THE PROPRIETY OF PROPENSITY: THE EFFECTS AND OPERATION OF NEW FEDERAL RULES OF EVIDENCE 413 AND 414

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I. INTRODUCTION

Despite the political wrangling that surrounded the passage and signing September 13, 1994 of the Violent Crime Control and Law Enforcement Act of 1994,[1] colloquially known as the Crime Bill,[2] there are few provisions within the Bill effects of which will last more than five years. The balance of the Crime Bill provides temporary grants that allow local police forces to hire new officers, monitor groups for certain types of crimes, and implement various social programs designed to meet the needs of at–risk youth.[3] The most lasting effects of this Bill can be found in Title IV, which addresses the problems of violence against women. Much of this section was formerly included in the Sexual Assault Prevention Act, introduced by Representative Susan Molinari (R–NY) and Representative Jon Kyl (R–AZ),[4] and the Violence Against Women Act, sponsored by Senator Orrin Hatch (R–UT), Senator Joseph Biden (D–DE), and Representative Patricia Schroeder (D–CO).[5] Three new evidence rules, which now reside in Title XXXII of the Crime Bill,[6] were proposed by senior counsel David J. Karp of the Office of Policy Development of the Justice Department[7] and introduced in section 231 of the Molinari Bill,[8] section 801 of President George Bush's violent crime bill,[9] and H.R. 3463, sponsored by Representative James Sensenbrenner (R–WI).

While appearing to be an afterthought to the Crime Bill, the new rules of evidence were included after extensive negotiations between Reps. Molinari and Kyl and the House Democratic leadership.[10] The new Federal Rules of Evidence

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1. Pub. L. No. 103-322, 108 Stat. 1796 (1994).
2. *See Crime Bill: What Congress Passed*, USA TODAY (US), Aug. 29, 1994, at 5.
3. Pub. L. No. 103–322, 108 Stat. 1796 (1994).
4. H.R. 5960, 102nd Cong., 2d Sess. § 121 (1992). Representative Jon Kyl was recently elected United States Senator from Arizona.
5. S. 8, 103rd Cong., 1st Sess. § 821 (1993).
6. This is the "Miscellaneous" section of the Bill. Ironically, these new evidence rules, arguably the most important sections of the Crime Bill because of their effect on criminal and civil prosecutions of sexual assault and molestation, were inserted at the last moment and so placed behind a definition of livestock, the Tennessee Valley Authority law enforcement personnel, and a section on labels on products. Pub. L. No. 103–322 § 320934 at 352.
7. Telephone interview with Elizabeth Maier, member of Sen. Kyl's staff (1994).
8. H.R. 1149, 102nd Congress, 1st Sess. (1991).
9. H.R. 1400, 102nd Congress, 1st Sess. § 635 (1991).
10. After trying for weeks to have the rules included as amendments to the Crime Bill, Republican members of the House defeated the Rule and prevented the entire Bill from being

413, 414, and 415 create an important exception to Federal Rule of Evidence 404(b). By allowing evidence of similar crimes in criminal and civil trials concerning sexual assault and child molestation, albeit constrained by relevancy and a fifteen day notice provision,[11] the new rules allow similar crimes to serve as evidence for purposes other than those stated in Rule 404(b)[12] and could create a broader base for admissibility than currently allowed by some state courts.[13] The most important effect of this change will be on the balance maintained by Rule 404(b). The new rules reevaluate the concern that evidence of prior acts is inherently unfair. This unfairness has been assumed because such evidence may allow judges and juries to make inferences of guilt based not

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brought to the floor. At this point the Democratic leadership became willing to negotiate the inclusion of these provisions. Telephone interview with Sen. Kyl (Jan. 17, 1995).

11. FED. R. EVID. 413(a) and (b); FED. R. EVID. 414(a) and (b). The new rules state:

> Rule 413. Evidence of Similar Crimes in Sexual Assault Cases
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> (a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.
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> (b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
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> (c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
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> (d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—
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> (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;
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> (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).
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> Rule 414. Evidence of Similar Crimes in Child Molestation Cases
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> (a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.
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> Rule 414 is identical to Rule 413, except that subsection (d) states:
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> For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code).

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

13. Exceptions created by the states, either by courts or by legislatures, will be discussed in depth in this Note. Generally, however, these exceptions limit evidence of prior crimes to those that are substantially similar or involve a limited class of victims, Soper v. State, 731 P.2d 587 (Alaska Ct. App. 1986), the time period between the acts is relatively short, State v. Garner, 116 Ariz. 443, 569 P.2d 1341 (1977), or where expert testimony shows an emotional propensity by the defendant to commit such acts, State v. Cousin, 136 Ariz. 83, 664 P.2d 233 (1983).

only on the evidence of the specific crime with which a defendant is charged but on his past misdeeds as well.[14] This reevaluation is made in light of the policy goal of bolstering the ability of the state to prosecute sexual assault and child molestation.[15] The legislative intent of the new rules was less to demonstrate "propensity" than "pattern of conduct," and therefore to link the defendant to the crime because he did the same or similar things on previous occasions.[16]

The purpose of this note is to explore the principles that underlie Rule 404(b), the balance that has been struck between those principles and the exceptions created by the states, and how the new rules will affect this balance. Because the crimes addressed by the new rules—sexual assault and child molestation—typically are not prosecuted in federal court, an integral part of exploring the effect of Rules 413, 414, and 415 will be to look at the likelihood they will be adopted by the states. While many states generally accept the Federal Rules of Evidence with only minor changes or additions,[17] these new rules might appear to diverge more strongly from some states' exceptions to Rule 404(b). Therefore, the possible adoption of these rules by states presents a conflict between the traditional legal philosophy behind 404(b) and the concerns of those who feel that the legal system allows violent sexual offenders to avoid punishment through arbitrary rules.[18]

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14. JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 58.2, at 1212 (Tillers rev. 1983). The policy behind not allowing evidence of prior, specific bad acts as elaborated by Professor Wigmore before the creation of the Federal Rules of Evidence are that evidence of character or propensity is unfair

> not because it has no appreciable probative value but because it has too much. The natural and an inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited and either allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge.

