans, 517 U.S. 620, 625 (1996)).}\]
\[^{202} \text{Id. at 1434.}\]
\[^{203} 140 F.3d 874 (10th Cir. 1998), aff'd, 188 F.3d 519, 1999 WL 369054 (10th Cir. Aug. 4, 1999), cert. denied, 120 S. Ct. 1212 (2000).}\]
\[^{204} \text{Id. at 883.}\]
\[^{205} \text{Id. at 884.}\]
\[^{206} 179 F.3d 889 (10th Cir. 1999), cert. denied, 528 U.S. 944 (1999).}\]
\[^{207} 189 F.3d 1251 (10th Cir. 1999), cert. denied, 523 U.S. 1098 (2000).}\]
\[^{208} 214 F.3d 1204 (10th Cir. 2000).}\]
\[^{209} \text{Velarde, 214 F.3d at 1212; McHorse, 179 F.3d at 896; Charley, 189 F.3d at 1259-60.}\]
\[^{210} \text{McHorse, 179 F.3d at 897.}\]
\[^{211} \text{Id.}\]

racially discriminatory purpose and thus, upheld FRE 414’s constitutionality under the rational basis test.\textsuperscript{212}

In \textit{United States v. Mound},\textsuperscript{213} the Eighth Circuit upheld the constitutionality of both FRE 413 and 414.\textsuperscript{214} The defendant challenged FRE 413’s constitutionality on both due process and equal protection grounds.\textsuperscript{215} The Eighth Circuit agreed with the Tenth Circuit’s analysis in \textit{Castillo}, finding the defendant’s due process and equal protection claims to be without merit.\textsuperscript{216}

Since \textit{Mound}, the Eighth Circuit has been presented with constitutional challenges to these rules in \textit{United States v. Stead}\textsuperscript{217} (challenging FRE 413) and \textit{United States v. Whithorn}\textsuperscript{218} (challenging FRE 413 and 414). In both cases, the defendants’ claims were foreclosed based on the court’s holding in \textit{Mound}.\textsuperscript{219}

The Ninth Circuit declined to decide FRE 413’s constitutionality upon its own motion in \textit{United States v. Sloan}.\textsuperscript{220} The defendant appealed his conviction for aggravated sexual abuse contending that the district court erred in admitting testimony regarding a prior attempted rape.\textsuperscript{221} Prior to hearing the testimony, the trial judge instructed the jury to only consider the evidence as it bore on the defendant’s identity and for no other purpose.\textsuperscript{222} The appellate court determined that although the trial judge stated the evidence was admitted pursuant to FRE 413, it was actually introduced pursuant to FRE 404(b) as indicated by his limiting instruction to the jury.\textsuperscript{223}

\begin{thebibliography}{99}
\bibitem{1} \textit{Id.}
\bibitem{212} 149 F.3d 799 (8th Cir. 1998), \textit{reh’g denied}, 157 F.3d 1153 (8th Cir. 1998), \textit{cert. denied}, 525 U.S. 1089 (1999).
\bibitem{213} \textit{Id.} at 801. Although the court’s constitutional analysis in \textit{Mound} only specifically refers to FRE 413, the Eighth Circuit later stated that this analysis also applied to FRE 414. \textit{United States v. Whithorn}, 204 F.3d 780, 795 (8th Cir. 2000).
\bibitem{214} \textit{Mound}, 149 F.3d at 800-01.
\bibitem{215} \textit{Id.}
\bibitem{216} 198 F.3d 252, 1999 WL 721325 (8th Cir. Sept. 14, 1999).
\bibitem{217} 204 F.3d 790 (8th Cir. 2000).
\bibitem{218} \textit{Whithorn}, 204 F.3d at 796; \textit{Stead}, 1999 WL 721325, at *1.
\bibitem{219} 141 F.3d 1182, 1998 WL 123118 (9th Cir. Mar. 17, 1998).
\bibitem{220} \textit{Sloan}, 1998 WL 123118, at *1.
\bibitem{221} \textit{Id.} at *1 n.4.
\bibitem{222} \textit{Id.} at *2.
\bibitem{223} \textit{Id.} at *2.
\end{thebibliography}
Therefore, the Eighth and Tenth Circuits are the only ones to have decided the constitutionality of FRE 413 and 414 and no circuit has addressed the constitutionality of FRE 415.

