THREE MAELSTROMS AND ONE TWEAK: FEDERAL RULES OF EVIDENCE 413 TO 415 AND THEIR ARIZONA COUNTERPART

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I. INTRODUCTION

"[I]t is far worse to convict an innocent man than to let a guilty man go free."[1] Grounded in this tenet of the American judicial system is the idea an accused should be tried for the *present* charge, not for matters in the past and not for general character. This "social commitment to the thesis that each person remains mentally free and autonomous at every point in his life" prohibits the use of specific acts evidence to establish a defendant's bad character.[2] Indeed, courts have long disfavored using such evidence.[3] The rationale is that, otherwise, jurors may become inflamed by evidence of a party's prior bad acts and cast a verdict based on character.[4] Evidence rules seek to prevent such an outcome; the jury

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1. *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

2. 1A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 54.1 (1983).

3. *See id.* § 58.2. *See also* Coleman v. People, 55 N.Y. 81, 90 (1873) ("A person cannot be convicted of one offence upon proof that he committed another.... It would lead to convictions...[by] uniting evidence of several offences to produce conviction for a single one."); GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 5.12 (3d ed. 1996) (stating the general principle of "disallow[ing] character evidence when offered for circumstantial use against the accused"); David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305, 312 (1995) ("[T]he law has chosen to err, if at all, on the side of excluding character [evidence].").

In criminal cases, there are exceptions to the general rule of inadmissibility. *See* FED. R. EVID. 404(a)–(b), 405(a). The accused, by way of reputation or opinion testimony, may offer evidence of a pertinent character trait of him or herself, or of the victim, and the prosecution may offer similar evidence to rebut. *See* FED. R. EVID. 404(a)(1)–(2), 405(a). If the accused is before the court on a charge of homicide and offers evidence that the victim was the first aggressor, the prosecution may offer reputation or opinion testimony of the victim's peacefulness. *See* FED. R. EVID. 404(a)(2), 405(a). In civil and criminal cases, evidence of other crimes, wrongs, or acts may be admissible to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *See* FED. R. EVID. 404(b).

4. *See* EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 1:03 (1984 & Supp. 1998) (noting that because uncharged misconduct evidence gives rise to an

should convict only if it believes that the defendant is responsible for the matter at issue.[5]

Another notion that underlies the law of evidence is that evidence rules should apply consistently to diverse cases and litigants.[6] This best enhances the truth determination.[7] To further this goal, the Federal Rules were written to apply uniform treatment to all types of cases.[8]

Throwing these two philosophies to the wind, Congress turned two centuries of evidentiary common law upside down when it enacted Federal Rules of Evidence ("FRE") 413, 414, and 415 as part of the Violent Crime Control and Law Enforcement Act of 1994.[9] The new rules were designed to bolster prosecution of sexual assault and child molestation offenders, as well as to assist plaintiffs in civil cases predicated on sexual assault or child molestation.[10] In such cases, the new rules allow evidence of the defendant's other sexual assaults and child molestations to be admitted.[11] According to FRE 413 to 415, this evidence should be "considered for its bearing on any matter to which it is relevant."[12]

Criticism against these new rules came swiftly and severely.[13] Opponents cited the danger of unfair prejudice, fearing that jurors would convict a defendant

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inference that the defendant is a bad person, the jury is tempted to return a guilty verdict even if not convinced the defendant committed the crime charged).

5. *See* Michelson v. United States, 335 U.S. 469, 476 (1948) (rationalizing that character evidence may weigh too heavily with the jury and prompt them to prejudge one with a bad record of prior acts, effectively denying the party a fair opportunity to defend him or herself). *See also* 1A WIGMORE, *supra* note 2, § 54.1.

6. *See* Leonard, *supra* note 3, at 341. Professor Leonard points out that there are exceptions to the basic structure of evidence law. Two examples are FED. R. EVID. 412, discussed *infra* text accompanying notes 63–69, and FED. R. EVID. 404(a)(1), which permits the defendant in a criminal case to offer evidence of a pertinent character trait. If the defendant chooses not to admit character trait evidence, the prosecution may not do so. *See* FED. R. EVID. 404(a)(1).

7. *See* Leonard, *supra* note 3, at 341.

8. *See* FED. R. EVID. 102 ("These rules shall be construed to secure fairness in administration....").

9. Pub. L. No. 103-322, 108 Stat. 1796 (1994). The new evidence rules represent Title XXXII of the Act. *Id.* § 320935(a), 108 stat. 2136–37.

10. 140 CONG. REC. E584-02 (daily ed. Mar. 24, 1994) (statement of Rep. Kyl).

11. FRE 413 creates an exception to FRE 404(b) in sexual assault cases. FRE 414 parallels FRE 413 in its content and structure, providing an exception to FRE 404(b) in child molestation cases. FRE 415 makes the rules governing admissibility of other acts evidence in sexual assault and child molestation cases applicable in civil suits. *See* FED. R. EVID. 404(b), 413 to 415.

12. *See* FED. R. EVID. 413 to 415.

13. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE JUDICIAL CONFERENCE ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (1995), *reprinted in* 159 F.R.D. 51, 53 (1995) [hereinafter REPORT] (opposing adoption of FRE 413 in part because of the constitutional problems it raises); James Joseph Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95 *passim* (1994); Leonard, *supra* note 3, at 338–41; 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

for past behavior or for being a bad person, and would disregard evidence offered by the defendant.[14] The danger of unfair prejudice is magnified by the possibility that FRE 413 to 415 bypass FRE 403 and 404, removing the judge's discretion to exclude prejudicial propensity evidence.[15] Moreover, there are due process concerns: admitting sexually charged evidence may unconstitutionally interfere with the reasonable doubt standard that is required of every element necessary to prove the crime charged.[16]

To promote uniformity, most states' evidentiary rules mirror the Federal Rules.[17] Due to the criticism against FRE 413 to 415, however, states have been reluctant to promulgate FRE 413 to 415. In fact, as of this writing, only three states have hopped on the federal bandwagon to adopt rules similar to FRE 413 to 415.[18]

Arizona's new evidence rule, 404(c), which governs the admissibility of other crimes, wrongs, or acts relevant to show aberrant sexual propensity in sexual offense cases,[19] differs significantly from FRE 413 to 415 in terms of notice requirements, authorization of rebuttal evidence, and allowance of jury instructions.[20] These marked differences diminish Rule 404(c)'s threat of unfair prejudice.

This Note analyzes the differences between the Federal and Arizona Rules, commenting on the different ramifications of each. Part II of this Note explains FRE 413 to 415 and discusses their problems. Part III explores how FRE 413 to 415 have functioned in courtroom practice in such cases as *United States v. Meacham*,[21] *United States v. Guardia*,[22] and *United States v. Enjady*.[23] Part IV delineates Arizona Rule 404(c) and comments on the changes the rule makes to Arizona law. Finally, Part V examines the ways Arizona Rule 404(c) improves upon the Federal Rules. Throughout, this Note posits that a main reason the

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RTS. J. 689 (1997).

14. *See* discussion *infra* Part II.B.1.

15. *See* discussion *infra* Part II.B.4.

16. *See* discussion *infra* Part II.B.2.

17. As of this writing, forty states states and the Commonwealth of Puerto Rico have adopted evidentiary rules similar to the Federal Rules. *See* 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5009 & n.3 (Supp. 1999). The states that have largely adopted the Federal Rules include Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* § 5009 n.2.

18. The three states that have adopted rules similar to FRE 413 to 415 are California, Missouri, and Indiana. *See* CAL. EVID. CODE § 1108 (West 1995); IND. CODE ANN. § 35-37-4-15 (Michie 1998); MO. ANN. STAT. § 566.025 (West 1999).

19 *See* ARIZ. R. EVID. 404(c).

20. *See* discussion *infra* Parts IV.A, V.

21. 115 F.3d 1488 (10th Cir. 1997).

22. 135 F.3d 1326 (10th Cir. 1998).

23. 134 F.3d 1427 (10th Cir. 1998).

Arizona approach is superior to the federal approach is because Arizona Rule 404(c) was crafted by a judiciary mindful of Arizona common law and centuries of Anglo-American evidence law, whereas FRE 413 to 415 were borne from a politically charged Congress.

II. FEDERAL RULES OF EVIDENCE 413, 414, AND 415

July 9, 1995, marked a decisive moment in the history of federal evidentiary law. On that date, despite strong opposition by the United States Judicial Conference,[24] FRE 413 to 415 became effective, opening the door to character evidence that had long been locked out of the courtroom.[25]

In enacting FRE 413 to 415, Congress bypassed the ordinary rulemaking process.[26] Usually, amendments to evidence rules are drafted under the auspices of the Supreme Court and the Rules Enabling Act, by members of the Advisory Committee who give strong deference to legal traditions.[27] Congress rarely initiates amendments itself, although it possesses the ultimate power over the enactment of rules.[28]

Congress exercised its authority in this instance, directly enacting amendments to the Federal Rules through the Violent Crime Control and Law Enforcement Act of 1994.[29] The amendments were products of political pressure from women's rights groups, as well as public scrutiny, sharpened to sexual assault issues by an increase in reported rapes and the William Kennedy Smith and Mike Tyson rape prosecutions.[30] In the end, a "get tough on crime" attitude boded more favorably for re-election purposes than did the idea of maintaining a fair, consistent body of evidence law.[31] One Representative described the legislative rashness:

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24. *See* John Gibeaut, *An Evidentiary Dragnet*, A.B.A. J., June 1998, at 44.

25. Generally, the new rules allow the prosecution or plaintiff to introduce evidence of the defendant's commission of prior sexual assaults or prior child molestations in cases where the defendant is charged with one of those respective crimes or of conduct constituting one of those offenses. *See* FED. R. EVID. 413 to 415.

26. For a discussion of the history behind the passage of FRE 413 to 415, see Duane, *supra* note 13, at 95–97. The rules resulted from a last minute amendment to the Violent Crime Control and Law Enforcement Act of 1994. *See id.* at 96.

27. 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5006 (1977); 28 U.S.C. § 2072 (1994). Although the Federal Rules are usually molded by the judiciary to mirror evidentiary common law, political pressures have spawned the adoption of other legislative amendments to the Federal Rules, particularly FRE 704, 410, and 412. For a discussion regarding the impact political considerations had on those amendments, see Leonard, *supra* note 3, at 317–33.