Id.

15. Rep. Jon Kyl, Introduction to the Kyl Sexual Assault Amendment to H.R. 4092, 140 Cong. Rec. E584 (daily ed. Mar. 24, 1994).

16. Telephone interview with Sen. Kyl (Jan. 17, 1995). According to the Senator, the goal was to create a broader or clearer statement to the "design or plan" exception in Rule 404(B), which the Congress believed was only seldom and narrowly applied. *Id.*

17. States tend to either modify the rules textually or through judicial application. In Alaska, for example, the legislature considered a modification to Rule 404(b) which states:

> (2) In a prosecution for a crime involving a physical or sexual assault of abuse of a minor, evidence of other acts by the defendant toward the same or another child is admissible to show a common scheme or plan if admission of the evidence is not precluded by another rule of evidence and if the prior offenses (i) are not too remote in time; (ii) are similar to the offense charge; and (iii) were committed upon persons similar to the prosecuting witness.

H.R. 237, 15th Leg., 2d Sess. § 9 (Alaska 1988).

In Arizona, the same type of exceptions apply to Rule 404(b), provided the testimony of prior acts is accompanied by the testimony of a mental health professional. *See infra* notes 87 and 88.

18. Much of this Note is predicated on the belief that Rules 413, 414 and 415 will remain substantially intact in form and content after review by the Judicial Conference. Subsections (c) and (d) of Section 320935 of the Violent Crime Control and Law Enforcement Act of 1994 provide that the Judicial Conference should make recommendations on the Rules within 150 days of enactment (i.e., by Jan. 18, 1995) and that if the recommendations are the same as the rules they will become effective within 30 days. If the Judicial Conference makes recommendations for changes to rules, then the rules become effective after 150 days, unless the recommendations are enacted by the Congress within those 150 days. If the Judicial Conference

II. PHILOSOPHICAL BACKGROUND OF RULE 404(B)

It was tragic. The defendant had, on several prior occasions, taken up with divorced women so he could have access to their children. He had sexually abused four other children before this little girl. The government either couldn't or didn't introduce any of this prior conduct

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makes no recommendations, then the Rules become effective 150 days after January 18, 1995, unless otherwise provided by law. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994), § 320935 (b), (c), (d).

In October of 1994, the Evidence Committee of the Judicial Conference recommended that rather than enact new evidence rules, the principles should be incorporated in Rule 404(a) along with a conforming amendment in Rule 405. As of October 19, 1994, the draft stated:

> (4) Character in sexual misconduct cases. If otherwise admissible under these rules, in a criminal case in which the accused is charged with sexual assault or child molestation, or in a civil case in which a claim is predicated on a party's alleged commission of sexual assault or child molestation, evidence of another act of sexual assault or child molestation, or evidence to rebut such proof or inference therefrom.
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> (A) In weighing the probative value of such evidence, the court, as part of its rule 403 determination, may consider:
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> (i) proximity in time to the charged or predicate misconduct;
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> (ii) similarity to the charged or predicate misconduct;
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> (iii) frequency of the other acts;
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> (iv) surrounding circumstances;
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> (v) relevant intervening events; and
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> (vi) other relevant similarities or differences.
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> (B) In a criminal case in which the prosecution intends to offer evidence pursuant to this subdivision, it must disclose the evidence including statements of witnesses or a summary of the substance of any testimony at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.
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> (C) For purposes of this subdivision,
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> (i) "sexual assault" means conduct of the type proscribed by chapter 109A of title 18, United States Code, or an attempt or conspiracy to engage in such conduct, regardless of whether that conduct would have subjected the actor to federal jurisdiction.
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> (ii) "child molestation" means conduct, committed in relation to a child under the age of 14 years, of the type proscribed by chapter 109A or chapter 110 of title 18, United States Code or an attempt or conspiracy to engage in such conduct, regardless of whether that conduct would have subjected the actor to federal jurisdiction.
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> (b) Other crimes, wrongs, or acts. - Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith except as provided in subdivision (a)...
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> The conforming language to be added to F.R.E. 405 would state:
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> (add to first sentence)... except as provided in subdivision (c) of this rule.
>
> (c) Proof in sexual misconduct cases. In cases in which evidence is offered pursuant to rule 404(a)(4), proof may be made by specific instances of conduct, testimony as to reputation or testimony in the form of an opinion except that the prosecution or claimant may offer reputation or opinion testimony only after the opposing party has offered such testimony.

Fax from senior counsel David Karp of the Office of Policy Development, United States Department of Justice, dated Oct. 19, 1994. The fax also includes a draft transmittal statement which states: "We do not believe that it is our role to prepare alternative rules that dilute the policies articulated by Congress. Instead, we have attempted to draft a rule that would correct ambiguities and possible constitutional infirmities...." *Id.*

Given the tight schedule of the members of the House because the "Contract with America" and the lack of interested sponsors it seems unlikely that any member of Congress will attempt to institute these changes in place of the rules adopted in the Crime Bill before June 1995.

> at the defendant's trial. The jury acquitted. When some of the jurors subsequently found out about the prior incidents, they were furious. "If only we'd known about them, we'd have convicted the guy!"[19]

This scenario illustrates the central problems that surround the prosecution of repeat sexual offenders, especially those who prey upon children.[20] If the assault appears to be an isolated incident, jurors are forced to compare the testimony of an adult with that of the child victim.[21] Given the heart-wrenching disgust society feels about these crimes it is understandable that jurors might want to believe that something like this could not really have happened.[22] Without the corroboration of continuing abuse or other victims, jurors feel unsure of convicting based on what might be a child's misunderstanding or fibs.[23]

However, as the quotation illustrates, the dynamics can change if evidence of previous assaults is presented. Jurors may wish to convict, not because they believe that the evidence presented proves beyond a reasonable doubt that the defendant committed this particular crime, but because they believe that defendant is more likely to commit such acts because he has done it before or because he has not been punished previously for these acts.[24]

It is to this element of unfairness that Federal Rule of Evidence 404(b) speaks. The rule states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person *in order to show action in conformity therewith....*"[25]

Evidence that is given in order to show that the accused is the type of person who has committed a certain crime before and, therefore, is likely to have committed the crime with which he is now charged is propensity evidence.[26] This is a species of character evidence that is not admissible under Rule 404(a).[27] Character propensity evidence creates an inferential sequence within the minds of jurors that 1) the accused has a unique, abnormal propensity to commit certain acts; 2) that he acts on that propensity; and 3) having done so repeatedly in the past he will do so in the future.[28] Character propensity differs from non-prejudicial, allowed non-propensity, and non-character propensity evidence that shows that the defendant is a member of an identifiable class of people with the knowledge or skill to commit a certain act.[29]

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19. Mary Christine Hutton, *Prior Bad Acts Evidence in Cases of Sexual Contact with a Child*, 34 S.D. L. REV. 604 (1989) (quoting M.T., Child Psychologist).