The federal appeals courts have addressed other issues regarding FRE 413 and 414. In United States v. Whithorn,\textsuperscript{224} the defendant argued that it was unconstitutional for FRE 412\textsuperscript{225} and 413 to be applied in the same case.\textsuperscript{226} At trial, the defendant's motion to admit evidence of the victim's sexual history pursuant to FRE 412 was denied,\textsuperscript{227} while the government was able to admit evidence of a prior sexual assault committed by the defendant.\textsuperscript{228} The Eighth Circuit held that while the application of FRE 412 and 413 in a single case "make it easier for the government to prosecute sex offenses cases... the overall effect of applying the rules in combination is not so unfair as to violate fundamental conceptions of justice."\textsuperscript{229}

Two separate circuits have had the opportunity to consider FRE 414's interaction with FRE 404(b). In both United States v. Lawrence\textsuperscript{230} and United States v. Eagle,\textsuperscript{231} the defendants argued that in order for evidence to be admissible under FRE 414 it must also be admissible under FRE 404(b).\textsuperscript{232} Both courts held that the admissibility requirements of each rule are distinct.\textsuperscript{233}

Since the enactment of FRE 413-415, 16 appeals have been heard where the defendant asserted the trial judge erroneously admitted evidence pursuant to one of these rules.\textsuperscript{234} When a

\textsuperscript{224} United States v. Whithorn, 204 F.3d 790 (8th Cir. 2000).
\textsuperscript{225} This is commonly known as the Rape Shield law, protecting a victim's sexual history from disclosed except as allowed in a few enumerated exceptions. Fed. R. Evid. 412.
\textsuperscript{226} Whithorn, 204 F.3d at 795.
\textsuperscript{227} Id. at 796.
\textsuperscript{228} Id.
\textsuperscript{229} Id. at 795.
\textsuperscript{230} 187 F.3d 638, 1999 WL 551358 (6th Cir. July 19, 1999).
\textsuperscript{231} 137 F.3d 1011 (8th Cir. 1998).
\textsuperscript{232} Lawrence, 1999 WL 551358, at *2; Eagle, 137 F.3d at 1016.
\textsuperscript{233} Lawrence, 1999 WL 551358, at *2; Eagle, 137 F.3d at 1016.
\textsuperscript{234} United States v. Whithorn, 204 F.3d 790 (8th Cir. 2000); United States v. King, 221 F.3d 1353, 2000 WL 1028228 (10th Cir. July 26, 2000), cert. denied, 121 S. Ct. 603 (2000); United States v. Summer, 204 F.3d 1182 (8th Cir. 2000); United States v. Korsh, 210 F.3d 390, 2000 WL 342252 (10th Cir. Apr. 3, 2000); United States v. Mann.
defendant contends on appeal that the district court improperly applied FRE 403 to either FRE 413 or 414, the appellate court reviews the record for abuse of discretion. In all 16 cases, no appellate court found an abuse of discretion, thus affirming the evidence's admission.

The legislative history of FRE 413-415 clearly indicates Congress' intent that evidence offered under these rules be liberally admitted. To the extent the appellate courts have not reversed a lower court decision and thereby excluded evidence, it appears the courts are indeed carrying out this legislative intent. The Tenth Circuit in United States v. Meacham was the first federal appellate court to explicitly state that despite FRE 403's applicability, in order to implement the legislature's intent, FRE 414 evidence should be liberally admitted.

Additionally, the Eighth Circuit in United States v. Mound, recognized that evidence which is inadmissible under FRE 404(b) may well be admissible under FRE 413-415. The court noted, "it was Congress' intent that the new rules supersede in sex offense cases the restrictive aspects of Federal Rule of Evidence 404(b)."

Two circuits have heard cases where the government appealed an evidentiary ruling which excluded FRE 413-415 evidence. In United States v. LeCompte, the government sought

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195 The abuse of discretion standard applies when the defendant objected to the trial court's ruling at trial. Castillo, 140 F.3d at 886; United States v. Goodson, 155 F.3d 963, 909 (8th Cir. 1998). If the defendant raises the issue for the first time on appeal, then the record is reviewed only for plain error. United States v. King, 221 F.3d 1353, 2000 WL 1028228, at *7 n.4 (10th Cir. July 26, 2000); United States v. Lawrence, 187 F.3d 638, 1999 WL 551358, at *2 (6th Cir. July 19, 1999).


