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PRIOR BAD ACTS AND TWO BAD RULES: THE FUNDAMENTAL UNFAIRNESS OF FEDERAL RULES OF EVIDENCE 413 AND 414

This note presents a Due Process analysis of Federal Rules of Evidence 413 and 414. These rules, which took effect in July 1995, overturn the exclusionary requirements of Rule 404 exclusively in cases involving sexual assault and child molestation. The new rules allow similar crimes to serve as evidence for purposes other than those stated in Rule 404(b). Now, federal prosecutors may offer evidence of a defendant's prior uncharged sexual misconduct to demonstrate that the defendant committed the sex offense for which he currently is being charged. Rules 413 and 414 reevaluate the historic concern that evidence of prior acts is inherently unfair because such evidence may allow judges and juries to make inferences of guilt based not only on the evidence of the specific crime with which the defendant is charged but on his past misdeeds as well.

After a discussion of the scope and effects of Rules 413 and 414, this Note argues that such use of "propensity evidence" violates the Due Process Clause because it is "fundamentally unfair." The rules, it is maintained, increase the risk of jury misdecision by allowing extremely prejudicial evidence to be heard, arguably even without first being scrutinized under the Rule 403 balancing test. This Note concludes that the new rules must either be abolished or, at the very least, amended so that the prosecution is required to show that the probative value substantially outweighs the prejudicial effect of the sexual propensity evidence.

* * *

INTRODUCTION

In July 1995, three new Federal Rules of Evidence took effect.¹ These new rules, the product of the Violent Crime Control and Law Enforcement Act of 1994,² focus on sexual assault and child molestation cases.³ All

¹ See FED. R. EVID. 413-415.

² Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified at 42 U.S.C. §§ 13,701 et seq. (1994)). Congress bypassed the normal rulemaking process, which usually involves an Advisory Committee proposal, a period for public comment, Supreme Court adoption, and Congressional review. See 28 U.S.C. § 2072 (1994); FED. R. EVID. 1102; see also STEPHEN A. SALTZBURG ET. AL., 1 FEDERAL RULES OF EVIDENCE MANUAL 575, 580, 583 (6th ed. 1994). Instead, the Act established a unique process by which the rules would go into effect. The process allowed the Judicial Conference 150 days from the date of enactment to recommend amendments to the rules. *Id.* If the Conference failed to recommend any amendments, the rules went into effect 300 days after enactment unless Congress provided otherwise. *Id.* If the Conference approved the rules, they

three rules overturn the exclusionary requirements of Rule 404⁴ and thereby lower the threshold for the admissibility of evidence that a defendant committed a prior act or acts of sexual assault or child molestation.⁵ Rule 413 provides that if a defendant is accused of sexual assault, evidence that the defendant committed another sexual assault offense or offenses "is admissible, and may be considered for its bearing on any matter to which it is relevant."⁶ Rule 414, which is structurally the same as Rule 413, applies to

went into effect 150 days after the approval was relayed, unless Congress provided otherwise. *Id.* This mechanism was formulated to enable Congress to re-evaluate the rules if the Conference made timely objections.

The Judicial Conference did report to Congress on February 9, 1995, recommending that the provisions of Rules 413-415 be in the form of amendments to existing Federal Rules of Evidence 404 and 405. Report of the Judicial Conference of the United States on the Admission of Character Evidence in Certain Sexual Misconduct Cases 159 F.R.D. 51 (Feb. 9, 1995). The Conference stated that there was a need to "clarify drafting ambiguities and eliminate constitutional infirmities." *Id.* at 52.

³ See FED. R. EVID. 413-415. These three evidence rules were introduced in section 231 of the "Molinari Bill," see H.R. 1149, 102d Cong. (1991); H.R. 1400, 102d Cong. § 635 (1991); H.R. 3463, 102d Cong. (1991), sponsored by Representative James Sensenbrenner (R-WI). The new rules finally were included in Title 28 of the Crime Bill, Pub. L. No. 103-322 § 320, 935, 108 Stat. 1796, 2135-37 (1994).

⁴ See *infra* notes 43-50 and accompanying text.

⁵ See *infra* notes 43-47 and accompanying text.

⁶ FED. R. EVID. 413. The full text of Rule 413 follows:

Evidence of Similar Crimes in Sexual Assault Cases

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

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

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

(d) For purposes of this rule and Rule 415, "offense of 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 paragraphs

child molestation cases.⁷ Rule 415 extends the scope of Rules 413 and 414 to civil cases.⁸

The policy goal of the new rules was to make it easier to prosecute sexual assault and child molestation cases.⁹ The most frequently cited reason given during arguments before Congress for the enactment of the new rules was the need for more convictions of sex offenders.¹⁰ Congresswoman Susan Molinari (R-N.Y.), a leading advocate of the new rules, warned her colleagues that the effect of leaving the Federal Rules as they were would be "that serial rapists and child molesters go free."¹¹ Representative Molinari mentioned the need to lower the probability of the "technical overturning" of cases on appeal when the trial judge has admitted evidence of prior similar acts in sex offense cases.¹²

The advocates of the new rules never clearly articulated the reason for treating sex offenses differently than other offenses. Implicit in the legislative history is the notion that evidence of uncharged misconduct in sex offense cases is more reliable than evidence of uncharged misconduct in other cases, such as those involving the equally serious offenses of murder or bank robbery. The data about recidivism, however, does not support the distinction between sex offenses and other serious offenses.¹³ A sponsor state-

(1)-(4).

Id.

⁷ See FED. R. EVID. 414.

⁸ See FED. R. EVID. 415. This Note focuses on criminal sex offense cases and therefore does not include further reference to Rule 415.

⁹ The Kyl Sexual Assault Amendment to H.R. 4092, 140 CONG. REC. E584-02 (daily ed. Mar. 24, 1994) (statement of Rep. Kyl).

¹⁰ Proponents of the new rules argued that Federal Rule of Evidence 404(b) prevented juries from hearing about a defendant's record of similar offenses. Rep. McCollum (R-FL) stated that "there is a problem with the rules of evidence with regard to the ability to produce the kind of background necessary to get rape convictions in this country." 140 CONG. REC. H5440 (daily ed. June 30, 1994). Representative Molinari said the new rules were "critical to the protection of the public from rapists and child molesters" because they were "frequently critical in . . . accurately deciding cases that would otherwise become unresolvable swearing matches." 140 CONG. REC. H8991-92 (daily ed. Aug. 21, 1994).

¹¹ 140 CONG. REC. H2433 (daily ed. Apr. 19, 1994).

¹² 140 CONG. REC. H5437 (daily ed. June 29, 1994).

¹³ A 1989 Bureau of Justice Statistics Report showed that the recidivism rate was actually lower for sex offenders than for most other serious criminals. After tracking 100,000 prisoners for three years after their release, the Bureau reported that 31.9% of released burglars were arrested again for burglary; 24.8% of drug offenders were rearrested for a drug offense; 19.6% of robbers were rearrested for robbery; but only 7.7% of rapists were rearrested for rape. ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1983, at 1 (1989); Roger C. Park & David P. Bryden, *The Twenty-Second Annual Kenneth J. Hodson Lecture: Uncharged Misconduct Evidence in Sex Crime Cases: Reassessing the Rule of Exclusion*, 141 MIL. L. REV.

ment supporting the new rules emphasized that it is highly unlikely that a person whose prior acts show him to be a rapist or child molester would be falsely accused.¹⁴ However, this argument should apply to most serious crimes, not just sex offenses.¹⁵

The rule against using character evidence to prove that a person behaved in conformity with his or her character or "propensity" is a longstanding rule of evidence that has existed since the latter part of the seventeenth century.¹⁶ The "propensity rule" is a part of the Federal Rules of Evidence, the California Evidence Code, and the evidence rules of thirty-seven other states.¹⁷ In the remaining twelve states and the District of Columbia, the propensity rule has persisted in the common law precedents.¹⁸

Despite the fact that the character evidence prohibition is well estab-

171, 192 (1993). Other studies have revealed varying recidivism rates for different types of sex offenders, but they have not shown a consistently higher or lower rate for sex offenders relative to other serious crime categories. See Lita Furby et al., *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULL. 3, 27 (1989); see also Park & Bryden, *supra*, at 171. But see Marnie E. Rice et al., *Sexual Recidivism Among Child Molesters Released from a Maximum Security Psychiatric Institution*, 59 J. CONSULTING & CLINICAL PSYCHOL. 381 (1991), which included a study showing a higher recidivism rate for extrafamilial child molesters. These offenders were tracked for more than six years after their release from maximum security psychiatric institutions; 31% were convicted of another sex offense. *Id.*

Even if one argued that the studies understate the rate of recidivism for sex offenders because many repeat offenders never are caught, see, e.g., A. Nicholas Groth et al., *Undetected Recidivism Among Rapists and Child Molesters*, 28 CRIME & DELINQ. 450 (1982), the same argument applies to drug offenders and bank robbers. Park & Bryden, *supra*, at 192.

