Hyperbole and the Laws of Evidence: Why Chicken is Generally Wrong, A Ten Year Retrospective on FRE 413-415

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HYPERBOLE AND THE LAWS OF EVIDENCE: WHY CHICKEN LITTLE IS GENERALLY WRONG
A Ten-Year Retrospective on Federal Rules of Evidence 413-415

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\textsuperscript{1} THE SKY IS FALLING, also known as Chicken Little, Chicken Licken or Henny Penny is an old fable of unknown origin about a chicken who believes the sky is falling. The phrase has also become used to indicate a hysterical or mistaken belief that disaster is imminent. There are many versions of the story, but the basic premise is that a chicken called Chicken Licken (or Chicken Little) eats lunch one day, and believes the sky is falling down because an acorn falls on her head. Depending on the version, the moral changes. In the “happy ending” version, the moral is not to be a “Chicken Licken” and have courage. In other versions the moral is usually interpreted to mean “do not believe everything you are told”. In the latter case, it could well be a cautionary political tale: Chicken Licken jumps to a conclusion and whips the populace into mass hysteria, which the unscrupulous fox uses to manipulate them for his own benefit.
Introduction

In litigation, attorneys are cautioned never to ask that one final question on cross-examination, at least if they aren’t absolutely certain what the answer will be. By contrast, as law students, we are encouraged as part of our legal education to ask questions and seek insight into the reasoning and rationale for a wide variety of decisions by our judicial, executive and legislative branches. At some point these two concepts merged for me in Evidence class my second year in law school and the result is this paper. After a lengthy discussion of Federal Rules of Evidence 413,\(^2\) 414,\(^3\) and 415,\(^4\) in which our professor explained how the rules work, how they differ from other character evidence rules, and why Congress felt it necessary to break with the traditional method of creating or amending the Federal Rules of Evidence, I asked the one question unanswered, namely whether the new rules have had the promised impact on the crimes of rape and child molestation.

Professor Katherine Darmer,\(^5\) used to my frequent questions appeared momentarily taken aback by either the stupidity of the question or my impertinence in asking it. After a brief pause and reflection, she gave me the answer I least expected – “I don’t know.”

In Part I of this paper, I will discuss the historical traditions behind the prohibition on using character evidence, especially propensity or prior bad acts, in criminal trials. In Part II, I will briefly explain the three new Federal Rules of Evidence and discuss their genesis. Part III

\(^2\) FRE 413 allows the admission of evidence of a defendant’s prior sexual misconduct in a rape trial.

\(^3\) FRE 414 allows the admission of evidence of a defendant’s prior child sexual molestation in a child sexual molestation trial.

\(^4\) FRE 415 allows such evidence in a civil trial arising out of rape or child sexual molestation.

\(^5\) Professor Darmer previously served as an Assistant United States Attorney in the Southern District of New York, specializing in public corruption, violent gang and narcotics prosecutions. She clerked for the Hon. Kimba M. Wood in the Southern District of New York and the Hon. William H. Timbers on the Second Circuit Court of Appeals. In 2003, Professor Darmer was co-editor of the book CIVIL LIBERTIES VS. NATIONAL SECURITY IN A POST-9/11 WORLD (New York, Prometheus Books 2004) which is the text used in her Advanced Criminal Procedure seminar.
looks at how FRE 404(b)\(^6\) and the various states’ “lustful disposition”\(^7\) exception have dealt with propensity evidence of the sort the new rules address. Part IV examines the role of politics in the passage and timing of the new rules, in the context of the tension between President Clinton’s desire to enact crime legislation to appeal to a segment of the voting population typically unsympathetic to his political views and the new-found power of the Republicans swept into power in the House of Representatives in the mid-term elections of 1994. Part V addresses and examines the justifications and claims advanced by proponents of the new rules.

In this discussion, I briefly assess the realities of the claims and counter-claims made by the two sides and point to flaws in the logic and rationale of both. Part VI looks at the categorical claims made by the new rules’ principal sponsor, Representative Susan Molinari (R-NY) in the aftermath of their passage. Part VII examines the concerns and counter-claims raised by those opposed to the new rules, within Congress as well as the legal community.

\(^6\) FRE 404(a) states the general rule that “[e]vidence of a person’s character, or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion” subject to three relatively narrow exceptions. FER 404(b), however, reverses this general rule, if the evidence is proffered to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Some courts have stretched rule 404(b) to allow the admission of evidence of prior sexual misconduct under the guise of one of these eight categories.

\(^7\) At the time the new rules were passed in 1994, several states recognized a “lustful disposition” exception to FRE 404(b) with respect to evidence of prior sexual misconduct, but the exact contours of the exception varied widely. Some lustful disposition exceptions only allowed evidence of prior sexual misconduct that involved the same victim, while others were less restrictive. States that acknowledge 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. Some states do not affirmatively acknowledge a liberalized standard, but decisions returned in their courts clearly indicate they engage in one. See Jill C. Legg, Note, State v. Ondricek: 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).
In Part VIII, I set forth the statistics on which my paper and its conclusions rest. Gathering this data proved both difficult and enlightening, for it pointed out the imprecision within which discussions regarding crime and punishment take place. While the United States Justice Department, the various states, and other organizations collect, publish and analyze crime statistics, the accuracy and scope of the data and therefore the conclusions they draw from it is somewhat suspect. However, since the methodology employed during the time frame of my statistical analysis has remained consistent, any errors will tend to be of lesser consequence, as I am examining trends, rather than individual years.

Finally, I will attempt to draw conclusions from the data and answer the question posed to Professor Darmer in Evidence class. As I studied the genesis of the new rules, their historical context, the debate in the House and Senate leading to their passage, the dire predictions made by those who opposed the rules, and the somewhat hyperbolic promises made by their proponents, I tried to keep in mind my central question – did they do what they set out to do, namely reduce the incidence of rape and child molestation. It was not always an easy task, but I hope this paper sheds some light on the new rules and their ultimate effectiveness.

After examining the crime data, the claims and concerns put forth by the proponents and opponents of the new rules, as well as the clinical studies of recidivism rates of rapists and child molesters, I have come to the conclusion that my question is truly unanswerable, given the interplay between the new rules, defects in how crimes are reported and tabulated, the increased use of DNA in rape trials, and the generally acknowledged relationship between violent crime and the general economic conditions in the country. While rape and child sexual assault are violent crimes and generally lumped in with other such crimes in statistical reports, the motivations behind these crimes are not similar to other violent crimes. In addition, passage of
the three new rules, while a departure from traditional rulemaking practice, in many ways simply
codified the practices of states and courts that employed other methods, such as a liberal
interpretation of FRE 404(b) or a “lustful disposition” exception, to introduce such evidence.
For these reasons, the new rules have had less of a beneficial effect on the rate of the underlying
crimes than their proponents hoped, and less of a negative impact on fairness and due process
than their critics predicted.

I. The History and Logic of Prohibiting Character Evidence

It has long been the tradition of our legal system, and that of England prior to the
Revolution, that character evidence be barred from trial, for a variety of reasons.\(^8\) Perhaps the
most compelling justification for excluding character evidence is that a person should be tried for
the specific acts for which he has been charged, and not because of any bad character traits he
might possess.\(^9\) In most cases, drafters of evidence rules have recognized that, particularly in
jury trials where ordinary citizens hold the power of life and liberty over the accused, basic

\(^8\) See, e.g., Julius Stone, The Rule of Exclusion of Similar Fact Evidence: England, 46 HARV. L. REV. 954 (1933)
(tracing the English history of the character evidence rule and its major exceptions); See also John H. Wigmore,
EVIDENCE IN TRIALS AT COMMON LAW, § 58.2, at 1213-1215 (Tillers rev. 1983) (examples of cases stating the
principle that the accused is not to be tried on all past infractions but merely the one with which he is charged).
Among the rationales offered in these cases include: “[W]e would not suffer any raking into men’s course of life, to
pick up evidence that they cannot be prepared to answer to,” Hapden’s Trial, 9 How. St. Tr. 1053, 1103 (K.B. 1684),
and “[I]t would have been evidence of the prisoner being a bad man, and likely to commit offenses there charged.
But the English law does not permit the issue of criminal trials to depend on this species of evidence.” R. v. Oddy, 2
Similar Fact Evidence: America, 51 HARV. L. REV. 988 (1938) (explaining in detail the American character evidence
rule and similar acts exception). See also Hurtado v. California, 110 U.S. 516, 528 (1884) (stating that the ban
against propensity evidence has been preserved by the courts for so long that it “must be taken to be due process of
law”); See also Kenneth J. Melilli, The Character Evidence Rule Revisited, 4 BYU L. REV. 1547, 1558 (1998). See
generally Thomas J. Reed, The Development of the Propensity Rule in Federal Criminal Causes, 1840–1975, 51 U.

\(^9\) See Mary Katherine Danna, The New Federal Rules of Evidence 413-415: The Prejudice of Politics or Just Plain
Common Sense?, 41 ST. LOUIS U. L.J. 277 (1996) (explaining the history and rationale of excluding such evidence
in English and American courts). See also United States v. Foskey, 636 F.2d 517, 523 (D.C. Cir. 1980) (stating that
an element of the presumption of innocence is the axiom that the accused must be tried only for what he did and not
for who he is).
notions of due process and fairness require that the legal system err on the side of fairness.\textsuperscript{10} Defendants should be tried on the basis of the offense they are charged with, not for other crimes or bad acts they are accused of committing in the past.\textsuperscript{11} Probably the clearest and most famous explanation why character evidence is not admissible in a criminal case came from Justice Jackson when he wrote:

\textit{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; on the contrary, 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. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.}\textsuperscript{12}

Yet it is precisely this type of evidence that the new rules are designed to allow.

Character evidence, whether it is deemed propensity evidence or specific instances of past conduct tend to be overly valued by laypersons in a jury setting.\textsuperscript{13} Most legal observers have acknowledged that the bar against character evidence seems counter-intuitive to most laypersons, but it represents the system’s attempt to maintain the judicial fairness essential to our

\begin{footnotesize}
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\item[\textsuperscript{10}]\textit{See} Michelson v. United States, 335 U.S. 469, 475-76 (1948). 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.” \textit{See} David J. Karp, \textit{Evidence of Propensity and Probability in Sex Offense Cases and Other Cases}, 70 CHI.-KENT L. REV. 15, 27 (1994).
\item[\textsuperscript{11}]\textit{See} Michelson, 335 U.S. at 475-76.
\item[\textsuperscript{12}]\textit{Id.} Courts and litigants in cases involving Federal Rules of Evidence 413 and 414 have quoted this language extensively. \textit{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. Emjady, 134 F.3d 1427, 1430 (10th Cir. 1998). A KeyCite© search on Westlaw returned 228 additional cases, and another 661 evidence manuals, law journals, administrative decisions, and appellate court documents that cited or mentioned this language from \textit{Michelson}.
\item[\textsuperscript{13}]\textit{See} Wigmore, \textit{supra} note 8, § 58.2 at 1212–13.
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Constitutional framework. Someone sitting in judgment of a defendant would generally find it highly relevant and probative that the accused has a long history of similar crimes, whether or not the defendant has been arrested or convicted for these offenses. It is precisely this tendency to presume current guilt based on prior conduct that the system has traditionally sought to avoid.