197 Meacham, 115 F.3d at 1492.

198 Mound, 149 F.3d at 802.

199 Id.

200 131 F.3d 767 (8th Cir. 1997).
to admit the testimony of T.T. who claimed the defendant had also molested her.\textsuperscript{241} After conducting a FRE 403 balancing test, the trial judge ruled the testimony inadmissible because the risk of unfair prejudice outweighed its probative value.\textsuperscript{242} Despite some similarities between T.T.'s and the victim's situations, the district court noted several differences.\textsuperscript{243} Because of the unique stigma of child sexual abuse, the lower court felt that "such highly prejudicial evidence should therefore carry a very high degree of probative value if it is to be admitted."\textsuperscript{244}

However, the Eighth Circuit stated it is precisely such rulings as this "that Congress intended to overrule," noting the danger of unfair prejudice in this case is "the one that all propensity evidence in such trials presents."\textsuperscript{245} Therefore, the appellate court concluded, "in light of the strong legislative judgment that evidence of prior sexual offenses should ordinarily be admitted," the district court erred in its FRE 403 assessment.\textsuperscript{246} The trial judge's ruling was reversed and T.T.'s testimony was admitted.\textsuperscript{247}

\textit{United States v. Guadía}\textsuperscript{248} is the only case where an appellate court has upheld the exclusion of prior misconduct under these new rules. The defendant, a physician, was federally charged with sexual abuse arising out of incidents during a gynecological exam.\textsuperscript{249} At trial, the government sought to present four additional witnesses who would testify that the defendant engaged in inappropriate sexual touching with them.\textsuperscript{250} After applying FRE 403, the district court excluded the testimony and the government appealed.\textsuperscript{251}

\textsuperscript{241} \textit{Id.} at 768.
\textsuperscript{242} \textit{Id.} at 769.
\textsuperscript{243} \textit{Id.}
\textsuperscript{244} \textit{Id.} (citing District Court Order at 4) (citation omitted).
\textsuperscript{245} \textit{Id.} at 770.
\textsuperscript{246} \textit{Id.} at 769.
\textsuperscript{247} \textit{Id.} at 770.
\textsuperscript{248} 135 F.3d 1326 (10th Cir. 1998).
\textsuperscript{249} \textit{Id.} at 1327.
\textsuperscript{250} \textit{Id.} at 1327-28 (10th Cir. 1998) (the two complaining witnesses were already scheduled to testify).
\textsuperscript{251} \textit{Id.} at 1328.
The appellate court noted that the district court’s overriding reason for excluding the testimony was the danger of jury confusion and this substantially outweighed any probative value. Each witness’ testimony would be followed by testimony from expert witnesses, one for the prosecution explaining the inappropriateness of the touching and one for the defense explaining the medical appropriateness for the touching. The trial judge feared the addition of four more witnesses followed by complicated medical testimony would make it difficult for the jury to separate the charged incidents from the uncharged ones. While although the witnesses’ testimony was probative, the appellate court held the district court was within its discretion in deciding the risk of prejudice outweighed the probative value. Therefore, the appellate court affirmed the trial judge’s decision to exclude the evidence.

Despite the deference shown district courts in affirming their evidentiary rulings, the federal appellate courts have been strict in requiring that there must be a record of the lower court’s FRE 403 analysis before the appellate court will review the decision for error. The Guardia court specifically required the district court to “fully evaluate the proffered … evidence and make a clear record of the reasoning behind its findings.” In Castillo, the extent of the trial judge’s FRE 403 finding on the record was merely that the evidence was relevant, probative, and

\[252\] lb. at 1331-32.
\[253\] Id. at 1332.
\[254\] Id.
\[255\] Id.
\[256\] Id.
\[257\] Only the Eighth and Tenth Circuit have had appeals where the lower court record was lacking regarding a FRE 403 finding as it applies to FRE 413-415. Therefore, these are the only circuits which have specifically addressed this issue. Their rationale for the requirement of a clear record regarding the trial judge’s FRE 403 finding in FRE 413-415 cases stems from the requirements for FRE 403 when it is applied to FRE 404(b). See United States v. Castillo, 140 F.3d 874, 884 (10th Cir. 1998); United States v. Sumner, 119 F.3d 658 (8th Cir. 1997). There is no reason to believe that another circuit will hold differently when faced with the same issue, particularly given the fact that the Eighth and Tenth Circuits have already held FRE 413-415 would be unconstitutional without the application of FRE 403. See United States v. Enjady, 134 F.3d 1427, 1431 (10th Cir. 1998); United States v. Mound, 149 F.3d 799, 800-01 (8th Cir. 1998) (holding that the rules are constitutional, subject to the constraints of FRE 403).
\[258\] United States v. Guardia, 135 F.3d 1326, 1331 (10th Cir. 1998).
not outweighed by any prejudice.\textsuperscript{259} The Tenth Circuit stated that this record fell short of their minimum requirement, "an on the record decision by the court explaining its reasoning in detail," and remanded the case in order for the district court to provide an explanation of its ruling.\textsuperscript{260}