¹⁴ 137 CONG. REC. S3240-41 (daily ed. Mar. 13, 1991). This sponsor statement actually describes the Comprehensive Violent Crime Control Act of 1991; however, the proposed Rules 413-415 in the 1993 bill were the same as those in the 1991 bill.

¹⁵

If the defendant is accused of murder, would it not be a bizarre coincidence for him to just happen to have been independently accused by three different people of other murders? If a probabilistic exception is to be made to the rule against character evidence in cases involving multiple accusations, then a consistent approach requires that the exception be made across the board.

Park & Bryden, *supra* note 13, at 193.

¹⁶ See *infra* notes 71-79 and accompanying text; see also *McKinney v. Rees*, 993 F.2d 1378, 1380 (9th Cir.), *cert. denied*, 510 U.S. 1020 (1993).

¹⁷ See *McKinney*, 993 F.2d at 1381 & n.2. The states that have codified the propensity rule are: Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *Id.*

¹⁸ See *id.*

lished in America,¹⁹ two primary developments have led to criticism of the prohibition. The first was an increased awareness in the United States that other common law jurisdictions have eliminated a strict character prohibition.²⁰ Commentators and jurists increasingly have agreed that the technical exclusionary rules, which theoretically mitigate the danger of misleading the factfinder, are not worth the trouble.²¹ The second development was a reassessment of the assumption that a person's character traits are poor predictors of that person's conduct.²² At the inception of the drafting of the Federal Rules of Evidence, the prevailing belief was that a person's environment largely determined that person's conduct.²³ A new theory has emerged, however, which posits that one can predict a person's behavior after observing that person's conduct in similar situations.²⁴

Although no American jurisdiction has followed England's example by virtually abolishing the character evidence prohibition in all types of cases, several jurisdictions have adopted new laws that partially dismantle the prohibition. For example, the Missouri legislature adopted a statute that

¹⁹ See Edward J. Imwinkelried & Miguel A. Mendez, *Resurrecting California's Old Law on Character Evidence*, 23 PAC. L.J. 1005, 1041 n.242 (1992) (citing California cases dating to the mid-nineteenth century).

²⁰ Cf. P.B. Carter, *Forbidden Reasoning Permissible: Similar Fact Evidence a Decade after Boardman*, 48 MOD. L. REV. 29, 29 (1985). In *Regina v. Boardman* [1975] App. Cas. 421, the House of Lords relaxed the prohibition, stating that the amount of probative value should be the decisive factor in determining the admissibility of uncharged misconduct. *Id.* at 457.

²¹ See generally WILLIAM TWINING, *THEORIES OF EVIDENCE: BENTHAM AND WIGMORE* (1985) (describing Bentham's support of "free proof" and its influence on modern scholarly discussion).

²² See David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 561-65 (1994).

²³ This once dominant theory is called "situationism." See Susan Marlene Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 514-15 (1991). Situationism rejects "trait theory." Trait theory posits that underlying traits of character make behavior consistent in a variety of situations. See generally WALTER MISCHEL, *PERSONALITY AND ASSESSMENT* (1968); 1 HUGH HARTSHORNE & MARK A. MAY, *STUDIES IN THE NATURE OF CHARACTER* 411-12 (1928). For example, studies show that labeling a child as "deceitful" has little predictive value because the child might lie at school but not at home or might cheat on a test but not in sports. See HARTSHORNE & MAY, *supra*, at 411-12; Bryden & Park, *supra* note 22, at 562. *But cf.* Roger V. Burton, *Generality of Honesty Reconsidered*, 70 PSYCHOL. REV. 481 (1963) (reevaluating the Hartshorne and May study and concluding that behavior exhibits a somewhat greater generality).

²⁴ Davies, *supra* note 23, at 518-19. Called "interactionism," this new theory rejects the contention that a person's character disposition has minimal predictive value. *Id.* Rather, this approach stresses the necessity of considering both the defendant's relevant traits and the specific situation in determining subsequent behavior. Bryden & Park, *supra* note 22, at 562.

made "uncharged crimes involving victims under fourteen years of age . . . admissible for the purpose of showing the propensity of the defendant to commit the crime . . . with which he is charged."²⁵ Indiana lawmakers similarly enacted a statute allowing the admission of uncharged acts of child molestation on a character theory of logical relevance.²⁶ At the federal level, Congress has created Federal Rules 413, 414, and 415, which abolish the character propensity evidence prohibition in sexual assault and child molestation cases.²⁷

This Note presents a due process analysis of Federal Rules 413 and 414. After a description of the scope and effects of the new rules, this Note argues that the "propensity rule" is deeply rooted in American jurisprudence and is required to ensure "fundamental fairness" in the criminal justice system. Furthermore, this Note posits that the admission of evidence of uncharged sexual misconduct in sex offense cases is potentially so prejudicial that it threatens the reliability of the jury's application of the constitutionally required reasonable doubt standard. Accordingly, this Note concludes that Rules 413 and 414, which abolish the propensity rule in cases involving sexual assault and child molestation, violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

I. THE OPERATION AND EFFECTS OF RULES 413 AND 414

Generally, there are three ways in which a person's character may be proved. The first is testimony regarding the person's reputation in the community for a relevant character trait. At common law, this was the most commonly acceptable form of proof,²⁸ and today reputation continues to be a generally approved method of proving character.²⁹ The second way to prove character is through testimony by a person so familiar with the individual as to possess a potentially valid opinion of an aspect of that individual's character. Unlike the common law, under which opinion evidence was restricted significantly more than reputation evidence,³⁰ the Federal Rules make opinion evidence admissible whenever reputation evidence

²⁵ MO. REV. STAT. § 566.025 (1979 & Supp. 1997) (effective Jan. 1, 1995).

²⁶ IND. CODE ANN. § 35-37-4-15 (1996). Note, however, that this statute was held to be a nullity because it violated the principles set forth in *Lannan v. State*, 600 N.E.2d 1334 (Ind. 1992). *Day v. State*, 643 N.E.2d 1, 2-3 (Ind. Ct. App. 1994) (citing *Brim v. State*, 624 N.E.2d 27, 33 n.2 (Ind. Ct. App. 1994)).

²⁷ See FED. R. EVID. 413-415.

²⁸ 7 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 1983-86 (James H. Chadbourn rev. 1978). *But cf. id.* § 1986 (calling reputation "the secondhand, irresponsible product of multiplied guesses and gossip").

²⁹ See FED. R. EVID. 405(a).

³⁰ Cf. Thomas J. Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidenced in Federal Criminal Trials*, 50 U. CIN. L. REV. 713, 713 n.1 (1981).

is admissible.³¹ The third and most restricted way to prove character, both at common law and under the Federal Rules of Evidence, is through evidence of specific instances of a person's conduct that tends to reveal that person's character.³² For example, one may seek to introduce evidence that someone has punched another at a bar in order to indicate a violent character.

When character is "in issue,"—when the substantive law makes the character of a party a matter that must be proved in order to establish a claim or defense—the Federal Rules impose few limitations on character evidence.³³ Rule 405(a) provides that if character evidence may be offered, character may be proved using reputation or opinion evidence.³⁴ Part (b) of Rule 405 states that when character is "an essential element of a charge, claim, or defense," character may be proved using specific instances of conduct.³⁵ In conjunction, parts (a) and (b) make character provable by any of these three methods whenever character is "in issue."³⁶

When evidence is used circumstantially to establish someone's character, however, such evidence is subject to additional restrictions. In circumstantial cases, for example, the Federal Rules allow opinion and reputation evidence only when the evidence bears on the "truthfulness" or credibility of a person, and even then such evidence is admissible only if the witness's character for truthfulness is attacked.³⁷ Evidence of specific instances of conduct to establish the credibility of a witness are also regulated tightly.³⁸

Rules 413 and 414 make admissible what normally would be excluded: character evidence in the form of specific prior acts to prove "any matter to which [such acts are] relevant,"³⁹ including evidence that the defendant possessed a trait of character that made it more likely that he committed the offense at issue. Such evidence offered to show that the defendant is the kind of person who committed the crime which is now charged is "propensity evidence." The comments of Representative Molinari demonstrate that the goal of the new rules is to allow the use of propensity evidence in sex offense cases:

³¹ See FED. R. EVID. 405(a) (stating that character may be proven by reputation or opinion evidence whenever character evidence may be offered).

³² See *infra* text accompanying notes 37-38.

