Ensuring Fairness and Justice Through Consistency: Application of the Rule 403 Balancing Test to Determine Admissibility of Evidence of a Criminal Defendant's Prior Sexual Misconduct Under the Federal Rules

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I. Introduction

Justice Potter Stewart's famous quote that "fairness is what justice really is" has never rung more true: in over 200 years of American criminal jurisprudence, the United States has prided itself on the protections afforded to its citizens under the Constitution, particularly those facing criminal prosecution. A cornerstone of these protections is the right to a fair trial. Since the introduction of the Federal Rules of Evidence,[2] criminal defendants have benefited from the protection of the system's general restriction on the introduction of prior bad act evidence to establish criminal propensity.[3]

Prior bad acts evidence was inadmissible because it had been held irrelevant to prove the conduct in question, and thus was unfair to a criminal defendant.[4] Prior to the introduction of Federal Rules of Evidence 413–415 (or "Rules 413–415"), evidence of prior bad acts was

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[2] It should be noted at the outset that the Federal Rules of Evidence were amended in 2011 "to make them more easily understood and to make style and terminology consistent throughout the rules." FED. R. EVID. 403–404, 413–415 advisory committee's notes. The Advisory Committee Notes make clear that these changes were "intended to be stylistic only." *Id.* In other words, there was "no intent to change any result in any ruling on evidence admissibility." *Id.* Because this article was prepared before any amendments became effective on December 1, 2011, and because the amendments were not intended to change the meaning or application of the Evidence Rules, this article will quote the language of the Rules that was in place when the article originally was written.

[3] *See generally* FED. R. EVID. 404(b)(1).

[4] *See* 22A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5239, at 261 (Supp. Pamph. 2012) (noting that it "has long been accepted in our law [t]hat 'the doing of one act is in itself no evidence that the same or a like act was again done by the same person.'" (quoting 1 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 192, at 642 (3d ed. 1940))).

admissible, but for limited purposes only.[5] Even at this time, however, the Supreme Court recognized that "similar act" and other Rule 404(b) evidence could be admitted only if there also was sufficient evidence to support a finding that the defendant had actually committed the similar act.[6] Character evidence was never admissible to show propensity, and especially not in cases involving evidence of prior sexual misconduct.[7] The first sentence of Rule 404(b) expresses the rule's policy concerns "that the jury may convict a 'bad man,' and that the jury will infer that because the accused committed other crimes, he probably committed the crime charged."[8] Although this logic theoretically could apply equally to defendants, victims, or third parties, at common law the rule barring prior bad act evidence existed to prevent the inference—from knowledge of prior bad acts—that a "defendant in a criminal case" perpetrated the "criminal act charged."[9] Furthermore, history makes clear that the policy underlying the rule at common law sought to protect the criminal defendant.[10]

Federal Rule of Evidence 403 allows for the exclusion of relevant evidence in a criminal trial if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant.[11] In a criminal case in which the defendant is accused of committing sexual assault or child molestation, however, Federal Rules of Evidence 413–415 allow for the admission of

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[5] FED. R. EVID. 404(b) provides 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. 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, 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."
[6] Huddleston v. United States, 485 U.S. 681, 685 (1988).
[7] *Id.*
[8] FED. R. EVID. 404; *see* United States v. Phillips, 599 F.2d 134, 136 (6th Cir. 1979) (noting that without Rule 404, evidence of other crimes or wrongs of the accused could so prejudice a jury that a fair verdict might be impossible).
[9] JOHN H. WIGMORE, WIGMORE'S CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW §§ 355–356, at 81 (3d. ed. 1942); *see also* United States v. Dudek, 560 F.2d 1288, 1295–96 (6th Cir. 1977) (noting that Rule 404(b) restates the common law).
[10] 22A WRIGHT & GRAHAM, *supra* note 4, at 436–39.
[11] FED. R. EVID. 403.

evidence of a defendant's commission of another offense of sexual assault or child molestation[12] (hereafter, "prior sexual misconduct"). Evidence of prior sexual misconduct is precisely the type of evidence for which probative value traditionally has been easily outweighed by the danger of unfair prejudice and, therefore, excluded from criminal proceedings,[13] particularly in light of the protections provided by Rule 404(b).[14]

In 1995, Congress added Rules 413, 414, and 415 to the Federal Rules of Evidence, which provide that similar prior bad act evidence is admissible and may be considered for its bearing on any matter to which it is relevant where the defendant is accused of sexual assault[15] or child molestation.[16] These new rules were implemented over the near-unanimous objection of the judges, academics, and practitioners sitting on the Advisory Committee on Evidence Rules.[17] Significantly, these new rules created exceptions to the general restriction of Federal Rule of Evidence 404(b), which prohibited the introduction of prior bad act evidence[18] by permitting the admission of similar prior bad act evidence in sexual assault and child molestation cases to show the defendant's propensity to commit the crime charged.[19]

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[12] FED. R. EVID. 413–415.

[13] *See, e.g.*, Paul R. Rice, *Article IV. Relevancy And Its Limits Commentary*, THE EVIDENCE PROJECT (Feb. 12, 2011, 7:40 PM), http://www.wcl.american.edu/pub/journals/evidence/commentary/a4r413c.html (calling for the repeal of Rules 413–415 and noting that said Rules "isolate specific types of other crimes, wrongs, or acts evidence traditionally governed by . . . Rule 404(b) . . . and give such evidence special evidentiary stature . . . [in that] the restrictions and safeguards found in [Rule 404] would not apply to this evidence. . . . Like other uncharged misconduct evidence, evidence of prior sexual assaults or instances of child molestation brings with it the danger of severe prejudice to the criminal defendant. The jury is apt to give such evidence an inappropriate amount of weight and to punish the defendant for the extrinsic crime rather than the one for which he is on trial.").

[14] FED. R. EVID. 404.

[15] FED. R. EVID. 413.

[16] These proposed additions to the Federal Rules of Evidence 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). Federal Rules of Evidence 413–415 ultimately were included in the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935, 108 Stat. 1796, 2135–37 (1994).

[17] *See* FED. R. EVID. 413–415 advisory committee's note; JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (1995), *reprinted in* 159 F.R.D. 51, 52 (1995).

[18] FED. R. EVID. 404; *see also* Jason L. McCandless, *Prior Bad Acts and Two Bad Rules: The Fundamental Unfairness of Federal Rules of Evidence 413 and 414*, 5 WM. & MARY BILL RTS. J. 689, 689 (1997).

[19] FED. R. EVID. 413–415.

In doing so, Congress observed that, in certain instances, sexual misconduct is different from other crimes.[20] The difference

> is either that propensity evidence has special value in certain violent sexual misconduct cases or that the difficulty of and need for convictions for these crimes warrants a decrease in the usual protections against propensity and character evidence. Regardless of which purpose drove Congress to adopt those rules, it recognized that their adoption would inevitably lead to additional convictions. Importantly, [Congress] limited the scope of the[] new rules to two particularly serious and violent crimes.[21]

Although the U.S. Courts of Appeals agree that evidence admissible pursuant to Rules 413–415 is subject to Rule 403,[22] the circuits are in disagreement about whether Rules 413–415 change how district courts perform the Rule 403 balancing test.[23] The Supreme Court has not made a decision as to how the balancing test should be performed.[24] In deciding whether Rules 413–415 change how district courts perform the Rule 403 balancing test, most circuits have imposed judicially crafted rules with respect to district judges' consideration of evidence under Rules 413–415.[25] Namely, the Ninth and Tenth Circuits have required district courts to apply Rule 403 with "careful attention to both the significant probative value and the strong prejudicial qualities" of the evidence—thus placing greater emphasis on Rule 403 when Rules 413–415 are

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[20] 140 CONG. REC. S12990–01 (daily ed. Sept. 20, 1994) (statement of Sen. Dole) ("The reform effected by these rules is critical to the protection of the public from rapists and child molesters, and is justified by the distinctive characteristics of the cases to which it applies."); United States v. Stout, 509 F.3d 796, 801 (6th Cir. 2007).

[21] *Stout*, 509 F.3d at 801–02. *But see* Erik D. Ojala, *Propensity Evidence Under Rule 413: The Need for Balance*, 77 WASH. U. L.Q. 947, 952–53 (1999) ("[C]ourts should limit the prejudicial effect of propensity evidence by using conferences outside the presence of the jurors, in conjunction with Rule 403 and jury instructions. This will balance the Congressional intent behind Rule 413 with the defendant's right to a fair trial, a policy that underlies Rule 403 and the rest of the Federal Rules of Evidence.").

[22] *See, e.g.,* Martinez v. Cui, 608 F.3d 54, 60 (1st Cir. 2010); Doe v. Smith, 470 F.3d 331, 346 (7th Cir. 2006), *abrogated on other grounds by* T.E. v. Grindle, 599 F.3d 583 (7th Cir. 2010); Seeley v. Chase, 443 F.3d 1290, 1294–95 (10th Cir. 2006); Blind-Doan v. Sanders, 291 F.3d 1079, 1082 (9th Cir. 2002); United States v. Guardia, 135 F.3d 1326, 1330 (10th Cir. 1998); United States v. Castillo, 140 F.3d 874, 884 (10th Cir. 1998).