In 1994, the 103rd Congress drafted three new federal rules of evidence in an attempt to tip the scales of justice in favor of the State against a class of criminals viewed with great revulsion and contempt by the politicians involved, and the general population as a whole. Federal Rules of Evidence 413 through 415 addressed the perceived threat to our citizenry from serial rapists and sexual offenders, as well as child sexual offenders and pedophiles. The public was supportive of a “get tough” stance in the wake of several high profile cases of serial

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14 Id. See also Justice Jackson’s footnote 9 in Michelson, “[A]s long ago as 1865, Chief Justice Cockburn said, ‘The truth is, this part of our law is an anomaly. Although, logically speaking, it is quite clear that an antecedent bad character would form quite as reasonable a ground for the presumption and probability of guilt as previous good character lays the foundation of innocence, yet you cannot, on the part of the prosecution, go into evidence as to character.’” 335 U.S. at 476 n.9 (quoting Regina v. Rowton, 10 Cox C. C. 25, 29–30 (1865)).

15 1A John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW 58.2 (Tillers rev. ed. 1983) at 1212–13. See also President’s Task Force on Victims of Crime, Final Report at VI, 9 (1983) (“[S]omewhere along the way the system has lost track of the simple truth that it is supposed to be fair and to protect those who obey the law while punishing those who break it . . . You expect the trial to be a search for the truth; you find that it is a performance orchestrated by the lawyers and the judge, with the jury hearing only half the facts . . . The jury is never told that the defendant has two prior convictions for the same offense and has been to prison three times for other crimes.”)

16 See Wigmore, supra note 8.

17 Floor statement of the principal House Sponsor, Rep. Susan Molinari, CONG. REC. H8991-92, August 21, 1994. See Katherine Dunn, The Politics of Fear: The Recent Hysteria Over Violent Crime is Based More on Myth than Genuine Danger, L.A. TIMES MAGAZINE, June 12, 1994, at 5. See also Jeffrey Waller, Federal Rules of Evidence 413-415: “Laws are Like Medicine; They Generally Cure an Evil by a Lesser . . . Evil”, 30 TEX. TECH. L. REV. 1503, 1505-6 (1999). The highly publicized sexual assault trials of Mike Tyson and William Kennedy Smith in 1991 followed by the sexual molestation and murder of seven-year-old Megan Kanka in 1994 served to inflame the public and brought about considerable pressure on legislators to act. Concern for the protection of women and children from sexual assaults had been building for years, and this media frenzy only exacerbated public outrage. Id. at 1506. See Edward J. Imwinkelried, Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot, 22 FORDHAM URB. L.J. 285, 296 (1995) (Discussing the Chicago Jury Project which found that the potential for hostility toward those accused of sexual misconduct, especially against children, is extraordinarily high. “According to researchers, many jurors found such conduct ‘reprehensible’ and became ‘outraged.’” Such jurors “will have no ‘patience with . . . [legal] technicality’ and will ‘override distinctions of the law’ to find the accused guilty.”)

rape and child sexual assaults, and the politicians were all too willing to pick up the banner and pass laws designed to make it easier to convict and thus incarcerate these predators.  

This paper will attempt to look back at the rules, examine the historical and political contexts in which they were drafted and implemented, consider the claims and promises made by the rules’ supporters as well as the dire predictions of their opponents, then try to statistically analyze what has transpired since, to see which, if either, side was correct. I will try to draw some conclusions from the data and assess the strengths and weakness of arguments by supporters and opponents of the rules in light of what has actually happened in the ten years since the rules were passed.

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19 See generally Estelle Freedman, “Uncontrolled Desires: The Response to the Sexual Psychopath, 1920-1960,” in PASSION & POWER: SEXUALITY IN HISTORY (Kathy Peiss & Christina Simmons eds., 1989) at 199 (discussing the media’s obsession with violent sexual murders during that period); Cf. Peggy Reeves Sanday, A WOMAN SCORNED: ACQUAINANCE RAPE ON TRIAL at 144 (1996) (discussing the preoccupation with the notion of the “sex psychopath” brought on by a “wave of brutal, seemingly sexually motivated child murders” during the 1930s). These murders set off nationwide “sex panics” regarding a perceived increase in such crimes. J. Edgar Hoover, for example, claimed, “the most rapidly increasing type of crime is that perpetrated by sex offenders.” Freedman, supra at 205-06. Statistics, however, did not support his claim. See id. at 206 (noting the “lack of evidence that the incidence of rape, child murder, or minor sex offenses has increased”).

20 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). In a 1986 poll, 1,000 adults were surveyed and asked to rank various crimes according to their heinousness. See Imwinkelried, supra note 17 at 297. While murder was the crime rated most serious, rape, incest and child abuse were the next three highest rated crimes. See id. A 1989 study by the Bureau of Justice Statistics, the Department of Justice’s research department, confirmed the conclusions of the 1986 study. See id. The researchers polled 60,000 adults in an attempt to determine how the public perceives the relative seriousness of different crimes. Once again, homicide received the highest rating and the next two highest ratings went to the offenses of rape and child abuse. See id. See also Cathy Booth, The Case Was Not Heard, TIME, Dec. 23, 1991, at 30, (regarding public perception that defendants were escaping conviction based on “technicalities” or gaining early release from prison after only a fraction of their sentences). See also Sonja Steptoe, A Damnable Defense, SPORTS ILLUSTRATED, Feb. 24, 1992 at 92 (reporting on the rape trial of Mike Tyson) and David A. Kaplan & Bob Cohn, Palm Beach Lessons, NEWSWEEK, Dec. 23, 1991, at 30 (reporting on public reaction to William Kennedy Smith trial.)
II. The “New” Rules – FRE 413, 414, and 415

The Federal Rules of Evidence are an outgrowth of the common law rules of evidence developed and followed by courts in England and in this country after its founding and the creation of the judicial branch in 1789. In 1965, Chief Justice Earl Warren sought to codify the rules through the creation of a separate, Congressionally authorized and implemented statutory regime for use throughout the federal court system. It took many years to finally achieve Chief Justice Warren’s vision, but in 1975 Congress enacted the Federal Rules of Evidence. The rules are applicable only to federal jurisdictions, but have been closely followed by most of the states in their own evidence codes and statutes.

The purpose of the rules is to “secure fairness in administration, elimination of unjustifiable expense and delay, and promote growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.” Nowhere in the rules does it mention the use of the rules of evidence relative to an outcome or result sought by

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22 See Wright & Graham, §5006
23 Id.
25 See Wright and Graham, supra note 22.
either party to a legal dispute. The rules are designed to afford justice and fairness to all who seek it from the federal judicial system. Yet in 1994, after many prior attempts to pass similar legislation failed for both sound legal reasons and political considerations, a determined group of legislators forced President Clinton to accept three new rules designed not to make sure that “truth may be ascertained and proceedings justly determined” but that a distinct class of defendants be more readily convicted and incarcerated, in an effort to rid our streets of what was viewed as a predatory, compulsion-driven criminal class, bent on inflicting the most heinous crimes on women and children.\textsuperscript{26}

The Judicial Conference of the United States was invited to offer comment and advice to the Congress regarding the new rules and to submit alternative recommendations.\textsuperscript{27} Based on extensive public comment, the Judicial Conference recommended that Congress abandon the

\textsuperscript{26} See, e.g. Rep. Molinari’s comments, \textit{supra} note 18.

\textsuperscript{27} See Rules Enabling Act, 28 U.S.C. §§ 2071-77 (1994). This Act calls for an Advisory Committee made up of scholars, judges and lawyers in the relevant field to draft a proposal for any amendment or addition to the existing rules. \textit{See id.} The proposal is then subjected to a period of public comment, reviewed by a subcommittee of the United States Judicial Conference (whose members are chosen by the Chief Justice of the Supreme Court), and finally subjected to Congressional review. \textit{See id.}
rules in their entirety and offered no alternative rules. Congress, in response, ignored the recommendations and allowed the rules to become law.

These New Rules took effect on July 9, 1995 and relate to the admissibility of sexual misconduct evidence in cases involving charges of sexual assault and child molestation. Their purpose is to make prior sexual misconduct evidence more freely admissible in these cases.

Rule 413 admits evidence of similar crimes in sexual assault cases. Rule 414 is similar in


31 Rule 413 reads: Evidence of Similar Crimes in Sexual Assault Cases

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

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

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

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

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

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

(3) contact, without consent, between the genitals or anus of the defendant and any part of another person’s body;
structure and content to Rule 413, but it applies to child molestation cases rather than sexual assault cases.\textsuperscript{32} Finally, Rule 415 applies Rules 413 and 414 to civil cases in which a plaintiff’s claim rests on a defendant’s alleged sexual assault or child molestation.\textsuperscript{33}

III. Federal Rule of Evidence 404(b) and the “Lustful Disposition” Exception

Prior to the enactment of FRE 413-415, courts at both the federal and state levels had developed ways around the general prohibition against the use of propensity evidence in sexual

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\textsuperscript{32} Rule 414 reads: Evidence of Similar Crimes in Child Molestation Cases
(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant’s commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.
(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
(d) For purposes of this rule and Rule 415, “child” means a person below the age of fourteen, and “offense of child molestation” means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—
   (1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;
   (2) any conduct proscribed by chapter 110 of title 18, United States Code;
   (3) contact between any part of the defendant’s body or an object and the genitals or anus of a child;
   (4) contact between the genitals or anus of the defendant and any part of the body of a child;
   (5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or
   (6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

\textsuperscript{33} Rule 415 reads: Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation
(a) In a civil case in which a claim for damages or other relief is predicated on a party’s alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party’s commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.
(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
offense trials. The objective of FRE 404(b) is to allow the use of prior misconduct evidence to prove non-character issues at trial. The reality, however, is that once introduced for a legitimate reason such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, there is a real risk that this evidence will be used by the jury to infer that the defendant has a propensity to engage in similar conduct.

Prior to the passage of FRE 413-415, some courts construed FRE 404(b) narrowly and excluded arguably probative evidence of uncharged sexual misconduct, while others stretched the limits of the rule in sexual assault and child molestation cases. The courts that stretched rule 404(b) to admit evidence of prior sexual misconduct generally did so by construing the prior misconduct as falling under one of the eight legitimate purposes. Under the motive exception,

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34 See Herman L. Trautman, *Logical or Legal Relevancy - A Conflict in Theory*, 5 Vand. L. Rev. 385, 403 (1952); *see, e.g.*, Elliot v. State, 600 P.2d 1044, 1047-48 (Wyo. 1979) (“[I]n recent years a preponderance of the courts have sustained the admissibility of the testimony of third persons as to prior or subsequent similar crimes, wrongs or acts in cases involving sexual offenses.”).

35 Federal Rule of Evidence 404(b) provides: Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . Fed. R. Evid. 404(b).

36 For example, proof of intent usually involves an inference of propensity. That is, evidence of intent is typically offered to demonstrate that a defendant had a particular propensity to commit a certain crime that led to the unlawful intent in the crime charged. Furthermore, uncharged misconduct evidence can be offered to show motive in two ways: to show that because of prior misconduct, the defendant had a reason to commit the present crime; or to show that the defendant had a pre-existing motive that incited him to commit both the uncharged prior act as well as the present crime. *See* Edward J. Imwinkelried, *UNCHARGED MISCONDUCT EVIDENCE § 3:15* (1995). *See also* 22 Charles Allen Wright & Kenneth W. Graham, Jr., *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5240*, at 481 (1978). The latter use of other crimes evidence to show motive has been criticized as simply demonstrating a defendant's propensity to commit the present crime. *See also* Richard O. Lempert & Stephen A. Saltzburg, *A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSSCRIPTS AND CASES* 226 (2d ed. 1982).

37 *See* 1A John Henry Wigmore, *Wigmore on Evidence § 62.2* at 1336 (Peter Tillers ed., rev. ed. 1983) (stating, “jurisdictions ... expansively interpret [404(b)] in prosecutions for sex offenses”); *see also* State v. Kitson, 817 S.W.2d 594, 598 (Mo. Ct. App. 1991) (“[E]vidence of sexual misconduct ... is simply admitted under the strained and questionable guise of one of the well established exceptions to the rule prohibiting the use of sexual misconduct to attack character.”) (citations omitted).