³³ For a discussion of the relationship between rules of substantive law and rules of evidence, see David P. Leonard, *Rules of Evidence and Substantive Policy*, 25 LOY. L.A. L. REV. 797 (1992).

³⁴ FED. R. EVID. 405(a).

³⁵ FED. R. EVID. 405(b).

³⁶ See 1 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 451 (6th ed. 1994).

³⁷ FED. R. EVID. 608.

³⁸ See FED. R. EVID. 608(b).

³⁹ FED. R. EVID. 413(a).

The past conduct of a person with a history of rape or child molestation provides evidence that he or she has the combination of aggressive and sexual impulses that motivates the commission of such crimes and lacks the inhibitions against acting on these impulses. A charge of rape or child molestation has greater plausibility against such a person.⁴⁰

The effect that propensity evidence may have upon jurors in a criminal trial is substantial. "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."⁴¹ As a result, the risk of unfair prejudice is great when propensity evidence is presented to the jury. The jury is especially likely to punish the defendant for being a "bad person" rather than for what he allegedly did on the particular occasion in question. Even if jurors do not think the accused is guilty beyond a reasonable doubt, they might decide to convict "on the basis of their disapproval of his prior crimes, on their hunch that he has committed other crimes for which he was never caught, or their fear of letting him remain on the streets to commit future crimes."⁴²

Because of this substantial potential for prejudice, character propensity evidence was made generally inadmissible by Rule 404.⁴³ This rule prohib-

⁴⁰ 140 CONG. REC. H2433 (daily ed. Apr. 19, 1994) (statement of Rep. Molinari).

⁴¹ Anne E. Kyl, *The Propriety of Propensity: The Effects and Operation of New Federal Rules of Evidence 413 and 414*, 37 ARIZ. L. REV. 659, 663 (1995).

⁴² James J. Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sexual Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95, 110 (1994).

⁴³ Rule 404 reads:

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of the character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of

its the use of evidence of past conduct to demonstrate character in order to show action in conformity with character.⁴⁴ Under Rule 404, therefore, evidence of other similar crimes is not admissible when offered for the purpose of suggesting that because the defendant is a person of criminal character, it is more likely that he committed the crime with which he is charged.⁴⁵ An important exception, embodied in 404(b), states that the general rule of exclusion does not apply where, for example, the prosecution offers evidence of the defendant's prior crimes not to show that he has a criminal disposition but rather to establish circumstantially an element of the crime charged.⁴⁶ If the probative value of 404(b) evidence is not outweighed by its tendency to cause undue prejudice under Rule 403, the evidence will be admitted.⁴⁷

In order to admit evidence of prior sex offenses, courts sometimes are willing to manipulate the 404(b) categories such as "motive," "intent," "absence of mistake," "plan," and "identity."⁴⁸ These categories form a gray area in sex offense cases because they usually involve character propensity inferences to some extent.⁴⁹ Notwithstanding the liberal use of Rule 404(b), it is still common for trial court decisions to be reversed because sex crimes evidence was erroneously admitted.⁵⁰

mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404.

⁴⁴ See *id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Rule 404 works in conjunction with Rule 403, which requires that the danger of undue prejudice created by the admission of evidence of prior crimes be balanced against the probative value of the evidence. See FED. R. EVID. 403; *id.* 404(b) advisory committee's note.

⁴⁸ See FED. R. EVID. 404(b).

⁴⁹ Bryden & Park, *supra* note 22, at 541. For example, Bryden and Park argue that when courts admit evidence of misconduct against third parties as evidence of motive, they are really admitting character propensity evidence. After all, "[m]otive is not a mystery in a sex crime case as it sometimes is in other crimes, such as murder." *Id.* at 544. Also, when the government offers prior misconduct evidence to prove intent, it actually "seeks to create an inference that because the defendant has a continuing propensity [to commit an act], he had the forbidden intent on the occasion in question." *Id.* at 551. In addition, misconduct evidence may be admitted for a purpose not listed in Rule 404(b) because the listed purposes are meant only to be illustrative and not exhaustive. *Id.* at 556. Courts are inventive in creating new purposes. *Id.* One court upheld the admission of the defendant's sexual misconduct against children because the evidence demonstrated a pattern. *Id.* Admitting evidence under such a broad category is no different than admitting otherwise inadmissible character evidence. *Id.*

⁵⁰ See Bryden & Park, *supra* note 22, at 560 n.137 (citing cases that held it improper

Some courts have gone completely beyond Rule 404(b) and its state analogs by admitting evidence of uncharged sexual misconduct to demonstrate "depraved sexual instinct" or "lustful disposition" in child molestation cases.⁵¹ Other courts have held the "depraved sexual instinct" exception violative of the prohibition against using character evidence to prove conduct.⁵² Among states that have adopted evidence codes modeled on the

er for the trial court to admit evidence of prior sexual misconduct by the defendant).

⁵¹ See *Maynard v. State*, 513 N.E.2d 641, 647 (Ind. 1987) (finding that uncharged child abuse of a third party was admissible to show "depraved sexual instinct"), *overruled by Lannan v. State*, 60 N.E.2d 1334, 1339 (Ind. 1992); *State v. Lachterman*, 812 S.W.2d 759, 768 (Mo. Ct. App. 1991) (finding that admission of prior acts as proof of "depraved sexual instinct" was proper in a case involving sodomy with young boys), *cert. denied*, 503 U.S. 983 (1992); *State v. Raye*, 326 S.E.2d 333, 335 (N.C. Ct. App. 1985) (ruling that prior sexual misconduct with the victim's sister was admissible to show intent and "unnatural lust" of the accused stepfather); *State v. Edward Charles L.*, 398 S.E.2d 123, 131 (W.Va. 1990) (holding that uncharged misconduct evidence was admissible to show the accused's lustful disposition toward his children). See generally John E.B. Myers, *Uncharged Misconduct Evidence in Child Abuse Litigation*, 1988 UTAH L. REV. 479, 540 & nn.205-06 (citing related cases).

At one point, it appeared that approximately 20 states recognized a special rule permitting admission of prior acts in rape and child sex abuse cases. See Chris Hutton, Commentary, *Prior Bad Acts Evidence in Cases of Sexual Contact with a Child*, 34 S.D. L. REV. 604, 614 n.47 (1989). Since the 1960s, however, courts in several states have sought to dismantle or weaken this special exception. Sara Sun Beale, *Prior Similar Acts in Prosecutions for Rape and Child Sex Abuse*, 4 CRIM. L.F. 307, 312 (1993).

⁵² In *Lannan v. State*, 600 N.E.2d 1334 (Ind. 1992), Indiana's "depraved sexual instinct" exception to the rule against character propensity evidence was invalidated. The court held invalid the two bases for the exception: (1) the high recidivism rates in child molestation cases, and (2) the desire "to level the playing field by bolstering the testimony of a solitary child victim-witness." *Id.* at 1335. As for the first rationale, the court, although acknowledging a high recidivism rate among sex offenders, believed the recidivism rate among drug dealers to be just as high. Therefore, the court reasoned that sex offenses should not be accorded special treatment. *Id.* at 1337. The court held that the "bolstering" rationale was outdated because sex crimes were now more common, and it no longer seemed "preposterous" that even a reputable citizen would "force himself sexually upon a child." *Id.* at 1337. The court added:

Sadly, it is our belief that . . . we live in a world where accusations of child [molestation] no longer appear improbable as a rule. This decaying state of affairs in society ironically undercuts the justification for the depraved sexual instinct exception at a time when the need to prosecute is greater.

Id.

Although some states have done away with the "depraved sexual instinct" exception, many continue to use it in child molestation cases. See, e.g., *Reichard v. State*, 510 N.E.2d 163, 165 (Ind. 1987) (holding that heterosexual rape evidence was inadmissible under the "depraved sexual instinct" exception because rape of a female adult is not depraved sexual conduct); *Lehiy v. State*, 501 N.E.2d 451, 453 (Ind. App.) (pre-*Lannan* case) (finding that heterosexual rape evidence was not admissible under the lustful dis-

Federal Rules,⁵³ courts appear divided on the question of whether special sexual propensity exceptions should stand in light of the provisions based on Federal Rule 404(b).⁵⁴

By allowing all relevant evidence of similar acts in sexual assault and child molestation trials, Rules 413 and 414 go far beyond Rule 404(b) and, much like the previously mentioned state exceptions, make the general rule of exclusion inapplicable. The rules do not distinguish among the three basic categories of prior misconduct evidence: (1) prior bad acts which resulted in a criminal conviction,⁵⁵ (2) prior bad acts for which the accused was acquitted,⁵⁶ and (3) conduct for which the accused has not been formally

position exception, but evidence of incest or sodomy would be admissible), *vacated and adopted by* *Lehiy v. State*, 509 N.E.2d 1116 (Ind. 1987); *State v. Tobin*, 602 A.2d 528, 532 (R.I. 1992) (finding that the "lustful disposition" exception applied at least in cases involving prior incestuous relations between the accused and the victim); *State v. Edward Charles L.*, 398 S.E.2d 123, 133 (W.Va. 1990) (holding that evidence was admissible to show a lustful disposition towards children).