28. *See* 18 U.S.C. § 2074 (1994). *See, e.g.*, Marcie J. Freeman, Comment, *Spanning the Spectrum: Proposed Amendments to Federal Rule of Evidence 407*, 28 TEX. TECH. L. REV. 1175, 1206–07 (1997).

29. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935(a), 108 Stat. 1796, 2136 (1994).

30. *See* Michael S. Ellis, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961, 974 (1998).

31. *See* Denis F. McLaughlin, *Rule Changes Pending in Congress: The Shape of Things to Come?*, 143 N.J. L.J. 683 (1996).

> The existing rule making process involves a minimum of six levels of scrutiny or stages of formal review. This has gone through none of those levels.
>
> The rule changes in this bill are based on a Senate amendment that was offered on the floor of the Senate and had maybe 20 minutes of debate.... There has been no debate on the potentially enormous impact it would have on civil or criminal cases.... [T]his is ridiculous.[32]

The result of the legislative bedlam was FRE 413 to 415. These new rules are exceptions to FRE 404(b), which prohibits the admission of evidence of other crimes, wrongs, or acts to prove the character of a person.[33] The manner in which FRE 413 to 415 will be implemented remains unclear. Few federal cases have engaged the new rules because most sex offense cases are not heard in federal courts.[34] Moreover, the rules were published without Advisory Committee notes to assist interpretation.[35] As a result, the plain language of the rules leaves much open for speculation.[36]

A. Federal Rules 413 to 415: The Plain Language

1. Criminal Cases of Sexual Assault

FRE 413 applies to criminal prosecutions for "sexual assault."[37] The rule states, "In a criminal case in which the defendant is accused of an offense of

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32. 140 CONG. REC. H8968-01, at H8990 (daily ed. Aug. 21, 1994) (statement of Rep. Hughes).

33. *See* FED. R. EVID. 404(b).

34. Most sexual offenses are not federal offenses, and thus are not subject to the Federal Rules of Evidence. *See* Duane, *supra* note 13, at 114. Only if a sexual offense occurs on federal property (e.g., federal parks, military bases), Indian land, or United States territorial waters does the crime amount to a federal offense. *See* 18 U.S.C. §§ 1153, 2242 (1994); 18 U.S.C.A. § 2241 (West Supp. 1999). See Duane, *supra* note 13, at 113–15, for a discussion of ways in which FRE 413 to 415 disparately impact Native Americans (who make up a disproportionate number of defendants in federal court sexual abuse cases) compared to the general population.

35. *See* FED. R. EVID. 413 to 415.

36. *See* REPORT, *supra* note 13, at 53 (noting that prior bad acts are admissible under FRE 413 to 415 even though not the subject of a conviction, and deeming it "arguable" that FRE 413 to 415 evidence must be admitted regardless of the hearsay rules or FRE 403).

37. "Sexual assault" is defined as:

> (1) any conduct proscribed by chapter 109A of title 18, United States Code;
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> (2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
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> (3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;
>
> (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
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> (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).

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."[38]

2. Criminal Cases of Child Molestation

FRE 414 substitutes "child molestation"[39] for "sexual assault," but its key provision, 414(a), is otherwise identical to FRE 413. FRE 414 states, "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."[40]

3. Civil Cases Involving Sexual Offenses

FRE 415 is the civil analog to FRE 413 and 414. FRE 415 states:

> 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....[41]

FED. R. EVID. 413(d). 18 U.S.C. ch. 109A, referred to in FRE 413(d)(1), sets forth the crimes of "aggravated sexual abuse," "sexual abuse," "sexual abuse of a minor or ward," "abusive sexual contact," and "sexual abuse resulting in death." 18 U.S.C. §§ 2241 to 2244.

38. FED. R. EVID. 413(a).

39. A child is a person under the age of fourteen. *See* FED. R. EVID. 414(d). "Child molestation" is defined as:

> (1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;
> (2) any conduct proscribed by chapter 110 of title 18, United States Code;
> (3) contact between any part of the defendant's body or an object and the genitals or anus of a child;
> (4) contact between the genitals or anus of the defendant and any part of the body of a child;
> (5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or
> (6) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5).

FED. R. EVID. 414(d). 18 U.S.C. ch. 110, referred to in FRE 414(d)(2), concerns "sexual exploitation and other abuse of children." 18 U.S.C.A. §§ 2251 to 2256 (West 1999).

40. FED. R. EVID. 414(a).

41. FED. R. EVID. 415(a).

4. Disclosure Requirements

The new rules set forth time frames for the disclosure of other acts evidence.[42] In criminal and civil cases, disclosure must occur at least fifteen days prior to trial, except for good cause.[43] Disclosure must include any "statements of witnesses or a summary of the substance of any testimony that is expected to be offered."[44]

B. Shortcomings of Federal Rules 413 to 415

Critics launched fierce opposition to the new Federal Rules shortly after their proposal.[45] The chief argument against adopting FRE 413 to 415 was that they threatened to unfairly prejudice defendants.[46] For instance, evidence of past crimes might confuse jurors about the present issue or spark juror ill-will, increasing the odds of conviction, even absent sufficient evidence of the crime charged.[47] Moreover, critics voiced due process concerns that admission of FRE 413 to 415 evidence unconstitutionally interferes with the reasonable doubt standard,[48] which is required of every element necessary to prove a crime.[49] Also, it was unclear how FRE 413 to 415 interacted with other evidence rules.[50] Case law has not fully defined the contours of the new rules; some circuits having yet to hear a case involving them.[51] Thus, potential problems still loom forebodingly.

1. High Risk of Unfair Prejudice

FRE 413 to 415 allow a jury to consider evidence of prior offenses to determine whether such evidence makes it substantially more likely that the defendant committed the offense for which he or she is presently charged.[52] Studies show jurors give other acts evidence substantially more weight than is

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42. *See* FED. R. EVID. 413(b), 414(b), 415(b).
43. *See* FED. R. EVID. 413(b), 414(b), 415(b).
44. FED. R. EVID. 413(b), 414(b), 415(b).
45. *See* sources cited *supra* note 13.
46. *See* Duane, *supra* note 13, at 107–11; McCandless, *supra* note 13, at 696–97.
47. *See* discussion *infra* Part II.B.4.
48. *See, e.g.*, McCandless, *supra* note 13, at 710–13.
49. *See, e.g.*, Greer v. United States, 245 U.S. 559, 560 (1918) (stating that a court must consider the defendant innocent until the prosecution proves the accused's guilt beyond a reasonable doubt).
50. *See* discussion *infra* Part II.B.4.
51. As of this writing, the only published opinions available on Westlaw discussing FRE 413 to 415 are from the Second, Third, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits.
52. *See* FED. R. EVID. 413(a), 414(a), 415(a).

warranted.[53] Additionally, jurors may confuse the issue of the prior offense with the present charge, casting a guilty verdict absent sufficient evidence.[54]

The problem in these cases is that the jury is initially skeptical of the defendant simply because he or she is charged with a loathsome crime.[55] The other acts evidence compounds jury ill-will.[56] There is a genuine concern, therefore, that a jury will convict a defendant, even when his or her guilt has not been established beyond a reasonable doubt, because the jury views the defendant as a bad person, or because the jury wants to punish the defendant for previous misconduct.[57] Even if there is a strong chance that the defendant is *innocent* of the present charge, the jury may have few moral reservations about convicting.

Perhaps the best illustration of how sexually charged evidence opens up a Pandora's box of unfair prejudice in the courtroom comes from the seminal University of Chicago Jury Project, which measured jurors' reactions to various types of evidence.[58] When researchers introduced evidence laced with sexual misconduct, jurors became outraged.[59] In all cases, defendants were charged with some behavior that did not quite meet the legal definition of a crime.[60] The juries, however, convicted the defendants anyway.[61] The researchers concluded, "The jury is so outraged by the defendant's conduct that it overrides distinctions of the law and finds him guilty as charged."[62]

The fears of undue prejudice seem especially apposite in light of FRE 412, which generally prohibits the introduction of evidence of the victim's sexual behavior.[63] Now, by permitting plaintiffs and prosecutors to admit evidence of a defendant's prior sexual offenses,[64] while prohibiting defendants from admitting evidence of the *plaintiff's* or *victim's* past sexual behavior,[65] the rules tilt heavily

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53. *See, e.g.*, RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 213 (1977); Glen Weissenberger, *Making Sense of Extrinsic Act Evidence: Federal Rule of Evidence 404(b)*, 70 IOWA L. REV. 579, 602–04 (1985); Richard O. Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1027–30 (1977).

54. *See, e.g.*, LEMPERT & SALTZBURG, *supra* note 53, at 213.

55. *See* Lempert, *supra* note 53, at 1051.

56. *See id.*

57. *See, e.g.*, LEMPERT & SALTZBURG, *supra* note 53, at 212.

58. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 396 (1966).

59. *See id.*

60. *See id.*

61. *See id.*

62. *Id.*

63. *See* FED. R. EVID. 412(a).

64. *See* FED. R. EVID. 413 to 415.

65. *See* FED. R. EVID. 412(a). FRE 412(b) denotes exceptions to this general rule. In civil cases there is an additional exception: The defendant may introduce evidence to prove the sexual behavior or sexual predisposition of the victim if the evidence's probative value substantially outweighs the danger of harm to the victim, or the danger of unfair prejudice. *See* FED. R. EVID. 412(b)(2). Typically, defendants have a hard time meeting this burden, and courts usually bar such evidence. *See, e.g.*, U.S. v. Bear Ribs, 722 F.2d 420 (8th Cir. 1983) (holding that evidence that defendant routinely exposed herself in public was properly excluded).

against defendants. In effect, plaintiffs and prosecutors can "dirty up" defendants, but defendants cannot do the same to plaintiffs.

FRE 412 stems from a social policy of protecting people against invasions of privacy, potential embarrassment, and sexual stereotyping.[66] The importance of these policies is obvious. But once the law puts protections in place for plaintiffs and victims, it makes sense to put equal protections in place for defendants—not to subject them to different rules.[67] If anything, defendants are in greater need of protection because they face stiff sentences (or crippling verdicts in civil cases) if adjudged guilty.[68] No such risks confront plaintiffs and victims who prosecute. Moreover, alleged victims always have a choice whether to pursue court action, whereas innocent defendants have no control over being haled into court. Certainly, society wants to encourage victims to come forward when they have been sexually molested. But FRE 412 adequately fosters that course of action.[69] FRE 413 to 415, on the other hand, give plaintiffs a vehicle to hale others into court, people who may be innocent, and announce their sexual missteps in front of judges and peers.[70]

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66. *See* FED. R. EVID. 412 advisory committee's note.

