SEARCHING FOR A BETTER CONSTITUTIONAL GUARANTOR FOR FRE 413–415: THE CONFLICT AMONG CIRCUITS IN APPLYING THE FRE 403 BALANCING TEST AND A NEW SOLUTION

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This Note argues that the federal circuits' current approaches in applying the FRE 403 balancing test in the context of FRE 413–415 are inadequate to ensure the constitutionality of FRE 413–415. Under the FRE 403 balancing test, evidence is inadmissible only if the probative value of the evidence is substantially outweighed by a danger of unfair prejudice. Federal circuits rely on FRE 403's balancing test as the constitutional guarantor for FRE 413–415, which allow the admission of evidence of the defendant's prior sexual assaults or child molestation, despite its significance of propensity reasoning and huge potential to mislead the jury. In addition, this Note introduces and provides detailed analysis on the current approaches used by different federal circuits in applying the FRE 403 balancing test to evidence admissible under FRE 413–415. Finally, this Note proposes a new approach for federal circuits where the lower-threshold, pro-exclusion balancing test utilized in FRE 609(a)(1)(B) is applied in the context of FRE 413–415. The new approach, which is a combination of the balancing test utilized in FRE 609(a)(1)(B) and five factors set forth in United States v. LeMay, takes into account both the Congressional intent to admit evidence of the defendant's prior sexual misconduct and the unfair prejudice of propensity reasoning that character evidence of this kind can generate.

TABLE OF CONTENTS

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I. INTRODUCTION

The Federal Rules of Evidence prohibit the use of character evidence in propensity reasoning, which is the inference that "because a person had a tendency to act in a particular way, the person was more likely to have committed a particular act on a specific occasion."[1] Specifically, FRE 404(a)(1) explicitly prohibits using evidence of a person's character or character trait "to prove that on a particular occasion the person acted in accordance with the character or trait."[2] However, Congress carves out an exception to this general prohibition by adopting FRE 413–415, which allow the admission of evidence of the defendant's prior sexual assaults or child molestation to show that the defendant has a tendency to commit sexual misconduct and thus is more likely to commit the particular sexual misconduct in the present case.[3] Because FRE 413–415 pose the risk of misleading a jury to "base its verdict on general

1. FED. R. EVID. 404(a)(1); DEBORAH JONES MERRITT & RIC SIMMONS, LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM 314 (2d. ed. 2012).
2. FED. R. EVID. 404(a)(1).
3. FED. R. EVID. 413–415.

propensities rather than on specific evidence," in contradiction to the criminal and civil justice systems' "promise to hold defendants responsible only for their actions on a particular occasion,"[4] FRE 413–415 engender many criticisms,[5] including that they violate the due process guarantee of the Constitution.[6]

In the face of a due process challenge, courts conclude that the FRE 403 balancing test is the constitutional guarantor for FRE 413–415, and that as long as the balancing test is properly applied, FRE 413–415 are constitutional.[7] The FRE 403 balancing test permits a judge to exclude evidence if the probative value of the evidence "is substantially outweighed by a danger of . . . unfair prejudice."[8] Therefore, judges can exclude evidence of the defendant's prior sexual assaults or child molestation under the FRE 403 balancing test if admitting the evidence is "so unduly prejudicial to the defendant that its unfair effect substantially outweighs the probative value."[9]

However, there are conflicting views among the federal circuits regarding how to use the FRE 403 balancing test in the context of FRE 413–415 to guard their constitutionality.[10] Some courts argue that the FRE 403 balancing test should be applied lightly, and thus defer to Congress' decision about the special probative value of evidence of the defendant's prior sexual assaults or child molestation; for example, the Eighth Circuit adopts this approach.[11] Some courts argue that the same standard should be used as in other contexts; for example, the First Circuit advocates this approach.[12] Others promulgated special criteria in applying the FRE 403 balancing in this context; for example, the Seventh, Ninth, and Tenth Circuits adopted modified FRE 403 balancing tests.[13]

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4. MERRITT & SIMMONS, *supra* note 1, at 314–15.

5. Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487, 1504–06 (2005) [hereinafter Orenstein, *Deviance, Due Process, and the False Promise*] (listing five criticisms against FRE 413 and 414).

6. U.S. CONST. amend. V, XIV, § 1; Orenstein, *Deviance, Due Process, and the False Promise*, *supra* note 5, at 1505.

7. *See* United States v. LeMay, 260 F.3d 1018, 1027 (9th Cir. 2001) (holding that "Rule 414 does not violate the Due Process Clause of the constitution" as long as FRE 403 applied properly); United States v. Charley, 189 F.3d 1251, 1259 (10th Cir. 1999) (stating that "Rule 414 is not unconstitutional on its face, 'because Rule 403 applies to Rule 414 evidence'") (quoting United States v. Castillo, 140 F.3d 874, 883–84 (10th Cir. 1998)).

8. FED. R. EVID. 403.

9. *Id.*; MERRITT & SIMMONS, *supra* note 1, at 402.

10. *See* Martínez v. Cui, 608 F.3d 54, 60 (1st Cir. 2010); MERRITT & SIMMONS, *supra* note 1, at 402.

11. *See Martínez*, 608 F.3d at 59–62; United States v. LeCompte, 131 F.3d 767, 768 (8th Cir. 1997) (holding that a lenient FRE 403 balancing test should be applied in the context of FRE 414 and stating that "[w]e do so in order to give effect to the decision of Congress, expressed in recently enacted Rule 414, to loosen to a substantial degree the restrictions of prior law on the admissibility of such evidence.").

12. *Martínez*, 608 F.3d at 59–62 ("We reject these approaches and have no reason to adopt special rules constraining district courts' usual exercise of discretion under Rule 403 when considering evidence under Rule 415 . . . .").

13. *See id.*; United States v. Hawpetoss, 478 F.3d 820, 825–26 (7th Cir. 2007) (citing United States v. Guardia, 135 F.3d 1326, 1331 (10th Cir.1998)); United States v. LeMay, 260 F.3d 1018, 1027–28 (9th Cir. 2001) (articulating five factors district judges must evaluate in applying FRE 403 balancing test in

This Note analyzes the different approaches that federal circuits take in applying the FRE 403 balancing test in the context of FRE 413–415. In Part II, it begins by introducing the Federal Rules of Evidence's general prohibition against propensity reasoning. Then it provides the background on FRE 413–415's adoption, their contents and effects, and various kinds of criticisms against these rules. This Note then introduces the FRE 403 balancing test and its importance as a constitutional guarantor for FRE 413–415. It then surveys the different approaches federal circuits adopt in applying FRE 403 balancing in the context of FRE 413–415. In Part III, this Note then provides detailed analysis on these different circuit approaches. Finally, in Part IV this Note suggests that a better approach to taking advantage of the balancing test in the context of FRE 413–415 to guard their constitutionality is to use the lower-threshold, pro-exclusion balancing test promulgated in FRE 609(a)(1)(B), another exception to the Federal Rules of Evidence's general prohibition against use of character evidence of the defendant in propensity reasoning. Under FRE 609(a)(1)(B), evidence of the defendant's prior felony is admissible if "the probative value of the evidence outweighs its prejudicial effect to that defendant,"[14] which is pro-exclusion compared with the requirement of the FRE 403 balancing test, under which the evidence is inadmissible only if the probative value of the evidence "is *substantially* outweighed by a danger of . . . unfair prejudice."[15]

II. BACKGROUND

Generally, the Federal Rules of Evidence bar the use of character evidence based on propensity reasoning due to its potential to mislead the jury to "base its verdict on general propensities rather than on specific evidence," thereby creating unfair prejudice to the defendants.[16] Congress, however, enacted FRE 413–415 in 1995 as a reflection of political trends intended to facilitate the conviction of sex offenders.[17] FRE 413–415 allow the admission of evidence of the defendant's prior sexual assaults or child molestation, despite its significant implication of propensity reasoning and huge potential to mislead the jury.[18] Since the adoption of FRE 413–415, criticisms accumulated, including the constitutional concern about the violation of the defendant's due process right under

the context of FRE 414); *Guardia*, 135 F.3d at 1330 (proposing applying the same FRE 403 balancing test as in other contexts with an emphasis on both the probative value and the prejudicial risk of the evidence and also suggesting several factors to be considered in evaluating the probative value).