⁵³ The following states have adopted evidence codes modeled on the Federal Rules: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Iowa, Louisiana, Kentucky, 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, West Virginia, Wisconsin, Washington, and Wyoming. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *MODERN EVIDENCE* § 1.2 at 4 (1994).

⁵⁴ See Hutton, *supra* note 51, at 614-15 & nn.52-54 (stating that the exception did not survive the adoption of Rule 404(b) but that Arizona, Nebraska, and Iowa have taken contrary positions). Compare *Edward Charles L.*, 398 S.E.2d at 133 (holding that prior child sexual assault and abuse with same or different victims was admissible to show lustful disposition toward a child or children generally), with *Getz v. State*, 538 A.2d 726, 733-34 (Del. 1988) (holding that the exception was contrary to Delaware Rule of Evidence 404(b)).

⁵⁵ If a defendant was convicted of another sex crime, the prosecution may use the conviction as impeachment evidence unless the trial judge determines that the jury is likely to use the evidence improperly despite a limiting instruction. See FED. R. EVID. 609(a). When admitted for impeachment, the prior misconduct supposedly demonstrates that the defendant is the type of individual who would lie on the witness stand, not that he is the sort of person who would commit the crime for which he currently is charged. Accordingly, the jury must be given a limiting instruction that it should use this evidence only to gauge the defendant's credibility, not to determine his culpability of the charged offense. See Bryden & Park, *supra* note 22, at 534 & n.14. If the judge believes that the jury will misuse the evidence because, for example, the other crime is similar to the charged crime, the evidence will be inadmissible for impeachment. See FED. R. EVID. 609(a); 3 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 609[04], at 609-54 to 609-55. Nevertheless, similarity is a factor favoring admissibility when evidence is offered because it shows such things as modus operandi or plan under Rule 404(b). See FED. R. EVID. 404(b). Therefore, it appears that "when the felony is too similar to be offered to impeach, it is invariably similar enough to be offered for substantive purposes." Bryden & Park, *supra* note 22, at 535 n.17.

⁵⁶ In *Dowling v. United States*, 493 U.S. 342 (1990), the Supreme Court held that

charged.⁵⁷

Rules 413 and 414 proclaim certain character evidence to be "admissible," which leads one to question whether these rules should be interpreted to override all the other rules of evidence.⁵⁸ When interpreting the Federal Rules of Evidence, the Supreme Court has employed a plain meaning standard.⁵⁹ The plain language of the Rules is controlling irrespective of policy,

the admission of evidence of other criminal conduct of which the defendant had been acquitted violated neither the collateral estoppel doctrine nor the due process test of "fundamental fairness." As to the issue of fundamental fairness, the Court reasoned that the trial court's authority to exclude potentially prejudicial evidence adequately addressed the possibility that introduction of such evidence would create a risk that the jury would convict a defendant based on inferences drawn from the acquitted conduct. *Id.* at 353. However, Rule 403 arguably does not apply to evidence of prior sexual misconduct under Rules 413 and 414. Therefore, a judge would not have the authority to exclude the evidence pursuant to Rule 403 in sex offense cases. *See infra* notes 58-62 and accompanying text.

⁵⁷ *Cf.* *Huddleston v. United States*, 485 U.S. 681, 689 (1988) ("In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor.").

⁵⁸ Rules 413 and 414 state when evidence of prior sexual misconduct "is admissible," as contrasted with Rule 404(b), which states when certain evidence "may be admissible." *See* Bryden & Park, *supra* note 22, at 566 (concluding that the applicability of Rule 403 to evidence admitted under Rules 413-15 is "unclear"). Federal Rule of Evidence 609(a)(2), however, was designed to supersede Rule 403 and does so by saying certain evidence "shall be admitted."

In general, the remaining rules say what evidence is inadmissible "and often go on to create an exception specifying when exclusion of such evidence is not required by 'this rule,' thereby explicitly leaving open the possibility that exclusion might be required by some other rule." Duane, *supra* note 42, at 117. Rules 413 and 414 add no language, explicitly leaving open the possibility that the evidence, although "admissible" under Rules 413 and 414, could be excluded under some other rule. *See* FED. R. EVID. 413, 414.

The primary sponsors of the new rules have said that the new rules only supersede Rule 404 and that the other rules will generally continue to apply. *See, e.g.*, 140 CONG. REC. S12,990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole) ("The new rules will supersede in sex offense cases the restrictive aspects of Federal rule of evidence 404(b)."); 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) (same). This contention is not reflected in the language of either Rule 413 or 414. Although Rule 412, which immediately precedes Rules 413 and 414, specifies the circumstances under which evidence of a rape victim's sexual behavior "is admissible, if otherwise admissible under these rules," FED. R. EVID. 412(b)(1) (emphasis added), the qualifier "if otherwise applicable under these rules" is not included in Rule 413 or 414. *See* FED. R. EVID. 413, 414.

⁵⁹ Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745, 745 (1990). Professor Jonakait argues that the Supreme Court's application of the plain meaning approach to interpretation of the Federal Rules of Evidence, "without regard to policy, history, practical operation of the

history, or even practical operation of the law of evidence.⁶⁰ Therefore, “admissible” in Rules 413 and 414 cannot mean the same as “admissible, if otherwise admissible under these rules,” as used, for example, in Rule 412(b)(1).⁶¹ If Rules 413 and 414 bypass not only Rule 404 but the other rules as well, Rule 403 would no longer apply to evidence of prior sexual misconduct. As a result, a judge would not be able to exclude evidence whose “probative value” was shown by the defendant to be “substantially outweighed by the danger of unfair prejudice.”⁶²

II. THE DUE PROCESS CLAUSE, THE PROPENSITY RULE, AND RULES 413 AND 414

The United States Supreme Court recently stated that the issue of whether the use of character evidence to show propensity would violate the Due Process Clause⁶³ remains an open question.⁶⁴ Many lower courts have

law of evidence, or new conditions,” *id.*, will “significantly transform the evidentiary landscape into a topography unforeseen and unintended by those who drafted and adopted the rules,” *id.* at 749.

⁶⁰ *Id.* at 745. Courts have no authority to follow “a single passage of legislative history that is in no way anchored in the text of the statute.” *Shannon v. United States*, 512 U.S. 573, 583 (1994). The Court often has repeated its contention that “[l]egislative history is irrelevant to the interpretation of an unambiguous statute.” *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 809 n.3 (1989) (citing *United Air Lines v. McMann*, 434 U.S. 192, 199 (1977)); *see also* *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993); *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). *But cf.* *Conroy v. Aniskoff*, 507 U.S. 511, 518 n.12 (1993).

⁶¹ *See supra* note 58. To assert that “admissible” in Rules 413 and 414 means the same as “admissible, if otherwise admissible under these rules,” as employed in Rule 412(b)(1), would contradict the Supreme Court’s holding that it “construe[s] statutes, where possible, so as to avoid rendering superfluous any parts thereof.” *Astoria Fed. Savings & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991); *see also* *Reves*, 507 U.S. at 177; *Acosta v. Louisiana Dep’t of Health and Human Resources*, 478 U.S. 251 (1986). Furthermore, “it is generally presumed that Congress acts intentionally and purposely” when it “includes particular language in one section of one statute but omits it in another,” *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994) (quoting *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993)), so that the courts will hesitate to conclude that “the differing language in the two subsections has the same meaning in each,” *Russello v. United States*, 464 U.S. 16, 23 (1983).

⁶² FED. R. EVID. 403.

⁶³ The Fifth Amendment states that no person may be “deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. The Fourteenth Amendment makes the Fifth Amendment due process requirement applicable to the states: “nor shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV (emphasis added).

⁶⁴ *See* *Estelle v. McGuire*, 502 U.S. 62, 75 n.5 (1991) (“Because we need not reach the issue, we express no opinion on whether a state law would violate the Due Process

held that the admission of propensity evidence, including evidence of prior sexual assault crimes and child molestation, violates due process under certain circumstances and is a basis for habeas corpus relief.⁶⁵

In *Patterson v. New York*,⁶⁶ the Supreme Court held that a procedural rule does not transgress the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."⁶⁷ Two primary factors should be considered when evaluating whether a principle is "fundamental": (1) "historical practice," and (2) whether the rule violates "any recognized principle of 'fundamental fairness' in operation."⁶⁸

A. Historical Practice

In determining whether a principle satisfies the "historical practice" prong, a court considers whether the principle has "deep roots in our common-law heritage."⁶⁹ Making character propensity inferences historically was considered improper for a jury because the practice ultimately conflicts with the presumption of innocence.⁷⁰ The rule prohibiting admission of evi-

Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime.").