67. FED. R. EVID. 413 to 415 allow evidence of past sexual conduct to be introduced against defendants in criminal and civil sex offense cases.

68. Under federal law, offenses of sexual abuse carry a maximum sentence of twenty years of imprisonment. *See* 18 U.S.C. § 2242 (1994). Sexual abuse of a minor between the ages of twelve and sixteen carries a maximum sentence of fifteen years of imprisonment. *See* 18 U.S.C.A. § 2243(a) (West Supp. 1999). Aggravated sexual abuse carries a maximum sentence of life imprisonment. *See* 18 U.S.C.A. § 2241 (West Supp. 1999). A repeat offense of aggravated sexual abuse committed against a minor under the age of twelve carries a mandatory life sentence. *See id.*

For examples of verdicts prescribed in civil cases predicated on sexual assault or child molestation, see generally Mathie v. Fries, 121 F.3d 808 (2nd Cir. 1997) (upholding compensatory damages of $250,000 and reducing punitive damages from $500,000 to $200,000 in case involving abuse of pretrial detainee by a county correctional facility security officer); Weeks v. Baker & MacKenzie, No. 943043, 1994 WL 774633 (Cal. App. Dep't Super. Ct. Nov. 28, 1994) (reducing $6,900,000 punitive damage verdict to $3,500,000 in case involving sexual harassment and touching); Miller v. State of New York, 110 A.D.2d 627 (N.Y. App. Div. 1985) (awarding $400,000 in compensatory damages in case involving forcible rape at a state university dormitory); *Phillip v. Goulbourne, N.Y. Sup. Ct. 1995*, N.Y. L.J., Aug. 4, 1995, at 27 (awarding compensatory damages of $500,000 and punitive damages of $500,000 to each victim in case involving sexual abuse, rape, and sodomy of two young children).

69. *See* FED. R. EVID. 412 advisory committee's note.

70. *See* FED. R. EVID. 413 to 415. Victims of unjustified litigation may bring a malicious prosecution action against their accusers, but courts disfavor that tort. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 119, at 871 (5th ed. 1984) ("[T]he accuser must be given a large degree of freedom to make mistakes and misjudgments without being subjected to liability.").

2. Evidence Admitted Under Federal Rules 413 and 414 May Unconstitutionally Interfere with the Reasonable Doubt Standard

The danger of unfair prejudice may occasion constitutional ramifications. The two new rules affecting evidence in criminal cases, FRE 413 and 414, betray a bedrock principle of the American criminal justice system—that courts should only convict a defendant if the evidence presented establishes his or her guilt beyond a reasonable doubt.[71] Proof of a criminal charge beyond a reasonable doubt is constitutionally required,[72] and procedural devices cannot alter the state's burden of proof.[73]

Normally, evidence will not interfere with the reasonable doubt standard because "'factfinder rationality and the reasonable doubt standard...safeguard against erroneous convictions.'"[74] In other words, jurors self-regulate the weight they give to evidence and can capably apply the reasonable doubt standard regardless of the nature of evidence.[75] However, a category of "exceptional evidence" exists that jeopardizes the application of the constitutional standard.[76] By definition, "exceptional evidence" is evidence that increases the likelihood of conviction of an innocent person.[77]

Due to its inflammatory nature, extrinsic acts evidence of the sexual variety fits into this category of "exceptional evidence."[78] As discussed in the preceding section,[79] extrinsic acts evidence poses problems because "the jury may punish the defendant for the prior act rather than the charged offense."[80] Or "the jury may infer from the defendant's assumed guilt of the prior offense that he committed the charged offense."[81] Or, in the jurors' minds, the "two incomplete or

71. *See, e.g.*, Greer v. United States, 245 U.S. 559, 560 (1918) (stating that a court must consider the defendant innocent until the prosecution proves the accused's guilt beyond a reasonable doubt).

72. *See In re* Winship, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

73. *See* Mullaney v. Wilbur, 421 U.S. 684, 701–02 (1975). Critically, presumptions of intent are unconstitutional if they interfere with the reasonable doubt standard. *See, e.g.*, Francis v. Franklin, 471 U.S. 307 (1985) (rebuttable presumption of intent is unconstitutional); Sandstrom v. Montana, 442 U.S. 510 (1979) (mandatory presumption of intent is unconstitutional).

74. McCandless, *supra* note 13, at 712 (quoting D. Craig Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 WASH. L. REV. 289, 314 (1989)).

75. *See id.*

76. *Id.*

77. *Id.*

78. *See* United States v. Beechum, 582 F.2d 898, 920 (5th Cir. 1978) (en banc) (Goldberg, J., dissenting) ("[E]xtrinsic acts evidence is fraught with dangers of prejudice—extraordinary dangers not presented by other types of evidence." (footnote omitted)).

79. *See supra* Part II.B.1.

80. *Beechum*, 582 F.2d at 920 n.2.

81. *Id.*

unproved offenses" may "somehow cumulate to justify some punishment."[82] These contingencies greatly increase the risk of conviction of an innocent person.[83]

3. No Reason to Single Out Sexual Misconduct Cases

Precisely because of the danger of unfair prejudice, the Federal Rules of Evidence generally exclude evidence of past offenses for purposes of showing "action in conformity therewith."[84] Congress singled out sexual assault and child molestation cases because it perceived problems in obtaining convictions.[85] But no scholarly studies back up that supposition.[86] Actually, 84 percent of all sex offense cases heard in federal court result in convictions.[87] In comparison, federally prosecuted homicide cases have a 75.8 percent conviction rate, larceny and theft cases have a 78.2 percent conviction rate, and assault cases have a 64.7 percent conviction rate.[88]

Another reason cited in support of FRE 413 to 415 is that sexual offenses have a high rate of recidivism, which makes evidence of prior sexual misconduct especially relevant to proving the matter charged.[89] Although there is general agreement regarding a high rate of recidivism among child molesters,[90] sexual offenders as a group are not more likely than other criminals to be re-arrested.[91] Of

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82. *Id.*

83. *See, e.g.*, McCandless, *supra* note 13, at 714.

84. FED. R. EVID. 404(b) ("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.").

85. *See, e.g.*, 140 CONG. REC. H5439-01, at H5440 (daily ed. June 29, 1994) (statement of Rep. McCollum) ("[T]here is a problem with the rules of evidence with regard to the ability to produce the kind of background necessary to get rape convictions...."); 140 CONG. REC. H8968-01, at H8991 (daily ed. Apr. 19, 1994) (statement of Rep. Molinari) ("[Rules 413 to 415 are] critical to the protection of the public from rapists and child molesters...."); 140 CONG. REC. H2415-04, at H2433 (daily ed. Apr. 19, 1994) (statement of Rep. Molinari) ("[Under FRE 404(b)] serial rapists and child molesters go free.").

86. *See* Duane, *supra* note 13, at 100–01 ("[T]he proponents of these new rules did not offer a shred of evidence that even *one* guilty man has gone free in a federal prosecution because of evidence excluded under Rule 404(b).").

87. *See id.* at 100 (citing U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1993, at 206 tbl.333).

88. *See id.*

89. *See, e.g.*, 140 Cong. Rec. H2415-04, at H2433 (daily ed. April 19, 1994) (Statement of Rep. Molinari).

90. *See, e.g.*, GORDON C. NAGAYAMA HALL, THEORY-BASED ASSESSMENT, TREATMENT, AND PREVENTION OF SEXUAL AGGRESSION 88 (1996) (reporting that sixty percent of child molesters with two or more arrests are convicted of another sexual crime against a child within twenty years of their first conviction).

91. *See, e.g.*, State v. Treadaway, 116 Ariz. 163, 167, 568 P.2d 1061, 1065 (1977) (stating that "sexual offenses as a group have a low rate of recidivism although a few sex offenses have a somewhat higher rate of recidivism than that of sex offenses in general"); Abril R. Bedarf, *Examining Sex Offender Community Notification Laws*, 83 CALIF. L. REV. 885, 896 (noting that the 7.7 percent recidivism rate for rape is substantially lower than other types of crimes (citing Allen J. Beck & Bernard E. Shipley, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1983 6 & tbl.10)); A. Nicholas Groth et al.,

course, sex offense victims may never report the occurrences, but that is true of all crimes.[92] The question remains: why single out sexual assault and child molestation offenses?

Proponents favor FRE 413 to 415 for another reason: they think the rules will encourage victims to press charges.[93] But that is logically unpersuasive. Victims of sex crimes who fail to institute and participate in proceedings against their offenders do so because they fear invasion of privacy, embarrassment, and sexual stereotyping.[94] Certainly, FRE 412 encourages victims of sexual misconduct to testify by assuring them that they will not be stigmatized for past sexual behavior or sexual predisposition.[95] But FRE 413 to 415 do nothing to ameliorate the trepidation associated with prosecuting sex crimes. While FRE 412 safeguards victims from disclosing intimate sexual details,[96] FRE 413 to 415 do not.[97] Whereas FRE 412 shields against the infusion of sexual innuendo into the fact-finding process,[98] FRE 413 to 415 do not.[99] In short, FRE 413 to 415 only address the admissibility of the defendant's past acts.[100] It does not follow that victims of sexual misconduct will report and prosecute more crimes simply because a prosecutor can raise the defendant's past offenses at trial.[101]

4. Federal Rules 413 to 415 May Override Other Rules of Evidence

Distressing possibilities pend regarding the ways in which FRE 413 to 415 interact with other rules of evidence. Of foremost concern is the effect the

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Undetected Recidivism Among Rapists and Child Molesters, 28 CRIME & DELINQ. 450, 452–54 (1982) ("[S]ex offenders have a recidivism rate comparable to non-sexual crime rates."); Stuart Scheingold et al., *The Politics of Sexual Psychopathy: Washington State's Sexual Predator Legislation*, 15 U. PUGET SOUND L. REV. 809, 810–12 (1992) (finding that sex offenders are no more likely to recidivate than are other categories of criminals).