20. Brian E. Lam, *The Admissibility of Prior Bad Acts in Sexual Assault Cases Under Alaska Rule of Evidence 404(b) - An Emerging Double Standard*, 5 ALASKA L. REV. 193, 195–96 (1988).

21. *Id.* at 205–206.

22. David J. Kaloyanides, *The Depraved Sexual Instinct Theory: An Example of the Propensity for Aberrant Application of Federal Rule of Evidence 404(b)*, 25 LOY. L.A. L. REV. 1297, 1328–29 (1992).

23. Lam, *supra* note 20, at 205–206.

24. WIGMORE, *supra* note 14, § 58.2 at 1215.

25. FED. R. EVID. 404(b) (emphasis added).

26. WIGMORE, *supra* note 14, § 58.2 at 1215.

27. FED. R. EVID. 404(a).

28. Kaloyanides, *supra* note 22, at 1319.

29. *Id.* at 1318. The author gives the example of a defendant who previously opened a safe using an unusually intricate or highly sophisticated method, evidence of which shows that he had the skill to perpetrate the crime of which he is accused. *Id.*

The reason it is preferable for jurors not to make character propensity inferences is imbedded in the Anglo-American system of justice along with the fundamental principle of presumption of innocence.[30] Since the Restoration[31] and the English Treason Act of 1695[32] Anglo-American law has veered away from Continental law[33] in preferring that judge or jury try the accused solely on the act charged and not on his crimes in the past or the inferences about his character that knowledge of those crimes creates.[34]

III. EXCEPTIONS TO THE PROHIBITION AGAINST PROPENSITY EVIDENCE

Despite the relatively long history of excluding character evidence in Anglo-American courts, there is an equally long history of exceptions to the rule.[35] Many of these exceptions are codified in Rule 404(b).[36] Evidence of prior crimes is admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[37] In the case of sexual assault, prior rapes may be used to show that the defendant assaulted the victim with an intent to rape, rather than merely steal her purse.[38] Likewise, evidence that the defendant lured his victims into a secluded spot using a previously employed ruse can be used to show design or plan.[39] This is the type of evidence previously defined as non-character propensity evidence.[40] However, these exceptions made on the basis of intent or design or plan,[41] are often considered a fiction by commentators.[42] Moreover, Rule 404 works in conjunction with Rule 403, which requires that the danger of undue prejudice

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30. *Id.* at 1305; *see* United States v. Foskey, 636 F.2d 517, 523 (D.C. Cir. 1980) (stating that an element of the presumption of innocence is the axiom that the accused must be tried only for what he did and not for who he is).

31. WIGMORE, *supra* note 14, § 58.2 at 1213.

32. Thomas J. Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidenced in Federal Criminal Trials*, 50 U. CIN. L. REV. 713, 717 (1981).

33. WIGMORE, *supra* note 14, § 58.2 at 1213.

34. *See* WIGMORE, *supra* note 14, § 58.2 at 1213–1215 (examples of early cases stating the principle that the accused is not to be tried on all past infractions but merely the one with which he is charged). Among the rationales offered in these cases include: "[W]e would not suffer any raking into men's course of life, to pick up evidence that they cannot be prepared to answer to," Hapden's Trial, 9 How. St. Tr. 1053, 1103 (K.B. 1684), and "[I]t would have been evidence of the prisoner being a bad man, and likely to commit the offences there charged. But the English law does not permit the issue of criminal trials to depend on this species of evidence." R. v. Oddy, 2 Den. Crim. Cas. 264, 169 Eng. Rep. 501, 502 (Cr. Cas. Res. 1851).

35. *See* WIGMORE, *supra* note 14, § 357 at 336.

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

37. *Id.*

38. Hutton, *supra* note 19, at 610; *see also* EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, § 4:12, at 35 (1990).

39. McKenzie v. State, 33 So.2d 488, 490 (1948).

40. *See supra* note 29.

41. WIGMORE, *supra* note 14, § 357, at 334.

42. *Id.* § 62.2, at 1335. There is, however, a contradiction in this point made by Professor Wigmore and his subsequent editors. In § 357 he states:

> [A] single previous act, even upon another woman, *may*, with other circumstances, give strong indication of a design (not a disposition) to rape; and previous act of the sort upon the same woman ought in itself usually be regarded as indicating such a design.
>
> Courts have shown altogether too much hesitation in receiving such evidence.

(Emphasis in original) *Id.* at 335.

created by the admission of evidence of prior crimes be balanced against the probative value of the evidence.[43]

Historically there have been additional exceptions made in the case of child molestation and sexual assault.[44] Known by various names, such as the "lustful or lewd disposition,"[45] "sexual proclivity"[46] or "depraved sexual instinct"[47] exception, this exception has been developed to allow evidence of prior sex crimes to show propensity on the part of the defendant to commit "a specific act on a specific occasion in conformity with that trait of character."[48] States have embraced these exceptions, especially in child molestation cases, primarily because of the difficulty of corroboration.[49] As was stated in *United States v. Leight*,[50] "In child abuse prosecutions, there are usually no eyewitnesses to identify the source of the injuries. Rather, such prosecutions are commonly built upon circumstantial evidence showing a pattern of repeated injuries suggesting child abuse."[51] This is even more true in the case of sexual abuse, where the injuries may be less visible and the stigma of disclosure is more severe.[52]

The dual problems of corroboration and credibility also exist in the prosecution of adult sexual assault cases.[53] A severe example of these problems is illustrated in *People v. Oliphant*.[54] In this unusual case the defendant exhibited great understanding of the effects of certain types of evidence on credibility.[55] After an initial mistrial, the trial court allowed evidence of three prior rapes.[56] The court argued that this evidence showed a plan or scheme to deny the victims credible evidence against him.[57] The defendant had perpetrated

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43. FED. R. EVID. 404(b) advisory committee's note; *see also* Slough and Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325 (1956).