⁶⁵ See, e.g., *McKinney v. Rees*, 993 F.2d 1378, 1384-86 (9th Cir.), *cert. denied*, 510 U.S. 1020 (1993), *rev'd on other grounds sub nom. Duncan v. Henry*, 513 U.S. 364 (1995) (per curiam); *Tucker v. Makowski*, 883 F.2d 877, 878, 881 (10th Cir. 1989) (per curiam); *Stidium v. Trickey*, 881 F.2d 582, 583-84 (8th Cir. 1989), *cert. denied*, 493 U.S. 1087 (1990).

⁶⁶ 432 U.S. 197 (1977).

⁶⁷ *Id.* at 202 (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958); *Leland v. Oregon*, 343 U.S. 790, 798 (1952); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). In *Patterson*, the Court rejected a due process challenge to a New York statute that placed on the defendant in a criminal trial the burden of proving the affirmative defense of emotional disturbance. *Id.* at 197.

⁶⁸ *Medina v. California*, 505 U.S. 437, 448 (1992).

⁶⁹ *Id.* at 446.

⁷⁰ 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, 1305 (1970). Since the Restoration, see WIGMORE, *supra* note 28, § 58.2 at 1213 (Peter Tillers rev., 1983), and the English Treason Act of 1695, see Reed, *supra* note 30, at 717 (1981), Anglo-American law has departed from Continental law, see WIGMORE, *supra* note 28, § 58.2 at 1213-15, in providing that the accused be tried on the charged act and not on his past crimes or any inferences about his character that knowledge of those past crimes might create. See *id.* (providing examples of cases, including *Hapden's Trial*, 9 How. St. Tr. 1053, 1103 (K.B. 1684) ("[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") and *Rex v. Oddy*, 2 Den. Crim. Cas. 264, 169 Eng. Rep 501, 502 (Cr. Cas. Res. 1851) ("[I]t would have been evidence of the prisoner being a bad

dence of specific acts to prove criminal tendencies originated in England.⁷¹ Early English criminal proceedings were not governed by rules limiting the prosecution's introduction of potentially misleading and prejudicial evidence against the accused.⁷² Indeed, it was common to admit evidence of character to prove conduct.⁷³

At the dawn of the eighteenth century, however, Parliament began to reform these proceedings.⁷⁴ The Treason Act of 1695, which was designed to dispense with the inquisitorial proceedings of the Star Chamber,⁷⁵ included a provision that prohibited the prosecution from proving any alleged crimes of the defendant that were not listed in the indictment.⁷⁶ This principle of the Act, in conjunction with increasing legislative and judicial concern for the rights of the accused, led to widespread adoption of the rule barring the use of specific acts evidence to prove the criminal tendencies of the defendant.⁷⁷ By the late eighteenth century, the propensity rule was well established in England.⁷⁸ Early cases demonstrated that the *raison*

man, and likely to commit the offenses there charged. But the English law does not permit the issue of criminal trials to depend on this species of evidence").

⁷¹ Many modern rules of evidence, such as the hearsay rule and the "best evidence" rule, can be traced to sixteenth-century England. See STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 12-13 (1988).

⁷² See *id.* at 13-14. In addition, the defendant could not cross-examine witnesses, present witnesses on his behalf, or be represented by counsel at trial. *Id.* at 13.

⁷³ "Historically, the use of bad general character appears as generally allowable—fitting, as it does, a more primitive notion of human nature. In England, it was used without question down to the latter part of the 1700s." 3A WIGMORE, *supra* note 28, § 923, at 728 (James H. Chadbourn rev. 1970).

⁷⁴ Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 79-82 (1974).

⁷⁵ The Star Chamber proceedings, although ostensibly treason trials, actually were used by the Tudors and Stuarts to do away with political and religious dissenters. Therefore, the proceedings were biased against the accused. A panel of jurists would base its decisions primarily on a written record compiled by the prosecutor. The accused was not allowed counsel at trial, and he was not permitted to answer his accusers. For a more detailed discussion of the Star Chamber, see Reed, *supra* note 30, at 716-17.

⁷⁶ *Id.*

⁷⁷ *Id.* at 717.

⁷⁸ Citing William Hawkins, author of the oldest of the criminal treatises to discuss the propensity rule, Chitty noted:

As we have seen that the evidence is to be confined to the points in issue, it is clear that the prosecutor can adduce no proof of the defendants' general character, unless that is the very scope of the charge against him. But where general character is put in issue, facts relating to it may be admitted. . . . But evidence to character is more frequently called on the behalf of the defendant, and, in doubtful cases, will often influence the jury to an acquittal. And even where the defendant thus opens the discussion, the prosecutor can ask no questions as to particular

d'etre of the propensity rule was to protect the accused from the severe prejudicial effect of past crimes evidence.⁷⁹

The English colonists brought the propensity rule to America.⁸⁰ American courts echoed English courts in their recognition that the admission of otherwise relevant prior bad acts would be highly prejudicial to the accused.⁸¹

In *Michelson v. United States*,⁸² the United States Supreme Court acknowledged the common law propensity rule and its important rationale:

Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish probability of his guilt. . . . The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.⁸³

facts, but must confine himself simply to general reputation and character.

JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 573-75 (3rd Am. ed. 1836); *see also* SIR FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIAL AT NISI PRUIS 296-296a (Richard Whaley Beidgman ed., London 1817); THOMAS PEAKE, COMPENDIUM OF THE LAW OF EVIDENCE 6-7 (London 1804).

⁷⁹ *See, e.g.,* *Rex v. Bond*, [1906] 2 K.B. 389, 397-401 (discussing precedents applying the propensity rule). "Nothing can so certainly be counted upon to make a prejudice against an accused . . . as the disclosure to the jury of other misconduct. . . . [I]ndeed, when the crime alleged is one of a revolting character . . . the prejudice must sometimes be almost insurmountable." *Id.* at 398.

⁸⁰ *See* Westen, *supra* note 74, at 91-92.

⁸¹ *See* *Coleman v. People*, 55 N.Y. 81 (1873), in which the court stated:

A person cannot be convicted of one offence upon proof that he committed another, however persuasive in moral point of view such evidence may be. . . . It would lead to convictions, upon the particular charge made, by proof of other acts in no way connect with it, and to uniting evidence of several offences to produce conviction for a single one.

Id. at 90; *see* 1A WIGMORE, *supra* note 28, § 58.2, at 1215 (Peter Tillers rev. 1983) (noting "the overstrong tendency to believe the accused guilty of the charge merely because he is a likely person to do such acts [and] the tendency to condemn not because the accused is believed guilty of the present charge but because he has escaped unpunished from other offenses").

⁸² 335 U.S. 469 (1948).

⁸³ *Id.* at 475-76 (footnotes omitted). The Court reaffirmed *Michelson* in *Huddleston*

This common-law interest in protecting defendants from the prejudicial effects of specific acts evidence became part of the Federal Rules of Evidence.⁸⁴ The drafters of the Federal Rules were acutely aware of the potential for prejudice posed by specific acts evidence. Although Rule 403's balancing test might have been sufficient to prevent a prosecutor from introducing specific acts evidence in order to show a defendant's criminal propensity, the drafters apparently felt the need to go one step further in dealing with the extreme prejudicial effect of such evidence.⁸⁵ Accordingly, they enacted Rule 404(b), which precludes a trial judge from employing the 403 balancing test when a prosecutor seeks to introduce evidence of an accused's prior misconduct.⁸⁶ Propensity evidence simply is inadmissible.⁸⁷

v. United States, 485 U.S. 681, 691 (1988).

⁸⁴ The drafters of the Federal Rules of Evidence were influenced by the Uniform Rules of Evidence and the A.L.I. Model Code of Evidence. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, RULES OF EVIDENCE: A PRELIMINARY REPORT ON THE ADVISABILITY AND FEASIBILITY OF DEVELOPING UNIFORM RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS 53 (1962), *reprinted in* 1 JAMES F. BAILEY, III & OSCAR M. TRELLES, II, THE FEDERAL RULES OF EVIDENCE: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS, at Doc. 4 (1980) ("The existence of these Uniform Rules and the A.L.I. Model Code of Evidence and the related literature means that the draftsmen of the Federal rules will not have to start from scratch.").