92. Victims report 39 percent of all crimes to police. *See* Bedarf, *supra* note 91, at 897 (citing MARAINNE W. ZAWITZ ET AL., U.S. DEP'T OF JUSTICE, HIGHLIGHTS FROM 20 YEARS OF SURVEYING CRIME 31 (1993)). In contrast, more than half of female rape victims report the crime. *See id.* (citing MARAINNE W. ZAWITZ ET AL., U.S. DEP'T OF JUSTICE, HIGHLIGHTS FROM 20 YEARS OF SURVEYING CRIME 9 (1993)).

93. *See, e.g.*, United States v. Enjady, 134 F.3d 1427, 1432 (10th Cir. 1998) ("'[L]ike rape shield statutes...Rule 413 encourages rape reporting....'" (quoting Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57, 70 (1995))).

94. *See, e.g.*, FED. R. EVID. 412 advisory committee's note.

95. FRE 412 prohibits evidence offered to prove an alleged victim's other sexual behavior or sexual predisposition, except in designated circumstances in which the probative value of the evidence significantly outweighs possible harm to the victim. *See* FED. R. EVID. 412.

96. *See id.*

97. *See* FED. R. EVID. 413 to 415.

98. *See* FED. R. EVID. 412.

99. *See* FED. R. EVID. 413 to 415.

100. *See id.*

101. Invasion of privacy fears keep victims of sexual misconduct from coming forward to report crimes. *See, e.g.*, FED. R. EVID. 412 advisory committee's note. FRE 413 to 415 do nothing to alleviate these fears. Therefore, FRE 413 to 415 do not encourage victims to come forward.

new rules have on FRE 403. FRE 403 allows a court to exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice" or other enumerated considerations, including confusion of the issues or undue delay.[102] This rule gives a judge the discretion to exclude such evidence.[103] FRE 403 applies to all evidence admitted in federal court, except in rare instances when other rules make an exception to it.[104]

Such exceptions might occur in FRE 413 to 415, which state that the evidence meeting their criteria "is admissible."[105] Black letter law defines "admissible" as evidence "of such a character that the court or judge is *bound* to receive it; that is, allow it to be introduced at trial."[106] FRE 413 to 415 do not qualify their decrees.[107] Thus, the plain language of the rules mandate that FRE 413 to 415 supersede FRE 403, and evidence of past sexual assaults and child molestations in like cases shall be admitted, regardless of the danger of unfair prejudice.[108]

This argument is strengthened when one considers the language of other evidence rules. FRE 404(b), which allows evidence of other crimes, wrongs, or acts to be admitted under certain delineated circumstances, states that such evidence "may...be admissible."[109] Then there is FRE 412, which specifies the circumstances under which a sex offense victim's past sexual behavior "is admissible, if otherwise admissible under these rules."[110] If the drafters of FRE 413 to 415 intended to limit the introduction of evidence under those rules to that which passes muster under FRE 403, they could have used qualifying language along the lines employed in FRE 404(b) or 412.[111] Instead, the drafters left courts, typically loathe to read "the differing language in the two subsections [as having] the same meaning in each,"[112] with little choice but to forego the FRE 403 analysis.

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102. FED. R. EVID. 403.

103. *See* THOMAS A. MAUET & WARREN D. WOLFSON, TRIAL EVIDENCE 83–84 (1998).

104. One such exception is FED. R. EVID. 609(a)(2), which mandates that prior convictions of a witness shall be admitted for impeachment purposes if the prior crimes involve dishonesty or false statements.

105. FED. R. EVID. 413(1), 414(a), 415(a).

106. BLACK'S LAW DICTIONARY 47 (5th ed. 1990) (emphasis added), *quoted in* Shoyer v. City of Philadelphia, 506 A.2d 522, 524 (Pa. 1986).

107. *Compare* FED. R. EVID. 413 to 415 *with* FED. R. EVID. 404(b), 412(b). FRE 404(b) and 412(b) are discussed *infra* in text accompanying notes 108–09.

108. *See* FED. R. EVID. 413 to 415. *See also* REPORT, *supra* note 13, at 53; Duane, *supra* note 13, at 118–19.

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

110. FED. R. EVID. 412(b).

111. The sponsors of FRE 413 to 415 stressed that the new rules do not override FRE 403. *See* 140 CONG. REC. S12990-01 (daily ed. Sept. 20, 1994) (statement by Sen. Dole); 140 CONG. REC. H8968-01, 8991 (daily ed. Aug. 21, 1994) (statement by Rep. Molinari). But "[l]egislative history is irrelevant to the interpretation of an unambiguous statute." Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 808 n.3 (1989) (citing United Air Lines, Inc. v. McMann, 434 U.S. 192, 199 (1977)).

112. Russello v. United States, 464 U.S. 16, 23 (1983).

Contrary to the unambiguous language of FRE 413 to 415, many courts have incorporated the FRE 403 balancing test into the new rules anyway.[113] But even if all circuits were to agree on this approach, the FRE 403 balancing test only mitigates, it does not alleviate, the harm effected by the new rules. Under FRE 403, the party opposing the introduction of evidence must object on the grounds that policy considerations outweigh the probative value of the evidence.[114] Thus, the defendant in a sexual assault or child molestation case bears a significant burden in order to keep out this sensitive evidence.[115]

Modifying the nature of the FRE 403 balancing test could ameliorate some of the concerns regarding jury misdecision.[116] If courts shifted the burden of proof, and presumed that evidence of prior sexual assaults or child molestations was *inadmissible* unless the proponent of the evidence showed that the probative value outweighed the prejudicial impact, less sexually charged evidence would make it to the jury, circumventing the danger of jury error.[117] Unfortunately, one interpreting court asserted with asperity that judges should adhere to the normal FRE 403 balancing test when evaluating the admissibility of FRE 413 to 415 evidence.[118]

Not only does the "is admissible" proclamation of FRE 413 to 415 cast doubt on how sexually charged evidence interacts with FRE 403, but the language wreaks havoc on FRE 405, 608, 609, 105, and 802 as well.

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113. *See* United States v. Guardia, 135 F.3d 1326 (10th Cir. 1997) (applying FRE 403 to FRE 413); United States v. Sumner, 119 F.3d 658, 661 (8th Cir. 1997) (same); United States v. Meacham, 115 F.3d 1488, 1495 (10th Cir. 1997) (applying FRE 403 to FRE 414); United States v. Larson, 112 F.3d 600, 604–05 (2d Cir. 1997) (same); Frank v. County of Hudson, 924 F. Supp. 620 (D.N.J. 1996) (applying FRE 403 to FRE 415).

114. FRE 403, read in conjunction with FRE 402, favors the admission of relevant evidence. FRE 402 provides that "[a]ll relevant evidence is admissible, except as otherwise provided." FED. R. EVID. 402. "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. Evidence that a defendant has committed a prior bad act similar to the charged crime makes it more probable that the defendant committed the charged crime; such evidence is relevant, and therefore generally admissible under FRE 402. FRE 403 serves as an exception to FRE 402 in cases where the delineated policy concerns overshadow the probative value, i.e., the relevance, of the proffered evidence. *See* FED. R. EVID. 403. If the objecting party demonstrates that a policy counterweight outweighs the probative value of the evidence, the evidence is excluded. *See id.* But if the party fails to do so, the evidence comes in. *See id. See also* LILLY, *supra* note 3, at 36 ("The decision whether the probative value of the evidence outweighs one or more of the counterweights is made by the trial judge, *usually after objection by counsel.*" (emphasis added)); MAUET & WOLFSON, *supra* note 103, at 5 ("The opponent of the evidence bears the burden of tipping the scale toward exclusion.").

115. *See* LILLY, *supra* note 3, at 36; MAUET & WOLFSON, *supra* note 103, at 5.

116. *See* McCandless, *supra* note 13, at 715. The high potential for jury error in sexual misconduct cases is noted *supra* Part II.B.1.

117. *See* McCandless, *supra* note 13, at 715.

118. *See* United States v. Guardia, 135 F.3d 1326, 1330 (10th Cir. 1998) ("Rule 413 only has effect if we interpret it in a way that leaves open the possibility of admission.").

FRE 405 specifies that "[i]n all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion."[119] Only in "cases in which character or a trait of character of a person is an essential element of the charge, claim, or defense" will courts allow proof of "specific instances of that person's conduct."[120] FRE 405 so restricts the use of specific conduct evidence because such evidence "possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time."[121] But FRE 413 to 415 exenterate that criteria by allowing for the admission of "evidence of the defendant's commission of another offense or offenses" of sexual misconduct.[122]

Equally troublesome is that the new rules jettison the criteria for admission under FRE 608 and 609, which govern when evidence regarding a witness may be admitted.[123] Under FRE 608, specific instances of the conduct of a witness may, if probative of truthfulness or untruthfulness and at the discretion of the court, be inquired into on cross-examination of the witness in question, or on cross-examination of another witness.[124] FRE 609 permits the admission of evidence that a witness was convicted of a felony (as long as FRE 403 concerns do not outweigh its probative value) or evidence that a witness was convicted of a crime involving dishonesty or false statement, but only if the period since the conviction (or the defendant's release from confinement, if he or she was jailed) does not exceed ten years.[125] FRE 413 to 415 extinguish that qualification. Under FRE 413 to 415, if the defendant takes the stand as a testifying witness, evidence of the type specified in FRE 608 and 609 "is admissible," notwithstanding the restrictions of those rules.[126]

FRE 105, which deals with limiting instructions,[127] presents another problem. Under that rule, courts may issue limiting instructions (which tell the jury the proper scope with which to consider evidence) when faced with "evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose."[128] Thus, FRE 105 allows a judge to specify to the jury that it may consider the offered evidence for the purpose of establishing

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119. FED. R. EVID. 405(a).

120. FED. R. EVID. 405(b).

121. FED. R. EVID. 405 advisory committee's note.

122. FED. R. EVID. 413(a), 414(a), 415(a).

123. *See* FED. R. EVID. 608, 609.

124. *See* FED. R. EVID. 608(b).

125. *See* FED. R. EVID. 609(a)–(b). The ten-year barrier is not impenetrable. The court may still admit under subsection (a) evidence of a conviction if the proponent meets the requisite advance notice requirements and "the court determines, in the interests of justice, that the probative value of the conviction...substantially outweighs its prejudicial effect." FED. R. EVID. 609(b). In practice, however, trial judges are reluctant to admit, for impeachment purposes, evidence of convictions that exceed the ten-year time barrier. *See* MAUET & WOLFSON, *supra* note 103, at 389.