[23] *See Martinez*, 608 F.3d at 60 (discussing circuit split among the U.S. Courts of Appeals).

[24] *Id.*

[25] *Id.*; *see infra* notes 26–30 and accompanying text; *see also* 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 413 (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. Supp. 2012).

implicated.[26] The Third, Sixth, and Eighth Circuits "have instructed district courts to apply Rule 403 less stringently, at least in some cases, to avoid having Rule 403 swallow evidence Congress clearly intended to make admissible" (through the introduction of Rules 413–415 in the first place).[27] The Third, Fourth, Seventh, Ninth, and Tenth Circuits have adopted factors district courts can or should consider in evaluating the admissibility of evidence under Rules 413–415 and Rule 403.[28] The Ninth Circuit has suggested that, on appeal, appellate courts should more carefully scrutinize a lower court's decision under Rules 413–415.[29] Lastly, the First Circuit rejects these approaches in their entirety and has held that there is no reason to adopt any special rules constraining the district courts' usual exercise of discretion under Rule 403 when considering evidence in connection with Rules 413–415.[30]

In performing the Rule 403 balancing test to determine whether to admit evidence of prior sexual misconduct, some courts look to "(1) the 'close[ness] . . . in time' of the prior acts to the current charges, (2) the 'similarity of the prior acts,' and (3) the 'alleged frequency' of the prior acts."[31] Other courts consider similar as well as additional factors, including "the presence

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[26] The Ninth and Tenth Circuits have imposed "judicially crafted rules with respect to district judges' consideration of evidence under [Rules 413–415]" through the application of Rule 403, with "careful attention to both the significant probative value and the strong prejudicial qualities" of the evidence. *Martinez*, 608 F.3d at 60; *Seeley*, 443 F.3d at 1295 (quoting *Guardia*, 135 F.3d at 1330); *see also* United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998); Doe *ex rel.* Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1268 (9th Cir. 2000).

[27] *Martinez*, 608 F.3d at 60. The Third, Sixth, and Eighth Circuits have imposed judicially crafted rules with respect to district judges' consideration of evidence under Rules 413–415 by instructing district courts to apply Rule 403 less stringently, at least in some cases. *See, e.g.*, Johnson v. Elk Lake Sch. Dist., 283 F.3d 138, 156 (3d Cir. 2002); *see also* United States v. Seymour, 468 F.3d 378, 385 (6th Cir. 2006); United States v. Gabe, 237 F.3d 954, 959–60 (8th Cir. 2001); United States v. Larson, 112 F.3d 600, 604 (2d Cir. 1997).

[28] The Third, Fourth, Seventh, Ninth, and Tenth Circuits have adopted factors that district courts can or should consider in evaluating the admissibility of evidence under Rule 403 and Rules 413–415. *See, e.g.*, *Seeley*, 443 F.3d at 1295; *Johnson*, 283 F.3d at 156; *Glanzer*, 232 F.3d at 1268–69.

[29] *Martinez*, 608 F.3d at 60. The Ninth Circuit has suggested that appellate courts should more carefully scrutinize lower court decisions decided under Rules 413–415. *See* United States v. LeMay, 260 F.3d 1018, 1022 (9th Cir. 2001).

[30] The First Circuit has held that there is no reason to adopt any special rules constraining district courts' usual exercise of discretion under Rule 403 when considering evidence under Rules 413–415. *Martinez*, 608 F.3d at 60.

[31] *Seymour*, 468 F.3d at 386; *see also* United States v. Julian, 427 F.3d 471, 487 (7th Cir. 2005); *Johnson*, 283 F.3d at 156.

or absence of any intervening acts, and . . . the reliability of the evidence of the past offense."[32] Some courts are required: to evaluate the connection between the evidence of prior sexual misconduct and the material fact on which it is offered; to consider the similarity of the prior acts to the acts charged; the closeness in time of the prior acts to the charged acts; the frequency of the prior acts; and the presence or lack of intervening events.[33] Then, the courts are to determine the risk of unfair prejudice that would be created by introducing the prior sexual misconduct evidence by weighing "1) how likely is it such evidence will contribute to an improperly-based jury verdict; 2) the extent to which such evidence will distract the jury from the central issues of the trial; and 3) how time consuming it will be to prove the prior conduct."[34] Only then should the district court look to "1) how clearly the prior act has been proved; 2) how probative the evidence is of the material fact it is admitted to prove; 3) how seriously disputed the material fact is; and 4) whether the government can avail itself of any less prejudicial evidence."[35] Still, other courts are required to consider all of these, as well as "other [factors] that arise on a case-by-case basis."[36]

Part of the reason these tests are so different likely stems from the fact that it is impossible to know for certain that allowing evidence of prior sexual misconduct in a criminal proceeding will definitively prevent future criminal offenses. Rules 413–415 effectually confound a bedrock principal of our criminal justice system: the disallowance of evidence of prior bad acts to establish propensity. The "empirical data regarding a convicted sexual offender's propensity to re-commit the same sexual offense . . . [is] inconclusive at best."[37] One

[32] United States v. Kelly, 510 F.3d 433, 437 (4th Cir. 2007).
[33] United States v. Guardia, 135 F.3d 1326, 1331 (10th Cir. 1998).
[34] United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998) (citation omitted).
[35] *Id.* (citation omitted).
[36] Doe *ex rel.* Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1268 (9th Cir. 2000).
[37] Joseph A. Aluise, *Evidence of Prior Sexual Misconduct in Sexual Assault and Child Molestation Proceedings: Did Congress Err in Passing Federal Rules of Evidence 413, 414, and 415?*, 14 J.L. & POL. 153, 194 (2008). *Cf.*

difficulty in determining recidivism rates is that, in order to be identified, a recidivating sexual offender must be apprehended and convicted of the crime (or at least admit to committing the crime).[38] Regardless of the total number of sexual offenders who will actually commit a similar offense again, rapists and child molesters are dangerous criminals, and most of them will recidivate. Yet, neither the available psychological data nor statistical comparisons demonstrate conclusively that sex offenders are any more likely to repeat their crimes than are other classes of criminals.[39] There certainly is evidence, however, that, like non-sexual criminals, at least some of the criminals who have committed sexual crimes will recidivate.[40] Accordingly, Congress has determined that the crimes of sexual assault and child molestation are so heinous and despicable, that evidence of prior instances of sexual misconduct may be introduced in criminal proceedings for a subsequent similar crime,[41] even at the cost of disregarding one central guarantee of fairness provided by our criminal justice system.[42]

The congressional intent underlying the implementation of Federal Rules of Evidence 413–415 makes clear that these rules were introduced to supersede in sex offense cases the restrictive aspects of Rule 404(b), and authorize the admission and consideration of evidence of an uncharged offense for its bearing on any matter to which it is relevant in these types of

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Louis B. Schlesinger, *Compulsive-Repetitive Offenders: Behavioral Patterns, Motivational Dynamics*, *in* SERIAL MURDER AND THE PSYCHOLOGY OF VIOLENT CRIMES 15, 21 (Richard N. Kocsis ed., 2008).

[38] Michelle L. Meloy, *The Sex Offender Next Door: An Analysis of Recidivism, Risk Factors, and Deterrence of Sex Offenders on Probation*, 16 CRIM. JUST. POL'Y REV. 211, 212–13 (2005) (noting that "[d]espite all of the recidivism research in recent years, the true extent to which sex offenders recidivate is especially difficult to determine because sex crimes are underreported to police and also because of the complications involved in how recidivism is measured, defined, and explored.").

[39] *Id.*

[40] PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1 (2002), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1134 ("Among nearly 300,000 prisoners released in 15 states in 1994, 67.5% were rearrested within 3 years.").

[41] 140 CONG. REC. S12990–01 (daily ed. Sept. 20, 1994) (statement of Sen. Dole).

[42] *See supra* note 13.

cases.[43] The present lack of uniformity among the circuits in determining how to balance the unfair prejudice of prior sexual misconduct evidence against its probative value for purposes of determining admissibility under Rule 403, combined with the fact that a trial court's application of Rule 403 balancing to determine admissibility of prior sexual misconduct under the Rules is subject only to abuse-of-discretion review, perhaps allows for a too generous level of discretion within the hands of the district courts.[44]

In the absence of a standardized approach, individual district judges are afforded the ability to shape the outcome of many criminal proceedings according to their own conception of what constitutes unfair prejudice (in contemplating extraordinarily prejudicial evidence) and probative value (in contemplating evidence with extremely high probative value). Balancing these two complex factors to determine admissibility of potentially damning evidence, with only the most moderate level appellate review available to a criminal defendant—should the judge make an improper decision—could quite easily cost a criminal defendant his freedom for life, depending on the severity of the sexual offense charged.

Accordingly, a uniform approach that takes into consideration the most widely accepted balancing factors, combined with a less deferential level of appellate review, should be

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[43] 140 CONG. REC. H8968–01, H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) ("The new rules will supersede in sex offense cases the restrictive aspects of Federal rule of evidence 404(b).").