For example, the language of Rule 404(b) is very similar to the wording of Rule 55 of the Uniform Rules and Rule 311 of the Model Code. The Uniform Rules' version of the propensity rule reads as follows:

RULE 55. *Other Crimes or Civil Wrongs.*

Subject to Rule 47 evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed another crime or civil wrong on another specified occasion but, subject to Rules 45 and 48, such evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity.

UNIF. R. EVID. 55 (1953).

The language of the Model Code is similar:

Rule 311. OTHER CRIMES OR CIVIL WRONGS.

Subject to Rule 306, evidence that a person committed a crime or civil wrong on a specified occasion is inadmissible as tending to prove that he committed a crime or civil wrong on another occasion if, but only if, the evidence is relevant solely as tending to prove his disposition to commit such a crime or civil wrong or to commit crimes or civil wrongs generally.

MODEL CODE OF EVID. Rule 311 (1942).

⁸⁵ Generally, the trial judge may exercise broad discretion under Rule 403. *See, e.g., United States v. Dwyer*, 539 F.2d 924, 927-28 (2d Cir. 1976). *But see United States v. Meester*, 762 F.2d 867, 874-77 (11th Cir.) ("Courts have characterized Rule 403 as an extraordinary remedy to be used sparingly because it permits the trial court to exclude otherwise relevant evidence."), *cert. denied*, 474 U.S. 1024 (1985).

⁸⁶ If such evidence is introduced for another purpose, however, such as proof of

Traditionally, therefore, the trial judge has not had the discretion to determine the relative prejudicial and probative values of specific acts evidence offered by a prosecutor to show a defendant's criminal propensity.

B. *Fundamental Fairness*

The second question to consider in evaluating the rules is whether they violate "any recognized principle of 'fundamental fairness' in operation."⁸⁸ In *McKinney v. Rees*,⁸⁹ Michael McKinney sought habeas corpus relief on the grounds that the use of what should have been inadmissible evidence of other acts deprived him of a fair trial.⁹⁰ The Ninth Circuit posed and then attempted to answer the question that the Supreme Court had avoided: "When does the use of character evidence to show propensity constitute a violation of the Due Process Clause?"⁹¹ First, the court recognized that the impermissibility of drawing propensity inferences from "other acts" evidence of character was historically grounded in American jurisprudence.⁹² Next, the court observed that excluding propensity evidence was necessary to force the jury, "as much as humanly possible," to set aside emotions and prejudices created by that evidence and "to decide if the prosecution ha[d] convinced them, beyond a reasonable doubt, that the defendant [was] guilty of the crime charged."⁹³

The court believed that the evidence in the case was "emotionally charged."⁹⁴ The jury was offered the image of a man with a knife collection, who sat in his room sharpening knives, scratching morbid messages on the wall, and occasionally walking around in camouflage with a knife strapped to his body.⁹⁵ According to the court, the evidence was introduced only for its emotional impact on the jury, "lead[ing] them to mistrust McKinney, and to believe more easily that he was the type of son who would kill his mother in her sleep without much apparent motive."⁹⁶ The court concluded that McKinney was convicted not because of the jury's

motive or intent, the judge then must decide "whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403." FED. R. EVID. 404(b) advisory committee's note.

⁸⁷ *Id.* 404(b).

⁸⁸ *Medina v. California*, 505 U.S. 437, 448 (1992).

⁸⁹ 993 F.2d 1378 (9th Cir.), *cert. denied*, 510 U.S. 1020 (1993).

⁹⁰ *Id.* at 1386.

⁹¹ *Id.* at 1384.

⁹² *Id.* at 1380-81.

⁹³ *Id.* at 1384.

⁹⁴ *Id.* at 1385.

⁹⁵ *Id.*

⁹⁶ *Id.*

“careful analysis of logical inferences raised by the circumstantial evidence” but because of McKinney’s “suspicious character and previous acts.”⁹⁷ Thus, the admission of the propensity evidence violated what the Ninth Circuit termed the “community’s standards of fair play.”⁹⁸ The court concluded that McKinney’s trial was “so infused with irrelevant prejudicial evidence as to be *fundamentally unfair*.”⁹⁹

The Court of Appeals for the Tenth Circuit also has held that the propensity rule is enveloped in the principle of fundamental fairness. In *United States v. Burkhart*,¹⁰⁰ the defendant had been convicted of violating a federal statute prohibiting the interstate transportation of a stolen motor vehicle.¹⁰¹ The Court of Appeals held that the admission of certified copies of prior convictions under the same statute for the purpose of proving intent constituted reversible error.¹⁰² The trial court had instructed the jury that the evidence of the prior convictions could be used only to show that the defendant had the requisite intent to commit the crime.¹⁰³ Although the Court of Appeals recognized that evidence of other crimes could, in special circumstances, be received to prove intent,¹⁰⁴ it warned that the propensity rule “is primarily a rule of exclusion of evidence and not one of admission.”¹⁰⁵ Exceptions such as the intent exception “do not detract from the general exclusionary approach which the rule demands.”¹⁰⁶

The Tenth Circuit cited three reasons for courts to be extremely cautious

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 1386 (emphasis added).

¹⁰⁰ 458 F.2d 201 (10th Cir. 1972).

¹⁰¹ *Id.* at 202.

¹⁰² *Id.* at 208.

¹⁰³ *Id.* at 203-04.

¹⁰⁴ Although the Tenth Circuit decided *Burkhart* more than three years before the July 1975 enactment of the Federal Rules of Evidence, the evidentiary common law rule discussed in this case was codified in the Federal Rules. In *Burkhart*, the trial court admitted evidence of the defendant’s prior convictions to show that he had the requisite intent to commit the current offense. *Id.* at 203. Federal Rule of Evidence 404(b) establishes that evidence of specific acts offered for a purpose other than to prove a character trait—such as plan, scheme, design, or intent—is admissible as long as the evidence is not too prejudicial. FED. R. EVID. 404(b); see FED. R. EVID. 403; see also *United States v. Fortenberry*, 860 F.2d 628 (5th Cir. 1988), *cert. denied*, 499 U.S. 930 (1991).

¹⁰⁵ *Burkhart*, 458 F.2d at 204. The court determined that the government had failed to meet the “essential requirement” that the intent be a common one in relation to the crime charged. *Id.* at 208. The prosecution, it held, was required to show a connecting link, based on factual similarity, between the case at trial and the similar offenses. *Id.* Otherwise, the prosecution wrongly would be inviting an inference by the jury that “once an accused has been adjudged to have a criminal turn of mind that this continues until shown to have terminated or changed.” *Id.*

¹⁰⁶ *Id.* at 204.

when dealing with propensity evidence. First, the accused must defend charges not listed in the indictment¹⁰⁷ and already may have answered to or served a sentence for the charges in the past.¹⁰⁸ Second, although the evidence of prior misconduct may be relevant to the offense being tried, its primary effect is to demonstrate the accused's criminal character.¹⁰⁹ "Showing that a man is generally bad has never been under our system allowable" because "[t]he defendant has a right to be tried on the truth of the specific charge contained in the indictment."¹¹⁰ Third, regardless of whether the court uses extreme care in instructing a jury, once prior convictions are introduced, "the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality."¹¹¹ In sum, the problem of admitting propensity evidence, said the court, "goes to the fundamental fairness and justice of the trial itself."¹¹²

Despite the determination by many federal circuit courts that the use of character evidence to show propensity would violate the Due Process Clause, the Supreme Court has not directly addressed the issue. In *Spencer v. Texas*,¹¹³ the Court did hold that the introduction of past convictions with a limiting instruction by a court stating that past convictions were not to be taken into account in assessing a defendant's guilt or innocence was not a violation of the Due Process Clause.¹¹⁴ Texas's recidivist statutes increased the punishment of offenders found guilty of a crime who also were convicted of other crimes in the past.¹¹⁵ Pursuant to these statutes, proof of

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 205. The court intimated that the propensity rule also has deep roots in common law heritage, thereby satisfying the "historical practice" prong of *Patterson v. New York*, 432 U.S. 197 (1977). See *supra* notes 66-68 and accompanying text. The court stated:

We have not been able to discover a precedent in either this Circuit or in the Eighth Circuit prior to 1929, when the Tenth Circuit was created out of the Eighth Circuit, which approves the use of a man's prior criminal history to show commission of the same offense on a similar offense theory in the manner it was done here.

Burkhart, 458 F.2d at 205.

Other federal appellate courts have considered due process-based challenges to the admission of potentially prejudicial uncharged misconduct evidence. These courts similarly have applied the general "fundamental fairness" test. See, e.g., *Bryson v. Alabama*, 634 F.2d 862 (5th Cir. 1981); *Hills v. Henderson*, 529 F.2d 397 (5th Cir.), *cert. denied*, 429 U.S. 850 (1976); *Manning v. Rose*, 507 F.2d 889 (6th Cir. 1974).