44. WIGMORE, *supra* note 14, § 357 at 336 (citing R. v. Reardon, 4 F. & F. 76 (1864)). In a case of child molestation, Willes, J. stated:

> I shall allow all the matters to be proved, in order to show the real nature of the case... It has repeatedly appeared to me in cases of this sort that the man by a threat of violence deters the child from complaining, and thus acquires a species of influence over her by terror, which enables him to repeat the offence on subsequent occasions; and this seems to me to give a continuity to the transaction which makes such evidence properly admissible.

Id.

45. Lam, *supra* note 20, at 194.

46. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, *supra* note 38, § 4:14 at 37.

47. Kaloyanides, *supra* note 22, at 1298.

48. WIGMORE *supra* note 14, § 62.2 at 1335.

49. Hutton, *supra* note 19, at 616.

> The abolition of the legal impediments to prosecution are seen as a reflection of society's growing recognition that the credibility of the victim in a sex crime case should be judged on an individual basis and should not be strapped with legal presumptions or other hindrances to its acceptance by a jury. The practical task of convincing a jury to believe uncorroborated testimony, however, remains.

Id.

50. 818 F.2d 1297,1303 (7th Cir.), *cert. denied*, 484 U.S. 958 (1987).

51. *Id.* at 1301.

52. Lam, *supra* note 20, at 196.

53. Kaloyanides, *supra* note 22, at 1327.

54. 250 N.W.2d 443 (Mich. 1976).

55. *Id.* at 446.

56. *Id.*

57. *Id.* at 449.

the rapes in such a way as to minimize evidence of a struggle or violence.[58] In two of the rapes the defendant gave the victims his name, address, and license plate number.[59] In the fourth rape he actually went to the police after the rape and reported that he had an argument with the victim and was afraid she might retaliate against him.[60] The acts were calculated to raise doubts about the non-consensual nature of the contact.[61] For reasons similar to these, the corroborative effect of prior bad acts is often permitted by state courts.[62]

This is not to say that these exceptions are not without limits. Many states limit when prior bad acts evidence may be introduced in rape and molestation cases by limiting the evidence to assaults against the same victim or victims with close similarities, similar types of abuse, and acts in which the time period between the prior act and the one alleged was relatively short.[63] The rationale behind such limits is often to fit the admission of the evidence into the exceptions permitted under Rule 404(b),[64] although commentators often describe the adoption of these rationales as fictions.[65]

Illustrative of the states' different approaches to the exceptions to Rule 404(b) and the limitations on the admissibility of evidence of prior bad acts are three cases of similar child molestations in three different states—*State v. Means*[66] in South Dakota, *Soper v. State*[67] in Alaska, and *State v. Cousin*[68] in Arizona.

In the South Dakota case, *State v. Means*, the 70 year-old defendant had apparently become romantically involved with the victim's grandmother in order to be close to the children.[69] During a family trip to the Black Hills the defendant molested the eight-year-old granddaughter and attempted sexual contact with her ten-year-old sister.[70] The trial court permitted the evidence of contact between the defendant and the ten-year-old girl and the testimony of a victim three years previously.[71] Apparently, three years earlier the defendant had gained the trust of another family in order to have access to a young girl.[72] The South Dakota Supreme Court found that the testimony of these two girls was admissible because it showed a plan and met the exceptions delineated in South Dakota's analog to Rule 404(b).[73] The elements described by the Court that went to show plan included that the prior acts were "similar in nature to the crime charged"[74] and the acts were relatively close in time.[75]

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58. *Id.*
59. *Id.*
60. *Id.* at 446.
61. *Id.* at 450.
62. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, *supra* note 38, § 4:14.
63. *Id.* at 37.
64. WIGMORE, *supra* note 14, § 62.2 at 1336.
65. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, *supra* note 38, § 4:13 at 36.
66. 363 N.W.2d 565 (S.D. 1985).
67. 731 P.2d 587 (Alaska Ct. App. 1987).
68. 136 Ariz. 83, 664 P.2d 233 (App. 1983).
69. State v. Means, 363 N.W.2d at 567, 569.
70. *Id.* at 567.
71. *Id.* at 568.
72. *Id.* at 568-69.
73. *Id.* at 569.
74. *Id.* at 568.
75. *Id.* at 568-69.

Unlike the South Dakota case, which attempted to fit the inclusion of prior bad acts evidence into the exceptions set forth in Rule 404(b), the decision in *Soper v. State*[76] marked a departure from previous case law for the Alaska court.[77] The Court broadened the previously admissible categories of prior acts evidence to include prior acts with another victim, rather than simply the same victim.[78] The defendant was charged with sexually abusing his youngest daughter at the family's weekend cabin.[79] In his second trial, after the first ended in a mistrial, the prosecution offered evidence that the defendant had molested his four older daughters in succession as they reached puberty.[80] Two of the defendant's stepdaughters testified to similarities in their father's approach in order to show a common plan or scheme.[81] The court held that several factors argued for the admissibility of the evidence of prior acts.[82] The similarities in the girls' ages when abused, the location of the assaults, and the father's approach meant that the prior acts were substantially similar to the crime charged.[83] Moreover, the victims were members of a limited class and the prior acts showed a pattern of abuse over a period of time.[84] The court held that these factors "occupy the middle ground between evidence of character, [Alaska Rule of Evidence] 404(b), and habit, [Alaska Rule of Evidence] 406."[85] In finding this "middle ground" the Alaska court appears to have abandoned the attempt to confine its exception within the Rule 404(b), and created a new class of admissible quasi-propensity evidence.[86]