126. FED. R. EVID. 413 to 415. As mentioned *supra* in text accompanying notes 107–10, the language in FRE 413 to 415 has no qualifications or limitations.

127. *See* FED. R. EVID. 105.

128. *See id.*

propensity, but not to establish guilt of the offense charged.[129] FRE 413 to 415 create a special exception in this area by specifying that the evidence meeting their criteria "may be considered for its bearing *on any matter to which it is relevant.*"[130] If the jury may consider the evidence for its bearing on *any matter* to which it is relevant, then conceivably *all* purposes to which FRE 413 to 415 evidence may be considered are proper applications of the evidence.[131] If that is the case, then courts are not authorized to issue limiting instructions on the use of FRE 413 to 415 evidence, because there are no purposes for which it is not admissible.[132] Apart from the language of the Federal Rules, legislative history supports the prohibition against issuing limiting instructions.[133]

An even more distressing possibility is that FRE 413 to 415 nullify FRE 802 in circumstances involving sexual misconduct. FRE 802 disqualifies hearsay from admission at trial "except as provided by these rules or by other rules prescribed by the Supreme Court."[134] The adversary system necessarily mandates this rule because "cross-examination is essential for ensuring accuracy and discovering truth."[135] But black letter law suggests that FRE 413 to 415 abandon FRE 802's prohibition.[136] According to the plain language of FRE 413 to 415, even *hearsay evidence* that an accused child molester or rapist committed like atrocities in the past is admissible.[137]

III. FEDERAL RULES 413 TO 415 AND COURTROOM PRACTICE

The federal cases that have employed FRE 413 to 415 illustrate how courtroom practice can sometimes correct problems of poorly drafted legislation. Because most sex offense cases are heard in state court and the new federal rules are so outcome determinative that they encourage defendants to plea-bargain and settle, case law has had little chance to refine the new rules.[138] Three Tenth Circuit

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129. *See id.*

130. FED. R. EVID. 413(a), 414(a) (emphasis added). FED. R. EVID. 415(a) states that the pertinent evidence "may be considered as provided in Rule 413 and Rule 414."

131. *See also* Duane, *supra* note 13, at 114–16.

132. *See* FED. R. EVID. 105. To be sure, FRE 413 to 415 speak to matters which are "relevant," so courts still may be able to issue limiting instructions in narrow circumstances to caution jurors against considering FRE 413 to 415 evidence for its bearing on *irrelevant* matters. But since FRE 413 to 415 do not limit the purpose to which the pertinent evidence may be considered, it is hard to imagine matters to which application of the evidence would be irrelevant.

133. *See* Duane, *supra* note 13, at 117 (citing 137 CONG. REC. S3191-02, S3242 (daily ed. Mar. 13, 1991) ("There is no risk that evidence admitted under the proposed new rules will be considered for a prohibited purpose, since the rules do not limit the purposes for which such evidence may be considered.")).

134. FED. R. EVID. 802.

135. LILLY, *supra* note 3, at 211 (citing V JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (1981)).

136. Evidence falling under FRE 413 to 415 "is admissible." FED. R. EVID. 413(a), 414(a), 415(a).

137. *See* Duane, *supra* note 13, at 118 ("[Interpreting FRE 413(a) to override FRE 802] is the only construction that is consistent with a literal reading of those two rules.").

138. *See supra* note 51 and accompanying text. A Westlaw search on Oct. 14,

cases that have employed FRE 413 to 415, *United States v. Meacham*,[139] *United States v. Guardia*,[140] and *United States v. Enjady*,[141] interpret the new federal rules to effect a far less volatile result than legal commentators initially feared, a result closer to that which Arizona's new evidence rule 404(c) condones. The Supreme Court has not yet decided a case involving the new rules and other circuits may still rule differently.

A. United States v. Meacham

"Beware," Henry Lee Meacham warned his ten-year-old relative, insinuating dire consequences if she ever told anyone what happened during their interstate road trip.[142] Meacham may have been exactly the kind of defendant Congress had in mind when it adopted FRE 413 to 415.

Meacham was charged under 18 U.S.C. § 2423[143] for transporting a minor from Utah to California with intent that she engage in sexual activity with him.[144] During the trial, the district court admitted testimony that Meacham had fondled his two minor stepdaughters thirty years earlier.[145] Pursuant to FRE 404(b), the court instructed the jury that it could consider the evidence for the limited purposes of plan, preparation, lack of mistake, and intent.[146] But the court also instructed the jury that it could "'consider [the] evidence for its bearing...on the matter of whether or not the defendant acted with a dominant or compelling purpose to transport [the victim] for illegal sexual activity.'"[147]

Recognizing that the district court utilized FRE 414 to some extent in admitting the evidence, the Tenth Circuit reviewed the lower court's findings.[148] Without much discussion, the Tenth Circuit relied on legislative history[149] and ruled that "[u]nder [FRE] 414 the prior acts evidence must still be relevant and followed by a [FRE] 403 balancing."[150] The Tenth Circuit then upheld the admission of the propensity evidence because the district court had conducted a proper FRE 403 balancing test, weighing the probative value of the evidence against the danger of unfair prejudice.[151] The evidence introduced at trial

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1999, uncovered only thirty-eight federal court opinions discussing FRE 413, 414, or 415.

139. 115 F.3d 1488 (10th Cir. 1997).

140. 135 F.3d 1326 (10th Cir. 1998).

141. 134 F.3d 1427 (10th Cir. 1997), *clarified*, 1998 WL 133994 (10th Cir. 1998), *and cert. denied*, 119 S. Ct. 202 (1998).

142. *Meacham*, 115 F.3d at 1495.

143. Section 2423 makes it a crime to "knowingly transport[ ] an individual who has not attained the age of 18 years in interstate or foreign commerce...with intent that the individual engage in prostitution, or any sexual activity for which any person can be charged with a criminal offense...." 18 U.S.C.A. § 2423 (West Supp. 1999).

144. *See Meacham*, 115 F.3d at 1490.

145. *See id.* at 1491.

146. *See id.* at 1494.

147. *Id.*

148. *See id.* at 1495.

149. *See id.* at 1492.

150. *Id.* at 1495.

151. *See id.*

suggested a pattern of sexual abuse of minor relatives made possible by exploitation of familial authority, and this outweighed concerns regarding the thirty-year time difference between the prior acts and the charged offense.[152] The Tenth Circuit explained that "evidence of other sex offenses by the defendant is often probative and properly admitted, notwithstanding very substantial lapses of time in relation to the charged offense or offenses."[153]

B. United States v. Guardia

Seven months after *Meacham* came down, the Tenth Circuit held that the FRE 403 balancing test also applied to FRE 413. In *United States v. Guardia*, defendant David Guardia was charged with sexual abuse stemming from salacious touchings and comments he made during gynecological exams that he performed for the United States Air Force.[154] At trial, the prosecution introduced testimony of four women Guardia had allegedly abused during past gynecological examinations.[155] In upholding the district court's exclusion of the evidence on the grounds that it would confuse the issues in the case, the Tenth Circuit held that "Rule 403 applies to all evidence admitted in federal court, except in...rare instances.... [W]e hold that the 403 balancing test applies to Rule 413 evidence."[156]

The opinion stressed that courts must conduct their FRE 403 analysis of FRE 413 evidence in the same manner as they do in other contexts, "with careful attention to both the significant probative value and the strong prejudicial qualities inherent in all evidence submitted under 413."[157] The Tenth Circuit recommended that trial courts clearly state their FRE 403 findings on the record,[158] as Arizona Rule 404(c) requires.[159] Doing so might avert two ways that courts could misapply the FRE 403 balancing test:

> First, a court could be tempted to exclude the Rule 413 evidence simply because character evidence traditionally has been considered too prejudicial for admission. Second, a court could perform a restrained 403 analysis because of the belief that Rule 413 embodies a legislative judgment that propensity evidence regarding sexual

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152. *See id.*

153. *Id.* at 1492.

154. *See* United States v. Guardia, 135 F. 3d 1326, 1327 (10th Cir. 1998).

155. *See id.*

156. *Id.* at 1329–30. The Tenth Circuit stated that the "is admissible" language in FRE 413 did not create an exception to the FRE 403 balancing test. *See id.* at 1329. Part of its reasoning was that FRE 402, "the rule allowing admission of all relevant evidence and a rule to which the FRE 403 balancing test undoubtedly applies," contains a similar "is admissible" proclamation, and since FRE 403 applies to FRE 402, FRE 403 must apply to Rule 413, too. *Id.* The court, however, evaded the fact that the "is admissible" statement in FRE 402 is followed by the qualification "except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court." FED. R. EVID. 402. FRE 413 does not contain such a qualification; it simply says that evidence of other sexual assaults "is admissible."

157. *Id.* at 1330.

158. *See id.* at 1331.

159. *See* ARIZ. R. EVID. 404(c)(1)(D).

> assaults is never too prejudicial or confusing and generally should be admitted.[160]

C. United States v. Enjady

One month after *Guardia*, the Tenth Circuit refined the nature of the FRE 403 balancing test in the context of sexual assault. In *United States v. Enjady*,[161] the defendant, a member of the Mescalero Apache Indian Tribe, allegedly raped a fellow member on the reservation while she was unconscious.[162] Enjady claimed that the sex was consensual.[163] Applying FRE 403 balancing, the district court admitted testimony from a victim Enjady had raped two years earlier.[164] The Tenth Circuit upheld the admission of the evidence and again emphasized that FRE 403 applied to FRE 413.[165] If Congress meant to exclude FRE 403, the court reasoned, Congress either would have specifically excluded FRE 403 in the language of FRE 413 to 415 or it would have amended FRE 403.[166] Additionally, the Tenth Circuit outlined what proper FRE 403 balancing entails.[167] A court must consider:

> 1) how clearly the prior act has been proved; 2) how probative the evidence is of the material fact it is admitted to prove; 3) how seriously disputed the material fact is; and 4) whether the government can avail itself of any less prejudicial evidence. When analyzing the probative dangers, a court considers: 1) how likely is it such evidence will contribute to an improperly-based [sic] jury verdict; 2) the extent to which such evidence will distract the jury from the central issues of the trial; and 3) how time consuming it will be to prove the prior conduct.[168]

In dicta, the Tenth Circuit opined that district courts "must make a preliminary finding that a jury could reasonably find by a preponderance of the evidence that the 'other act' occurred."[169] Without that and the FRE 403 safeguards, the court asserted that FRE 413 would be unconstitutional[170] because unchecked propensity evidence undermines the reasonable doubt standard and encourages juries to punish defendants for prior misdeeds.[171]

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160. *Guardia*, 135 F. 3d at 1330 (citation omitted). For an example of a court excluding FRE 413 evidence in compliance with the traditional exclusion of propensity evidence, see *United States v. Sumner*, 119 F.3d 658 (8th Cir. 1997). For an example of a restrained FRE 403 balancing, see *United States v. LeCompte*, 131 F.3d 767 (8th Cir. 1997).