38 *See* 1A John Henry Wigmore, *Wigmore on Evidence § 62.2* at 1336 (Peter Tillers ed., rev. ed. 1983) (stating, “jurisdictions ... expansively interpret [404(b)] in prosecutions for sex offenses”); *see also* State v. Kitson, 817 S.W.2d 594, 598 (Mo. Ct. App. 1991) (“[E]vidence of sexual misconduct ... is simply admitted under the strained and questionable guise of one of the well established exceptions to the rule prohibiting the use of sexual misconduct to attack character.”) (citations omitted).

39 *See, e.g.*, State v. Lachtermann, 812 S.W.2d 759, 768 (Mo. Ct. App. 1991) (“Evidence of repeated acts of sexual abuse of children demonstrates, per se, a propensity for sexual aberration and a depraved sexual instinct and should be recognized as an additional, distinct exception to the rule against the admission of evidence of uncharged
some courts admitted evidence of prior sexual misconduct, reasoning that because of such uncharged misconduct, the defendant had a reason to commit the present crime.\textsuperscript{40} To admit such evidence under the intent exception, intent must be at issue in the trial and there must be some similarity between the uncharged conduct and the charges in the pending case.\textsuperscript{41} However, in some instances courts have tortured the facts and the language of the rule to bring the evidence in.\textsuperscript{42} In one case, the court found that uncharged sexual misconduct was admissible because the conduct showed the defendant’s motive “to gratify his lustful desire by grabbing or fondling young girls.”\textsuperscript{43} The identity exception to 404(b) requires that identity be at issue, that both crimes were committed using the same or similar methods constituting a unique signature, and the signature is so unique that only one perpetrator could have committed both crimes.\textsuperscript{44} Despite

\textsuperscript{40} See 22 Wright & Graham, supra note 36, § 5240, at 481.
\textsuperscript{41} See 22 Wright & Graham, supra note 36, § 5242.
\textsuperscript{42} See United States v. Peden, 961 F.2d 517, 520 (5th Cir.), cert. denied, 506 U.S. 945 (1992). \textsuperscript{[Parenthetical needed]}
\textsuperscript{43} See Imwinkelried, supra note 36, § 3:10, at 3–43. The identity exception has also been referred to as the “pattern,” "signature" or “modus operandi” exception. These names all reflect that the evidence must show the unique, distinctive nature of the action linking the defendant to the crime. More specifically, uncharged misconduct evidence is admissible to show proof of identity when the evidence shows that the uncharged crime was committed in the same unique way as the charged crime. \textsuperscript{See} Norman Krivosha et al., Relevancy: The Necessary Element in Using Evidence of Other Crimes, Wrongs, or Bad Acts to Convict, 60 Neb. L. Rev. 657, 675 (1981). Identification of a defendant is possible by demonstrating the similarity between the modus operandi or signature used by the defendant in committing the uncharged misconduct and that used by the perpetrator of the charged crime. \textit{Id}.
these stringent requirements, some courts have found ways to employ the identity exception where arguably it did not apply.  

Perhaps the most common FRE 404(b) exception used by the courts to admit evidence of prior sexual misconduct is to prove a plan. Courts have admitted such evidence under two variations of the plan exception, the “true plan” exception and the “pattern of criminality” exception. Under the “true plan” exception, the evidence is admitted to demonstrate that the defendant committed the uncharged acts in a plot to prepare for the present crime or as a step in achieving some other criminal objective. However, some courts have used the plan exception to allow introduction of such evidence to show a pattern of misconduct. The so-called, “pattern of criminality” exception has been criticized as nothing more than a ruse to circumvent the limitations of FRE 404(b) and allow improper propensity evidence.

While some jurisdictions have taken the “wink and a nod” approach to getting around the prohibition against sexual misconduct evidence, others have approached the task head on and

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45 See People v. Oliphant, 250 N.W.2d 443 (Mich. 1976). (Parenthetical needed)
48 See, e.g., Sias v. State, 416 So. 2d 1213 (Fla. Dist. Ct. App.), review denied, 424 So. 2d 763 (Fla. 1982) (admitting prior crimes evidence to show defendant’s “ritual” and modus operandi of placing clothing over victims’ heads and removing it only upon completion of sex act); Summ it v. State, 285 So. 2d 670 (Fla. Dist. Ct. App. 1973) (admitting prior crimes testimony of victim's sister to show motive and intent); State v. Paille, 601 So. 2d 1321, 1323 (Fla. Dist. Ct. App. 1992) (very broad interpretation of plan exception, stating, “The fact that the incidents began with kissing and continued over a period of three months is relevant to prove that Paille planned and intended to lure the victim into sexual activity over time. We believe this is relevance beyond mere propensity.”); see also, e.g., Cotita v. State, 381 So. 2d 1146 (Fla. Dist. Ct. App. 1980); Gossett v. State, 191 So. 2d 281 (Fla. Dist. Ct. App. 1966).
49 See Ali v. United States, 520 A.2d 306, 311-12 (D.C. 1987); see also Imwinkelried, supra note 36, §§ 3:21-:23; Note, Admissibility of Similar Crimes: 1901-1951, 18 BROOK. L. REV. 80, 104-05 (1952); see, e.g., People v. Ing, 422 P.2d 590 (Cal. 1967) (admitting evidence of 18 years of uncharged sexual misconduct to show obstetrician's long-term “plan” to take advantage of anesthetized patients). Pre-passage of FRE413-415, critics and fans of the new rules alike observed that courts seemed to be more expansive in their application of FRE 404(b) in sex abuse cases than in other areas of criminal law. Evidence of prior rapes and child molestations was sometimes inappropriately labeled as being used for other purposes (besides propensity) listed in 404(b), such as plan, intent, and identity. See, e.g., Mendez & Imwinkelried, supra note 39, at 473 (criticizing the California Supreme Court's expansion of its interpretation of “plan” to allow prior bad acts to be admitted against a defendant in a child molestation case). Courts allowing a back-door admission of the prior crimes through 404(b) where the argument, in truth is propensity, is bad for evidence law and the rule of law in general. See id.
recognize what is termed a “lustful disposition” or “depraved sexual instinct” exception to FRE 404(b).\(^{50}\) Under this approach, the evidence isn’t admitted to prove one of the listed exceptions in the rule,\(^{51}\) but rather the exception simply contradicts the general rule.\(^{52}\) Often, however, this exception was limited to prior misconduct involving the same victim or to acts that were considered “deviant” or “depraved.”\(^{53}\) Initially, this did not include rape, perhaps because of society’s ambivalence about the crime, but eventually most jurisdictions expanded the exception to encompass “abhorrent” conduct, which typically included rape.\(^{54}\) Many jurisdictions, however, restricted the use of lustful disposition exception to child sexual molestation.

Unbelievably, the Indiana Supreme Court held that the rape of an adult woman did not justify the

\(^{50}\) See Imwinkelried, supra note 36, § 4:14, at 4-37 (stating, “In some jurisdictions, intellectual honesty triumphed, and the courts eventually acknowledged that they were recognizing a special exception to the norm prohibiting the use of the defendant’s disposition as circumstantial proof of conduct.”). As then Senator Robert Dole explained: “[I]f an exception admitting such evidence cannot be avowed openly and honestly, then the temptation is strong to achieve admission by manipulating other exception categories, and by applying evidentiary rules in a manner that is not consistent with their interpretation and application in non-sex offense cases. This state of affairs is undesirable because judges should not have to bend or break the law to do the right thing.” 137 CONG. REC. S4925, S4927 (daily ed. Apr. 24, 1991) (statement of Sen. Dole).

\(^{51}\) See State v. Taylor, 735 S.W.2d 412, 415 (1987) (“[T]he commission of a sex crime has an inherent significance as evidence the perpetrator has previously committed... [similar acts].”); see also Lannan, 600 N.E.2d at 1335-37 (noting that high rates of recidivism in child molestation cases and difficulties of proof form the basis for this exception). For an excellent description of the lustful disposition exception, see Katherine K. Baker, Once A Rapist? Motivational Evidence and Relevancy in Rape Law, 110 HARV. L. REV. 563, 582 (1981) (“Not all courts accept [the lustful disposition] exception, but those that do rest the exception on the previously discussed misconceptions that rapists are rare and particularly recidivistic, and on a belief that the private nature of the act justifies letting in prior act evidence due to the absence of corroborating witnesses.”); see also David P. Bryden & Roger C. Park, “Other Crimes” Evidence in Sex Offense Cases, 78 MICH. L. REV. 529, 559 (1994) (asserting that these exceptions “do not justify the admission of uncharged misconduct to show a ‘depraved sexual instinct’”).

\(^{52}\) Charles T. McCormick, McCormick on Evidence § 190, at 799, 803 (John W. Strong ed., 4th ed. 1992); See also State v. Ferguson, 667 P.2d 68, 71 (Wash. 1983) (“This court has often invoked an exception in similar cases to permit evidence of collateral sexual misconduct when it shows a lustful disposition ....”). Rather than create an exception, the approach of one court in admitting uncharged misconduct evidence in a child molestation case was simply to find that evidence showing a predisposition to commit a sex crime was not evidence of character for purposes of the state’s evidence code. State v. McKay, 787 P.2d 479 (Or. 1990).

\(^{53}\) See, e.g., State v. Tobin, 602 A.2d 528 (R.I. 1992) (lewd disposition exception to general rule barring propensity evidence recognized in case in which prior acts involved same victim). ***Add Example of Second Claim***

\(^{54}\) See Imwinkelried, supra note 36, § 4:14, at 4-41
use of the depraved sexual instinct exception, because the court did not consider the rape of an
adult woman to be “depraved sexual conduct.”

IV. The Intersection of the Federal Rules of Evidence and Politics

It is a widely accepted maxim that there are two processes people should avoid observing
if they don’t want to be disgusted or disillusioned – sausage making and law making. The
process by which FRE 413-415 were enacted does nothing to diminish the truth of the maxim.

For several years, a group of lawmakers argued for the passage of evidence rules that would
equip prosecutors with stronger tools to combat the perceived scourge of rape and child
molestation. Chief among these were Senator Robert Dole (R-Kansas) and Representative

55 Reichard v. State, 510 N.E.2d 163, 165 (Ind. 1987); see also State v. McFarlin, 517 P.2d 87, 90 (Ariz. 1973)
(court confined lustful disposition exception to cases involving sexual conduct deemed deviant, noting that the fact
that one woman was raped is not substantial evidence that another woman did not consent).

56 The phrase, “Law is like sausage: those who like it should not watch it being made” is often attributed to Otto Von
Bismarck. The exact phrase used was “Laws are like sausages. It’s better not to see them being made.” O.C. HISS,

57 The history of the sexual propensity rules dates back to 1991. See President’s Message to Congress Transmitting Proposed
102D CONG., 1ST SESS. 100 (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 22, § 5411, at 360–61. Moreover, the American Bar Association House of Delegates also passed a resolution
opposing Rules 413–15. Congress ignored the ABA 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. Ultimately, the Judicial Conference urged Congress not to adopt Rules 413–15.
Judicial Conference Report, supra note 29, at 2140.; See generally Glen Weissenberger & James J. Duane, FEDERAL
RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY at 187 (Cincinnati, Anderson
that the new rules make admissible “the defendant’s propensity to commit sexual assault or child molestation
offenses”), at 186 n.1 (“[T]he 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
Susan Molinari (R-New York). In 1991, Senator Dole and Representative Molinari first introduced the revised rules as part of the Women’s Equal Opportunity Act. The traditional and customary way amendments to federal procedural rules are passed is through the Rules Enabling Act. This method was not followed in passage of FRE 413-415 because Congress used its power to propose the three rules themselves, thereby bypassing the Rules Enabling Act. While the revised rules were supported by most Republicans as well as then President George H. W. Bush, Democrats held control of the Congress until 1994, and blocked passage of the revised rules because of concerns that they were unnecessary, possibly unconstitutional, and poorly drafted in either event.

has the force of legal history. See Karp, supra note 10. For a scathing description of Karp’s role, see 23 Wright & Graham, supra note 22, § 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 Rules Enabling Act, supra note 27. The Act calls for an Advisory Committee made up of scholars, judges and lawyers in the relevant field to draft a proposal for any amendment or addition to the existing rules. See id. The proposal is then subjected to a period of public comment, reviewed by a subcommittee of the United States Judicial Conference (whose members are chosen by the Chief Justice of the Supreme Court), and finally subjected to Congressional review and debate. See id.