[44] 1 WEINSTEIN & BERGER, *supra* note 25, § 103.40[1].

> Courts are split on the appropriate standard of review for evidentiary rulings. There are decisions in all circuits holding that the trial judge's decision to admit or exclude evidence is reviewed only for "abuse of discretion." Under the abuse-of-discretion standard of review, the trial court's decision will be reversed only if it is "based on a clearly erroneous finding of fact or an erroneous conclusion of law or manifests a clear error in judgment." . . . [T]he First Circuit has held that it reviews questions of law arising from claimed evidentiary errors *de novo*, questions of fact for "clear error," and matters of discretion, such as rulings concerning relevance and prejudice, for "abuse of discretion." An Eight[h] Circuit panel has held that *de novo* review applies to evidence issues that involve both an interpretation of the federal rules of evidence and an application of the rules to the facts of a case. . . . To further complicate matters, some circuits, including the Second, Seventh, and Tenth, have interpreted the "abuse of discretion" standard to include *de novo* review of errors of law, characterizing those errors as an "abuse of discretion."

Id. (internal citations omitted).

considered for implementation by the U.S. Supreme Court to resolve the current circuit split. De novo review of a district judge's admissibility determination under the Rule 403 balancing test in light of Rules 413–415 would be correct if such a balancing were found to be a legal interpretation of the Federal Rules of Evidence as opposed to review of a general evidentiary ruling.[45] De novo review would provide the circuit courts with the authority to review district courts' conclusions on questions of the application, interpretation, and construction of the law—namely, whether the Rule 403 balancing test was performed in conformity with established parameters in deciding to admit evidence of prior sexual misconduct. This less deferential level of appellate review, combined with the implementation of a universal balancing test, effectively would allow the Supreme Court to resolve the circuit split and settle most issues that have arisen and will likely continue to arise in connection with the split, while providing an important check on district court discretion in this precarious area.

II. Background

Prior to 1994, and before Rules 413–415 were part of the Federal Rules of Evidence, Rule 404(b) governed admission of a defendant's prior crimes or acts in criminal proceedings.[46] Rule 404(b) disallowed such evidence when used to prove "the character of a person in order to show action in conformity therewith."[47] Sexual assault and child molestation, however, are particularly heinous crimes, and evidence of a criminal defendant's prior sexual misconduct is thought to be indicative of the criminal defendant's propensity to continue to act in conformity with those crimes.[48]

[45] Gen. Elec. Co. v. Joiner, 522 U.S. 136, 139 (1997) (holding that abuse of discretion is the standard generally applicable to review of evidentiary rulings).
[46] United States v. LeMay, 260 F.3d 1018, 1024 (9th Cir. 2001).
[47] FED. R. EVID. 404(b).
[48] Schlesinger, *supra* note 37.

The criminal justice community is divided on the question of recidivism for sexual offenders.[49] Some researchers have found the rate of recidivism very high for sexual offenders, while others have found that the rate is lower for rapists than it is for burglars, drug offenders, or robbers.[50] The incidence of sexual assault crimes itself is considered notoriously difficult to measure, due largely to underreporting by sexual assault victims.[51] It is even more difficult to determine the incidence of child molestation; however, multiple studies indicate that child sexual abuse is a serious threat to the youth of our nation.[52] Because it is difficult to know with any certainty the incidence rates of either of these crimes, it also is difficult to know how many of the criminals committing these crimes will actually recidivate.[53] Accordingly, due at least in part to the difficulty in prosecuting the criminal actors responsible for the commission of these serious offenses, Congress took legislative action to make prosecuting these criminals more tenable.

Federal Rules of Evidence 413–415 were enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, and became effective in 1995.[54] These rules were designed to "protect the public from crimes of sexual violence" by permitting "in sexual assault and child molestation cases . . . evidence that the defendant has committed offenses of the same type on

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[49] *See, e.g.*, R. Karl Hanson & Andrew J. R. Harris, *Where Should We Intervene? Dynamic Predictors of Sexual Offense Recidivism*, 27 CRIM. JUST. & BEHAV. 6 (2000) (discussing lack of empirical data available and conducting study of sexual offenders, nearly half of whom ultimately recidivate). *Compare* PATRICK A. LANGAN ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, at 1–2 (Carolyn Williams & Thomas Hester eds., 2003), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1136 (study indicating that 5.3% of released sex offenders were later arrested for another sex crime within 3 years of release. The same study noted that 68% of released non-sex offenders were rearrested for some other crime (both sex and non-sex offenses)), *with* Nikolaus Heim & Carolyn J. Hursch, *Castration for Sex Offenders: Treatment or Punishment? A Review and Critique of Recent European Literature*, 8 ARCHIVES SEXUAL BEHAV. 281, 281–304 (1979) (noting a 60% long-term recidivism rate for untreated sex offenders).

[50] LANGAN ET AL., *supra* note 49.

[51] FREDERIC G. REAMER, HEINOUS CRIME: CASES, CAUSES, AND CONSEQUENCES 23–24 (2005) (citing studies indicating that only 9–16% of rapes are reported to police; comparing national surveys assessing the prevalence of sexual assault with FBI Uniform Crime Report Statistics; and concluding that conflicting trends suggest that the actual incidence of rape may be declining, but that the crime itself is now more likely to be reported to authorities).

[52] *See id.* at 35–37 (citing numerous studies confirming the prevalence of childhood sexual abuse).

[53] *See supra* notes 51–52.

[54] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935, 108 Stat. 1796, 2135–37 (1994).

other occasions."[55] As such, the rules created an exception to the general ban on propensity evidence contained in Rule 404(b).[56] Initially, the Judicial Conference of the United States opposed the enactment of Rules 413–415, citing concerns that the rules could be interpreted as requiring the automatic admission of uncharged acts of sexual misconduct without consideration of various concerns, such as a defendant's Sixth Amendment right of confrontation, and without any Rule 403 balancing to exclude evidence that is both unreliable and highly prejudicial.[57]

Over the objection of the Judicial Conference of the United States, and without an established scientific connection between sexual misconduct and criminal recidivism, Congress enacted Federal Rules of Evidence 413–415.[58] Thus, unless these rules were found unconstitutional (or an alternative interpretation were accepted), the courts were to be bound by these new rules. The question, then, became how to implement Rules 413–415, which called for admission of evidence of a criminal defendant's prior sexual misconduct, while still upholding the already established rules that protect a criminal defendant from being unfairly prejudiced in criminal proceedings against him.

Rules 413–415 significantly altered the general rule barring evidence of prior bad acts, at least with respect to evidence of prior sexual misconduct. Indeed, while character evidence of

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[55] 140 CONG. REC. H8968–01, H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).

> [C]ourts must get tougher on criminals because of the changes we made. . . . [T]he opportunity for admission of prior evidence in rape and child molestation cases . . . [means] it is tougher for the criminal, it is fairer for the victim, and it is, in fact, better for all of our future. . . . The enactment of this reform is first and foremost a triumph for the public—for the women who will not be raped and the children who will not be molested because we have strengthened the legal system's tools for bringing the perpetrators of these atrocious crimes to justice.

Id.

[56] *Id.* ("The new rules will supersede in sex offense cases the restrictive aspects of Federal rule of evidence 404(b) . . . [and] authorize admission and consideration of evidence of an uncharged offense for its bearing on any matter to which it is relevant.").

[57] United States v. Larson, 112 F.3d 600, 604–05 (2d Cir. 1997) (citing JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (1995), *reprinted in* 159 F.R.D. 51, 53 (1995)); *see also* 23 WRIGHT & GRAHAM, JR., *supra* note 4, § 5411.