161. 134 F.3d 1427 (10th Cir. 1998).

162. *See id.* at 1429.

163. *See id.*

164. *See id.*

165. *See id.* at 1431.

166. *See id.*

167. *See id.* at 1433.

168. *Id.* (quoting Mark A. Sheft, *Federal Rules of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57, 59 n.16 (1995)).

169. *Id.* at 1433.

170. *See id.*

171. *See id.* at 1432.

IV. ARIZONA RULE OF EVIDENCE 404(C)

The substantial criticism waged against FRE 413 to 415 made states reluctant to adopt these new rules.[172] In contrast to the congressional system of rulemaking, most states adopt evidentiary rules through the constitutional rulemaking authority of state supreme courts.[173] In Arizona, the state constitution gives the supreme court the power to promulgate procedural rules in any state court.[174] Pursuant to this power, the state supreme court promulgated the Arizona Rules of Evidence, which took effect in 1977.[175] The state legislature cannot repeal any of the evidence rules made by the supreme court pursuant to its constitutional authorization.[176]

As a result, the Arizona Supreme Court can craft judicial rules free from the political pressures that affect legislators. For this reason, when the supreme court amended Arizona Rule 404 in 1997 to include a subsection dealing with the admission of other acts evidence in sexual misconduct cases, the product did not depart much from Arizona's common law.[177] Effective December 1, 1997, Arizona Rule of Evidence 404(c) manifests marked differences from the federal rules.

A. Arizona Rule 404(c): The Plain Language

1. Other Acts May Be Admitted if Relevant

Arizona Rule 404(c) applies in criminal and civil cases predicated on the defendant's alleged commission of a sexual offense.[178] In such cases, "evidence of other crimes, wrongs, or acts may be admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged."[179] Such evidence is relevant if it has any tendency to

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172. As of this writing, only California, Missouri, and Indiana have adopted evidentiary rules substantially similar to FRE 413 to 415. See *supra* note 18 and accompanying text.

173. *See* L. Kinvin Wroth, *The Federal Rules of Evidence in the States: A Ten-Year Perspective*, 30 VILL. L. REV. 1315, 1350 (1985).

174. *See* ARIZ. CONST. art. 6, § 5(5); State *ex rel.* Collins v. Seidel, 142 Ariz. 587, 590, 691 P.2d 678, 681 (1984). The legislature may also prescribe evidence rules, but the state supreme court does not have to recognize them. *See Collins*, 142 Ariz. at 591, 691 P.2d at 682 ("We will recognize 'statutory arrangements which seem reasonable and workable' and which supplement the rules we have promulgated." (quoting Alexander v. Delgado, 507 P.2d 778, 779 (N.M. 1973))).

175. *See Collins*, 142 Ariz. at 590, 691 P.2d at 681.

176. *See id.* at 590, 691 P.2d at 681.

177. *See* discussion *infra* Part IV.B (comparing ARIZ. R. EVID. 404(c) with Arizona case law).

178. *See* ARIZ. R. EVID. 404(c). The term "sexual offense" includes sexual abuse, ARIZ. REV. STAT. § 13-1404 (1998), sexual conduct with a minor, § 13-1405, sexual assault, § 13-1406, sexual assault of a spouse, § 13-1406.01, molestation of a child, § 13-1410, continuous sexual abuse of a child, § 13-1417, sexual misconduct by a behavioral health professional, § 13-1418, commercial sexual exploitation of a minor, § 13-3552, and sexual exploitation of a minor, § 13-3553. *See* ARIZ. REV. STAT. § 13-1420(C) (1998).

179. ARIZ. R. EVID. 404(c).

make the existence of the character trait "more probable or less probable than it would be without the evidence."[180] "[E]vidence to rebut the proof of other crimes, wrongs, or acts, or an inference therefrom, may also be admitted."[181]

The nature of the evidence allowed in under the Arizona rule differs significantly from that admitted under the Federal Rules. Whereas the Federal Rules only permit plaintiffs and prosecutors to introduce evidence of other sexual assaults in sexual assault cases, and only evidence of other child molestations in child molestation cases,[182] the Arizona rule allows in a broader array of other acts evidence, in a broader array of cases.[183] In addition, the Arizona rule permits rebuttal evidence,[184] while the Federal Rules do not.[185]

2. Court Must Make Findings Before Admitting Evidence

The Federal Rules allow the introduction of prior sexual misconduct evidence carte blanche,[186] but Arizona Rule 404(c) requires courts to make several findings first.[187] Under 404(c), a court must determine whether "[t]he evidence is sufficient to permit the trier of fact to find that the defendant committed the other act."[188] In a criminal case, "the relevant prior bad act must be shown to have been committed by the defendant by clear and convincing evidence."[189] Next, the court must find that "[t]he commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged."[190] Finally, the rule explicitly requires the court to conduct a Rule 403 balancing test to determine whether the probative value of the evidence is outweighed by the danger of unfair prejudice, or other delineated factors.[191]

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180. ARIZ. R. EVID. 401.

181. ARIZ. R. EVID. 404(c).

182. *See* FED. R. EVID. 413 to 415.

183. *See* ARIZ. R. EVID. 404(c). As mentioned *supra* Part IV.A, other acts evidence is admissible in Arizona "if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." *Id.*

184. *See id.*

185. *See* FED. R. EVID. 413 to 415.

186. *See id.*

187. *See* ARIZ. R. EVID. 404(c)(1).

188. ARIZ. R. EVID. 404(c)(1)(A).

189. ARIZ. R. EVID. 404(c) cmt. to 1997 amendment. *State v. Terrazas*, 189 Ariz. 580, 582–84, 944 P.2d 1194, 1196–98 (1997), established the clear and convincing standard for the admission of prior bad acts.

190. ARIZ. R. EVID. 404(c)(1)(B).

191. *See* ARIZ. R. EVID. 404(c)(1)(C). Factors to be considered in the 403 equation include "(i) remoteness of the other act; (ii) similarity or dissimilarity of the other act; (iii) the strength of the evidence that defendant committed the other act; (iv) frequency of the other acts; (v) surrounding circumstances; (vi) relevant intervening events; (vii) other similarities or differences; (vii) other relevant factors." *Id.*

3. Jury Instruction Required

When evidence is admitted under Rule 404(c), "the court shall instruct the jury as to the proper use of such evidence."[192] This means that the court must issue a limiting instruction in 404(c) cases.[193]

4. Disclosure Requirements

The Arizona rule demands that the party wishing to introduce Rule 404(c) evidence make disclosure of that evidence earlier than the Federal Rules require.[194] In Arizona criminal cases, the state must disclose other acts evidence to the defendant "no later than 45 days prior to the final trial setting or at such later time as the court may allow for good cause."[195] The defendant must disclose its rebuttal evidence of the other acts "no later than 20 days after receipt of the state's disclosure or at such other time as the court may allow for good cause."[196] In civil cases in which a party offers 404(c) evidence, that party must make disclosure "no later than 60 days prior to trial, or at such later time as the court may allow for good cause shown."[197]

B. Changes in Arizona Law Resulting From Rule 404's Amendment

Rule 404(c) codifies Arizona common law, reflected in two cases, *State v. McFarlin*[198] and *State v. Treadaway.*[199] *McFarlin* involved a defendant convicted of child molestation. At trial, the State introduced evidence of the defendant's four previous child molestations to show that he had "a specific emotional propensity for sexual aberration."[200] In upholding the conviction, the Arizona Supreme Court established the "emotional propensity exception" to the exclusionary rule.[201] This exception was triggered when a defendant was charged with an "abnormal sex act" (e.g., sodomy, child molestation, lewd and lascivious behavior, etc.).[202] In such cases, courts could "accept proof of similar acts near in time to the offense charged as evidence of the accused's propensity to commit such perverted acts."[203] Compounding matters for criminal defendants, *McFarlin*

192. ARIZ. R. EVID. 404(c)(2).
193. *See id.*
194. *Compare* ARIZ. R. EVID. 404(c)(3), *with* FED. R. EVID. 413(b), *and* FED. R. EVID. 414(b), *and* FED. R. EVID. 415(b).
195. ARIZ. R. EVID. 404(c)(2).
196. *Id.*
197. *Id.*
198. 110 Ariz. 225, 517 P.2d 87 (1973).
199. 116 Ariz. 163, 568 P.2d 1061 (1977).
200. *McFarlin*, 110 Ariz. at 226, 517 P.2d at 88.
201. *See id.* at 228, 517 P.2d at 90. Arizona Rule 404(b) generally excludes "[e]vidence of other crimes, wrongs, or acts...[for purposes of] show[ing] action in conformity therewith." ARIZ. R. EVID. 404(b).
202. *McFarlin*, 110 Ariz. at 228, 517 P.2d at 90.
203. *Id.* at 228, 517 P.2d at 90.

held that courts did not have to give limiting instructions on the proper scope of emotional propensity evidence unless requested to do so by defense counsel.[204]

Four years later, in *State v. Treadaway*,[205] the Arizona Supreme Court qualified the emotional propensity exception. *Treadaway* involved the sodomy and murder of a six-year-old boy.[206] At trial, the state introduced evidence that three years earlier the defendant had molested another young boy.[207] On appeal, the supreme court instituted the requirement of "reliable expert testimony."[208] Before a sexual act remote in time or different in nature could come in, expert testimony had to establish that the act "tends to show continuing emotional propensity to commit the act charged."[209] Once the prosecution met this burden, the court had to balance the probative value of the evidence against its potential for unfair prejudice, confusion, or waste of time.[210] If these other factors substantially outweighed the probative value, the court could exclude the evidence.[211]

Arizona Rule 404(c) displaces state common law.[212] The most pronounced difference between the two is that the common law emotional propensity exception only applied in situations where the defendant was charged with matters of extreme sexual aberration.[213] In practice, the exception was usually limited to prosecutions for sexual activity with children.[214] Now, Rule 404(c)

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204. *See id.* at 228, 517 P.2d at 90.