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

[T]he truth of the matter is that is not how human nature necessarily functions . . . so there is little probative value. The fact that the defendant may have done something ten years ago . . . may or may not be relevant to whether or not he is at the scene of the crime of which he is being accused . . . . So I suspect we would not allow in evidence, for example, to suggest in a robbery case—this is not what this amendment would do, but to make the point—that you had been convicted of drunk driving. Why would not we allow drunk driving charges to be brought in a robbery case? Well, because it goes to character, it makes you look like you are maybe the kind of guy if you broke that law, you may break this law. It is prejudice without any probative value. The
The election of 1994, in which control of the House of Representatives shifted to the Republicans in a landslide of historic proportions, brought about the political conditions necessary to revisit the revised rules and to get them passed.\textsuperscript{62} Chief proponent of the revised rules was Representative Molinari, the daughter of a former Congressman from New York’s 7\textsuperscript{th} District, and a rising star in the Republican Party due to her gender and telegenic qualities.\textsuperscript{63} More than one commentator expressed the belief that Representative Molinari had aspirations for higher office and saw the passage of the revised rules as a strong platform for this effort.\textsuperscript{64}

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\textsuperscript{62} The Republicans had attempted to pass the new rules in 1991, but faced stiff opposition from Democratic majorities in both house of Congress. After the landslide of 1994, in which control of the House of Representatives shifted dramatically to Republicans under the leadership of Rep. Newt Gingrich, President Clinton faced the prospect of legislative stalemate in the House. Senator Robert Dole (R-KS) blocked President Clinton’s version of the Crime Bill in the Senate while Rep. Susan Molinari (R-NY) led the effort to block its passage in the House. \textit{See also} 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari); 140 CONG. REC. H2433 (daily ed. Apr. 19, 1994).

\textsuperscript{63} Former Rep. James E. Rogan (R-CA), commenting on Rep. Molinari’s understanding of the implications of the revised rules on American legal tradition and the presumption of innocence, suggested that “it was widely known...”

\textsuperscript{64} See also 140 CONG. REC. S15,072-73 (daily ed. Nov. 4, 1993) (statement of Sen. Biden). Senator Biden clearly stated that he was in favor of curbing violence against women and children, but not at the price of fairness:

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

140 CONG. REC. S10,966, S10,967 (July 31, 1995) (statement of Sen. Biden). \textit{See also} 140 CONG. REC. H8990 (daily ed. Aug. 21, 1994) (statement of Rep. Hughes) (“If the primary evidence in a prosecution’s case in chief is evidence of prior acts – which would be possible under the changes – we would be sinking into the start chamber procedures that have long been rejected by civilized societies everywhere.”). \textit{See also} 139 CONG. REC. S15,072 (daily ed. Nov. 4, 1993) (statement of Sen. Biden) (stating that character evidence should not be used “to blind people to looking at the real facts before them and making an independent judgment...”). \textit{See also} 140 CONG. REC. H8990 (daily ed. Aug. 21, 1994) (statement inserted into the record by Rep. Hughes) (noting that the rules would raise “very serious constitutional questions”); 140 CONG. REC. H5439 (daily ed. June 24, 1994) (statement of Rep. Schumer) (“Make no mistake about it my colleagues, this would say, not just a conviction but any allegation at all would be admissible in a court, not for all crimes but for these crimes. That is turning our system of due process on its head.”). \textit{See also} 140 CONG. REC. H8968, H8990 (daily ed. Aug. 21, 1994) (statement by Rep. Hughes) (“[T]he existing rulemaking process involves a minimum of six levels of scrutiny... This has gone through none of those levels. The rule changes... are based on a[n]... amendment offered on the floor of the Senate and had... twenty minutes of debate. It is procedurally and substantively flawed.”).


\textsuperscript{65} Rep. Molinari was the daughter of lawyer and perennial Republican politician Guy Molinari. She served on the New York City Council before winning a special election to the House of Representatives in 1990 to replace her father, who retired from Congress. Rep. Molinari gave the keynote speech at the 1996 Republican National Convention, but resigned the House in June 1997 to take a job as a television journalist for CBS.
At the same time, President William Clinton was struggling to recover from a series of political reversals. President Clinton was viewed by many as weak on crime and thus vulnerable to partisan attacks by Republicans in the Congress. Out of this perfect storm, a landslide victory for the Republicans in the 1994 election and a weakened President Clinton came the Violent Crime Control and Law Enforcement Act of 1994 (“Crime Bill”) containing FRE 413-415. Despite Republican control of the House, Democrats controlled the Senate, and passage of the Crime Bill required Democratic votes in the Senate to make it to President Clinton’s desk for signing. President Clinton worked directly with members of Congress from both parties to advance the bill and it was generally believed that he pressured recalcitrant members of his own party to vote for the Crime Bill in an effort to burnish his image. Representative Molinari remarked that she was shocked, but pleased, that she was able to negotiate directly with Democratic leaders in the House and Senate to get the bill passed, and that President Clinton actually “twisted arms” on behalf of the bill.

Because the Congress bypassed the Rules Enabling Act to pass the revised rules directly, it included a provision in the Crime Bill directing the Judicial Conference to report to Congress that Rep. Molinari’s real objective was becoming a Senator and that the concerns about the revised rules did not resonate with Rep. Molinari because “she’s not a lawyer.” Rep. Rogan drafted the California Evidence Rule 1108, viewed as the state’s analog to FRE 413–415. Rep. Rogan is now a Superior Court Judge for Orange County in Fullerton, California and teaches Trial Practice at Chapman University School of Law in Orange, California.


Id. at A1.


Political composition of the 104th Congress (1995–1997) was 48 Republicans and 52 Democrats in the Senate and 230 Republicans, 204 Democrats and 1 Independent in the House of Representatives.


Ann Devroy, *All-Out Assault Pays Off for President*, WASH. POST, Aug. 22, 1994, A1 at A4. See also Katherine Q. Seelye, *House Approves Crime Bill After Days of Bargaining, Giving Victory to Clinton*, N.Y. TIMES, Aug. 22, 1994, A1 at B6. [Rep. Susan] Molinari told reporters: “There we were, toe to toe with Speaker Foley and Leader Gephardt, and we walk out and say, ‘Pinch me, is this happening?’ This is a day the U.S. Congress looks pretty darn good.” Id.
its recommendations for amending the rules as proposed.\textsuperscript{71} Congress delayed implementation of the revised rules for 150 days to allow the Judicial Conference time to comment and propose amendments.\textsuperscript{72} Exactly 149 days later, on February 9, 1995 the Judicial Conference submitted its report to Congress.\textsuperscript{73} With the exception of the United States Department of Justice,\textsuperscript{74} the Advisory Committee unanimously opposed the revised rules and urged Congress to reconsider its decision on the policy questions underlying the new rules, and recommended that Congress abandon the rules completely.\textsuperscript{75} Despite the overwhelmingly negative response to the revised rules, Congress ignored the report and the rules, as originally enacted, became law on July 9, 1995.\textsuperscript{76}

\textbf{V. The Intersection of Reality and Politics}

Sergeant Joe Friday was fond of using the phrase “just the facts, M’amaam” whenever he investigated a crime on the television show Dragnet and the witness verbally wandered into extraneous information. Had Sergeant Friday been present during the debate in Congress over


\textsuperscript{72} See Violent Crime Control and Law Enforcement Act of 1994, supra note 67, at § 32,0935(d).

\textsuperscript{73} See \textsc{Judicial Conference Report}, supra note 28 (submitted to Congress in accordance with § 32,0935 of the Violent Crime Control and Enforcement Act of 1994).

\textsuperscript{74} The Department of Justice stated, “The new rules are responsive to deficiencies in the existing rules of evidence, and the Department of Justice strongly supports their enactment.” Letter from W. Lee Rawls, Assistant Att’y Gen., Office of Legislative Affairs, to Sen. Robert Dole, Minority Leader (Apr. 24, 1991), \textit{reprinted in 137 Cong. Rec. S4927} (daily ed. Apr. 24, 1991). The letter continued by arguing the “entirely sound perception that evidence of this type is frequently of critical importance in establishing the guilt of the rapist or child molester, and that concealing it from the jury often carries a grave risk that such a criminal will be turned loose to claim other victims.” \textit{Id.}

\textsuperscript{75} See \textsc{Judicial Conference Report}, supra note 28, at 53. Lawyers, the ABA, judges and scholars soundly criticized the proposed rules. The Administrative Office of the United States Courts solicited comments from these various individuals and found that eighty-eight individuals opposed the rules and only seven supported them. Only three organizations supported the rules, while twelve opposed them. Those opposed to the new rules gave various reasons as to why they were opposed. The reasons included that the rules were unfair (58 responses), were poorly drafted (47 responses), and contained insufficient data on propensity (33 responses). \textit{Id.} at 52. The Judicial Conference suggested in the alternative that the provisions of FRE 413-415 should be incorporated as amendments to Rules 404 and 405 in order to clarify any ambiguities. \textit{Id.} at 54.

\textsuperscript{76} Effective Date of Evidence Rules 413, 414, and 415, 1995 United States Order 95-24, July 9, 1995, available in Westlaw, U-S Orders database.
the revised rules, perhaps he could have applied his trademark phrase a time, or two. A major criticism of the revised rules is the absence of any empirical data to support the need for the revised rules. Much of the discussion on the House and senate floors consisted of anecdotal evidence of crazed rapists and child molesters stalking our streets and preying on women and children. In fact, many of the “facts” trotted out by Representative Molinari, Senator Dole, and others were not only unsupported by any date or research, but were in fact contradicted by data and research.

For example, supporters of the legislation advanced three main arguments for the revised rules. The first was that women and children suffer from a credibility deficit in our judicial system and the new rules would serve to offset this by buttressing their statements with additional evidence from sources other than the victims. The second claim was that sex

77 Rep. Molinari, Sen. Dole, and others made several references to “facts” regarding rape and child sexual molestation in their statements supporting the new rules but failed to substantiate them with source data. The Congressional Record is devoid of any statistical data or studies, but does include ample anecdotal information. 78 138 CONG. REC. S15160 (Sept. 25, 1992) (remarks by Sen. Dole) (“Violent attacks by men is the primary health risk to American women.”); 139 CONG. REC. S15,070 (daily ed. Nov. 4, 1993) (statement of Sen. Diane Feinstein) (expressing her support for the Violence Against Women Act of 1993 and claiming that, “In fact, 98% of the victims of sex crimes never see their attacker apprehended, tried or imprisoned.”). 79 The actual arrest rate for sexual offenses, including rape, was 51.5% in 1993. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics: Compendium of Federal Justice Statistics, 1993. 80 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 at 286 (Berkeley: University of California Press, 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. See also Aviva Orenstein, No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials, 49 HASTINGS L.J. 663, 716, n.40 (1999).