[58] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935, 108 Stat. 1796, 2135–37 (1994).

any type traditionally has been disfavored for admission in criminal proceedings,[59] on their face, the new rules made such evidence admissible as it applied to instances of prior sexual misconduct, providing that "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."[60] Rules 413–415 allow evidence to be admitted for the purpose of establishing propensity to commit other sexual offenses.[61] In allowing this evidence, the rules reflect Congress's view that this propensity evidence "is typically relevant and probative" in an otherwise difficult-to-prosecute criminal proceeding, and should therefore be admissible.[62] Thus, an important question in the Rule 413–415 inquiry is whether the probative value of admitting evidence of prior sexual misconduct outweighs its prejudicial effect.[63] "As Representative Susan Molinari, the principal House sponsor for Rules 413–415, commented in her floor statements, 'In child molestation cases . . . a history of similar acts tends to be exceptionally probative because it shows an unusual disposition of the defendant—a sexual or sadosexual interest in children—that simply does not exist in ordinary people.'"[64]

Federal Rules of Evidence 413–415 markedly changed the federal judiciary's approach to allowing for the admissibility of character evidence—a fact that could lead to at least two different misapplications of the Rule 403 balancing test. First, a court could be tempted to exclude Rule 413 evidence simply because character evidence traditionally has been considered

[59] *See, e.g.*, Old Chief v. United States, 519 U.S. 172, 181 (1997) (noting that "[t]here is . . . no question that propensity would be an 'improper basis' for conviction. . . .").
[60] FED. R. EVID. 413.
[61] *See* FED. R. EVID. 413–415.
[62] *See* 140 CONG. REC. S12990–01 (daily ed. Sept. 20, 1994) (statement of Sen. Dole).
[63] Doe v. Smith, 470 F.3d 331, 346 (7th Cir. 2006).
[64] *Id.* (quoting 140 CONG. REC. H8968–01, H8991–92 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari)).

too prejudicial for admission.[65] Second, a court could perform a restrained Rule 403 analysis, thereby placing either a higher emphasis on probative value or a lower emphasis on unfair prejudice, because of the belief that Federal Rules of Evidence 413–415 embody a legislative judgment that propensity evidence regarding sexual assaults generally is not too prejudicial or confusing and, therefore, should be admitted.[66]

All of the rules in Article IV of the Federal Rules of Evidence are "concrete applications [of rules 402 and 403] evolved for particular situations."[67] The fact that Congress created Rules 413–415 can mean only that Congress intended to partially repeal the "concrete application" of Rule 404(b) and acknowledge a subset of cases in which Congress found 404(b)'s rigid rule to be inappropriate.[68] This conclusion is not surprising, given the fact that propensity evidence has a unique probative value in sexual assault trials, which often suffer from a lack of relevant evidence beyond the alleged victim's testimony and the testimony of the criminal defendant.[69] Rules 413–415 are a refinement of Rule 403 and were meant to work in concert with Rule 403. Recognizing the interplay between these rules and allowing for a fair and thorough application of the rules in a criminal proceeding is imperative.[70] Over time, the circuit courts have developed distinct approaches to the application of the Rule 403 balancing test in determining the admissibility of prior sexual misconduct evidence under Rules 413–415.[71] These approaches are explored in the following sub-parts.

A. The Unmodified 403 Balancing Test

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[65] Old Chief v. United States, 519 U.S. 172, 181–82 (1997) (stating that Rule 404(b) merely "reflects . . . common-law tradition.").
[66] United States v. LeCompte, 131 F.3d 767, 769 (8th Cir. 1997).
[67] FED. R. EVID. 403 advisory committee's note.
[68] Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57, 69–70 (1995).
[69] United States v. Guardia, 135 F.3d 1326, 1332 (10th Cir. 1998).
[70] *See id.*
[71] Martinez v. Cui, 608 F.3d 54, 60 (1st Cir. 2010).

The First Circuit holds that there is no reason to adopt special rules constraining a district court's usual exercise of discretion under Rule 403 when considering evidence under Rule 415.[72] No other circuit courts have joined the First Circuit in holding that district court decisions concerning the admissibility of prior sexual misconduct evidence under Rules 413–415 are best left to the discretion of the trial court.[73] The First Circuit further holds that any appellate examination of these decisions is reviewed under the ordinary and deferential abuse-of-discretion standard.[74]

B. Balancing in Favor of Admissibility

Other circuits take a similar approach to that of the First Circuit concerning the application of the Rule 403 balancing test but temper that approach with a presumption of admissibility concerning evidence of prior sexual misconduct admitted under Rules 413–415. These circuits call on district courts to perform the standard Rule 403 balancing test, but require said courts to tip the scales in favor of admissibility when weighing evidence of prior sexual misconduct.[75] The Eighth Circuit, for example, in evaluating the admission of prior sexual misconduct evidence under Rules 413–415, notes that Rule 414 and its companion rules are general rules of admissibility.[76] Although evidence offered under these rules may be excluded under Rule 403's balancing test, "Rule 403 must be applied to allow [the rule] its intended effect."[77] In sexual assault and child molestation cases, the Eighth Circuit has held that "evidence that the defendant committed a prior similar offense 'may be considered for its bearing

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[72] *Id.*
[73] *Id.*; *see also* United States v. Dillon, 532 F.3d 379, 388–90 (5th Cir. 2008); Doe v. Smith, 470 F.3d 331, 341, 346 (7th Cir. 2006); United States v. Wilson, 437 F.3d 616 (7th Cir. 2006); United States v. Julian, 427 F.3d 471, 485–87 (7th Cir. 2005); United States v. Talley, 164 F.3d 989, 998 (6th Cir. 1999).
[74] *Martinez*, 608 F.3d at 60.
[75] *See, e.g.*, United States v. Seymour, 468 F.3d 378, 384–85 (6th Cir. 2006); United States v. Gabe, 237 F.3d 954, 959 (8th Cir. 2001); United States v. LeCompte, 131 F.3d 767, 769 (8th Cir. 1997); United States v. Larson, 112 F.3d 600, 604–05 (2d Cir. 1997).
[76] *Gabe*, 237 F.3d at 959; *LeCompte*, 131 F.3d at 769.
[77] *LeCompte*, 131 F.3d at 769.

on any matter to which it is relevant,' including the defendant's propensity to commit such offenses."[78] To the extent relevant, "such evidence is admissible unless its probative value is 'substantially outweighed' by one or more of the factors enumerated in Rule 403, including 'the danger of unfair prejudice.'"[79]

In *United States v. LeCompte*, the Eighth Circuit observed that the district court excluded other similar acts of child molestation that occurred eight to ten years before the charged acts, due to the danger of unfair prejudice to the defendant.[80] The court held that the danger of unfair prejudice relied on by the trial court in excluding the evidence "was that presented by the 'unique stigma' of child sexual abuse, on account of which [the defendant] might be convicted not for the charged offense, but for his sexual abuse of a [different child]."[81] The Eighth Circuit, in overturning the district court, and thereby setting the Eighth Circuit standard, found that "this danger [was] one that all propensity evidence in such trials present[ed]. It [was] for this reason that the evidence was previously excluded, and was precisely such a holding that Congress intended to overrule."[82]

The Sixth Circuit also weighs evidence of prior sexual misconduct in favor of admissibility when performing the Rule 403 balancing test.[83] The Sixth Circuit holds that where the past act is demonstrated with specificity and is substantially similar to the act(s) for which the

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[78] *Gabe*, 237 F.3d at 959 (quoting FED. R. EVID. 413(a), 414(a)).
[79] *Id.* (quoting *LeCompte*, 131 F.3d at 769). In *Gabe*, the sexual abuse for which the defendant was charged was very similar to an earlier allegation of abuse. *Id.* Indeed, both incidents involved girls who were young at the time of the offense, both victims were related to the defendant, and the sexual nature of the misconduct was similar. *Id.* The court balanced the probative value of the evidence against the risk of unfair prejudice and held that testimony concerning the earlier incident of sexual abuse was admissible because "Rule 403 is concerned only with unfair prejudice, that is, an undue tendency to suggest decision on an improper basis." *Id.* at 959–60 (internal quotation marks and citation omitted). The court observed that the testimony was prejudicial to the defendant for the same reason it was probative—it tended to prove the defendant's propensity to "molest young children in his family when presented with an opportunity to do so undetected." *Id.* at 960. The testimony, therefore, was not unfairly prejudicial, according to the court. *Id.*
[80] *LeCompte*, 131 F.3d at 768–69.
[81] *Id.* at 770.
[82] *See* 2 WEINSTEIN & BERGER, *supra* note 25, § 413.04.
[83] United States v. Seymour, 468 F.3d 378, 385 (6th Cir. 2006).

defendant is being tried, it is Congress's intent that the probative value of the similar act be presumed to outweigh Rule 403's concerns.[84] The Sixth Circuit noted in *United States v. Seymour* that the "district court found the prior-assaults evidence highly probative based on (1) the 'close[ness] . . . in time' of the prior acts to the current charges, (2) the 'similarity of the prior acts,' and (3) the 'alleged frequency' of the prior acts."[85] Even prior to the adoption of Rules 413–415, when Rule 404(b) governed the admissibility of all prior bad acts evidence, the Sixth Circuit recognized that the district courts should give evidence "its maximum reasonable probative force and its minimum reasonable prejudicial value."[86]

Similarly, the Second Circuit recognized that the sponsors of the legislative amendment that introduced Rule 414 had noted that, in contrast to Rule 404(b), which bans evidence of prior bad acts to establish propensity,[87] Rule 414 permits evidence of other instances of prior sexual misconduct as proof of, inter alia, a "propensity" of the criminal defendant to commit sexual misconduct offenses; however, in other respects, the general standards of the rules of evidence will continue to apply, including the restriction on hearsay evidence and the court's authority under Rule 403 to exclude evidence in which its probative value is substantially outweighed by its prejudicial effect.[88]

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[84] *Id.* at 381.