14. FED. R. EVID. 609(a)(1)(B).

15. FED. R. EVID. 403 (emphasis added).

16. FED. R. EVID. 404(a)(1); MERRITT & SIMMONS, *supra* note 1, at 314–15.

17. Michael S. Ellis, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961, 973–77 (1998) (summarizing the politics and history behind the adoption of FRE 413–415 and arguing that Congress reacted to "appeas[e] the political cries of the public," rather than to "provid[e] reasonable legislation").

18. FED. R. EVID. 404(a)(1), 413–415.

the Constitution.[19] In response to the due process challenge, courts concluded that the Due Process Clause is not violated as long as the FRE 403 balancing test remains in place to exclude evidence of the defendant's prior sexual misconduct that is not probative enough, but instead is unfairly prejudicial.[20]

A. The Federal Rules of Evidence's General Prohibition Against Propensity Reasoning and FRE 404(a)(1).

Character evidence is evidence of "character, reputation, and specific acts" showing the character or character trait of a person.[21] When the character evidence offered suggests that "because a person had a tendency to act in a particular way, the person was more likely to have committed a particular act on a specific occasion," that use involves propensity reasoning.[22] This kind of propensity reasoning can mislead a jury to "base its verdict on general propensities rather than on specific evidence," in contradiction to the criminal and civil justice systems' "promise to hold defendants responsible only for their actions on a particular occasion."[23] Therefore, the Federal Rules of Evidence generally prohibit character evidence's propensity-reasoning.[24] FRE 404(a)(1) states: "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."[25] Therefore, generally, character evidence offered only to show propensity—that because a person has a specific character or character trait, this person is more likely to act badly in accordance with that character in this particular case—is not admissible under FRE 404(a)(1).[26]

In the famous Supreme Court case *Old Chief v. United States*,[27] the Court specifically noted, and emphasized, the tremendous possibility of character evidence "to lure a juror into a sequence of bad character reasoning."[28] In *Old Chief*, the defendant faced two charges: assault with a dangerous weapon and possession of a firearm by a prior felon.[29] At the defendant's trial, the Government attempted to introduce evidence of the defendant's prior felony: assault causing serious bodily injury (very similar in nature to the crime charged in the present case—assault with a dangerous weapon).[30] The Court held that the name of the prior felony

19. U.S. CONST. amend. V, XIV, § 1; *see* United States v. LeMay, 260 F.3d 1018, 1024 (9th Cir. 2001); Orenstein, *Deviance, Due Process, and the False Promise*, *supra* note 5, at 1505.

20. *See LeMay*, 260 F.3d at 1027; Orenstein, *Deviance, Due Process, and the False Promise*, *supra* note 5, at 1517–18.

21. MERRITT & SIMMONS, *supra* note 1, at 292.

22. *Id.* at 314.

23. FED. R. EVID. 404(a)(1); MERITT & SIMMONS, *supra* note 1, at 314–15.

24. FED. R. EVID. 404(a)(1); MERRITT & SIMMONS, *supra* note 1, at 314–15.

25. FED. R. EVID. 404(a)(1).

26. *Id.*

27. 519 U.S. 172 (1997).

28. *Id.* at 185.

29. *Id.* at 174.