“This disbelief and desire to silence women are rooted in our western tradition's suspicion of women's talk and the danger of women's seductive powers. Starting with Eve, it seems Western culture has been convinced that women tempt men and get them in trouble. '[Women's] role is to learn, listening quietly and with due submission. I do not permit women to teach or to dictate to men; they should keep quiet. For Adam was created first, and Eve afterwards; moreover it was not Adam who was deceived; it was the woman who, yielding to deception, fell into sin.' 1 Timothy 2:10-14. 'Yosé ben Yochanan of Jerusalem says: Do not engage in too much idle talk with women. This has been said even with regard to one's own wife; how much more does it apply to
offenders have an extremely high recidivism rate and therefore evidence of prior criminal acts, charged or not, are highly probative on the question of guilt in the instant matter.\(^{81}\) Third, and somewhat related to the second claim, was the argument that even if individual sex offenders are not recidivist, evidence of prior sexual aggressiveness or propensities toward such offenses is unique and highly probative.\(^{82}\) This so-called “compulsion claim” advanced as a scientifically based theorem, is based on the notion that very few people in a population have the desire, inclination, or depravity to be rapists or pedophiles.\(^{83}\) That someone has engaged in such behavior in the past, even if not proved in a criminal prosecution beyond a reasonable doubt

81 See Karp, supra note 10, at 25 (noting with no substantive support that “rapists and child molesters frequently commit numerous crimes before being apprehended and prosecuted”). But see R. Karl Hanson & Monique T. Bussiere, Predictors of Sexual Offender Recidivism: A Meta-Analysis (Ottawa Dept’t of the Solicitor Gen. of Can., Representative 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., Risk Factors Associated with Recidivism Among Extrafamilial Child Molesters, 65 J. Consulting & Clinical Psychol. 141, 148 (1997) (reporting that known recidivism rates for child molesters tend to be very low); Raeder, supra note 28, 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?”); see also Bryden & Park, supra note 51 at 572 (1994) (discussing Bureau of Justice Statistics study that tracked 100,000 prisoners for three years and found that rapists had 7.7% recidivism rate; only homicide had a lower recidivism rate, while burglary had a 31.9% recidivism rate).

82 See R. Karl Hanson et al., A Comparison of Child Molesters and Nonsexual Criminals: Risk Predictors and Long-Term Recidivism, 32 J. Res. in Crim. & Delinq. 325, 335–36 (1995) (concluding that it is possible to isolate distinct groups of child molesters who tend to recidivate).

83 Such thinking plays into the public’s belief system and tends to reinforce what are referred to as “rape myths” which shape not only public perceptions but also the legal system’s response. See Joyce E. Williams & Karen A. Holmes, SECOND ASSAULT: RAPE AND PUBLIC ATTITUDES at 118 (Westport, Greenwood Press 1981) (discussing study finding that most people believe rapists are “crazy”, “mentally ill”, or “emotionally disturbed”). According to Williams & Holmes, 91% of white men and 92% of white women, 83% of black men and 98% of black women, and 87% of Mexican-American men and 63% of Mexican-American women believe that rapists are “sick.” See id. at 136. Numerous studies have found that the public perceives rapists to fit a profile, both psychologically and physically. One court watcher at the William Kennedy Smith rape trial, infra note 135, commented, “I just find it hard to believe that someone with that much money would have to resort to rape to get what he wants.” Id. at 301, n.96. However, most Americans are quite ignorant of the realities of rape. See H. Field & L. Bienen, JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW (Lexington, Mass., Lexington Books 1980). In one study, people were queried about their understanding of rape using a fourteen-question quiz. “[T]he scores showed that, in general, most people knew very little about the facts regarding rape. The average score . . . on the fourteen-item test was less than four items correct.” Id. at 89. Such thinking is not new, however, and not limited to the public. See, e.g., Abbott v. State, 204 N.W. 74, 75 (Neb. 1925). (“[T]he criminal impulse which makes such an act possible is unnatural and unusual. The felony itself suggests a carnal pervert.”)
standard, tends to show that person to be a member of this infinitesimally small group.\textsuperscript{84} Thus, such evidence is highly probative on the question of guilt in the instant trial.\textsuperscript{85} According to Representative Molinari, “[T]he proposed reform is critical to the protection of the public from rapists and child molesters, and is justified by the distinctive characteristics of the cases it will affect.”\textsuperscript{86}

As a fourth and somewhat late arriving claim supporting the new rules, proponents argued that evidence in trials involving rape and child molestation is hard to come by, and anything that would increase the evidence quotient would be highly beneficial to society.\textsuperscript{87}

\textsuperscript{84} See Mary I. Combs, \textit{Telling the Victim’s Story}, 2 TEX. J. WOMEN & THE L. 277 (1993). Professor Combs posits that it is in society’s and men’s interest to believe that rape is a rare event and “attribute it only to monsters.” \textit{Id.} at 285. By doing so, men are relieved of examining their attitudes about sex and their own behavior toward women. \textit{Id. See also} Orenstein, supra note 80.

“This of course taps into one form of denial, in which we as a society believe that rapes are rare events and the product of a demented individual. By limiting the perpetrators to those outside the cultural norm, the jury is spared the pain of confronting the epidemic proportions and widespread perpetration of rape. Women are spared the realization of their own vulnerability to violent attack. Righteous men are spared facing the fact that they may not be able to protect wives, sisters, daughter, or friends. ’Normal’ men who occasionally coerce sex are spared facing their crimes. Applying traditional evidence lingo, given the widespread nature of rape and our subtle tolerance of it, the fact that an accused has raped before may not be particularly probative. Concomitantly, jurors may overvalue the prior rapes. Their desire to eradicate rape may cause jurors to focus on the prior accusations and may distract them from considering the facts of the case in front of them. Most troubling, the jury may be infected by irrational emotions, blinded by their antipathy for someone branded as a rapist and by their own psychological need to focus the problem of rape on a few select individuals.” \textit{Id.} at 716, n.124, 125.

\textsuperscript{85} Rep. Molinari, a principal sponsor of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994), explained: “In child molestation cases, for example, 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.” 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari). David Karp argued that the “common sense ground” for propensity is that “[o]rdinary people do not commit outrages against others.” See Karp, \textit{supra} note 10, at 20. Karp emphasized the probative value of character evidence concerning an accused that committed similar acts, contending “evidence showing that the defendant has 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.” \textit{Id.} at 24 (emphasis added); 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{87} 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.”).
Proponents of the new rules claimed that convictions in rape and child sexual molestation were notoriously difficult to obtain because such crimes typically occur in private, with no witnesses other than the victim and offender, and little physical evidence. In fact, this claim, like others made by proponents was not only unsupported by empirical evidence, but also flatly incorrect. The conviction rate for rape in the federal justice system prior to the passage of the new rules was already greater than 80%.

As a final justification for relaxing the ban on prior bad acts evidence, proponents argued that allowing prior victims to testify, even though they might not have done so in their own cases, could potentially sensitize society at large to the prevalence of rape and child sexual molestation. The theory was that the relaxed new rules would lead to higher conviction rates.


See Orenstein, supra note 80 at 695. (“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).”) Orenstein argues, “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. 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.” Id.
and removal from society of the perpetrators of such violence against women and children, while raising awareness of the problem generally.\footnote{Id. See also Rawls letter, supra note 74 (“These new rules are responsive to deficiencies in the existing rules of evidence . . . [It is an] entirely sound perception that evidence of this type is frequently of critical importance in establishing the guilt of a rapist or child molester, and that concealing it from the jury often carries a grave risk that such criminal will be turned loose to claim other victims.”).}

VI. An End to Rape and Child Sexual Molestation As We Know It and Other Hyperbolic Promises Made by Proponents of the New Rules

In their zeal to pass the legislation, proponents not only made public statements explaining why the new rules were necessary and legally sound, but also went so far as to suggest that the impact of the new rules would be a tectonic shift in the legal firmament. As with their claims in support of the new rules, their promises as to the likely (nee certain) impact of their passage were decidedly bold.\footnote{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.”).} Representative Molinari, probably the most outspoken of the new rules’ proponents and the one, by virtue of her gender, possibly the least likely to be attacked by opponents, went so far as to suggest a cause and effect relationship between the new rules and reduced incidence of rape and child sexual molestation. Molinari asserted, “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.” (emphasis added).\footnote{140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).}

Such a claim required an interlocking series of presumptions, all of which the sponsors took as givens, to pan out. These included the notion that the relaxed rules would lead to a
higher conviction rate for rape and child sexual molestation defendants, the assumption that there is a distinct and finite group of people who would engage in such conduct, the belief that once these offenders were incarcerated the number of rapists and child molesters loose in society would be reduced, and thus the number of offenses committed would decline. Such a dependant string of independent, but interlocking assumptions would ordinarily be seen as defying the basic rules of probability, but when considered by proponents of the new rules the outcome seemed intuitively obvious and not open for debate. The critical assumption, on which the entire premise rests, is that there is a distinct and finite group of people (predominantly men) who would have the compulsion to commit these crimes. Unfortunately for the proponents of the new rules, this assumption appears invalid.

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95 140 Cong. Rec. H2433 (daily ed. Apr. 19, 1994) (statement of Rep. Molinari) (“The past conduct of a person with a history of rape or child molestation provides evidence that he or she has the combination of aggressive and sexual impulses that motivates the commission of such crimes and lacks the inhibitions against acting on these impulses. A charge of rape or child molestation has greater plausibility against such a person.”).
96 Id.
97 In a series of studies, men’s attitudes about rape were found to discredit this predicate assumption. In one experiment, 30% of the men polled indicated that if they would not be caught, there would be some likelihood of their raping. See James V. Check & Neil M. Malamuth, Sex-Role Stereotyping and Reactions to Depictions of Stranger versus Acquaintance Rape, 45 J. PERSONALITY & SOC. PSYCHOL. 344, 346-47 (1983). See also James V. Check & Neil Malamuth, An Empirical Assessment of Some Feminist Hypothesis About Rape, 8 INT’L J. WOMEN’S STUD. 414 (1985) (supporting the proposition that rapists are relatively normal, based on the percentage of men who would commit rape if they were assured that they would not be caught or punished). In another study, over half the college-age male population surveyed would rape if they were assured that they would not be caught or punished. See Morrison Torrey, When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions, 24 U.C. DAVIS L. REV. 1013, 1023 (1991). See also Mary P. Koss, Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education, in RAPE & SEXUAL ASSAULT II (Ann Wolbert Burgess ed., Garland Pub. 1988) (nationwide survey of 6,100 college males revealed that one in twelve admitted to committing rape); Karen Rapaport & C. Dale Posy, Sexually Coercive College Males, in Martha R. Burt, RAPE MYTHS AND ACQUAINTANCE RAPE, THE HIDDEN CRIME (Andrea Parrot & Laurie Bechhofer eds., New York: John Wiley & Sons, Inc. 1991) (43% of college males surveyed admitted to engaging in coercive sex). Perhaps the most disturbing study, however, is not one which surveyed adult males, but those still in junior high school. “In a survey of 1,700 sixth to ninth graders from Rhode Island, 24% of the boys and 16% of the girls said it is acceptable for a man to force a woman to have sex with him if he has spent money on her.” See Torrey, supra at 1021.
VII. An End to Fairness and Due Process in Our Legal System, a Death Blow to the Presumption of Innocence, and the Beginning of the End to Consistency in the Federal Rules of Evidence—Chicken Little⁹⁸ Lives!