[85] *Id.* at 386 (citation omitted). Defendant Seymour was convicted of sexually abusing and molesting two individuals: a mother and her daughter. *Id.* at 381. The defendant challenged his conviction, arguing that, during his criminal proceedings, the district court had wrongly admitted evidence of prior uncharged sexual assaults Seymour allegedly had committed against two other women. *Id.* at 384. The Sixth Circuit determined, however, that in light of the defendant's child-molestation charge, the district court had properly conducted a Rule 403 balancing test with respect to the testimony concerning the allegedly uncharged sexual assaults. *Id.* at 385. The court noted that the district court had found the testimony markedly similar to the claims in Seymour's criminal proceeding ("[a]ll four alleged victims were part of Seymour's extended family, and all four allegedly were assaulted on a bed after Seymour arrived in an intoxicated state"), and that this similarity enhanced its probative value to the point that it outweighed any unfair prejudice against Seymour. *Id.* (citing Johnson v. Elk Lake Sch. Dist., 283 F.3d 138, 144 (3d Cir. 2002)).

[86] United States v. Schrock, 855 F.2d 327, 333 (6th Cir. 1988) (citation omitted).

[87] FED. R. EVID. 404.

[88] United States v. Larson, 112 F.3d 600, 604–05 (2d Cir. 1997); 140 CONG. REC. S12990–01 (daily ed. Sept. 20, 1994) (statement of Sen. Dole); 140 CONG. REC. H8968–01, H8991 (daily ed. Aug. 21, 1994) (statement of Rep.

In *United States v. Larson*, performing a Rule 403 balancing analysis, the district court weighed the probative value of the evidence against its potential for unfair prejudice, and granted a motion to exclude the testimony of a witness/victim who would have described prior acts of sexual misconduct committed by the defendant more than twenty-one years prior to trial.[89] The district court concluded that these events were too remote in time to have any probative value in the case and that, to the extent the witness's testimony would be admissible under Rule 414, any probative value would be substantially outweighed by the resulting danger of unfair prejudice to the defendant in having to defend against allegations so remote in time. The district court further noted that this danger of unfair prejudice also applied to admitting the testimony of a witness under Rule 404(b).[90] The district court in *Larson* did, however, permit testimony by another witness concerning uncharged sexual assaults committed by Larson some sixteen years prior to trial in order to establish intent.[91] The Second Circuit found that the district court had properly evaluated the proffered evidence under both Rule 404(b) and Rule 414 and fully performed a Rule 403 analysis with respect to both,[92] holding the Rule 403 analysis to be consistent with

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Molinari). With respect to Rule 403 balancing, however, the congressional sponsors stated that "[t]he presumption is that the evidence admissible pursuant to these rules is typically relevant and probative, and that its probative value is not outweighed by any risk of prejudice." 140 CONG. REC. S12990–01 (daily ed. Sept. 20, 1994) (statement of Sen. Dole); *see also* 140 CONG. REC. H8968–01, H8992 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) ("[I]ts probative value is normally not outweighed. . . .").

[89] *Larson*, 112 F.3d at 602.

[90] *Id.* at 602–03.

[91] *Id.* at 602.

[92] Defendant Larson was charged and convicted of interstate transportation of a minor with intent to engage in criminal sexual conduct. *Id.* The victim testified that, on numerous occasions, Larson had taken him to his cabin, plied him with liquor, and engaged him in sexual acts. *Id.* The prosecution offered into evidence the testimony of three other witnesses who had similarly been sexually victimized by Larson when they were minors, some 16–21 years prior to trial. *Id.* Larson moved to exclude the testimony of the three witnesses on the grounds that the alleged incidents were too remote in time. *Id.* The district court ruled that testimony with respect to events that had occurred 16 years before trial would be admitted, finding the testimony probative of intent "because it revealed a similarity to the alleged sex acts performed; a similarity in the methodology of enticing the alleged victims; a similarity in the provision of alcohol to the minors; and a similarity in the location of the alleged offenses." *Id.* at 602. Performing a Rule 403 balancing analysis—i.e., weighing the probative value of the evidence against its potential for unfair prejudice—the district court granted the defendant's motion to exclude testimony concerning acts that occurred more than 21 years before trial. *Id*. The district court observed that, to the extent this testimony would be admissible under Rule 414, any probative value was substantially outweighed by the resulting danger of

Congress's intent as reflected in the legislative history, and noting that the government "agrees that . . . Rule 414 . . . does not mandate the admission of the evidence or eliminate the need for the court to conduct the analysis required under Rule 403."[93]

C. Enhanced Level of Deference to District Court Determination

In the Fifth Circuit, evidence admissible under Rules 413–415 may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.[94] The Fifth Circuit's approach differs from the approaches adopted by other circuits, however, because under the Fifth Circuit approach, a district court's determination under Rule 403 as to whether the probative value of prior sexual misconduct evidence is substantially outweighed by the danger of unfair prejudice is reviewed under an abuse-of-discretion standard—with, at least generally, "an especially high level of deference to" the district court, and reversal called for "'rarely' and only when there has been 'a clear abuse of discretion.'"[95]

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unfair prejudice to Larson in having to defend allegations so remote in time. *Id.* In contrast, with respect to the testimony concerning more recent events (i.e., events that occurred only 16 years prior to trial), the court found that these events were not so remote in time as to constitute unfair prejudice to the defendant, and, therefore, these uncharged acts of sexual abuse were admissible. *Id.* at 605. The Second Circuit agreed, holding that the district court properly evaluated the evidence and that the probative value of the witness' testimony outweighed its potential for unfair prejudice. *Id.* (internal citations and quotation marks omitted).

[93] *Id.*

[94] United States v. Dillon, 532 F.3d 379, 388 (5th Cir. 2008); United States v. Fields, 483 F.3d 313, 354 (5th Cir. 2007) (quoting United States v. Maggitt, 784 F.2d 590, 597 (5th Cir. 1986)), *cert. denied*, 552 U.S. 1144 (2008).

[95] In *Dillon*, the defendant argued on appeal that the district court had abused its discretion by admitting, pursuant to Federal Rule of Evidence 413, evidence of two other sexual assaults allegedly committed by the defendant. 532 F.3d at 382, 387. The Fifth Circuit noted that the district court had weighed allegations of four prior uncharged sexual assaults thoroughly, ultimately admitting the testimony of two witnesses because their alleged sexual assaults occurred within weeks of one of the charged offenses, the defendant had met the women through his official position, and one victim's assault happened in a manner similar to the charged offenses. *Id.* at 387–90. Although this evidence undoubtedly was prejudicial to the defendant's case, the Fifth Circuit observed that all "[r]elevant evidence is inherently prejudicial . . . it is only unfair prejudice, substantially outweighing probative value, which permits exclusion of relevant matter under Rule 403." *Id*. at 391 (quoting United States v. Pace, 10 F.3d 1106, 1115–16 (5th Cir. 1993)). The court noted that the district court clearly kept this distinction in mind because it excluded the testimony of two other alleged victims, holding that the victims' testimony would have been unfairly prejudicial because the two alleged sexual assaults were remote in time and dissimilar in their commission to the charged offenses. *Id.* The Fifth Circuit ultimately found that the district court took great care in weighing the evidence of the prior sexual assaults and, in making this decision, could not conclude, under the applicable standard of review, that the district court had abused its discretion. *Id.*

The Fifth Circuit notes that Rule 413, which provides that evidence of prior sexual assaults "may be considered for its bearing on any matter to which it is relevant," is limited by Rule 403's balancing test, which allows evidence to be admitted as long as its probative value is not substantially outweighed by its potential for unfair prejudice.[96] Similarity of prior sexual misconduct establishes relevance in the Fifth Circuit because the more similar the earlier activity is to the charged offense, the more probative it is deemed to be.[97]

D. Balancing Specific Factors and Explicit Findings

The Third Circuit rejects as "overly simplified" a number of courts' and commentators' conclusions that Rule 403 should be applied to Rules 413–415 with "a thumb on the scale in favor of admissibility."[98] Rather, the Third Circuit focuses on specificity and similarity, and has held that "in cases where the past act is demonstrated with specificity and is substantially similar to the act(s) for which the defendant is being sued, it is Congress's intent that the probative value of the similar act be presumed to outweigh Rule 403's concerns."[99]

In *Johnson v. Elk Lake School District,* the Third Circuit determined that evidence of the prior sexual offense was equivocal and the past act differed from the charged act in important ways. Therefore, the court found no presumption in favor of admissibility and held that the trial court retained significant authority to exclude the proffered evidence under Rule 403.[100] Also relevant to the Third Circuit's Rule 403 balancing analysis are "the closeness in time of the prior

[96] United States v. Guidry, 456 F.3d 493, 503 (5th Cir. 2006).
[97] *Dillon*, 532 F.3d at 389.
[98] Johnson v. Elk Lake Sch. Dist., 283 F.3d 138, 155 (3d Cir. 2002).
[99] *Id.* at 144.
[100] In *Johnson*, Johnson claimed that her guidance counselor, Stevens, sexually harassed and abused her while she was a high school student. *Id.* at 143. Johnson attempted to introduce evidence of Stevens' prior sexual misconduct to show a propensity for sexual abuse, namely testimony from Stevens' former co-worker regarding a bizarre incident in which Stevens allegedly picked her up off the floor in another teacher's office and, in the course of doing so, touched her in the crotch area, perhaps intentionally. *Id.* The district court refused to admit this evidence. *Id.* The Third Circuit agreed that the trial court retained discretion to exclude the evidence, and that evidence of the past sexual offense was notably dissimilar from the charged offense; therefore, there was no presumption in favor of admissibility in order, and the district court did not abuse its discretion in excluding the co-worker's testimony. *Id.* at 143–56. (internal citations and quotation marks omitted).