30. *Id.* at 175.

should not be mentioned, concerned that the significant similarity between the current charge and the prior conviction would lure the jury into a sequence of bad character reasoning: Old Chief probably committed the currently charged assault because he had a propensity for committing assaults.[31]

B. An Exception to the General Prohibition Against Propensity Reasoning and FRE 413–415

In 1995, Congress created an exception to FRE 404(a)(1)'s general prohibition against propensity reasoning—FRE 413–415—in proceedings involving sexual assaults and child molestation.[32] In criminal proceedings for sexual assaults, FRE 413 allows the prosecutor to introduce evidence of other sexual assaults committed by the defendant to show that the defendant has a tendency to commit sexual assaults, and thus is more likely to commit the crime in the present proceeding.[33] Similarly, in criminal proceedings involving child molestation, pursuant to FRE 414, past child molestation committed by the defendant is admissible to prove the defendant's tendency to molest children.[34] Also, in civil proceedings involving sexual assaults or child molestation, FRE 415 allows the introduction of evidence of the defendant's prior sexual assaults or child molestation to show the defendant's propensity to commit sexual misconduct.[35] FRE 413–415 are "general rules of admissibility in sexual assault and child molestation cases for evidence that the defendant has committed offenses of the same type on other occasions," and "[t]he new rules will supersede in sex offense cases the restrictive aspects of Federal Rule of Evidence 404."[36] Notably, the defendant's prior sexual misconduct, by its nature, is highly similar to the sexual misconduct at issue in the present case. In *Old Chief*, the Court expressed the concern about the unfair prejudice caused by the similarity between the name of the crime charged and that of the prior crime of the defendant.[37] Obviously, FRE 413–415 involves similar concern as that in *Old Chief*, but still, the fact is that Congress enacted FRE 413–415, after an odd process as will be discussed in this section.[38]

Under the Rules Enabling Act, "[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals."[39] Generally, the Advisory Committee on Evidence Rules pro-

31. *Id.* at 185, 191–92.

32. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796; FED. R. EVID. 404(a)(1), 413–415; MERRITT & SIMMONS, *supra* note 1, at 397.

33. FED. R. EVID. 413.

34. FED. R. EVID. 414.

35. FED. R. EVID. 415.

36. 140 CONG. REC. H8992 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).

37. Old Chief v. United States, 519 U.S. 172, 185, 191–92 (1997).

38. *See id.*

39. Rules Enabling Act, 28 U.S.C. § 2072(a) (2012).

poses the Rules of Evidence and then the Supreme Court transmits the proposals to Congress for enactment.[40] The goal of this rule-making process is "to encourage the cooperation of the two branches of the federal government"—the judicial branch and the legislative branch.[41]

Congress itself, however, drafted FRE 413–415 in 1994 as part of its Violent Crime Control and Law Enforcement Act.[42] The supporters of the bill argued that because child molestation and sexual assaults were so distinctive, they required an exception to the general prohibition against character and evidence propensity reasoning.[43]

This adoption of FRE 413–415 is therefore an odd story, since Congress bypassed the existing rule-making process, as discussed above.[44] Due to this oddity, "[a]s a compromise, Congress announced that it would reconsider the rules if the Judicial Reviewing Conference made a timely objection."[45] Immediately after the proposal of FRE 413–415, the Judicial Conference Committee sent a clear report to Congress, urging it to reconsider the rules.[46]

The Judicial Conference Committee's report to Congress included the Advisory Committee on Evidence Rules' report on the proposed FRE 413–415.[47] With the exception of one Committee member, the Advisory Committee objected to the adoption of the rules.[48] The Advisory Committee's objections included: 1) Rule 404(b), which allows introduction of character evidence *when offered for other reasons than* propensity reasoning, and allows the parties to introduce prior sexual assaults or child molestation evidence; 2) FRE 413–415 would allow convicting criminal defendants based on past misconduct instead of the defendant's misconduct in the currently charged crime; and 3) there would be tedious and lengthy mini-trials because each party would introduce evidence proving or disapproving the prior offenses, which include both convicted and un-convicted sexual misconduct of the defendant.[49] Despite the Advisory Committee's objections and the Judicial Conference Committee's urge to reconsider the FRE 413–415, Congress refused to amend the proposals, enacting FRE 413–415 in 1995, as originally drafted.[50]

The adoption of FRE 413–415 engendered widespread criticism. As discussed in this section, even before the enactment, FRE 413–415 re-

40. MERRITT & SIMMONS, *supra* note 1, at 22.

41. 28 U.S.C. § 2072; Ellis, *supra* note 17, at 970.