¹¹³ 385 U.S. 554 (1967). This case was a consolidation of three habeas corpus cases.

¹¹⁴ *Id.*

¹¹⁵ See *id.* at 556 n.1 (citing TEX. PENAL CODE ANN. §§ 62-64 (West 1952), *amend-*

prior crimes was admitted, and juries were charged that past convictions could be considered only for purposes of sentencing (if the jury found the defendant guilty) and not for the purpose of actually determining whether a defendant was guilty under the present indictment.¹¹⁶

The common complaint among the three petitioners in *Spencer* was that the prosecution's use of prior convictions at trial "was so egregiously unfair upon the issue of guilt or innocence" as to violate due process.¹¹⁷ The Court conceded the possibility of prejudice but believed that possibility to be "outweighed by the validity of the State's purpose in permitting introduction of the evidence."¹¹⁸ Ultimately, the Court based its decision on aspects of federalism and the defendant's reliance on a more general due process challenge rather than on a specific constitutional right:

[I]t has never been thought that [cases recognizing a due process right to fundamental fairness in criminal trials] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority. In the face of the legitimate state purpose and the long-standing and widespread use that attend the procedure under attack here, we find it impossible to say that because of the possibility of some collateral prejudice the Texas procedure is rendered unconstitutional under the Due Process Clause as it has been interpreted and applied in our past cases

In the procedures before us . . . no specific Federal right . . . is involved; reliance is placed solely on a general "fairness" approach. In this area the Court has always moved with caution before striking down state procedures.¹¹⁹

Spencer may not, however, control the constitutionality of Rules 413 and 414. First, as Chief Justice Warren pointed out in his dissent, "the Court never face[d] up to the problem of trying to justify this recidivist procedure on the ground that the State would not violate due process if it used prior convictions simply as evidence of guilt because it showed criminal propensi-

ed by TEX. PENAL CODE ANN. § 12.42 (West 1994 & Supp. 1997)).

¹¹⁶ *Id.* at 556. Subsequent to the convictions of the petitioners, Texas changed the procedure so that in noncapital cases, a jury does not decide the recidivist issue unless it first finds the defendant guilty of the charged crime. *Id.* at 556 n.2.

¹¹⁷ *Id.* at 559.

¹¹⁸ *Id.* at 561.

¹¹⁹ *Id.* at 564-65.

ty.”¹²⁰ Rather, the Court reasoned that if evidence of prior offenses could be offered to show such things as intent, motive, identity, or an element of a crime, then such evidence also should be offered to further the state purpose of enforcing the habitual offender statute.¹²¹ Therefore, the Court merely decided that the admission of evidence of the prior crimes in this particular case was proper under the common law precursor to current Rule 404(b). Second, *Spencer* arguably supports giving greater deference to state procedures than the Constitution permits in the Court’s review of the validity of a federal procedure.¹²² The decisiveness of the federalism concerns in *Spencer* diminishes any controlling force that the case may have on a constitutional analysis of Federal Rules 413 and 414.

Even if *Spencer* controls, Rules 413 and 414 should be found unconstitutional. The Court stated that the *Spencer* defendants’ interests were protected, inter alia, “by the discretion residing with the trial judge to limit or forbid the admission of particularly prejudicial evidence even though admissible under an accepted rule of evidence.”¹²³ Therefore, although there was no Rule 403 test at the time of the trials, judicial scrutiny still was allowed to safeguard against unduly prejudicial evidence. No such safeguard exists, however, under Rules 413 and 414. These rules, by making evidence of prior sexual misconduct simply “admissible,” remove the judge’s discretion to exclude prejudicial propensity evidence in sexual assault and child molestation cases. Thus, in these types of cases, a defendant’s interests no longer are protected as they were in the opinion of the *Spencer* Court.

A third reason that *Spencer* may not control the constitutionality of Rules 413 and 414 is that an analysis of these rules could proceed on the basis of a “specific right” as well as the “general ‘fairness’ approach.” Although the Supreme Court has defined, very narrowly, the category of circumstances that violate fundamental fairness,¹²⁴ it is clear that fundamental fairness demands that the government “pro[ve] beyond a reasonable doubt . . . every fact necessary to constitute the crime with which [a defendant] is charged.”¹²⁵ In *In re Winship*,¹²⁶ the Court confirmed what had long been assumed: a reasonable doubt standard is *required* in criminal cases.¹²⁷ The reasonable doubt standard guarantees that “[the] government

¹²⁰ *Id.* at 571 (Warren, C.J., dissenting in part and concurring in part).

¹²¹ *Id.* at 560-63.

¹²² The Supreme Court reaffirmed *Spencer* in *Marshall v. Lonberger*, 459 U.S. 422 (1983), and Justice Rehnquist’s majority opinion reiterated the federalism concerns as “[c]entral to our decision [in *Spencer*].” *Id.* at 438 n.6. Four dissenting Justices believed “the only premises that even arguably support the holding in *Spencer* are no longer valid.” *Id.* at 457 (Stevens, J., dissenting).

¹²³ *Id.* at 561.

¹²⁴ *Dowling v. United States*, 493 U.S. 342, 352 (1990).

¹²⁵ *In re Winship*, 397 U.S. 358, 364 (1970).

¹²⁶ 397 U.S. 358 (1970).

¹²⁷ “Expressions in many opinions of this Court indicate that it has long been as-

cannot adjudge [someone] guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty."¹²⁸ Grounded in the standard is the "determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."¹²⁹

Winship provided a clear basis for assessing the constitutionality of trial procedures. Five years after *Winship*, the Court extended the *Winship* doctrine well beyond the formal burden of proof instruction to a jury in a criminal case to other procedures that effectively altered the burden of proving an element of a crime.¹³⁰ As a result, criminal due process entered a "new dimension" that called for "review of the substantive effect of procedural devices on the state's burden of proof."¹³¹ *Winship*-based decisions have concluded that a procedure is unconstitutional if it interferes with a factfinder's application of the reasonable doubt standard to an element of the crime charged.¹³²

The Supreme Court, in developing the *Winship* doctrine, has dealt primarily with jury instructions on presumptions and inferences and the allocations of burdens of persuasion.¹³³ The Court has not addressed directly how *Winship* applies to preinstruction rulings on the admissibility of the government's evidence. In 1972, the Court stated, in dictum, in *Lego v. Twomey*¹³⁴ that *Winship* did not apply to preinstruction evidentiary rulings:

sumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required." *Id.* at 362. "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." *Id.* at 364.

¹²⁸ *Id.*

¹²⁹ *Id.* at 372 (Harlan, J., concurring).

¹³⁰ In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Court unanimously affirmed a decision by the First Circuit which set aside a state murder conviction because a procedure unconstitutionally allocated to the defendant the burden of proving, in order to reduce the crime from murder to manslaughter, that he acted in a heat of passion on sudden provocation. *Id.* at 702.

¹³¹ D. Craig Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 WASH. L. REV. 289, 297 (1989).

¹³² See, e.g., *Francis v. Franklin*, 471 U.S. 307 (1985) (finding that a rebuttable presumption of intent unconstitutionally shifted the burden to defendant); *Sandstrom v. Montana*, 442 U.S. 510 (1979) (finding that the mandatory presumption of intent is unconstitutional). Furthermore, the Supreme Court has held that a court may review the substantive sufficiency of evidence to prove guilt beyond a reasonable doubt. See *Jackson v. Virginia*, 443 U.S. 307, 316-17 (1979) (requiring that the jury rationally apply the reasonable doubt standard to facts in evidence).

¹³³ See cases cited *supra* notes 130 & 132.

¹³⁴ 404 U.S. 477 (1972).

Our decision in *Winship* was not concerned with standards for determining the admissibility of evidence. . . . *Winship* went no further than to confirm the fundamental right that 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."¹³⁵

Nevertheless, seven years later in *County Court of Ulster County v. Allen*,¹³⁶ the Supreme Court, although speaking of "evidentiary devices" in the context of inferences and presumptions, stated that the *Winship* test was the "ultimate test of any device's constitutional validity."¹³⁷ Furthermore, in *Lego*, the Court was deciding whether *Winship* required that the voluntariness of a confession be judged by the reasonable doubt standard.¹³⁸ The Court ruled that *Winship* principles did not apply because "the purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts."¹³⁹ In other words, admission of a piece of evidence, even when there is doubt about the amount of weight that evidence deserves, normally will not pose a serious threat to the required certainty about an accused's guilt because it is expected that the jury will rationally apply the reasonable doubt standard to the *totality* of evidence. "Thus, for unexceptional evidence risks of unreliability are accommodated by the expectations that factfinder rationality and the reasonable doubt standard will safeguard against erroneous convictions."¹⁴⁰

This general principle does not, however, apply to "exceptional" evidence that may threaten the process of rational and reliable decisionmaking by a factfinder. Reliability is gauged by determining whether a procedure threatens the certitude that an innocent person has not been convicted. Even if a procedure may increase the possibility of obtaining an accurate conviction, it is unconstitutional if it puts this certitude in jeopardy. Courts and commentators generally agree that uncharged misconduct evidence can have a decisive impact on criminal trials because of its influence on a jury's factfinding process.¹⁴¹ Jurors likely will find a greater probability connec-

¹³⁵ *Id.* at 486 (quoting *In re Winship*, 397 U.S. 358, 364 (1970)).