acts to the charged acts, the frequency of the prior acts, the presence or lack of intervening events, and the need for evidence beyond the testimony of the defendant and alleged victim."[101] The Third Circuit emphasizes factors that focus on the propensity inferences drawn from the past act evidence, and holds that Congress, using these factors, surely intended for the probative value of the evidence to outweigh its prejudicial effect; it did not want Rule 403 to justify exclusion.[102] The Third Circuit also requires that district courts "state explicitly their reasons for admitting or excluding evidence under Rules 413–15," though a formal "finding" is not required.[103]

E. Consideration of Threshold Issues, Factors, and Findings of Fact

Interpreting Rule 413, the Tenth Circuit stresses that the rule "contains no language that supports an especially lenient application of Rule 403."[104] Thus, when balancing Rule 413 evidence under Rule 403, "the district court should not alter its normal process of weighing the probative value of the evidence against the danger of unfair prejudice."[105] The Tenth Circuit holds that evidence of prior sexual misconduct may be admitted under Rule 413 if the defendant is on trial for a sexual assault offense, the evidence proffered is of another sexual assault, and the court finds the evidence is relevant.[106] To be relevant, "the evidence must show both that the defendant has particular propensity, and that the propensity it demonstrates has a bearing on the charged crime."[107] Additionally, the trial court "must make a reasoned, recorded finding that the prejudicial value of the evidence does not substantially outweigh its probative value" under Rule

[101] *Id.* at 156 (quoting United States v. Guardia, 135 F.3d 1326, 1330 (10th Cir. 1998)).
[102] *Id.* (citing 140 CONG. REC. 15,209 (1994) (recognizing as the archetypal case one in which "there is a clear pattern of conduct by an accused who has been convicted of similar conduct.")).
[103] *Id.* at 157 n.16 (citing Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1269 (9th Cir. 2000)); *see also* 2 WEINSTEIN & BERGER, *supra* note 25, § 415.04.
[104] *Guardia*, 135 F.3d at 1331.
[105] *Id.*
[106] *Id.* at 1332.
[107] *Id.*

403.[108] The court must give "careful attention to both the significant probative value and the strong prejudicial qualities inherent in all evidence submitted under [Rule] 413."[109]

The Tenth Circuit approach further requires that once a district court resolves the three threshold issues, including making a finding that the proffered evidence is relevant, it must proceed to balance the probative weight of the Rule 413 evidence against "the danger of unfair prejudice, confusion of the issues, or misleading the jury, or . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[110] The court must perform the same Rule 403 analysis that it would in any other context, but with careful attention to both the significant probative value and the strong prejudicial qualities inherent in all evidence submitted under Rule 413.[111]

The Tenth Circuit approach provides several enumerated factors that a court should consider when performing Rule 403 balancing in sexual misconduct cases.[112] Specifically, the district court must determine: the probative value of the prior offense; the connection between the evidence of the prior offense and the material fact for which it is offered, and the risk of unfair prejudice that would be created through introduction of the prior offense. In determining the probative value of the prior offense, the district court should consider: "[h]ow clearly the prior act has been proved"; "[h]ow probative the evidence is of the material fact it is admitted to prove"; "[h]ow seriously disputed the material fact is"; and "[w]hether the government can avail itself of any less prejudicial evidence."[113] In evaluating the connection between the evidence and the material fact for which it is offered, a district court should consider: the "similarity of the

[108] *Id.*
[109] *Id.* at 1330; Seeley v. Chase, 443 F.3d 1290, 1294–95 (10th Cir. 2006).
[110] *Seeley*, 443 F.3d at 1294–95 & n.3.
[111] *Id.* at 1295.
[112] United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998).
[113] 2 WEINSTEIN & BERGER, *supra* note 25, § 413.04[2].

prior acts to the acts charged"; the "closeness in time of the prior acts to the charged acts"; the "frequency of the prior acts"; and the "presence or lack of intervening events."[114] To determine the risk of unfair prejudice that would be created through introduction of the prior offense, a court should consider how likely it is that the evidence will contribute to an improperly based jury verdict, the extent to which the evidence will distract the jury from the central issues of the trial; and how time consuming it will be to prove the prior conduct.[115] Moreover, because of the sensitive nature of this balancing test in sexual assault cases, the Tenth Circuit requires that the district court "make a clear record of the reasoning behind its findings."[116]

Applying these considerations, the Tenth Circuit upheld the trial court's exclusion of evidence of prior sexual assaults in *United States v. Guardia*.[117] There, using the enumerated factors, the district court refused to permit other patients' testimony regarding sexual misconduct the criminal defendant may have committed under somewhat similar circumstances, due to the substantial risk of jury confusion. The district court held that "[t]he subtle factual distinctions among these incidents would make it difficult for the jury to separate the evidence of the uncharged conduct from the charged conduct," even though the evidence satisfied the Rule 413 requirements.[118]

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[114] *Id.*
[115] United States v. Guardia, 135 F.3d 1326, 1330–31 (10th Cir. 1998).
[116] United States v. Castillo, 140 F.3d 874, 884 (10th Cir. 1998) (quoting *Guardia*, 135 F.3d at 1331).
[117] Dr. Guardia was charged with sexually assaulting several patients during routine medical examinations in the course of his practice. United States v. Guardia, 955 F. Supp. 115, 117 (D.N.M. 1997). Citing Rule 403, the district court refused to admit testimony of other patients that Dr. Guardia treated under similar but distinct circumstances due to the substantial risk of jury confusion. *Guardia*, 135 F.3d at 1331–32. The court held that "[t]he subtle factual distinctions among these incidents would make it difficult for the jury to separate the evidence of the uncharged conduct from the charged conduct" (even though the evidence satisfied Rule 413 requirements). *Id.* at 1332. The Tenth Circuit agreed that the district court's decision "reflect[ed] its thoughtful consideration of both the relevance of the Rule 413 evidence and the policies behind Rule 403 . . . [and that] [g]iven the deference due district courts in making Rule 403 determinations . . . the district court did not abuse its discretion in concluding under Rule 403 that the risk of jury confusion substantially outweighed the probative value of the Rule 413 evidence proffered by the government." *Id.*
[118] *Guardia*, 955 F. Supp. at 118.

The Tenth Circuit has "refrain[ed] from construing the words and phrases of a statute—or entire statutory provisions—in a way that renders them superfluous."[119] Furthermore, the Tenth Circuit notes that Rule 413 permits the admission of otherwise excludable evidence, because "if Rule 413 evidence were always too prejudicial under 403, Rule 413 would never lead to the introduction of evidence. . . . [t]herefore, Rule 413 only has effect if . . . interpret[ed] in a way that leaves open the possibility of admission."[120]

F. Multi-Factor Balancing, Totality of the Circumstances

The Ninth Circuit requires district courts to apply Rule 403 with "careful attention to both the significant probative value and the strong prejudicial qualities" of the prior sexual misconduct evidence.[121] The Ninth Circuit takes the Tenth Circuit's multi-factor balancing further by requiring district courts to fully evaluate the Tenth Circuit's factors, as well as other factors that may arise on a case-by-case basis, and requiring that the district court establish a clear record concerning its decision as to whether or not to admit such evidence for consideration on appeal.[122]

Similarly, the Seventh Circuit holds that admissibility of evidence under Rules 413–415 does not "displace the court's authority pursuant to Rule 403 to exclude evidence of a prior assault if its probative value is substantially outweighed by the danger of unfair prejudice."[123] This view is consonant with that of many other circuit courts that have considered the interplay between Rule 403 and Rules 413–415.[124] The Seventh Circuit has not expressly adopted the

[119] *Guardia*, 135 F.3d at 1330 (citing DePaoli v. Comm'r, 62 F.3d 1259, 1264 (10th Cir. 1995); United States v. McHenry, 968 F.2d 1047, 1048 (10th Cir. 1992)).
[120] *Id*.
[121] Seeley v. Chase, 443 F.3d 1290, 1295 (10th Cir. 2006) (quoting *Guardia*, 135 F.3d at 1330); *see also* Doe *ex rel.* Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1268 (9th Cir. 2000).
[122] *Glanzer*, 232 F.3d at 1268–69.
[123] United States v. Julian, 427 F.3d 471, 487 (7th Cir. 2005).
[124] *See* sources cited *supra* note 22.

factors-based tests developed by the Ninth and Tenth Circuits.[125] Instead, in *United States v. Julian,* the court stressed that "the district court enjoys wide discretion in admitting or excluding evidence, and our review of its evidentiary ruling is highly deferential."[126] In effect, then, *Julian* adopts a more flexible approach than the factors-based tests developed by the Ninth and Tenth Circuits, and one that the Seventh Circuit finds more in harmony with the outlined approach of the Tenth Circuit in *Guardia*, where the court foresaw that district courts would consider "innumerable" factors.[127] The Seventh Circuit has hesitated to artificially cabin the discretion of the district courts through the imposition of a relatively rigid, multi-factored test, believing that the factors articulated in *LeMay*, for example, are helpful but not determinative for a district court making the discretionary determination on the admissibility of prior sexual misconduct evidence.[128]