205. 116 Ariz. 163, 568 P.2d 1061 (1977).

206. *See id.*

207. *See id.* at 165, 568 P.2d at 1063.

208. *Id.* at 167, 568 P.2d at 1065. *Treadaway* does not require the prosecution to introduce expert testimony if the emotional propensity evidence is both similar and near in time to the offense charged. *See* State v. Varela, 178 Ariz. 319, 323, 873 P.2d 657, 661 (Ct. App. 1993).

209. *Treadaway*, 116 Ariz. at 167, 568 P.2d at 1065.

210. *See, e.g.*, ARIZ. R. EVID. 403; State v. Stuard, 176 Ariz. 589, 599, 863 P.2d 881, 891 (1993).

211. *See* ARIZ. R. EVID. 403.

212. *Compare* ARIZ. R. EVID. 404(c) ("[E]vidence of other crimes, wrongs, or acts may be admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity."), *with Treadaway*, 116 Ariz. at 163, 568 P.2d at 1061 (stating that prior bad acts of child molestation are admissible if they tend to show continuing emotional propensity to commit the acts charged), *and* State v. McFarlin, 110 Ariz. 225, 517 P.2d 87 (1973) (noting that past offenses involving abnormal sex acts near in time to the offense charged are admissible as evidence of the accused's propensity to commit such perverted acts).

213. *See McFarlin*, 110 Ariz. at 228, 517 P.2d at 90 ("[The emotional propensity exception comes into play in] those instances in which the offense charged involves the element of abnormal sex acts such as sodomy, child molesting, lewd and lascivious, etc....").

214. *See, e.g.*, State v. Roscoe, 184 Ariz. 484, 910 P.2d 635 (1996) (prosecution for molestation, kidnapping, and first degree murder of seven-year-old); State v. Jerousek, 121 Ariz. 420, 590 P.2d 1366 (1979) (prosecution for child molestation, committing lewd and lascivious acts upon a child under the age of fifteen, and attempted rape); *Treadaway*, 116 Ariz. at 163, 568 P.2d at 1061 (prosecution for sodomy and killing of six-year-old boy); *McFarlin*, 110 Ariz. at 225, 517 P.2d at 87 (prosecution for child molestation); State v.

broadens the sweep of the exception; evidence of other relevant acts may be admitted in *all* cases predicated on a sexual offense, not just child molestations.[215] Moreover, Arizona Rule 404(c) extends the exception to civil cases;[216] under Arizona common law, the exception only applied in criminal cases.[217]

Other differences inhere. Overruling *Treadaway*, Arizona Rule 404(c) does not require expert testimony to link a remote or dissimilar act with a continuing emotional propensity to commit the act charged.[218] Under Arizona Rule 404(c), the prior bad act need not have occurred close in time or be similar to the act charged; those are only factors the court considers in weighing whether the evidentiary value of other act evidence overcomes Rule 403 concerns.[219] Also, Arizona Rule 404(c) demands that the court instruct the jury on the proper scope of Arizona 404(c) evidence, regardless of whether requested to do so by defense counsel.[220] This overrules *McFarlin*, which held that courts may forgo issuing limiting instructions if not requested to do so by defense counsel.[221]

V. THE ADVANTAGES OF ARIZONA RULE 404(C) OVER FEDERAL RULES 413 TO 415

Through careful drafting, Arizona Rule 404(c) avoids many of the pitfalls of FRE 413 to 415, putting to rest such questions as whether judges need to conduct 403 balancing tests, whether judges must issue limiting instructions, and whether defense counsel can introduce evidence to rebut other acts evidence.[222] As a result, the Arizona rule poses much less of a hazard to the truth-seeking function of criminal trials.[223]

Salazar, 181 Ariz. 87, 887 P.2d 617 (Ct. App. 1994) (prosecution for attempted molestation of defendant's thirteen-year-old niece); State v. Valera, 178 Ariz. 319, 873 P.2d 657 (Ct. App. 1993) (prosecution for sexual exploitation of minor and solicitation of child molestation). Courts were loathe to allow the exception in prosecutions involving other kinds sexual misconduct, *see, e.g.*, State v. Cuen, 153 Ariz. 382, 736 P.2d 1194 (Ct. App. 1987) (holding that evidence of defendant's prior act of sexual misconduct was inadmissible in prosecution for sexual assault), but that was not the universal rule. *See* State v. Gates, 118 Ariz. 357, 576 P.2d 1357 (1978) (holding that indecent exposure to other adults fits within the ambit of emotional propensity rule); State v. Beck, 151 Ariz. 130, 726 P.2d 227 (Ct. App. 1986) (holding that evidence of incest with adult daughter was admissible in prosecution for incest).

215. *See* ARIZ. R. EVID. 404(c).

216. *See id.*

217. *McFarlin, Treadaway*, and their progeny were all criminal cases.

218. *See* ARIZ. R. EVID. 404(c). The rule only requires that "[t]he commission of the other act provide[ ] a reasonable basis to infer the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged." ARIZ. R. EVID. 404(c)(1)(B). However, if the other act is distant or distinct from the act charged, expert testimony will undoubtedly bear heavily on the reasonable basis equation.

219. *See* ARIZ. R. EVID. 404(c)(1)(C)(i)–(ii).

220. *See* ARIZ. R. EVID. 404(c)(2).

221. *See* State v. McFarlin, 110 Ariz. 225, 228, 517 P.2d 87, 90 (1973).

222. *See* ARIZ. R. EVID. 404(c).

223. The Arizona rule, however, has some of its own problems. *See infra* note 244 and accompanying text.

A. Rule 403 Determination

The most direct way that Arizona Rule 404(c) improves upon its federal counterparts is by mandating that judges make a Rule 403 determination.[224] The Rule 403 component lessens the chance of prejudicial sexual-misconduct evidence going to the jury and possibly altering the reasonable doubt calculus.[225] Rule 403 is a vehicle by which a judge can exclude such evidence.[226] Moreover, the Rule 403 language in Arizona 404(c) alleviates concerns about the timelines of other acts evidence. Under FRE 413 to 415, other acts evidence from ten, twenty, or thirty years ago, or more, "is admissible," without any additional judicial scrutiny.[227] Rule 404(c), however, specifies that the "remoteness of the other act" is a factor the court shall consider in making its Rule 403 determination.[228]

As discussed in Part III, many federal courts have incorporated the FRE 403 balancing test into FRE 413 to 415 anyway,[229] despite the fact that the plain language of the rules apparently denies judges this discretion.[230] But even applying FRE 403 to the Federal Rules does not totally alleviate the harm of unfair prejudice to defendants; defendants still have the burden of objecting on FRE 403 grounds.[231] If they fail to object in a timely fashion, the evidence is admitted.[232] This procedural allocation favors admission over inadmission, making it more likely than not that exceptional evidence will find its way to the jury. Critically, Arizona Rule 404(c) directs the court to make a finding *first* that "[t]he evidentiary value of proof of the other act is not substantially outweighed by [403 concerns]" before admitting other acts evidence.[233] Only after the court adheres to this

224. *See* ARIZ. R. EVID. 404(c)(1)(C).

225. As discussed *supra* Part II.B.2, extrinsic acts evidence fits into a category of "'exceptional'" evidence which jeopardizes the application of the constitutional reasonable doubt standard. *See* McCandless, *supra* note 13, at 712 (quoting D. Craig Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 WASH. L. REV. 289, 314 (1989)). *See also* United States v. Beechum, 582 F.2d 898, 920 (5th Cir. 1978) (en banc) (Goldberg, C.J., dissenting) ("[E]xtrinsic acts evidence is fraught with dangers of prejudice, extraordinary dangers not presented by other types of evidence." (footnote omitted)). Because the text of FRE 413 to 415 flatly says that sexually charged extrinsic acts evidence "is admissible" in sexual assault and child molestation cases, FED. R. EVID. 413 to 415, the rules, as drafted, do not give judges discretion to use FRE 403 to exclude inflammatory evidence likely to alter the "reasonable doubt" standard. *See* REPORT, *supra* note 13, at 53; Duane, *supra* note 13, at 118–19. On the other hand, Arizona Rule 404(c) demands that judges conduct a Rule 403 balancing test; thus, judges have the discretion to exclude exceptional evidence when Rule 403 concerns outweigh its probative value. *See* ARIZ. R. EVID. 403.

226. *See* ARIZ. R. EVID. 403.

227. FED. R. EVID. 413 to 415.

228. ARIZ. R. EVID. 404(c)(1)(C)(i).

229. *See* discussion *supra* Part III.

230. *See* FED. R. EVID. 413 to 415.

231. *See* LILLY, *supra* note 3, at 36 ("The decision whether the probative value of the evidence outweighs one or more of the counterweights is made by the trial judge, *usually after objection by counsel.*" (emphasis added)).

232. *See id.* at 5. In extreme cases involving criminal charges, courts may act on their own motions to exclude the evidence. *See id.* at 5–6.

233. ARIZ. R. EVID. 404(c)(1)(C).

stricture may it admit the evidence.[234] Hence, Arizona courts, unlike federal, presume that other acts evidence is *inadmissible* and do not require defense counsel to object on 403 grounds; instead, courts must automatically make a 403 determination.[235] Because of this, less inflammatory evidence will reach Arizona juries, circumventing the danger of unfair prejudice.

B. Limiting Instruction

Not only does the Arizona rule limit *what* evidence reaches the jury, but it also limits the *purpose* for which the jury can consider proffered evidence. In contrast to FRE 413 to 415, which prohibit judges from issuing limiting or cautionary instructions on other acts evidence,[236] Arizona Rule 404(c) explicitly directs judges to instruct juries on the proper use of other acts evidence.[237] The instruction tells juries that they can consider other acts evidence for its bearing on whether the defendant had a "character trait giving rise to an aberrant sexual propensity to commit the offense charged," but not to prove guilt.[238] This constraint on the use of the evidence should retrench the possibility that juries will mishandle the reasonable doubt standard.

Of course, research shows that juries do not always follow limiting instructions,[239] and that juries naturally tend to give other acts evidence more weight than is warranted.[240] Certainly, limiting instructions will not always dull the inflammatory nature of the evidence, but they do not aggravate the risk of jury error.[241]

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234. *See id.*

235. *See id.*

236. *See* FED. R. EVID. 413(a), 414(a) ("[E]vidence...is admissible, and may be considered for its bearing on any matter to which it is relevant."); FED. R. EVID. 415(a) ("[Pertinent evidence] may be considered as provided in Rule 413 and Rule 414.").