Opponents of the new rules were perhaps as certain of the wrong-headedness of the legislation as their proponents were of its correctness. The criticisms of the new rules came from a variety of sources and centered mainly on five major themes. First, the new rules were a bad idea because they were proposed by Congress and not the Judicial Conference and thus were politically driven rather than serving a legitimate need identified by the judiciary.⁹⁹ Second, the new rules violated the long-standing prohibition on the use of character evidence and seemed to some to be a first step in undoing the prohibition generally, not just for sexual offenses.¹⁰⁰ Third, commentators criticized the new rules for creating a distinction between evidentiary rules for sexual offenses and those of other crimes. By creating rules specifically for one type of criminal

⁹⁸ See Chicken Little, supra note 1.
⁹⁹ Many of the criticisms leveled at the new rules related to the manner in which they were proposed and submitted for comment. Under the Rules Enabling Act, supra note 27, new rules and amendments to existing rules of procedure and evidence originate in the Judicial Conference and then are submitted to Congress for adoption. By starting in the Congress, critics argued that the new rules lacked the critical insight of those most familiar with the rest of the Federal Rules of Evidence, namely the judiciary, legal professionals, law professors, and legal scholars. See 140 CONG. REC. H8968, H8990 (daily ed. Aug. 21, 1994) (statement by Rep. Hughes), supra note 61.
¹⁰⁰ See David P. Leonard, supra note 30 at 341. As Professor David P. Leonard points out, “In creating specific rules of evidence applicable to certain classes of cases but not others, Congress may have signaled a change in the basic structure of evidence law. Though there are some exceptions under existing law, at present the formal law of evidence does not apply differently in different kinds of cases, whether civil or criminal. In addition, again with limited exceptions, the law does not generally treat differently the two sides in a particular dispute. Instead, a unitary set of rules applies to all cases and to all litigants. By defining certain classes of cases and permitting one party to offer an especially volatile type of evidence for a purpose that would otherwise be forbidden, Congress arguably has worked a fundamental change in the structure of the evidence law. This change, especially if it marks the beginning of a trend, would have several effects, two of which seem especially important. First, it would make the law of evidence considerably more complex than it already is. It is already difficult enough for courts and counsel to learn the intricacies of the evidence rules; considerably more difficulty, dispute and appellate litigation can be expected if the rules are further complicated by the proposed changes. Second, the treatment of litigants in different kinds of cases with different evidentiary standards arguably changes the nature and purpose of evidence rules and codes. Evidence law is hardly neutral today from a substantive standpoint, but neither is it pervasively substantive in effect. For the most part, the rules of evidence are designed to facilitate the truth-seeking function rather than serve substantive policy. In the absence of specific support for the value of character evidence in sexual assault and child molestation cases, it is difficult to see how admitting such evidence will enhance truth-determination. It seems equally plausible that truth-determination will suffer.”
offense, the new rules departed from the consistency provided by the Federal Rules of Evidence. Fourth, many critics felt that the new rules were violative of due process and equal protection since they undercut the presumption of innocence that is central to our criminal jurisprudence and singled out one class of defendant to be disadvantaged. Fifth, and finally, critics felt that the new rules were poorly drafted and confusing. Critics of the new rules pointed out that they failed to address what impact FRE 403 should, or could, have in determining if propensity evidence would be admissible. Critics also noted that the drafters failed to address

101 See Erik D. Ojala, Propensity Evidence Under Rule 413: The Need For Balance, 77 WASH. U. L. Q. 947, 974 (1999). “At a fundamental level, one’s feelings about the probative value of sexual assault evidence depends on one’s view of sexual assaults in light of other violent crimes. If one believes sexual assaults largely are analogous to all other violent crimes, character evidence rules need not vary. Alternatively, if one views sexual assaults as one of the physical manifestations of a male-dominated society that tends to discriminate against and oppress women in a variety of ways, then it is reasonable to expect that male prosecutors, judges and fact finders will approach sexual assault cases with biases that are by-products of that societal oppression. Special rules of admissibility to compensate for these biases may be appropriate.” See also Mary Katherine Danna, supra note 9 at 299 (discussing the rationale and benefit of broadening the exception for propensity evidence beyond sexual offenses because “it may be that admission of prior acts would increase fact-finding in all types of cases” and noting that some scholars, including Wigmore, have concluded that “If we wish to use sexual propensity evidence against an accused, consistency demands that we abolish the propensity rule in its entirety.”) See Wigmore, supra note 8 at § 62.2 at 1345.

102 See Jason L. McCandless, Prior Bad Acts and Two Bad Rules: The Fundamental Unfairness of Federal Rules of Evidence 413 and 414, 5 WM. & MARY BILL RTS. J. 689 (1997) (discussing due process and fundamental fairness concerns regarding use of prior misconduct evidence in trial and jury instructions.) See also Hurtado v. California, supra note 8 (stating that the ban against propensity evidence has been preserved by the courts for so long that it “must be taken to be due process of law”). See also Louis M. Natali, Jr. & R. Stephen Stigall, “Are You Going to Arraign His Whole Life?”: How Sexual Propensity Evidence Violates The Due Process Clause, 28 LOY. U. CHI. L.J. 1 (1996), in which the authors argue that the use of sexual propensity evidence violates a defendant’s right to due process by turning the centuries old history on its head and citing cases to 1684 in which courts prohibited such evidence. The title of the article refers to the statement of Lord Chief Justice Holt at Old Bailey in Harrison’s Trial. Upon the proffer of propensity evidence, Justice Holt remarked: “Hold, what are you doing now? Are you going to arraign his whole life? Away, away, that ought not to be; that is nothing to the matter.”

103 By stating that evidence of prior sexual offenses may be used “for its bearing on any matter to which it is relevant” the new rules arguably are subject to FRE 401 (definition of relevant evidence) and 402 (general admissibility of relevant evidence). However, because the new rules state that such evidence “is admissible” there is doubt as to whether the new rules are subject to FRE 403’s probative versus prejudicial balancing requirement. A strict interpretation of the words of the new rules would seem to indicate that Congress has already made the probative versus prejudicial determination, and the courts must defer to their judgment. See 140 CONG. REC. H8992 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) (stating that “[T]he underlying legislative judgment is that the evidence admissible pursuant to the proposed rules is typically relevant and probative, and that its probative value is normally not outweighed by any risk of prejudice or other adverse effects.”) However, the Congressional Record belies this interpretation. See 140 CONG. REC. S12990-01 (Sept. 20, 1994) (statement of Sen. Dole) (stating that courts will retain their “authority under evidence rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect”); 140 CONG. REC. H8991-92 (daily ed. Aug. 21, 1994) (statement of Rep.
how the new rules would deal with hearsay evidence and did not define the standard of proof required for such prior sexual misconduct evidence to be admitted.\textsuperscript{104}

Taken as a whole, the promises made by proponents and dire warnings issued by opponents, the debate and controversy surrounding the new rules must have left many confused and perplexed, and anxious about the impact of their implementation on our legal system. Judging from the number of law review articles\textsuperscript{105} published on the topic and the number of scientific and policy studies conducted,\textsuperscript{106} one would presume that at least one such treatise

\textsuperscript{104}Related to the concerns about how the new rules were drafted and proposed, several commentators noted that the rules themselves did not establish a standard of proof by which evidence could be judged. Similarly, since no specific reference to the use of hearsay was included in the new rules or the Congressional Record, opponents raised a concern that the courts would be unable to exercise any control over the form and weight of proffered evidence as they do in other contexts. Courts faced with this dilemma have turned to several sources of authority, including Huddleston v. United States, 485 U.S. 681, 684 (1988) (“We conclude that such evidence [of other crimes, acts, or wrongs] should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act.”) The obvious problem with this approach is that the standard of proof required in Huddleston was merely “more likely than not”, or a “preponderance of the evidence”, far short of the “beyond a reasonable doubt” standard required in criminal cases. Since commentators have almost universally recognized that the use of such evidence cannot help but influence a jury in finding a defendant guilty, the danger is that the actual standard of proof is thus less than is required in trials where such evidence is not involved.

\textsuperscript{105}A KeyCite© search on Westlaw on the subject of the Federal Rules of Evidence 413-415 returned 295 law review articles. In researching and writing this paper I read and incorporated ideas and background information from 70 of these articles. A list of the law review/journal articles surveyed for this paper is included as Appendix A.

\textsuperscript{106}In addition to law review articles, I gathered information and conclusions from a number of other sources including clinical psychology journals, and prison and recidivism studies, as well as periodicals that discussed many of the topics referred to in this paper. Several published studies were central to my conclusions regarding the accuracy of proponents’ arguments, including Leam A. Craig, Kevin D. Browne, and Ian Stringer, Risk Scales and Factors Predictive of Sexual Offence Recidivism, 4 TRAUMA, VIOLENCE & ABUSE 45 (2003); Sander L. Gilman, Helen King, Roy Porter, G.S. Rousseau and Elaine Showalter, Hysteria Beyond Freud (1993); R. Karl Hanson, Richard A. Steffy, Rene Gauthier, Long-Term Follow-Up of Child Molesters: Risk Predictors and Treatment Outcome, 57 JOURNAL OF CONSULTING AND CLINICAL PSYCHOLOGY 536 (1992); R. Karl Hanson ad Monique T. Bussiere, Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies, 66 JOURNAL OF CONSULTING AND CLINICAL PSYCHOLOGY 348 (1998); R. Karl Hanson and David Thornton, Improving Risk Assessment for Sex Offenders: A Comparison of Three Actuarial Studies, 24 LAW AND HUMAN BEHAVIOR 119 (2000); Michelle Meloy, The Sex Offender Next Door: An Analysis of Recidivism, Risk Factors, and Deterrence of Sex Offenders on Probation, 16 CRIMINAL JUSTICE POLICY REVIEW 211 (2005); Robert A. Prentky, Robert A. Knight, and Austin F. S. Lee, Risk Factors With Recidivism Among Extramarial Child Molesters, 65 JOURNAL OF CONSULTING AND CLINICAL PSYCHOLOGY 141 (1997); Lisa L. Sample and Timothy Bray, Are Sex Offenders Different? An Examination of Rearrest Patterns, 17 CRIMINAL JUSTICE POLICY REVIEW 83 (2006). A list of the scientific journal articles surveyed for this paper is included as Appendix B.
would address my question posed to Professor Darmer in 2005, but though I diligently searched Westlaw, LexisNexis, Google, and other repositories of information, none were found.