Arizona accepts evidence of a defendant's "emotional propensity for sexual aberration;"[87] however, Arizona also requires reliable expert medical testimony that the defendant shows a continuing emotional propensity to commit the crime charged.[88] In *State v. Cousin*, these rules were applied when the defendant was charged with child molestation for sexually touching the ten-year-old victim.[89]

The defendant was charged as well with touching his stepdaughter in a similar way when she was a similar age.[90] A board certified forensic psychiatrist testified that the prior touching of the stepdaughter indicated an emotional propensity to perform acts of child molestation.[91] Likewise, the testimony of an eighteen-year-old stepdaughter about prior acts was also allowed where it showed the same propensity to perform similar acts of molestation on girls of that age.[92] However, the court did not allow the oldest daughter to testify concerning the defendant's rape of her when she was twelve

76. 731 P.2d 587 (Alaska Ct. App. 1987).
77. 731 P.2d at 590; *cf.* Bolden v. State, 720 P.2d 957, 959-60 (Alaska Ct. App. 1986).
78. 731 P.2d at 587, 590.
79. *Id.* at 588.
80. *Id.* at 588–89.
81. *Id.* at 589.
82. *Id.* at 590.
83. *Id.*
84. *Id.*
85. *Id.*
86. Lam, *supra* note 20, at 210.
87. State v. McFarlin, 110 Ariz. 225, 227-28, 517 P.2d 87, 89-90 (1973).
88. State v. Treadaway, 116 Ariz 163, 167, 568 P.2d 1061, 1065 (1977).
89. State v. Cousin, 136 Ariz. 83, 85, 664 P.2d 233, 235 (App. 1983).
90. *Id.* at 84-85, 664 P.2d at 234-35.
91. *Id.* at 85, 664 P.2d at 235.
92. *Id.*

years old because it did not show the same propensity.[93] The Arizona standards applied in *State v. Cousin* are perhaps a middle ground between the South Dakota attempt to force their exception into the categories permissible under Rule 404(b) and the Alaska court's creation of a new species of evidence.

IV. THE EFFECTS OF THE NEW RULES ON THE BALANCE

In comparison with these restrictions on propensity evidence placed by various states, the new evidentiary rules passed in the Crime Bill[94] appear to allow a broad range of prior bad acts evidence. Moreover, the exceptions created by Rules 413, 414 and 415 seem to flout the philosophical underpinnings of Rule 404(b).[95] This, however, was not the intent of the members of Congress who introduced and supported the new evidence rules.[96] Senator Kyl, in particular, focused on the *pattern* of abuse evidenced in cases such as *Soper v. State*, rather than propensity, and thus saw the new rule as less of a change from existing rulings on admissibility.[97] Representative Molinari made this point on the House floor.[98] Citing the facts of *People v. Hansen*,[99] Representative Molinari noted that the appellate court held that the testimony of two girls who had been lured to the defendant's home in a manner similar to the victim was "unnecessary to establish intent" and therefore "without a valid purpose."[100] The new rules would ameliorate such technical overturnings, as they allow judicial discretion when the cases are similar and relevant enough to permit evidence of past actions.[101] As stated by Representative Molinari in the Congressional Record, application of the evidence rules is limited in both the types of cases it addresses and the types of evidence the rules will allow.[102] The types of evidence that are allowed directly address the policy concerns that bolster the existing state exceptions.[103] In fact, under the interpretation of the federal rules sanctioned by the Supreme Court in *Huddleston v. United States*,[104] many of the limitations required under the states' rules are inherent in Rules 104 and 403.[105]

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93. *Id.*
94. *Supra* note 11.
95. FED. R. EVID. 413 and 414. On a quick reading the limit of only relevance might appear to be too broad to prevent propensity evidence from being entered. As will be discussed later, this reading does not withstand a thorough analysis of the meaning of relevance.
96. Telephone interview with Sen. Kyl (Jan 17, 1995).
97. *Id.*
98. 140 Cong. Rec. H5437 (daily ed. June 29, 1994) (statement of Rep. Molinari).
99. People v. Hansen, 708 P.2d 468 (Col. Ct. App. 1985).
100. *Supra* note 95, citing Hansen, 708 P.2d at 470.
101. *Id.*
102. *Id.*
103. By allowing a larger window for prior bad acts evidence, the authors of the new rules hoped to overcome the problems of corroboration and credibility. Telephone interview with Sen. Kyl (Jan. 17, 1995).
104. 485 U.S. 681, 688, 689 (1988), citing United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc). In *Beechum*, the Court noted that temporal proximity is one limiter to be considered, as well as similarities between the charged offense and the previous acts. 582 F.2d at 915.
105. Rule 104(b) states:

> When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

FED. R. EVID. 104(b).

Rule 403 states:

To understand why these three rules are not as iconoclastic as they appear on the initial reading, one must first see how they operate as an exception to Rule 404(b) and, second, how the rules are governed by the requirements of relevancy and probity. Section (a) of Rule 413 states:

> In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.[106]

Rule 414 states the same proposition in cases of child molestation.[107] In effect these two rules create a discretionary exception to Rule 404(b), or, more accurately, state two occasions in which evidence of prior bad acts is not strictly restricted to the purpose of showing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,[108] and these terms may be more liberally interpreted.[109]

The exception, however, is limited to the two situations in which it applies. Rule 413 only affects cases of criminal sexual assault that involved specific acts, attempts at those acts, or conspiracy to commit those acts.[110] Similarly, Rule 414 is limited to offenses of child molestation involving a child under the age of fourteen.[111] In these instances the admission of evidence of the defendant's prior acts of sexual assault or child molestation allows the jury to consider whether it is more likely than not that the defendant committed the offense with a specific motive or in a certain way.[112] This directly addresses

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> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FED. R. EVID. 403.