42. FED. R. EVID. 413–415; MERRITT & SIMMONS, *supra* note 1, at 398.

43. MERRITT & SIMMONS, *supra* note 1, at 398 (citing *Concerning the Prior Crimes Evidence Rules for Sexual Assault and Child Molestation Cases*, 140 CONG. REC. H8991–92 (daily ed. Aug. 21, 1994)).

44. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935, 108 Stat. 1796, 2135–37 (1995); Ellis, *supra* note 17, at 970.

45. § 320935, 108 Stat. at 2135–37; Ellis, *supra* note 17, at 970.

46. Judicial Conference of the U.S., *Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases*, 159 F.R.D. 51, 52 (1995).

47. *Id.* at 52–53.

48. MERRITT & SIMMONS, *supra* note 1, at 398.

49. FED. R. EVID. 404(b); MERRITT & SIMMONS, *supra* note 1, at 398–99.

50. § 32095, 108 Stat. at 1806; MERRITT & SIMMONS, *supra* note 1, at 399.

ceived fierce objection from Advisory Committee members, which included practicing lawyers, judges, and commentators.[51] Unsurprisingly, the criticism continued after its adoption.[52]

C. Criticism of FRE 413–415 and the Potential Evil Created

One criticism of FRE 413–415 is that they were adopted to meet the special needs of a subset of politically powerful and influential victims.[53] Many believed Congress enacted FRE 413–415 as a reflection of the political trends,[54] responding to serious public outrage over the then-existing legal system's inability to protect the society from sexual offenders and predators.[55] Actually, prior to the adoption of FRE 413–415, women's political influence had become stronger, and new terms such as "sexual harassment" gained attention from the nation.[56] Therefore, some people criticized Congress's enactment of FRE 413–415 as mere showing to people that it was addressing current political issues, rather than providing the judiciary branch with reasonable and effective laws.[57]

Another criticism of FRE 413–415 is that they isolated sexual assaults and child molestation, and emphasized their distinctive nature by the crime-specific FRE 413–415 evidentiary rules, which "undermine the unified and transsubstantive nature of the Federal Rules of Evidence."[58] This means that, although evidence of prior misconduct is not admissible for other crimes—because FRE 404(a) prohibits introducing them to prove the defendant's culpability—sexual assaults and child molestation are treated differently by allowing the admission of evidence of the defendant's prior sexual misconduct.[59] This differential treatment is inconsistent with the Federal Rules of Evidence's intended approach of a set of unified and transsubstantive evidentiary rules.[60]

Furthermore, some critics argued that FRE 413–415, especially FRE 413 and 414, implicated constitutional questions of due process and equal protection.[61] "Due Process requires that a criminal defendant be judged

51. MERRITT & SIMMONS, *supra* note 1, at 398–99.

52. Orenstein, *Deviance, Due Process, and the False Promise*, *supra* note 5, at 1504.

53. *Id.*

54. Ellis, *supra* note 17, at 973.

55. *Id.* at 974.

56. *Id.*

57. *Id.* (citing Sara Sun Beale, *Prior Similar Acts in Prosecutions for Rape and Child Sex Abuse*, 4 CRIM. L.F. 307, 307–08 (1993)).

58. Orenstein, *Deviance, Due Process, and the False Promise*, *supra* note 5, at 1505 (citing Tome v. United States, 513 U.S. 150, 166 (1995) (recognizing the difficulties in prosecuting child abusers but emphasizing that "[t]his Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases." (quoting United States v. Salerno, 505 U.S. 317, 322 (1992)))).