The Fourth Circuit agrees that in applying the Rule 403 balancing test to prior sexual misconduct offenses admissible under Rules 413–415, a district court should consider a number of factors, including: the similarity between the previous offense and the charged crime; the temporal proximity between the two crimes; the frequency of the prior acts; the presence or absence of any intervening acts; and the reliability of the evidence of the past offense.[129] The Fourth Circuit also emphasizes a higher level of deference, deferring to the district court's Rule

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[125] United States v. Hawpetoss, 478 F.3d 820, 825 (7th Cir. 2007); *Julian*, 427 F.3d 471.
[126] *Julian*, 427 F.3d at 487.
[127] 2 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL § 413.03 (10th ed. 2011) .
[128] In *United States v. Hawpetoss*, the Seventh Circuit, affirming a conviction for sexual assault on three children, found no abuse of discretion in the admission of evidence regarding uncharged instances of molestation of two other children. 478 F.3d at 822–23, 825–27. The defendant argued that not all of the five *LeMay* factors listed by the Ninth Circuit had been satisfied; however, the court took a more flexible approach because it was hesitant to cabin artificially the discretion of the district courts through the imposition of a relatively rigid multi-factored test. *Id*. at 825. Still, the court considered the factors identified in *LeMay* a helpful guide in making the discretionary determination on admissibility. *Id.* at 825–26.
[129] In *United States v. Kelly*, the Fourth Circuit held that the district court did not abuse its discretion by admitting defendant Kelly's prior conviction for the attempted rape of a child. 510 F.3d 433, 437 (4th Cir. 2007). The court focused on the similarity between the two offenses and the purpose of engaging in illicit sexual conduct with a twelve-year-old, and noted that while Kelly's prior conviction was twenty-two years prior to the crimes charged, this fact alone, given the factual similarities between the offenses, did not render the conviction inadmissible. *Id.*

403 balancing, using these or other factors, "unless it is an arbitrary or irrational exercise of discretion."[130] The Fourth Circuit has found the Seventh Circuit's more flexible approach preferable in light of its general view that a district court has "wide discretion" in admitting or excluding evidence under Rule 403.[131] This deferential standard reflects the fact that the Fourth Circuit believes that "a district court is much closer than a court of appeals to the 'pulse of a trial.'"[132]

G. Undecided

The Eleventh Circuit has not yet directly addressed this issue.[133] The Eleventh Circuit has found, however, that "[w]here . . . the extrinsic offense evidence is relevant to an issue such as intent, it may well be that the evidence has probative force that is not substantially outweighed by its inherent prejudice." If this is so, evidence of prior sexual misconduct may be admissible following the Second Circuit's line of reasoning in *United States v. Larson*.[134]

III. Analysis

Under Rules 413–415, a trial judge must bear in mind the impact evidence of prior sexual misconduct inevitably will have on jurors, and should err on the side of excluding any evidence that does not demonstrate substantially similar conduct in substantially similar situations.[135] As long as trial judges are willing to provide the proper filter that Rules 413–415 do not, the end result will be well-managed trials in which only truly relevant evidence is presented to the jury.[136]

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[130] *Id.* at 436–37; United States v. Heater, 63 F.3d 311, 321 (4th Cir. 1995) (quoting Garraghty v. Jordan, 830 F.2d 1295, 1298 (4th Cir. 1987)).
[131] *See* United States v. Heyward, 729 F.2d 297, 301 n.2 (4th Cir. 1984).
[132] *See Kelly*, 510 F.3d at 437 n.3 (quoting United States v. Russell, 971 F.2d 1098, 1104 (4th Cir. 1992)).
[133] Martinez v. Cui, 608 F.3d 54, 60 (1st Cir. 2010).
[134] *See* United States v. Hersh, 297 F.3d 1233, 1254 n.31 (11th Cir. 2002).
[135] Aluise, *supra* note 37, at 195–98.
[136] *Id.*

The Supreme Court "has supervisory authority over the federal courts, and . . . may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals."[137] A formalized framework with a less deferential standard of review provides a fair and universally administrable solution to the current split, while embracing the intent behind the implementation of Federal Rules of Evidence 413–415. The congressional intent underlying the implementation of Rules 413–415 makes clear that these rules were introduced to supersede in sex offense cases the restrictive aspects of Rule 404(b), and to authorize the admission and consideration of evidence of an uncharged offense for its bearing on any matter to which it is relevant in a sexual misconduct case.[138]

The present lack of uniformity among the circuits with respect to how to balance the unfair prejudice of evidence of prior sexual misconduct against its probative value, combined with the fact that a trial court's application of Rule 403 balancing is subject only to abuse-of-discretion review, perhaps allows for *too much* discretion in the hands of the district courts. In the absence of a standardized approach, individual district judges are free to shape the outcome of criminal proceedings based on their own conception of any unfair prejudice and/or probative value of the evidence, and with only a moderate level of appellate review available to a criminal defendant. Accordingly, a uniform approach that considers the most widely accepted balancing factors, combined with a less deferential standard of review and a requirement for comprehensive findings of fact, should be implemented by the U.S. Supreme Court to resolve the split.

A. Uniform Balancing Test

[137] Dickerson v. United States, 530 U.S. 428, 437 (2000).
[138] *See* 140 CONG. REC. H8968–01, H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).

As a starting proposition, in applying the Rule 403 balancing test, a district court should consider prior sexual misconduct evidence to be inherently prejudicial and, therefore, likely *not* admissible. Such evidence should be held admissible only after a Rule 403 balancing test, performed using the Tenth Circuit's "multi-factor" approach, is found to tip in favor of admissibility. The Tenth Circuit's approach provides a workable, analytical framework for conducting this balancing test, as the factors are precise and factually determinable. Specifically, in determining the *probative value* of the prior offense, the court should consider how clearly the prior act has been proved, how probative the evidence is of the material fact it is admitted to prove, how seriously disputed the material fact is, and whether the government can avail itself of any less prejudicial evidence.

In evaluating the *connection between the evidence and the material fact* for which it is offered, courts should consider matters such as the similarity of the prior acts to the acts charged, the closeness in time of the prior acts to the charged acts, the frequency of the prior acts, and the presence or lack of intervening events.

To determine the *risk of unfair prejudice* that would be created by introducing evidence of the prior offense, the court should consider how likely it is that the evidence will contribute to an improperly based jury verdict, the extent to which the evidence will distract the jury from the central issues of the trial, and how time consuming it will be to prove the prior conduct.

B. Appellate Review

The district courts should be required to make a clear record of the reasoning behind their findings in deciding whether to admit or exclude evidence of prior sexual misconduct under Rules 413–415 after performance of the Rule 403 balancing test, and appellate courts should be permitted to review the district court's application of Rule 403 to the facts of the case using a de novo standard of review. Generally, a district court's decision to admit evidence is reviewable

only for abuse of discretion.[139] In the context of prior sexual misconduct evidence, however, the district court's application of the totality of the circumstances balancing test to the facts of the case should be reviewed de novo.[140] Indeed, the circuit courts would be better served by the adoption of this less deferential standard of review. De novo review would shift the discretionary determination to the appellate courts and provide an additional layer of protection to ensure consistent application of the test.

Prior to the introduction of the Violent Crime Control and Law Enforcement Act of 1994, and the subsequent addition of Federal Rules of Evidence 413–415, a trial court's balancing the probative worth and prejudicial effect of evidence under Rule 403 was reviewed only for abuse of discretion, largely because this balancing exercise involved the consideration of multiple factors and was a highly fact-sensitive undertaking.[141] De novo review would provide the circuit courts with the authority to review district courts' conclusions on questions of the application, interpretation, and construction of the law—namely, whether the Rule 403 balancing test was performed in conformity with established parameters in deciding to admit evidence of prior sexual misconduct. This less deferential level of appellate review, combined with the implementation of a universal balancing test, effectively would allow the Supreme Court to resolve the circuit split and settle most issues that have arisen and will likely continue to arise in connection with the split, while providing an important check on district court discretion in this precarious area.

In addressing the current circuit split, the Supreme Court should consider an exception to the general proposition that evidentiary rulings are reviewed only for abuse of discretion, taking

[139] United States v. Wilson, 237 F.3d 827, 834 (7th Cir. 2001) (citing United States v. Hunter, 145 F.3d 946, 951 (7th Cir. 1998)).
[140] *See, e.g.*, Reeder v. Am. Econ. Ins. Co., 88 F.3d 892, 894 (10th Cir. 1996).
[141] Peter Nicolas, *De Novo Review in Deferential Robes?: A Deconstruction of the Standard of Review of Evidentiary Errors in the Federal System*, 54 SYRACUSE L. REV. 531, 541 (2004) (citations omitted).

into consideration the fluidity of the factors to be considered, and reinforcing the power of federal appellate courts to ensure fair and accurate application of the balancing test—particularly in light of the potentially devastating effect the evidence in question may have on a criminal defendant's constitutional right to a fair trial.