106. FED. R. EVID. 413

107. FED. R. EVID. 414.

108. FED. R. EVID. 404(b). Fed. R. Evid 413 and 414 are also not restricted by Fed. R. Evid. 405 which requires that evidence of character be presented in the form of reputation or opinion testimony. Letter to Chief Justice Rehnquist from Sen. Hatch, Sen. Kyl, and Rep. Molinari (Oct. 11, 1994) (hereinafter Hatch letter).

109. Telephone interview with Sen. Kyl (Jan. 17, 1995).

110. FED. R. EVID. 413(d)

> For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—
>
> (1) any conduct proscribed by chapter 109A of title 18, United States Code;
>
> (2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
>
> (3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;
>
> (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
>
> (5) an attempt or conspiracy to engage in conduct described in paragraph (1)–(4).

Id.

111. FED. R. EVID. 414(d). The only difference from Rule 413 in the description of the crimes that this exception applies to is in Federal Rule of Evidence 414(d)(2), which states that the rule applies to conduct proscribed by chapter 110 of Title 18, United States Code.

112. Hatch letter, *supra* note 108, at 11; *see also* Kaloyanides, *supra* note 22, at 1319.

concerns that sexual assault and molestation cases are often swearing contests because of the unlikelihood of presenting substantial corroboration.[113]

Rules 413 and 414 do not, however, provide an open door to introduce any and all evidence that might suggest that the defendant is a despicable human being likely to commit such heinous crimes. Section (a) of both rules requires that such evidence be allowable only when it is relevant to the matter at hand.[114] The requirement of relevance means that Rules 104 and 403 operate in conjunction with the new rules,[115] as is explicitly stated in section (c) of both Rule 413 and 414.[116] In effect, these requirements serve essentially the same purpose as the states' limitations that are placed on evidence of prior bad acts in sexual assault and child molestation cases.[117]

Before allowing evidence of prior similar acts, the judge first must decide under Rules 401, 104 and 403 if the evidence is both relevant and has sufficient probative value to warrant its admission.[118] Relevancy, in the sense required by the rules of evidence, is a narrow category[119] and requires that a judge filter the proposed evidence through at least three levels of inquiry as to its relevancy, probity and prejudicial effect to determine the probative value of the evidence.[120]

In the first level of analysis the judge must determine whether the evidence of a similar crime or prior bad act is relevant to the case at hand. As held in *United States v. Beechum*,[121] in order for extrinsic evidence of similar acts or crimes to be relevant, it must be similar in the characteristic to which it is addressed.[122] The court rejected the notion that all of the physical elements of the crime need to be similar,[123] but stated that if the element to be proved is knowledge, then the extrinsic evidence must demonstrate the same knowledge.[124] As stated in Rule 401, evidence of similar acts is relevant[125] only if the evidence creates a logical connection between the facts at issue and the evidence.[126] In the context of Rules 413 and 414, the initial determination of

113. *Id.* at 7.
114. FED. R. EVID. 414(a), 413(a). Moreover, these rules are permissive rather than mandatory rules of admission. Hatch letter, *supra* note 108, at 11.
115. Hatch letter, *supra* note 108, at 11.
116. FED. R. EVID. 413(c) and 414(c) ("This rule shall not be construed to limit the admission or consideration of evidence under any other rule.").
117. *See supra* note 66.
118. *See, e.g.*, IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, *supra* note 38, § 4:12.
119. WIGMORE, *supra* note 14, § 28 at 968. Dean Wigmore advances the argument that, while the historian or naturalist may collect diverse pieces of "evidence," setting aside bits and pieces until they fall together into a complete picture "relevant" to the issue at hand, in the legal setting the pieces must immediately appear relevant for the judge to admit them for the jury's consideration.
120. EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 83 (2d Ed. 1989).
121. 582 F.2d 898 (5th Cir. 1978).
122. *Id.* at 911 (citing Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954, 955 (1933)).
123. *Id.*
124. *Id.* at 912.
125. FED. R. EVID. 401. Relevancy is defined as a "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."
126. IMWINKELRIED, EVIDENTIARY FOUNDATIONS, *supra* note 120, at 83.

relevancy employs the same type of restrictions explicitly stated by several states.[127]

The second step to the determination of probative value determines whether the evidence can be authenticated in some way.[128] Rule 104 requires that evidence dependent on the fulfillment of a factual condition be sufficient and that each party be able to present evidence relevant to the weight or credibility of the evidence.[129] Evidence is not accepted on face value and the proponent of similar crimes evidence must authenticate the evidence.[130] This does not mean that the prior bad act brought as evidence must be an offense for which the defendant has been convicted.[131] Rather the evidence must be sufficient to allow the jury to determine its value, after presentation of witnesses, cross-examination and rebuttal.[132]

This process is actually enhanced by the new rules.[133] In Section (b) of both Rule 413 and Rule 414, the evidence must be disclosed to the defendant at least fifteen days before the date of the trial.[134] Under these rules a defendant has an opportunity to impeach evidence of prior bad acts. Under these rules a judge can therefore be more certain of the authentication of the evidence as required by Rule 104.[135]

The third, and finest, filter through which a judge must evaluate evidence of prior bad acts is that created by Rule 403.[136] Where the tests for relevancy and probative value discussed above may allow a broad range of evidence into consideration, Rule 403 allows a judge to severely limit the admissibility of the evidence.[137] This is described as "legal relevance," which allows for the

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127. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, *supra* note 38, § 4:14 at 37.

128. IMWINKELRIED, EVIDENTIARY FOUNDATIONS, *supra* note 120, at 83.

129. FED. R. EVID. 104(b) and (e).

130. IMWINKELRIED, EVIDENTIARY FOUNDATIONS, *supra* note 120, at 83.

131. Hatch letter, *supra* note 108, at 13. This was considered very important by Democrats who opposed the Rules on the floor of the House. Telephone interview with Sen. Kyl (Jan. 17, 1995). This type of evidence has been upheld by the Supreme Court as permissible in the context of Rule 404(b) in Huddleston v. United States, 485 U.S. 681 (1988).