Similarly in \textit{United States v. Mann},\textsuperscript{261} after hearing the defense's objection and argument, the trial judge simply stated he was going to admit the evidence. Again, the appellate court remanded the case for a detailed explanation of the FRE 403 ruling.\textsuperscript{262} And in \textit{United States v. Velarde},\textsuperscript{263} the case was remanded because there existed no record at all regarding the district court's findings.\textsuperscript{264}

To date, the United States Supreme Court has not granted certiori to any case whose appeal contained an issue regarding FRE 413, 414, or, 415.\textsuperscript{265} It is possible that at some point the Supreme Court will choose to decide on FRE 413-415's constitutionality. However, since the federal appellate courts which have addressed this issue thus far have all upheld the rules' constitutionality, a federal circuit would probably have to hold one of the rules unconstitutional before the Supreme Court would hear the issue.

In \textit{United States v. Mound}, a subsequent appeal for a rehearing en banc was denied.\textsuperscript{266} However, Judge Morris Sheppard Arnold dissented from that opinion believing that the

\textsuperscript{259} 140 F.3d at 884.
\textsuperscript{260} id.
\textsuperscript{261} 145 F.3d 1347, 1998 WL 171845 (10th Cir. Apr. 13, 1998), aff'd 193 F.3d 1172 (10th Cir. 1999).
\textsuperscript{262} Mann, 1998 WL 171845, at *2.
\textsuperscript{263} 214 F.3d 1204 (10th Cir. 2000).
\textsuperscript{264} id. at 1212.
\textsuperscript{266} United States v. Mound, 157 F.3d 1153 (8th Cir. 1998), cert. denied, 525 U.S. 1089 (1999).
constitutionality of FRE 413 was a question of exceptional importance.\footnote{267} She observed that FRE 413 “runs counter to a centuries-old legal tradition that views propensity evidence with a particularly skeptical eye”\footnote{268} and the “prognosticative power of past sexual behavior is quite low.”\footnote{269} She was joined in her dissent by three other judges,\footnote{270} suggesting that there very well may be those who would hold FRE 413-415 unconstitutional.

B. Where Do We Go From Here?

Before their enactment, one commentator expressed his fear that if passed, FRE 413-415 would “open wide the door to character evidence currently kept virtually closed.”\footnote{271} It certainly appears that prosecutors are taking advantage of these rules and the courts are adhering to Congress’ intent to liberally admit this evidence, as indicated by the number of federal appellate court decisions affirming the admission of FRE 413 and 414 evidence.\footnote{272} These rules have freed the prosecution from having to use motive or intent as euphemism for character. However, I submit that if FRE 413-415 were repealed, the government would simply revert to disguising what amounts to character evidence as FRE 404(b) evidence in order to gain its admission.\footnote{273}

Quite unintentionally I am sure, the court in United States v. Cunningham\footnote{274} illustrated how this is accomplished. The Seventh Circuit, in an effort to demonstrate that propensity evidence and motive evidence may overlap, yet still be admissible under FRE 404(b), engaged in the following analogy:

‘Propensity’ evidence and ‘motive’ evidence … overlap when the crime is motivated by a taste for engaging in that crime or a compulsion to engage in it.

\footnotesize

\footnotetext{267}{Id.}
\footnotetext{268}{Id.}
\footnotetext{269}{Id. at 1154.}
\footnotetext{270}{Id. (Judges McMillian, Wollman, and Beam would have also granted the en banc rehearing).}
\footnotetext{271}{Leonard, supra note 19, at 334.}
\footnotetext{272}{See supra cases cited in note 234. In order to fully analyze this question a survey of all district court cases involving admission of FRE 413, 414, or 415 evidence would be needed, which is beyond the scope of this paper.}
\footnotetext{273}{See Bryden & Park, supra note 24, at 540-57.}
\footnotetext{274}{103 F.3d 553 (7th Cir. 1996), cert. denied, 520 U.S. 1192 (1997).}
... Sex crimes provide a particularly clear example. Most people do not have a taste for sexually molesting children. As between two suspected molesters, then, only one of whom has a history of such molestation, the history establishes a motive. ... Rule 414 was added to the Federal Rules of evidence to make evidence of prior acts of child molestation expressly admissible, without regard to Rule 404(b). ... But the principle that we are discussing is not limited to sex crimes. A "firebug"—one who commits arson ... for the sheer joy of watching a fire—is, like the sex criminal, a person whose motive to commit the crime with which he is charged is revealed by his past commission of the same crime. No special rule analogous to Rules 413 through 415 is necessary to make the evidence of the earlier crime admissible, because 404(b) expressly allows the evidence of prior wrongful acts to establish motive.\textsuperscript{275}

While the court's intended effect may have been to show how prior bad acts can be admissible under FRE 404(b) as motive evidence, the result was to reinforce how propensity evidence has been able to masquerade as motive evidence.