59. FED. R. EVID. 404(a), 413–414.

60. *See* Orenstein, *Deviance, Due Process, and the False Promise*, *supra* note 5, at 1505.

61. U.S. CONST. amend. V, XIV; Orenstein, *Deviance, Due Process, and the False Promise*, *supra* note 5, at 1505.

according to the relevant evidence pertinent to the present charge."[62] FRE 413 and FRE 414, however, allow the admission of evidence of prior sexual assaults and child molestation for any relevant purpose, including the propensity reasoning prohibited by FRE 404(a).[63] Propensity reasoning permits juries to convict defendants on a basis other than the misconduct of the defendant in the present case, violating the Due Process Clause.[64] Also, "[t]he common law concept of fundamental rights and ordered liberty may well be threatened by the presumption that similar act evidence should automatically be admitted."[65] Furthermore, "[t]he risk of due process violation is increased by the potential that a jury will be prejudiced by explicit reference to prior bad sexual acts."[66]

Two equal protection problems may arise as a result of FRE 413 and 414.[67] First, the recidivism rate for rape is relatively low. According to a 2014 Bureau of Justice Statistics study only 1.7% of rapists or sexual assault criminals were arrested after five years of release.[68] In fact, the recidivism rates of many other types of crimes are much higher than that of rape or sexual assault.[69] For example, the recidivism rate of assault is 23%; the recidivism rate of robbery is 5.5%; and the recidivism rate of drug-related crimes is 38.8%.[70] Therefore, since the recidivism rate for rape or sexual assault is relatively low compared with other crimes, permitting propensity reasoning based on character evidence seems to "discriminate *unfairly* against those individuals accused of sexual offenses and child molestation,"[71] violating the principle that "different types of criminals and different types of cases should be treated similarly for the purposes of trial procedure."[72] The reason behind this criticism is that FRE 413–415 are based on the existence of a special relationship between a prior sexual misconduct and the present criminal sexual misconduct; namely, the prior sexual misconduct is a strong predicator for future sexual misconduct.[73] If the recidivism for rape is low, then the close

62. Margaret C. Livnah, *Branding the Sexual Predator: Constitutional Ramifications of Federal Rules of Evidence 413 Through 415*, 44 CLEV. ST. L. REV. 169, 180–81 (1996) (voicing concern that, under FRE 413, 414, and 415, due to the presumption of automatic admission of prior similar sexual misconduct evidence, "[t]he common law concept of fundamental rights and ordered liberty may well be threatened," therefore implicating due process violation).

63. FED. R. EVID. 404(a)(1), 413–414.

64. U.S. CONST. amend. V, XIV; FED. R. EVID. 413–414.

65. Livnah, *supra* note 62, at 180.

66. *Id.* at 181.

67. *Id.* at 190.

68. MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010, at 9 (2014), *available at* http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf.

69. *See id.*

70. *Id.*

71. Livnah, *supra* note 62, at 190 (emphasis added).

72. *Id.*

73. Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127, 146 (1993) ("If a person's past criminal behavior is a strong predictor of future, similar criminal behavior, as some evidence commentators have conceded, then an accused's criminal history would be logically relevant to proof of guilt. If an empirical relationship between prior and present criminal sexual misconduct can be established, then the criminal histo-

relationship between prior sexual misconduct and present crime is attenuated, thus failing to support the special treatment for sexual misconducts under FRE 413 and 414.[74]

Second, the Federal Rules of Evidence apply only to cases pending before federal courts, and because state courts try most sexual assaults and child molestation cases, FRE 413 and FRE 414 "may apply unfairly to discriminate against Native Americans,"[75] due to the fact that sex crimes are a federal offense only if they occurr on Indian land or federal property of the United States.[76] Actually, starting from FRE 413–15's proposal (especially under FRE 413 and 414), scholars have been challenging their disproportionate impact on Indians.[77] For example, one scholar criticized the disproportionate application of FRE 413 and 414 "to a minority population that has traditionally suffered from discrimination and maltreatment" as unfair and troubling.[78]

Therefore, the application of FRE 413–415 generates a potential evil that must be curtailed and controlled in order to address the concerns addressed in this section.