Since 1972, the United States Department of Justice (USDOJ) Bureau of Justice Statistics has compiled an annual nationwide statistical database for all serious crime.\textsuperscript{107} This database includes reports of serious crimes from all Standard Metropolitan Statistical Areas (SMSA) in all fifty states.\textsuperscript{108} In addition to the USDOJ statistics, the Federal Bureau of Investigation publishes the Uniform Crime Report (UCR) that compiles crime reports from all fifty states.\textsuperscript{109} While the methodology employed and the date collected in the USDOJ survey differs from that in the UCR, all such data compilations have maintained a consistent methodology since prior to the passage of the new rules.\textsuperscript{110} This ensures that when comparing data from different time frames, the impact of any inherent errors should be negligible on the eventual information. For example, the USDOJ acknowledges that the number of rapes reported each year is fewer than the actual

\begin{itemize}
  \item \textsuperscript{107} The USDOJ Office of Justice Programs, Bureau of Justice Statistics publishes the National Criminal Victimization in the United States each year. The report compiles data from a continuing survey of the occupants of a representative sample of housing units in the United States. The report measures victimization, not actual reported crimes, by interviewing roughly 100,000 people in 50,000 households. The survey is thus a statistical estimate of the actual number of crimes committed in the country each year, regardless of whether these crimes are reported to authorities. The survey is designed to measure data on difficult-to-measure crimes such as rape and sexual assault that are generally under-reported to police. \textit{See} Bureau of Justice Statistics, Criminal Victimization Survey, http://www.ojp.usdoj.gov/bjs/cvictgen.htm [hereinafter NCVS].
  \item \textsuperscript{108} \textit{Id.}
  \item \textsuperscript{109} The Uniform Crime Reporting (UCR) Program was conceived in 1929 by the International Association of Chiefs of Police to meet a need for reliable, uniform crime statistics for the nation. In 1930, the FBI was tasked with collecting, publishing, and archiving those statistics. Several annual statistical publications, such as the comprehensive Crime in the United States, are produced from data provided by nearly 17,000 law enforcement agencies across the United States. The American public relies on these data for information on the fluctuations in the level of crime from year to year, and criminologists, sociologists, legislators, city planners, the media, and other students of criminal justice use them for a variety of research and planning purposes. To ensure these data are uniformly reported, the FBI provides contributing law enforcement agencies with a handbook that explains how to classify and score offenses and provides uniform crime offense definitions. Annual UCR data and Crime in the United States reports may be accessed at http://www.fbi.gov/ucr/ucr.htm.
  \item \textsuperscript{110} The National Crime Victimization Survey was initiated in 1972 and serves as the basis for the USDOJ Criminal Victimization annual report. The survey was redesigned in 1989 in response to criticism of the earlier survey’s capacity to gather information about certain crimes, including sexual assaults and domestic violence, because improved survey methodology enhances the ability of people being interviewed to recall events, and because public attitudes toward victims had changed, permitting more direct and frank questioning about sexual assaults. \textit{See, e.g.} Criminal Victimization in the United States, 1993: A National Crime Victimization Survey Report, http://www.ojp.usdoj.gov/bjs/abstract/cvus93.htm.
\end{itemize}
number of rapes that occur in the total population.\textsuperscript{111} It is highly unlikely, and statistically improbable, that the rate of under-reporting such assaults would change markedly in any given year from the rate in prior or latter years; thus, by comparing years the under-reporting error is not statistically significant to the conclusions drawn.\textsuperscript{112}

VIII. Crime Statistics 1993-2005

For this paper, I chose 1993 as the baseline because it was the last full year prior to debate and enactment of the new rules, and though a few states had a “lustful disposition” exception to the prohibition against prior misconduct evidence at that point, for statistical purposes it serves as a consistent marker for pre- and post-implementation of the new rules and reporting of rape. Perhaps because of the difficulty in segregating child sexual molestation crimes from rape, the data collected by the USDOJ does not distinguish between these discrete categories. As a result, the data presented and conclusions drawn from it refer broadly to rape and sexual assault. There is no national data that specifically focuses on child sexual molestation

\textsuperscript{111} Id.
\textsuperscript{112} The difficulty in ascertaining an accurate number for rapes committed each year is both methodological and sociological. While several commentators have noted that there has been a greater willingness to discuss sexual assault and rape (see, e.g. NCVS, \textit{supra} note 110 regarding changing cultural attitudes about such crimes and victims’ willingness to discuss them), the fact remains that nobody truly knows how many rapes are committed each year. \textit{See} David P. Bryden & Sonja Lengnick, \textit{Rape in the Criminal Justice System}, 87 J. CRIM. LAW & CRIMINOLOGY 1194, 1211 (1997) (discussing victim surveys that indicate as many as 500,000 women are raped or victim of some form of sexual assault each year). Rape is one of the most underreported crimes against the person. Estimates of the number of unreported rapes range from 61\% by the Department of Health and Human Services Centers for Disease Control and Prevention (see http://www.cdc.gov/ncipc/factsheets/svfacts.htm) to as much as 75\% by Mary Koss, \textit{The Underdetection of Rape: Methodological Choices Influence Incidence Estimates}, 48 JOURNAL OF SOCIAL ISSUES 61 (1992). \textit{See also} Lisa van Amburg & Suzanne Rechtin, \textit{Rape Evidence Reform in Missouri: A Remedy for the Adverse Impact of Evidentiary Rules on Rape Victims}, 22 ST. LOUIS L.J. 367 (1978); Vivian Berger, \textit{Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom}, 77 COLUM. L. REV. 1 (1977); Elizabeth M. Davis, \textit{Rape Shield Statutes: Legislative Responses to Probative Dangers}, 27 J. URBAN & CONTEMP. L. 271 (1984). \textit{See also} Lisa Furby et al., \textit{Sex Offender Recidivism: A Review}, 105 PSYCHOL. BULL. 3, 27 (1989) (stating that no more than 10\% of sex offenses are reported). The Justice Department’s survey reports that 47\% of nonstranger rapes and 57\% of stranger rapes are reported to the police. Caroline W. Harlow, \textit{U.S. Dep’t of Justice, Female Victims of Violent Crime} at 13 (1991). It is common for victims of sex crimes to be too traumatized or embarrassed to file a claim and endure a trial, especially under the existing justice system. Sen. Robert Dole, Letter to the editor: \textit{Good Idea in the Crime Bill}, WASH. POST, Nov. 29, 1993 at A18. These victims are often quite eager to testify as witnesses, however, upon learning that their attacker raped or molested another victim. \textit{Id.}
crimes. The USDOJ Bureau of Justice Statistics publishes a number of surveys and data compilations, including the National Crime Victimization Survey/Criminal Victimization Report\textsuperscript{113} and the Federal Bureau of Investigation Uniform Crime Report.\textsuperscript{114} For this paper I chose to use the data from these reports because their methodology is consistent,\textsuperscript{115} the scope of reporting contained in the data is broad,\textsuperscript{116} and the definitions of various crimes fairly precise and easily understood. Forcible rape, as defined in the Uniform Crime Reporting Program, is the carnal knowledge of a female forcibly and against her will. Assaults or attempts to commit rape by force or threat of force are also included in the number reported; however, statutory rape (without force) and other sex offenses are excluded.\textsuperscript{117}

Prior to passage of the new rules, there were 106,014 reported forcible rapes in 1993.\textsuperscript{118} This represented roughly 41.1 rapes per 100,000 of total population.\textsuperscript{119} Starting in 1994, and continuing largely unabated through 2005,\textsuperscript{120} the number of rapes reported has declined both in raw numbers as well as incidents per 100,000 population, to the point that by 2005 the number of reported rapes had fallen to 93,934 and the rapes per 100,000 inhabitants dropped to 31.7, or

\begin{footnotesize}
\begin{enumerate}
\item See NCVS, supra note 107.
\item See UCR, supra note 109.
\item See NCVS, supra note 107 and UCR, supra note 109.
\item Both the NCVS and UCR draw data from all fifty states. The UCR receives reports from 17,000 police agencies responsible for police protection for more than 90\% of the nation. The NCVS receives data from 100,000 people in 50,000 households throughout the nation, chosen scientifically to provide a representative statistical snapshot of the country as a whole.
\item See UCR, supra note 109.
\item See UCR, Table 1, Crime in the United States, http://www.fbi.gov/ucr/05cius/data/table_01.html.
\item Id.
\end{enumerate}
\end{footnotesize}

\textsuperscript{113} The number of reported rapes increased slightly in 2000, 2001, and 2002 by .86\%, .76\% and 4.81\% respectively. With the exception of 2002, when it increased by 3.84\%, the rate of reported rapes per 100,000 inhabitants decreased in the other years. From 1994, the year the new rules were passed by Congress, to 2005, the total number of rapes declined by 11.39\% and the rate per 100,000 inhabitants decreased by 22.94\%.
almost a 25% decline.\textsuperscript{121} By way of comparison, during this same period, the number of murders dropped from 24,526 and 9.5 per 100,000 inhabitants to 16,692 and 5.6 per 100,000 inhabitants (41.1% decline);\textsuperscript{122} robberies from 659,870 and 256 per 100,000 inhabitants to 417,122 and 140.7 per 100,000 inhabitants (45.1% decline);\textsuperscript{123} and aggravated assaults from 1,135,607 and 440.6 per 100,000 inhabitants to 862,947 and 291.1 per 100,000 inhabitants (33.9% decline).\textsuperscript{124}

The State of Florida did not have an evidence rule analogous to FRE 413-415 during much of the time frame, yet the incidence of rape is comparable to the national statistics. From 1993 to 2004, the number of rapes reported in Florida declined 9% and the rate per 100,000 inhabitants dropped 29%.\textsuperscript{125}

Looking strictly at the data, it might appear that there is at least some slight causal relationship between the new rules and a decline in the number of reported rapes and the marked decline in the number of rapes per 100,000 inhabitants. However, when compared to the

\textsuperscript{121} See UCR, supra note 109 for 2005. The table below shows data from the UCR for the period 1993-2005.

<table>
<thead>
<tr>
<th>Year</th>
<th>U.S. Population</th>
<th>Reported Rapes</th>
<th>% Change</th>
<th>Rapes Per 100,000 Inhabitants</th>
<th>% Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>1993</td>
<td>257,782,608</td>
<td>106,014</td>
<td></td>
<td>41.125</td>
<td></td>
</tr>
<tr>
<td>1994</td>
<td>260,327,021</td>
<td>102,216</td>
<td>-3.58%</td>
<td>39.264</td>
<td>-4.52%</td>
</tr>
<tr>
<td>1995</td>
<td>262,803,276</td>
<td>97,470</td>
<td>-4.64%</td>
<td>37.089</td>
<td>-5.54%</td>
</tr>
<tr>
<td>1996</td>
<td>265,228,572</td>
<td>96,252</td>
<td>-1.25%</td>
<td>36.290</td>
<td>-2.15%</td>
</tr>
<tr>
<td>1997</td>
<td>267,783,607</td>
<td>96,153</td>
<td>-0.10%</td>
<td>35.907</td>
<td>-1.06%</td>
</tr>
<tr>
<td>1998</td>
<td>270,248,003</td>
<td>93,144</td>
<td>-3.13%</td>
<td>34.466</td>
<td>-4.01%</td>
</tr>
<tr>
<td>1999</td>
<td>272,690,813</td>
<td>89,411</td>
<td>-4.01%</td>
<td>32.788</td>
<td>-4.87%</td>
</tr>
<tr>
<td>2000</td>
<td>281,421,906</td>
<td>90,178</td>
<td>+0.86%</td>
<td>32.044</td>
<td>-2.27%</td>
</tr>
<tr>
<td>2001</td>
<td>285,317,559</td>
<td>90,863</td>
<td>+0.76%</td>
<td>31.846</td>
<td>-0.62%</td>
</tr>
<tr>
<td>2002</td>
<td>287,973,924</td>
<td>95,235</td>
<td>+4.81%</td>
<td>33.071</td>
<td>+3.84%</td>
</tr>
<tr>
<td>2003</td>
<td>290,788,976</td>
<td>93,883</td>
<td>-1.42%</td>
<td>32.286</td>
<td>-2.37%</td>
</tr>
<tr>
<td>2004</td>
<td>293,656,842</td>
<td>94,635</td>
<td>+0.80%</td>
<td>32.226</td>
<td>-0.18%</td>
</tr>
<tr>
<td>2005</td>
<td>296,410,404</td>
<td>93,934</td>
<td>-0.74%</td>
<td>31.691</td>
<td>-1.66%</td>
</tr>
<tr>
<td>1993- 2005</td>
<td></td>
<td></td>
<td>-11.39%</td>
<td></td>
<td>-22.94%</td>
</tr>
</tbody>
</table>

\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
comparable figures for murder, robbery, and aggravated assault, the decline in reported rapes is far less and the decline since the passage of the new rules cannot be attributed with any degree of certainty to the new rules.\textsuperscript{126} Coupled with this data is the fact that arrest rates for rape have declined markedly since the passage of the new rules. In 1995 (the oldest data year available), the arrest rate for forcible rape was 51.5% of reported crimes. By 2005, this figure had declined to 41.3%\textsuperscript{127} or a 19.9% drop in the arrest rate.