Some scholars believe that FRE 413-415 should be completely repealed, with one stating that "Rules 413 to 415 address conduct that is currently admitted into evidence pursuant to Current Rule 404(b)."\textsuperscript{276} Professor Rice contends that FRE 404(b) strikes the correct balance, excluding evidence whose sole purpose is for propensity purposes, while admitting that evidence which can show another purpose.\textsuperscript{277} He argues FRE 404(b) is a better method for admitting evidence of prior sexual offenses because "it is accompanied by a long history of caselaw which balances the defendant's due process rights with the probative value of [the] evidence."\textsuperscript{278}

If the rules are not repealed, Professor Liebman recommends that at least they should be amended to allow only evidence of prior convictions to be used for propensity purposes.\textsuperscript{279} Not allowing evidence of prior uncharged misconduct to be used for propensity purposes, he argues, would eliminate the most disconcerting problems which FRE 413-415 present.\textsuperscript{280} Specifically,

\textsuperscript{275} \textit{Id.} at 556 (citations omitted).
\textsuperscript{276} Rice, \textit{supra} note 84, at 386; Liebman, \textit{supra} note 9, at 758-59.
\textsuperscript{277} Rice, \textit{supra} note 84, at 386.
\textsuperscript{278} \textit{Id.}
\textsuperscript{279} Liebman, \textit{supra} note 9, at 760.
\textsuperscript{280} \textit{Id.}
this change would avoid 1) jurors using "unsubstantiated charges as a basis for an inference that a defendant has a propensity to offend and thus . . . is guilty of the offense at hand" and 2) the "disruptive, confusing, and time-consuming mini-trials" which be required to determine the validity of each allegation of prior uncharged misconduct.²⁸¹

Senator Joseph Biden would also prefer that FRE 413-415 be repealed.²⁸² However, being a self-described pragmatist, he instead introduced a bill, S. 1094, in Congress to amend FRE 413-415.²⁸³ The amendment would implement the Judicial Conference's recommendation²⁸⁴ to substantively incorporate the rules into FRE 404 and 405.²⁸⁵ S. 1094 was subsequently referred to the Senate Committee on Judiciary where, as of the close of the 106th Congress, no action had been taken.²⁸⁶

Regardless of whether FRE 413-415 are repealed, amended, or left unchanged, the Rules Enabling Act should be amended by Congress in order to prevent legislators from bypassing its procedures in the future. At a minimum, any amendment to the federal evidence rules which originates in Congress should be immediately sent to the Judicial Conference. Only after their review and recommendation should the amendment's debate begin in Congress.

In their effort to get tough on crime, FRE 413-415's proponents felt this goal could be accomplished by changing the federal evidence rules. Senator Dole stated, "This amendment is

²⁸¹ Id.
²⁸⁴ See supra text accompanying note 129. Since Congress must approve all federal evidentiary rules proposed by the Judicial Conference, only a congressional amendment could substantively change or repeal FRE 413-415. "Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." 28 U.S.C.A. § 2074(b).
about getting tough with criminals, and giving the victims of vicious sex crimes the justice they
deserve."\(^{287}\) However, Senator Biden recognized the Rules Enabling Act's crucial role in
protecting the federal evidence rules stating, "This mechanism is designed to head off
unwarranted changes and avoid unintended consequences. And it ensures that decisions about
changes in the rules are made in a deliberative, cool-headed way, \textit{rather than in the heat of a}
\textit{political moment}."\(^{288}\) I couldn't agree more with Senator Biden. The Federal Rules of Evidence
are in place to ensure that the defendant has a fair trial, which should not be sacrificed merely to
advance one's political agenda.

V. Conclusion

FRE 413-415 carved out an additional exception for sex offense cases from FRE 404(b),
allowing the use of uncharged misconduct to prove character in criminal and civil sexual assault
and child molestation cases. While these rules have made it easier for the government to offer
evidence of prior bad acts, this is the same evidence which a clever prosecutor was having
admitted under FRE 404(b) before FRE 413-415's existence. The truly disturbing point about
FRE 413-415's enactment is Congress' circumvention of the Rules Enabling Act. The federal
evidentiary laws are at the very heart of our adversarial judicial system and should not be subject
to change based merely upon Congress' political inclinations.