D. FRE 403 Balancing Test and its Potential to Curtail the Evil Created by FRE 413–415

The FRE 403 balancing test applies to evidence of the defendant's prior sexual assaults and child molestation admitted pursuant to FRE 413–415.[79] Under FRE 403, a judge may exclude evidence if the probative value of the evidence "is *substantially* outweighed by a danger of . . . unfair prejudice."[80] The FRE 403 balancing test weighs the probative value of evidence against its unfair prejudice.[81] Therefore, a judge may exclude evidence of prior sexual assaults or child molestation if she decides that it is "so unduly prejudicial to the defendant that its unfair effect substantially outweighs the probative value."[82]

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ry of a sex offender, limited to uncharged sexual misconduct evidence, will be relevant in sex offender prosecutions.").

74. FED. R. EVID. 404(a)(1), 413–415.

75. Livnah, *supra* note 62, at 190.

76. James Joseph Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of A Very Bad Idea*, 157 F.R.D. 95, 114 (1994) (stating that federal sex crime prosecutions discriminately impacted Native Americans, and in order to support his argument, citing statistics showing that in the year ending September 1993, "80% of all defendants convicted of sexual abuse crimes in federal court" are Native Americans).

77. Aviva Orenstein, *Propensity or Stereotype?: A Misguided Evidence Experiment in Indian Country*, 19 CORNELL J.L. & PUB. POL'Y 173, 176 (2009) (stating that scholars paid attention to the potential impact of FRE 413 and 414 on Native Americans since the proposal of these rules, and quoting ABA Criminal Rules Committee's observation that "as a practical matter, in federal criminal cases, the effect will be felt in Indian Territory where what would otherwise be state crimes are prosecuted in federal court." (quoting Myrna S. Raeder, *American Bar Association Criminal Justice Section Report to the House of Delegates*, 22 FORDHAM URB. L.J. 343, 352 (1995))).

78. *Id.* at 177.

79. FED. R. EVID. 403; MERRITT & SIMMONS, *supra* note 1, at 402.

80. FED. R. EVID. 403 (emphasis added).

81. *Id.*

82. *Id.*; MERRITT & SIMMONS, *supra* note 1, at 402.

The FRE 403 balancing test is widely presumed to act as a due process guarantor.[83] Courts cite the FRE 403 balancing test as a means to ensure due process and to ease the struggle with FRE 413–415's constitutionality.[84] Courts recognize both the unfairness of propensity evidence of a defendant's prior sexual assaults or child molestation, and the important gatekeeping function of FRE 403's balancing test to exclude unconstitutional evidence.[85] Every federal appellate court that has considered the due process implications of FRE 413–415 acknowledges that the FRE 403 balancing test "provides the mechanism for handling due process concerns."[86] For example, in *United States v. LeMay*,[87] the Ninth Circuit held that "Rule 414 does not violate the Due Process Clause of the constitution" as long as FRE 403's balancing test is properly applied.[88] In *LeMay*, the Ninth Circuit reasoned that because the protections of FRE 403's balancing test can sufficiently "ensure that potentially devastating evidence of little probative value will not reach the jury," therefore, "the right to a fair trial remains adequately safeguarded" (namely, due process is guaranteed).[89] Moreover, the Ninth Circuit noted that several other courts had reached the same conclusion, including the Eighth Circuit and the Ninth Circuit.[90]

Therefore, as discussed in this section, FRE 403's balancing test is widely considered an important protection for the constitutionality of FRE 413–415.