¹³⁶ 442 U.S. 140 (1979).

¹³⁷ *Id.* at 156 (emphasis added).

¹³⁸ See generally *Lego*, 404 U.S. at 477.

¹³⁹ *Id.* at 486.

¹⁴⁰ Lewis, *supra* note 131, at 314.

¹⁴¹ See, e.g., EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 1:02 ("Evidence of uncharged misconduct strips the defendant of the presumption of innocence." (footnote omitted)); Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 803 (1981) ("[The general

tion between a person's past misconduct and present culpability than is warranted.¹⁴² In addition, jurors unreasonably may disregard evidence offered by a defendant because he was shown to be a contemptible person.¹⁴³ There is also the danger that a jury might confuse the issue of an accused's commission of uncharged misconduct with the question of his culpability of the charged offense.¹⁴⁴ The greatest risk is that a jury will convict a defendant, even though guilt of the charged crime was not demonstrated clearly, because the defendant was shown to be either deserving of punishment for bad character or guilty of other misconduct for which the defendant never received punishment.¹⁴⁵ Concern about this risk formed the basis of the common law prohibition of propensity evidence.¹⁴⁶

rule is] that extrinsic acts evidence is fraught with dangers of prejudice—extraordinary dangers not presented by other types of evidence.” (quoting *United States v. Beechum*, 582 F.2d 898, 920 (5th Cir. 1978) (en banc) (Goldberg, J., dissenting), cert. denied, 440 U.S. 920 (1979)); Glen Weissenberger, *Making Sense of Extrinsic Act Evidence: Federal Rule of Evidence 404(b)*, 70 IOWA L. REV. 579, 581 (1985) (“Arguably no other item of evidence . . . possesses such enormous potential to affect the outcome of a criminal case.”).

¹⁴² See, e.g., RICHARD O. LEMPert & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 213 (1977); Richard O. Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1027-30 (1977); Weissenberger, *supra* note 141, at 602-04.

¹⁴³ See, e.g., Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 764 (1961).

Richard Lempert has pointed to the potential for prejudice from “double counting” of uncharged misconduct evidence. See Lempert, *supra* note 142, at 1051-52 (1977). A jury presumes to some extent that a defendant is guilty because the government has charged the defendant with a crime. *Id.* As a result, says Lempert, if a defendant's uncharged misconduct is of some relevance to guilt, that relevance is compounded by the jury's initial skepticism about the defendant's innocence. *Id.*

¹⁴⁴ See, e.g., LEMPert & SALTZBURG, *supra* note 142, at 213.

¹⁴⁵ See, e.g., IMWINKELRIED, *supra* note 141, at § 1:03; LEMPert & SALTZBURG, *supra* note 142, at 212; Kuhns, *supra* note 141, at 777-78.

¹⁴⁶ In *Boyd v. United States*, 142 U.S. 450 (1892), the Supreme Court recognized the potential for prejudice that accompanies propensity evidence. The Court voiced “no fewer than five of these concerns (surprise, misestimation, confusion of the issues, arousal of punitive instincts, and interference with the guilt determination standard).” Lewis, *supra* note 131, at 326 n.141. In *Boyd*, the defendants were charged with felony murder for killing during the course of a robbery. The trial court admitted evidence of recent robberies committed prior to the charged crime, with an instruction to the jury that the evidence could be considered with regard to establishing the identity of the felony murderers. *Boyd*, 142 U.S. at 456-57. The Supreme Court reversed, stating that proof of the robberies “only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that [the defendants' lives] were of no value to the community” *Id.* at 458. The Court embraced the rationale behind the common law propensity rule: “However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offence charged.”

The risk of jury misdecision seems to be particularly acute when a court admits evidence of sexual misconduct or child molestation. A well-known study of American juries by Harry Kalven and Hans Zeisel supports this observation.¹⁴⁷ It describes the Chicago Jury Project, in which researchers gauged jurors' reaction to a wide array of offenses. The researchers noted a very high potential for prejudice in sex offense cases.¹⁴⁸ Many jurors expressed their outrage at such conduct, calling it "reprehensible."¹⁴⁹ The researchers concluded that there was a real danger that jurors would "override[] distinctions of the law" to find the defendant guilty.¹⁵⁰ In other words, jurors might be so outraged by a defendant's prior misconduct that they would ignore "legal technicality" and make improper use of the emotionally-charged evidence.

III. CONCLUSION

There is no Supreme Court decision that unambiguously defines the boundaries of constitutionally acceptable uses of propensity evidence, especially in view of *Winship*'s emphasis on reliability. In *Spencer*, four dissenting Justices agreed that "evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause,"¹⁵¹ but the majority never addressed this broad issue. Lower court decisions like *McKinney* support the *Spencer* dissenters. Even if Rules 413 and 414 do not offend "fundamental fairness" in a broad sense, they are fundamentally unfair under *Winship*, a decision that specifically imposes a standard seeking to ensure the reliability of outcomes in criminal cases.

Rules 413 and 414 should be removed from the Federal Rules of Evidence so that Rule 404 (along with the Rule 403 balancing test) will apply to sexual assault and child molestation cases. Although there is no hard evidence that even one guilty offender was set free because of supposedly excessive limits placed upon federal prosecutors by the current Rule 404(b), it appears inevitable that the enactment of Rules 413 and 414 will increase greatly the risk of convicting an innocent person. If there is still, in the words of Justice Harlan, "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free,"¹⁵² then these rules must be repealed. The propensity rule must remain a firmly rooted principle in American criminal justice.

Id.

¹⁴⁷ See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966).

¹⁴⁸ *Id.* at 396-97.

¹⁴⁹ *Id.* at 397.

¹⁵⁰ *Id.* at 396.

¹⁵¹ *Spencer v. Texas*, 385 U.S. 554, 574 (1967).

¹⁵² *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

Alternatively, if the new rules remain, they should be amended to include a stringent balancing test to determine the ultimate admissibility of propensity evidence in sex offense cases. Such a balancing test should be a reverse of current Rule 403, so that the prosecution will bear the burden of showing a judge that the probative value of the propensity evidence it seeks to introduce substantially outweighs the prejudicial effect it may have on an alleged sex offender. This reversal of the 403 balancing test is necessary because prejudicial evidence of uncharged sexual misconduct creates the risk that a jury will alter the reasonable doubt calculus itself. A jury presented with evidence of an accused's prior sexual misconduct may not be as cautious about rendering an erroneous guilty verdict. If a jury expands the level of doubt it finds acceptable for a conviction, it is likely to convict using a standard of proof less than that required by *Winship* and the Due Process Clause.¹⁵³

Assuming *arguendo* that courts—contrary to the plain language of Rules 413 and 414—employed a Rule 403 balancing test before admitting sexual propensity evidence under Rules 413 and 414, such a test would still be insufficient to protect an accused from extreme prejudice and the high possibility of jury misdecision. The pro-admission bias of Rule 403 often leads to a “casual judicial attitude toward claims of prejudice from the admission of evidence.”¹⁵⁴ Courts, responding to the substantial bias toward admission inherent in Rule 403, may fail to employ any Rule 403 balancing once they have determined that evidence has probative value.¹⁵⁵ Moreover, under Rules 413 and 414, courts no longer need to justify the admission of evidence of uncharged sexual misconduct against claims of unfair prejudice by choosing from the list of “other purposes” described in Rule 404(b).¹⁵⁶ By requiring the government to show that the probative value of uncharged sexual misconduct substantially outweighs the danger of unfair prejudice, courts would be more sensitive to the effects that sexual propensity evidence may have on the reliability of a jury's decision.

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¹⁵³ See *supra* notes 126-29 and accompanying text.

¹⁵⁴ Lewis, *supra* note 131, at 356.

¹⁵⁵ See, e.g., Victor J. Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59, 61-63 & nn.6-11 (1984); Lewis, *supra* note 131, at 356.

¹⁵⁶ See FED. R. EVID. 404(b); see also *supra* notes 43-47 and accompanying text.