132. Hatch letter, *supra* note 108, at 13.

133. *Id.*

134. FED. R. EVID. 413(b) and 414(b).

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

135. FED. R. EVID. 104.

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

137. WIGMORE, *supra* note 14, § 28 at 975.

> The dominant contemporary approach to problems of relevancy stresses the importance of broad standards of admissibility: All evidence with the slightest degree of probative value should be admissible in the absence of a specific reason to exclude. But what the Lord giveth, the Lord taketh. The modern approach to relevancy also confers on the trial judge extensive discretionary power to exclude relevant evidence...

exclusion of evidence because the probative dangers of the evidence outweigh the evidence's probative value.[138]

It is important to note that many of the reasons for which evidence may be determined "legally irrelevant" are similar to the reasons for disallowing propensity evidence.[139] It seems likely if the primary difficulty with propensity evidence is that it leads jurors to convict not on the basis of the offense charged but on the cumulative evidence or the prior acts,[140] then some types of prior bad acts evidence might be disallowed on the basis that it confuses the issues or misleads the jury.[141] For this reason, Rules 413 and 414 do not stray too far afield from the intentions of Rule 404(b).[142]

This revelation does not, however, make Rules 413 and 414 moot. Two components of Rule 403 imply some inclusion rather than none, when prior bad acts evidence is presented.[143] First, the rule is written in the passive voice, which suggests that the defendant has the burden of showing that the dangers of admission outweigh the probative value of the evidence.[144] Second, in convincing the judge that there are more dangers inherent in the evidence than value, the defendant must show that there are "substantially" more dangers.[145]

The consideration of the prior bad acts evidence in relationship to Rule 403 also requires the judge to take into consideration some of the factors that are explicitly stated in the various state exceptions to Rule 404(b).[146] For example, the judge should consider the similarity between the proposed evidence and the charged offense.[147] Even if the evidence has passed the test of relevancy because the elements that must be proved are similar, if they are in all other ways dissimilar the offense may not have enough probative value to outweigh the prejudice that attends prior bad acts evidence.[148] This balance is similar to some states' exceptions which require that prior bad acts evidence show similar victims or acts.[149] Also, in *Beechum*, the Court suggested that the time separating the prior act and the charged act should be taken into consideration,[150] just as some states require temporal proximity in their exceptions to Rule 404(b).[151]

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138. IMWINKELRIED, EVIDENTIARY FOUNDATIONS, *supra* note 120, at 83.
139. *Id.*
140. Kaloyanides, *supra* note 22, at 1319.
141. FED. R. EVID. 403; *see also* IMWINKELRIED, EVIDENTIARY FOUNDATIONS, *supra* note 120, at 83.
142. Hatch letter, *supra* note 108, at 11. Like Rule 404(b), Fed. R. Evid. 413 and 414 operate under the control of Rules 104 and 403; also Questions and Answers on F.R.E. 413-415, 10, prepared by senior counsel David Karp, suggests that like Rule 404(b) "once it has been found that evidence is relevant for a proper purpose, it is then generally admitted, unless the court affirmatively determines that probative value is substantially outweighed by prejudice.".
143. IMWINKELRIED, EVIDENTIARY FOUNDATIONS, *supra* note 120, at 84.
144. *Id.*
145. *Id.*
146. United States v. Beechum, 582 F.2d 898, 915 (1978); *cf. supra* notes 66, 67, and 68.
147. *Id.*
148. *Id.*
149. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, *supra* note 38, at § 4:14, 37; *see also* State v. Means, 363 N.W.2d 565 (S.D. 1985).
150. United States v. Beechum, 582 F.2d 898, 915 (citing United States v. Carter, 516 F.2d 431, 434–35 (5th Cir. 1975)).
151. WIGMORE, *supra* note 14 at § 62.3, 1346-1347 n.3 at 1346.

Because of the filtering process through which the evidence of prior bad acts must pass, there is only a limited exception to Rule 404(b) created by Rules 413 and 414.[152] Moreover, the exception created by the new rules meshes well with the various exceptions created by the states to attend to the problems created in the prosecution of sexual assault and child molestation.[153] Because Rules 413 and 414 are restricted, both in the types of offenses to which they apply and the types of evidence which will be allowed under the Federal Rules of Evidence, the new rules provide a valuable tool in the one area where the philosophical objections to propensity evidence are outweighed by the nature and conditions of the offense.[154]

V. LIKELIHOOD OF STATE ADOPTION OF FEDERAL RULES 413 AND 414

One of the stated implications of the passage and adoption of Federal Rules of Evidence 413 and 414 is the effect the new rules will have on states' rules and exceptions to Rule 404(b).[155] Two states, Missouri and Indiana, have already specifically adopted evidence rules based on Rules 413 and 414.[156] Currently, thirty-four states and Puerto Rico have adopted evidentiary rules modeled on the Federal Rules of Evidence.[157] Given the movement toward uniformity in evidentiary rules it is likely that as new rules are promulgated at the federal level they will have at least some influence on the rules used by the states.[158]

In many cases acceptance of the Federal Rules seems assured because of the growing movement toward uniformity in the law. Uniformity has become the bellwether of modern procedure, including evidentiary rules, for the purposes of fairness, efficiency, and progress.[159] Moreover, uniformity has become a goal in and of itself, so that when the federal rules are changed many states follow automatically to retain uniformity.[160]

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152. This was the legislative intent. Rather than create an exception, the drafters intended to broaden the use of the type of evidence permitted under Rule 404(b). Telephone interview with Sen. Kyl (Jan. 17, 1995).

153. *See supra* note 44.

154. *See supra* notes 49, 62.

155. *See* Hatch letter, *supra* note 108, at 2.

156. *See* MO. ANN. STAT. § 566.025 (Vernon 1995); IND. CODE. ANN. § 35-37-4-15 (Burns 1994).

157. Joan L. Larsen, *Of Propensity, Prejudice, and Plain Meaning: The Accused's Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404(B)*, 87 NW. U. L. REV. 651, 652-53 n.8 (1993). The states adopting and adapting the Federal Rules are: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Iowa, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Furthermore, some states have selectively adopted the Federal Rules through case law. *Id. See also* L. Kinvin Wroth, *The Federal Rules of Evidence in the States: A Ten-Year Perspective*, 30 VILL. L. REV. 1315 (1985).