C. Other Considerations

Rules 413–415 have been the subject of numerous constitutional challenges, generally for violation of a criminal defendant's due process rights.[142] To date, these challenges have been unsuccessful, mainly because the appellate courts interpret Rule 403 as providing sufficient protection against abuse.[143] The legislative history suggests that Rules 413–415 and Rule 403 should provide the trial judge with sufficient discretion to ensure that convictions are based on a factual record and not simply on "bad man" emotional evidence.[144] Some courts have stated that without Rule 403, the constitutionality of these rules would be in doubt.[145]

Rules 413–415 do not refer to any other rules of evidence. Nor do they mention employing Rule 403's balancing test to determine the admissibility of prior sexual misconduct evidence in criminal proceedings. This omission has been the subject of some judicial attention, but is not itself determinative of the availability or scope of judicial discretion to exclude similar

[142] *See, e.g.*, United States v. Julian, 427 F.3d 471, 487 (7th Cir. 2005) (citing Gillespie v. City of Indianapolis, 185 F.3d 693, 708 (7th Cir. 1999)).
[143] United States v. LeMay, 260 F.3d 1018, 1026–27 (9th Cir. 2001) (rejecting due process challenge to Rule 414); United States v. Mound, 149 F.3d 799, 801 (8th Cir. 1998) (rejecting constitutional challenge to Rule 413); *see also* United States v. Castillo, 140 F.3d 874, 883 (10th Cir. 1998) (rejecting equal protection challenge to Rule 414); United States v. Enjady, 134 F.3d 1427, 1433–34 (10th Cir. 1998) (rejecting equal protection challenge to Rule 413 under plain error review).
[144] *See* 140 CONG. REC. S12990–01 (daily ed. Sept. 20, 1994) (statement of Sen. Dole) (indicating Congress's intention that Rule 403 be utilized to exclude unfairly prejudicial evidence); *see also* 140 CONG. REC. H8968–01 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) (noting that Rules 413–415 were drafted with the intention to exclude covered evidence that violates Rule 403).
[145] Lee D. Schinasi, *Teaching the "Portraits, Mosaics and Themes" of the Federal Rules of Evidence*, 29 MISS. C. L. REV. 83, 141–42 (2010).

sexual misconduct evidence under Rule 403.[146] Although it is generally well-settled that Rule 403 does in fact apply to the determination of whether to admit evidence of prior sexual misconduct, the balancing test should be refined so that it can be uniformly administered and result in more fact-sensitive determinations, with reasoning that is easily reviewable at the appellate level.

IV. Conclusion

The proposed solution will resolve the circuit split that has developed regarding the application of Rule 403's balancing test to evidence of prior sexual misconduct otherwise governed by Rules 413–415. Further, implementation of the proposed solution will alleviate most of the fairness concerns that currently exist given the state of the law, particularly due to the highly prejudicial nature of evidence of a criminal defendant's prior sexual misconduct—even uncharged conduct, in certain circumstances[147]—that can be introduced in criminal proceedings. These concerns should be addressed through a highly fact-sensitive, well-documented analysis that is performed uniformly by district courts throughout the country. Moreover, appellate review of this inquiry should be less deferential, thereby providing an additional level of protection to criminal defendants' right to a fair trial.

The existence of the current circuit split undoubtedly creates a sense of unfairness and injustice for criminal defendants, particularly in light of the fact that evidence of prior sexual misconduct is admissible against these criminal defendants in some federal circuits but not others. Without resolution of this circuit split, it is possible, and perhaps likely, that the split will only widen, eventually allowing for a successful constitutional challenge to certain criminal

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[146] Rosanna Cavallaro, *Federal Rules of Evidence 413–415 and the Struggle for Rulemaking Preeminence*, 98 J. CRIM. L. & CRIMINOLOGY 31, 65–66 (2007).
[147] United States v. Larson, 112 F.3d 600, 604 (2d Cir. 1997); *see also* 23 WRIGHT & GRAHAM, JR., *supra* note 4, § 5411.

prosecutions. Moreover, many, if not all, state courts look to the Federal Rules of Evidence and the federal courts' interpretation of those rules in crafting and interpreting their own evidentiary rules.[148] Thus, the Supreme Court's failure to resolve the disagreement that has arisen regarding the application of Rule 403's balancing test to the admission of evidence of prior sexual misconduct ultimately will leave both the state and federal systems in flux.

Rules 413–415 reflect a political decision that there should be additional flexibility under the Federal Rules of Evidence in allowing evidence of prior sexual misconduct in a criminal proceeding.[149] The circuit courts seem to agree that Rule 413 mandates a change in the way courts traditionally have balanced the probative value and prejudicial effect of such acts in determining admissibility.[150] Under Rule 404(b) and Rule 403, a trial court must balance the probative value of the uncharged misconduct for the not-for-character purpose; it cannot consider, and weigh in favor of admissibility, the probative value for the forbidden propensity inference.[151] In contrast, Rule 413 provides that the trial court must consider the prior act of sexual assault as probative of the defendant's propensity to commit the crime charged.[152] Thus, the propensity inference is part of the probative value judges must balance under the Rule 403 test.[153]

Moreover, under Rules 404(b) and 403, a trial court, in weighing the risk of prejudice, must consider the possibility that the jury will convict the defendant because of his propensity to

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[148] Paul R. Rice, *Advisory Committee on the Federal Rules of Evidence: Tending to the Past and Pretending for the Future?*, 53 HASTINGS L.J. 817, 819 (2002) (noting that the "codification [of the Rules of Evidence] established a uniform code of evidence throughout the federal judicial system, eliminating dependence on the evidence rules of each state in which the federal district courts sit. Codification also provided a model for state adoptions, facilitating consistency in evidence rules both among the states and between the federal and state systems.").
[149] *See supra* notes 16, 56.
[150] 2 WEINSTEIN & BERGER, *supra* note 25, § 413.02.
[151] *Id.*
[152] FED. R. EVID. 413.
[153] 2 WEINSTEIN & BERGER, *supra* note 25, § 413.02.

commit the crime charged.[154] This constitutes "prejudice" because the rules do not permit the jury to draw the propensity inference. In contrast, under Rules 413–415, the jury is allowed to draw the inference that because the defendant has committed sexual misconduct in the past, he has a propensity to commit sexual misconduct and, therefore, is more likely to have committed sexual misconduct on the occasion in question.[155] Thus, the risk of drawing the propensity inference cannot be considered "prejudicial" when the trial judge conducts the Rule 403 balancing test in sexual misconduct cases under Rules 413–415. Consequently, the Rule 403 balancing test is far less likely to result in the exclusion of prior acts of sexual assault than was the case before Rules 413–415 were passed. Congress has instructed the courts to find more probative value and less prejudicial effect with respect to such evidence than the courts were previously permitted to find.

In effect, a Rule 403 objection to evidence of prior sexual misconduct is likely to be successful only in exceptional cases.[156] One circumstance supporting exclusion would be where the prior act is completely dissimilar from the charged act (e.g., the defendant is charged with molesting a child at his home, and the prior sexual misconduct involved a workplace incident with an adult). Another circumstance supporting exclusion would be where the prior sexual misconduct occurred a long time ago, and without any intervening acts of sexual misconduct.[157] Where these circumstances arise—and especially if remoteness and dissimilarity are combined—the propensity inference is weak and, for similar reasons, the evidence would seem to have minimal, if any, probative value for any Rule 404(b)-type not-for-character purpose. Most importantly, the evidence of the dissimilar and/or remote act is prejudicial independent from any

[154] FED. R. EVID. 403, 404(b).
[155] FED. R. EVID. 413–415.
[156] 2 WEINSTEIN & BERGER, *supra* note 25, § 413.02.
[157] *See, e.g.*, Johnson v. Elk Lake Sch. Dist., 283 F.3d 138, 156 (3d Cir. 2002).

propensity inference: it encourages the jury to convict the defendant not because he has a propensity to commit the crime charged (which is permissible) but rather because he is a "bad person" (which is impermissible, even under Rules 413–415).

Addressing the present lack of uniformity among the circuits in determining how to balance the unfair prejudice of prior sexual misconduct evidence against its probative value for purposes of determining admissibility under Rule 403 is of vital importance. Through the introduction of a uniform approach that takes into consideration the most widely accepted balancing factors, combined with a less deferential standard of appellate review, most, if not all, of the fairness concerns that have arisen and will continue to arise through the introduction of prior sexual misconduct evidence can be resolved. Furthermore, adoption of a uniform approach would resolve the current circuit split that has developed, thereby protecting the constitutionality of the rules through a uniform and fair application, and provide state courts with the guidance they have traditionally received by looking to the Federal Rules of Evidence and the federal courts' interpretation of those rules in crafting and interpreting their own evidentiary rules.