237. *See* ARIZ. R. EVID. 404(c)(2).

238. *See* ARIZ. R. EVID. 404(c).

239. *See* Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 J. LAW & HUMAN BEHAV. 37, 47 (1985) (reporting that mock jurors were more likely to render a guilty verdict when told of a defendant's prior convictions). *See also To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant with a Criminal Record*, 4 COLUM. J.L. & SOC. PROBS. 215, 218 (1968) (reporting that 98 percent of attorneys and 43 percent of judges do not believe that juries obey limiting instructions on prior-convictions evidence).

240. *See, e.g.*, LEMPERT & SALTZBURG, *supra* note 53, at 213; Weissenberger, *supra* note 53, at 602–04.

241. Strategically, lawyers sometimes do not want limiting instructions issued. *See* MAUET & WOLFSON, *supra* note 103, at 21. Lawyers fear that the instructions may draw attention to harmful evidence. *See id.* But this fear is unfounded in sexual misconduct cases; it is difficult to imagine limiting instructions drawing further attention to evidence that is so glaring to begin with.

C. Rape Shield

Defendants in 404(c) cases also face less unfairness vis-à-vis the state's rape shield laws than they do under FRE 413 to 415.[242] Arizona's rape shield law, developed through case law, prohibits admission of a victim's sexual history in most instances,[243] as does its federal counterpart, FRE 412.[244] But the Arizona rape shield allows in such evidence in four critical circumstances: (1) when the victim's previous acts with the accused indicate consent; (2) when testimony "directly refutes physical or scientific evidence, such as...the origin of semen, disease, or pregnancy"; (3) when the prosecution has opened the door by offering evidence of the victim's chastity; and (4) "where the subjective intent of the assailant is an element of the crime."[245] In contrast, FRE 412 only permits criminal defendants to introduce specific instances of the victim's sexual behavior for purposes of proving consent, or proving that someone else committed the act.[246] In essence, then, the Arizona rape shield is a lower bar, permitting admission of a victim's sexual history in two instances where the FRE 412 does not.[247] Because of this, Arizona Rule 404(c) seems less one-sided than its federal counterparts; the Arizona rule lets the prosecution introduce instances of the defendant's sexual misconduct, yes, but the defendant can, in a number of circumstances, use similar ammunition against his or her accuser.[248]

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242. As noted *supra*, FRE 412 generally prohibits evidence of the victim's sexual behavior in sex offense cases. But FRE 413 to 415 allow such evidence to be introduced against defendants. By allowing plaintiffs to dirty up defendants, but prohibiting defendants from dirtying up plaintiffs, the federal rules tilt trials heavily against defendants. *See supra* text accompanying notes 63–69.

243. *See* State *ex rel.* Pope v. Superior Court, 113 Ariz. 22, 28, 545 P.2d 946, 952 (1976).

244. *See* FED. R. EVID. 412.

245. *Pope*, 113 Ariz. at 29, 545 P.2d at 953. An attempted rape prosecution is an example where subjective intent is an element of the crime. *See id.* at 29, 545 P.2d at 953.

246. *See* FED. R. EVID. 412(b)(1). FRE 412 also allows the defendant to admit "evidence the exclusion of which would violate the constitutional rights of the defendant." FED. R. EVID. 412(b)(1)(C).

247. FRE 412 does not permit the defense to admit evidence of a victim's sexual history when the prosecution offers evidence of the victim's chastity, nor where subjective intent is an essential element of the crime. *Compare* FED. R. EVID. 412, *with Pope*, 113 Ariz. at 29, 545 P.2d at 953.

248. *See supra* text accompanying note 245. That is not to say that Rule 404(c) and the Arizona rape shield law operate fairly against defendants; they merely disadvantage defendants to a lesser extent than do FRE 412 to 415. Only in the highly particularized situations delineated above can defendants introduce evidence of the victim's sexual history. On the other hand, Arizona Rule 404(c) makes it relatively easy for plaintiffs and prosecutors to introduce character evidence against defendants. *See supra* Part IV.A (discussing the requirements for introducing evidence under Arizona Rule 404(c)). Maybe it is time to amend Arizona's rape shield law. In *Pope*, the case that affirmatively established the rape shield, the Arizona Supreme Court spent two pages discussing how evidence law generally excludes evidence of the defendant's prior bad acts. *See Pope*, 113 Ariz. at 25–26, 545 P.2d at 949–50. Quoting an earlier case, the court stated, "[W]hen a man is put upon trial for one offense, he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and...proof of his guilt of one or a score of other offenses...is

D. Rebuttal Evidence

Another way that Rule 404(c) equalizes matters between both parties to an action is by allowing defendants to rebut proof of other acts.[249] The federal rules do not appear to allow this. Significantly, FRE 404(b) inexorably prohibits "[e]vidence of other crimes, wrongs or acts...to prove the character of a person in order to show action in conformity therewith."[250] This general prohibition excludes other acts evidence in both cases-in-chief and rebuttals.[251] FRE 413 to 415, the sole exceptions to 404(b), only permit evidence of similar crimes in sexual assault and child molestation cases to be used *against* defendants.[252] But nothing in FRE 413 to 415 explicitly permits rebuttal evidence.[253] Thus, the Federal Rules as drafted suggest that defendants faced with FRE 413 to 415 other acts evidence may not rebut that evidence with other acts evidence of the plaintiff or victim.[254] In contrast, Arizona Rule 404(c) explicitly allows the admission of "evidence to rebut the proof of other crimes, wrongs, or acts, or an inference therefrom."[255]

E. Dissimilar Crimes

Arizona Rule 404(c) makes matters easier for plaintiffs and prosecutors in a way that the Federal Rules do not, by opening the door to evidence of dissimilar crimes.[256] This is contrary to FRE 413 to 415, which only allow

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wholly excluded." *Id.* at 25, 545 P.2d at 949 (quoting Guey v. State, 20 Ariz. 363, 368–369, 181 P. 175, 177 (1919)). Later, the court recognized an oft-cited charge by those who oppose the use of evidence of unchastity in rape cases: "[W]here consent is alleged the complaining witness is subjected to embarrassing questions...leaving her and possibly the jury with the feeling that her moral background rather than the defendant is on trial." *Id.* at 27, 545 P.2d at 951. Taken together, these two statements imply that the court established the rape shield law, at least in part, to correspond with the general exclusion of character evidence. If that is the rationale behind the rape shield, now that 404(c) has abolished the old rule, the rape shield law does not serve as pressing a need. In the interest of leveling the playing field between defendants and plaintiffs and prosecutors, Arizona should amend its rape shield rule. However, a thorough exploration of this issue is beyond the scope of this Note.

249. *See* ARIZ. R. EVID. 404(c).

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

251. *See id.*

252. *See* FED. R. EVID. 413 to 415.

253. *See id.*

254. Defendants can still rebut other acts evidence with character trait evidence under FED. R. EVID. 404(a)(1). In *United States v. Enjady*, 134 F.3d 1427, 1434 (10th Cir. 1998), the Tenth Circuit held that the district court did not abuse its discretion in allowing FRE 413 testimony to rebut the defendant's position. At the same time, the court conceded that FRE 413 evidence is "not technically rebuttal evidence." *Id.*

255. ARIZ. R. EVID. 404(c).

256. *See id.* The other acts must be "relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." *Id.* As long as this requirement is met, any relevant act may be admitted in any sex offense prosecution. Under FRE 413 to 415, a court may not admit a prior sexual assault committed against an adult in a child molestation prosecution, even though this might be highly relevant. Arizona Rule 404(c) does allow this. However, the "similarity or dissimilarity of

evidence of similar crimes to be admitted in similar cases.[257] In other words, federal prosecutors can admit sexual assault evidence against defendants in sexual assault cases but not child molestation cases.[258] Likewise, federal prosecutors can admit acts of child molestation against defendants in child molestation cases but not sexual assault cases.[259] This distinction seems senseless; dissimilar crimes might be highly probative of the matter at issue.[260] By eliminating this distinction, and allowing the court to decide whether the act should be admitted, Arizona Rule 404(c) brings the law into correspondence with relevance.

VI. CONCLUSION

FRE 413 to 415 are products of a Congress prompted by a "get tough on crime" political climate.[261] As drafted, the new Federal Rules, paradoxical and in conflict with other rules of evidence law, pose as many problems for courts as they do for criminals.[262] Comparing new Arizona Rule 404(c) with Federal Rules of Evidence 413, 414, and 415, the vast superiority of the Arizona approach becomes obvious. The Arizona rule represents careful judicial draftsmanship, mindful of Arizona common law and centuries of evidence law.[263]

Potential problems still loom forebodingly for FRE 413 to 415, even though case law on the new rules indicates that they may not cause such pernicious ripples in the current of evidentiary law as critics initially feared.[264] Meanwhile, the effects of Arizona Rule 404(c) await to be seen, as it has not yet been analyzed in published judicial opinions.

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the other act" is a factor courts shall take into consideration in making their Rule 403 determinations. ARIZ. R. EVID. 404(c)(1)(C)(ii).

257. *See* FED. R. EVID. 413(a), 414(a), 415(a).

258. *See id.*

259. *See id.* One could argue that in civil cases, FRE 415 permits courts to admit evidence of dissimilar crimes against the defendant (i.e., proof of a child molestation in a sexual assault case), depending on how one interprets subsection (a). FED. R. EVID. 415(a) ("In a civil case...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."). But the last phrase of FRE 415(a) seems to undermine that contention. It specifies that the evidence "may be considered as provided in [FRE] 413 and 414," FED. R. EVID. 415(a), and since evidence of dissimilar crimes can not be considered under FRE 413 to 414, then evidence of dissimilar crimes would not be permitted under FRE 415, either.

260. In prosecutions for depraved acts, the commissions of other depraved acts make the alleged crimes more likely to have occurred. *See* Grey v. State, 404 N.E.2d 1348, 1352 (Ind. 1980) (holding that evidence of defendant's remote incestuous relationship was admissible in prosecution of rape of a child under twelve).

261. *See* discussion *supra* Part II.

262. *See* discussion *supra* Part II.B.

263. *See* discussion *supra* text accompanying notes 26–32.

264. *See* discussion *supra* Part III.