158. For a discussion of the tendency toward and effects of uniformity in rules, see Kenneth W. Graham, Jr., *State Adaptation of the Federal Rules: The Pros and Cons*, 43 OKLA. L. REV. 293 (1990).

159. *Id.* at 299.

160. *Id.* at 298. ("The point is this: uniformity is a sort of bellwether by which rulemaking lambs can be led to slaughter with a minimum of effort—provided that all of the flock has been conditioned to follow the bellwether.")

This not to say that the thirty-four states that have adopted the Federal Rules of Evidence have done so wholesale. All the states have adapted the rules to different extents.[161] For example, Utah has made very few changes in translation from the Federal Rules to its state rules, while Alaska has rejected many of the Federal Rules and retained the existing state rules.[162]

Dean Wroth has catalogued at least five reasons states have altered the Federal Rules when adopting them.[163] The first reason for many of the changes is simple editing, either to accommodate institutional differences or stylistic improvements.[164] Second, many states have decided to retain traditional state practices in some areas, rather than adopt the federal approach.[165] The third and fourth reasons are variations on this second reason.[166] Third, where the Federal Rules have chosen a controversial solution to an evidentiary problem, states have sometimes rejected the federal solution in favor of a traditional rule or a new solution.[167] Fourth, states have also dealt with the controversy by ignoring it altogether and not adopting any rule.[168] Fifth and finally, some states have decided to codify solutions to problem areas that the Federal Rules have not addressed at all.[169] In considering how states will deal with new Federal Rules 413 and 414 and their relationship to existing state rules, it is reasonable to expect that the second, third and fourth methods of adaptation are most likely to apply. While small stylistic changes may occur in some states, the nature of the issue suggests that many states will want to specifically tailor the rules to fit their existing exceptions or create new law.

The most important factor determining the extent to which the rules will be adapted, however, seems to be the method states use to enact evidentiary rules.[170] The great majority of the states that have adopted the Federal Rules do so through the constitutional rulemaking authority of the state's highest court.[171] Professor Graham suggests that states in which the legislature adopts the rules of evidence are more likely to change the Federal Rules as they are pulled through the wringer.[172] Furthermore, he believes that states with judicial rulemaking are more likely to toe the line when adopting Federal Rules.[173] This seems especially true because judges are not as subject to special-interest wrangling and are more likely to belong to the cult of uniformity.[174]

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161. *Id.* at 294 ("[T]he fact that no state has yet done this may suggest that 'straight, no chaser' is not a viable way to down the federal brew.")
162. *Id.* at 308.
163. Wroth, *supra* note 157, at 1322.
164. *Id.* at 1323.
165. *Id.*
166. *Id.* at 1324.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 1349.
171. *Id.* at 1350.
172. Graham, *supra* note 158, at 304. In 1985 the states that adapted the Federal Rules this way included Arkansas, Florida, Hawaii, Iowa, Nebraska, Nevada, North Carolina, Oklahoma, and Oregon. Wroth, *supra* note 155, at 1350 n.272.
173. Graham, *supra* note 158, at 304.
174. At least in states where the judiciary is not elected, we assume that judges are more insulated from political pressure and of a more academic bent than members of the legislature. As uniformity has been the "bellwether" of the law for the last 30 years, it seems likely that judges, especially those on state supreme courts, would at least be more in tune with this trend.

In the case of the likely adoption of Federal Rules 413 and 414, common sense suggests these assumptions about actions by legislatures and judicial conferences would appear to be turned on their heads. While legislatures may be more likely to debate and, in response, tinker with proposed rules, Rules 413 and 414 are gut-wrenching policy issues in which many politicians may want to take as strong a position as possible. In the era of trying to be tougher than the next guy on crime, it is unlikely that many state legislators will want to soften the effect of these new rules.[175]

In contrast, while judicial pedagogues may agree that uniformity is a noble goal of rule codification, they are also more likely to be sophisticated about the philosophical principles behind Rule 404(b). While the new rules are actually very similar in scope and purpose to the existing state rules, judicial debate over the balance between problems and necessities of propensity evidence in sexual assault and child molestation cases may lead to wide variations of adaptation of Rules 413 and 414.[176] These adaptations are likely to codify existing state exceptions[177] or create an original solution to the problem.[178] However, even if the exact wording of Rules 413 and 414 is not adopted by the states, some form of codification of the existing state exception to Rule 404(b) would be a step toward addressing the problems of credibility and corroboration inherent in the prosecution of sexual assault and child molestation.[179]

VI. CONCLUSION

While on their face Rules 413 and 414 appear to create a large exception to Rule 404(b) and go beyond the exceptions created by the individual states to allow evidence of prior offenses in the prosecution of sexual assault and child molestation, the requirements that the evidence be relevant and probative under Rules 104, 401 and 403 has created a very limited exception to Rule 404(b). Moreover, the restrictions inherent in Rules 401 and 403 encompass many of the limits placed by the states on their exceptions that allow prior bad act evidence. Whether a state adopts evidentiary rules through the legislative process or the rulemaking authority of its courts, it is probable that some form of Rules 413 and 414 will be favorably considered by the states.

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175. "Getting tough on crime" seems to be a national obsession. *See* Katherine Dunn, *The Politics of Fear: The Recent Hysteria Over Violent Crime is Based More on Myth than Genuine Danger*, L.A. TIMES, June 12, 1994 (Magazine), at 5.

176. While perhaps a tautological argument, it appears that Congress felt the new rules were necessary because judges were slow to use the exceptions contained within Rule 404(b), thus it suggests that judges, in general, are cognizant of the many philosophical and evidentiary problems of prior bad acts evidence.

177. As suggested by Wroth, *supra* note 157, at 1323, in method 2 of adapting the Federal Rules.

178. *See* Wroth, *supra* note 157, at 1324.

179. Professor Graham sounds a particularly apt warning about frequent changes in the rules made by Congress. If Congress begins to treat the rules as an easy way to deal with tricky political problems it will become more and more difficult for the states to keep up with the changes. More importantly, states may be less interested in adopting or adapting the rule of the week. Graham, *supra* note 157, at 307.