The FBI does not report conviction rates in the Uniform Crime Report, and thus there is no centralized source of data; however, the USDOJ Bureau of Justice Statistics publishes the Compendium of Federal Justice Statistics annually, which includes conviction rates for all major crimes prosecuted in the Federal system.\textsuperscript{128} In 1993, the conviction rate for forcible rape at the Federal level was 80.2%, slightly less than the overall conviction rate for all violent crimes.\textsuperscript{129} By 2002 (the most recent year for which this report is available), the conviction rate had improved to 89.1%, though the conviction rate for rape remained slightly below that of other violent crimes.\textsuperscript{130}

The increased conviction rate may be due to other factors beside the new rules. As many observers have noted, during this ten-year period, there has been a marked increase in the use

\textsuperscript{126} While it may be true that the incidence of murder, robbery, and aggravated assaults are more closely related to general economic conditions in the country and rape is more about control and violence toward women, the fact is that during this time the incident rate for rapes fell only slightly more than 50% of these other crimes. Part of this relatively smaller decline in rapes may be due to a greater willingness to report the crime due to sociological factors (see NCVS, supra note 110 regarding changing attitudes about the crime of rape). Additionally, the ability of prosecutors to obtain convictions using the new rules might have contributed to increased reporting by women who would have previously been unwilling to subject themselves to the ordeal of a trial and the possibility of being subjected to an assault on their own sexual character. However, this is speculative.


and acceptance of DNA evidence generally and in rape cases specifically. The popularity of such hit television shows as CSI and its progeny, as well as the highly publicized trials of O. J. Simpson, William Kennedy Smith, Mike Tyson and others has added to the widespread notion that the use of DNA evidence is a given in such trials, and its absence is often viewed as catastrophic to the prosecution’s ability to successfully convict defendants accused of crimes involving biological material. It is also quite possible, though probably impossible to

131 Remarks of Deborah J. Daniels, Assistant Att’y Gen., Office of Justice Programs, at the American Prosecutors Research Institute’s DNA Forensics Program, DNA: Justice Speaks (Nov. 20, 2003).

132 The hit show CSI (rated #1 in the most recent Nielsen ratings of all television shows), or Crime Scene Investigators, portrays scientists and criminalists in the Las Vegas Police Department as central actors in everyday police work by making arrests, determining guilt, and obtaining convictions in court through high-tech gadgets and methods. The "CSI Effect" (sometimes referred to as the "CSI syndrome") is the phenomenon of popular television shows raising crime victims' and jury members' real-world expectations of forensic evidence, especially crime scene investigation and DNA testing. This is said to have changed the way many trials are presented today, in that prosecutors are pressured to deliver more forensic evidence in court. See Stefan Loygren, “‘CSI’ Effect” Is Mixed Blessing for Real Crime Labs, NATIONAL GEOGRAPHIC NEWS, Sept. 23, 2004; see also Kit R. Roane & Dan Morrison, “The CSI Effect,” U.S. NEWS & WORLD REPORT, April 25, 2005.

133 The success of CSI spawned CSI: Miami and CSI: New York. Both shows portray criminalists as key players in the front line of police work, and their labs as the primary reason the police and prosecutors are able to identify, arrest, and convict the guilty and exonerate the innocent.

134 Simpson was tried and acquitted for the murder or her ex-wife and her friend, at least in part because of concerns that the DNA evidence presented had been tampered with or compromised by sloppy forensic work by the Los Angeles Police Department.

135 The televised and much publicized trial of William Kennedy Smith is an example where uncharged sexual misconduct, which appeared to be highly probative, was deemed inadmissible. Smith, nephew of former President John F. Kennedy, was arrested and charged with forcible rape in 1991. Three other women came forward and claimed Smith had also sexually assaulted them in the 1980’s. The trial judge excluded this evidence as improper character evidence, unfairly prejudicial and outside Florida’s version of rule 404(b) because insufficient proof of similarity existed between the alleged offense and the prior accusations. The judge did not allow the evidence to be considered by the jury because of Florida’s prohibition on the use of character evidence to establish propensity to commit a crime. Smith was acquitted. See Margaret C. Livnah, Branding the Sexual Predator: Constitutional Ramifications of Federal Rules of Evidence 413 Through 415, 44 CLEV. ST. L. REV. 169, 173 (1996). Florida continues to resist calls for the adoption of evidence rules directly analogous to Federal Rules of Evidence 413 through 415. See Peter Mirfield, Similar Fact Evidence of Child Sexual Abuse in English, United States, and Florida Law: A Comparative Study, 6 J. TRANSNAT’L L. & POL’Y 7, 34 (1996).

136 Mike Tyson was tried and convicted of rape in Indiana, largely on the basis of testimony from women alleging that he had previously sexually assaulted them in a similar fashion to the charges he faced in this trial. The outcome in the Tyson trial stood in stark contrast to the acquittal of William Kennedy Smith, in that both men were famous, both men claimed the sex was consensual, and both men faced prior victim testimony evidence.

137 DNA evidence has also been important in exonerating those convicted of rape on the basis of victim identification or other “traditional” forms of evidence. See The Innocence Project, http://www.innocenceproject.org/press/ (last visited Nov. 29, 2006). To date, 182 people nationwide have been exonerated with DNA testing. Ninety percent of the 182 exonerations involved sexual assault. While the criminal justice system began using DNA testing two decades ago to help identify the guilty and exonerate the innocent, it has become more prevalent and more sophisticated in recent years. Id.

138 See Remarks of Deborah J. Daniels, supra note 131.
prove, that prosecutorial discretion as to which cases to charge plays a significant role in the statistics. By trying only those cases where conviction is likely, a prosecutor increases the conviction rate while reducing the percentage of reported rapes cleared.

Conclusions: On the One Hand, But on the Other Hand

It is probably true that we can only know what we observe with our own eyes or experience with our other senses, and even then we are subject to misperception or distortion, but it appears that after ten plus years of experience with the Federal Rules of Evidence 413, 414, and 415 we truly do not know if they achieved any of their proponents’ objectives. While it is objectively true that the number and rate of reported rapes has declined since the passage of the new rules, they have not declined as much as those for other violent crimes against persons such as murder, robbery, and aggravated assault. Certainly, the reduction in the number of rapes is welcome news, and perhaps the decline is somehow linked to the use of the new rules by prosecutors, but one would presume that the combination of the new rules and increased acceptance and use of DNA in rape trials would result in a greater decline. Though the conviction rate for rape has improved significantly the improvement has been roughly comparable to that achieved in the other violent crimes against persons and provides no statistical basis to attribute the improvement to the new rules.

Because rape is a grossly underreported crime it is virtually impossible to accurately gauge the true number of rapes perpetrated each year. Perhaps, the total number of rapes has

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139 See rape statistics, supra note 121.
140 See crime murder, robbery and aggravated assault statistics, supra notes 122, 123 and 124.
141 See discussion of use and acceptance of DNA in rape prosecutions, supra note 131.
142 See rape conviction statistics, supra note 130.
143 Id.
144 See discussion regarding underreporting of rape and other sexual assaults, supra note 112.
dropped even as more women are willing to come forward and press charges, and what we have seen is actually a more significant decline than the raw numbers would indicate. However, absent a data collection method far more extensive and precise than what is available, there is truly no way to support such a supposition.

Perhaps the fact that some courts stretched the limits of FRE 404(b) to admit evidence of prior sexual misconduct, or that some states had “lustful disposition” exceptions that allowed propensity evidence to be used in sexual offense trials prior to the passage of the new rules helps explain why there was not a greater decline. Because the legal landscape, at least at the state level where the vast majority of such trials take place, already contained ways to introduce propensity evidence, the new rules were merely “surplussage” and this accounts for the relative intractability of the rape numbers. Thus the effect of the new rules was hollow because, in effect, they had already been in use prior to their passage.

More troubling than the failure to achieve a greater reduction in the number of rapes through conviction and incarceration of more rapists is the fact that both the number of arrests and the percentage of rapes “cleared” has dropped markedly since 1994, despite the improvements in forensic science and greater funding for policing. While the new rules were never promoted as a means to increase arrest rates, this statistic is alarming for it suggests that the use of prior sexual misconduct evidence will have an impact, if in fact a beneficial impact exists, in fewer prosecutions of those accused of sexual violence against women and children.

145 See discussion of various courts’ willingness to stretch FRE 404(b)’s exceptions, supra note 38.
146 See discussion of various state evidence codes that have codified a “lustful disposition exception” allowing the use of prior sexual misconduct evidence, supra note 50.
147 See generally discussion of rape statistics and table showing trends in the number of rapes and the rate per 100,000 inhabitants, supra notes 120 and 121.
148 See rape arrest and conviction statistics, supra note 127.
More troubling still is the attitudes displayed by society in general, and young men in particular, regarding rape. The evident willingness of large numbers of college age males to commit such a heinous crime if they were assured that they would not be caught or punished\textsuperscript{149} is truly disheartening, as is the attitude toward rape displayed by sixth to ninth graders.\textsuperscript{150}

Based strictly on the data available from the UCR and NVCS, one cannot measure any impact on the crime of rape either directly or indirectly from the Federal Rules of Evidence 413, 414, and 415, other than through conjecture. That said, the concerns raised by opponents of the new rules also appear to have been overblown and hyperbolic. To date, no case has reached the United States Supreme Court involving any of the three new rules, and those that have been addressed by the various circuit courts have resulted in a variety of decisions. It appears that despite the dire warnings issued by opponents of the new rules, the judicial system has adapted to Federal Rules of Evidence 413, 414, and 415 by performing its traditional role as neutral arbiter, upholding basic notions of fairness and due process in our criminal justice system.\textsuperscript{151}

In the early days of our nation’s history, when it was unclear how power within the new government would be exercised by, and between, the three co-equal branches, Chief Justice Marshall established the rather controversial notion that the Supreme Court would be the final arbiter of Constitutional disputes. Marshall’s holding in Marbury v. Madison\textsuperscript{152} that “[i]t is emphatically the province and duty of the judicial department to say what the law is” has withstood the test of time despite many who find fault with the predicate presumption.

\textsuperscript{149} See discussion of male attitudes regarding their own willingness to commit a rape, supra note 97.
\textsuperscript{150} See survey results of sixth to ninth graders regarding rape, supra note 97.
\textsuperscript{151} See discussion of the purpose of Federal Rules of Evidence and by inference, the courts’ responsibilities, supra note 25.
\textsuperscript{152} Marbury v. Madison, 5 U.S. 137, 177 (1803) (While scholars have debated whether the reasoning employed by Chief Justice Marshall was sound, the claimed role of the United States Supreme Court to serve as the final and supreme arbiter of issues of constitutionality has endured more than two hundred years.)
Similarly, the courts’ role in conducting a rigorous prejudicial versus probative balancing test before allowing prior sexual misconduct evidence to be used, while contrary to the literal language of the rules themselves, may continue to go unchallenged by the political branches of government. For this reason, the dire consequences put forth by proponents may continue to be more of a lingering subjective fear than an objective reality. In the vernacular of my high school and college avocation, basketball, the effect of the new rules appears to have been “no harm, no foul.”

Even though there appears to be no measurable impact, positive or negative, from the new rules, the highly political nature of the way the rules were passed, the willingness of Congress to ignore the warnings from the Judicial Conference and others, and the potential harm to our legal traditions posed by the new rules, it is a cautionary tale for those in the law to understand that other bedrock evidence precepts are at the mercy of the next popular hysteria and the willingness of the elected branches of government to respond first, and consider second.


64. Lynne Henderson, Without Narrative: Child Sexual Abuse, 4 VA. J. SOC. POL’Y & L. 479 (1997)


APPENDIX B – CLINICAL STUDIES