E. The Conflicting Approaches Courts Use in Applying the FRE 403 Balancing Test in the Context of FRE 413–415

Although courts agree that FRE 403's balancing test is a constitutional guarantor for FRE 413–415, some "find it difficult to apply 403's balancing test in the context of [FRE] 413–415."[91] The difficulty lies in the fact that FRE 413–415 explicitly require judges to recognize the pro-

83. Orenstein, *Deviance, Due Process, and the False Promise*, *supra* note 5, at 1517.

84. *Id.*

85. *Id.*

86. *Id.* at 1518; *see* United States v. LeMay, 260 F.3d 1018, 1027 (9th Cir. 2001) (holding that "Rule 414 does not violate the Due Process Clause of the constitution" as long as FRE 403 applied properly). In *United States v. Charley*, the Tenth Circuit stated: "Rule 414 is not unconstitutional on its face, because Rule 403 applies to Rule 414 evidence." 189 F.3d 1251, 1259 (10th Cir. 1999) (quoting United States v. Castillo, 140 F.3d 874, 883–84 (10th Cir. 1998)).

87. 260 F.3d 1018 (9th Cir. 2001) (citation omitted).

88. *Id.* at 1027.

89. *Id.* at 1026.

90. *Id.* at 1027 (citing courts of appeals that reached the same conclusion that FRE 413–415 is constitutional as long as FRE 403 is in place); *see, e.g.*, *Charley*, 189 F.3d at 1259 (stating "that Rule 414 is not unconstitutional on its face, 'because Rule 403 applies to Rule 414 evidence.'" (quoting *Castillo*, 140 F.3d at 884)); United States v. Mound, 149 F.3d 799, 800–02 (8th Cir.1998) (concluding that FRE 413 is constitutional if FRE 403 protections remain in place); *Castillo*, 140 F.3d at 883 ("[A]pplication of Rule 403 to Rule 414 evidence eliminates the due process concerns posed by Rule 414."); United States v. Enjady, 134 F.3d 1427, 1430–35 (10th Cir.1998) (affirming the constitutionality of FRE 413).

91. *See* Martínez v. Cui, 608 F.3d 54, 59–62 (1st Cir. 2010); MERRITT & SIMMONS, *supra* note 1, at 402.

bative value of propensity evidence of prior sexual assaults and child molestation, notwithstanding their unfair prejudicial effect. This judges with a "struggle[] to articulate the proper relationship" between FRE 403's balancing test and FRE 413–415.[92]

Two different misapplications of the FRE 403 balancing test can occur, demonstrating the difficulty in applying the test in to FRE 413–415.[93] First, a court may exclude the evidence merely because, traditionally, character evidence has been considered too prejudicial for admission.[94] Second, a court may perform a restrained 403 balancing analysis because it wrongly believes that the legislative judgment is that propensity evidence regarding prior sexual assaults or child molestation is "never too prejudicial or confusing and generally should be admitted."[95] Due to these difficulties in applying FRE 403 balancing test to FRE 413–415, federal courts have struggled with how to use the balancing test with evidence admitted pursuant to FRE 413–415; thus there are conflicting views among the federal circuits regarding how to do just that.[96]

This has lead to diverse approaches among the federal circuits to properly apply FRE 403's balancing test to ensure the constitutionality of FRE 413–415.[97] Some courts apply the balancing test lightly; deferring to Congress' decision about the special, probative value of evidence of a defendant's prior sexual assaults or child molestation.[98] Some courts argue that the same standard should be used as in other contexts.[99] Still others promulgated special criteria in applying the FRE 403 balancing test in this context.[100]

Next, this Note introduces the different approaches that federal circuits use in applying the FRE 403 balancing test to evidence admissible under FRE 413–415.

92. MERRITT & SIMMONS, *supra* note 1, at 402.

93. United States v. Guardia, 135 F.3d 1326, 1330 (10th Cir. 1998).

94. *See id.*

95. *See id.*

96. *See Martínez*, 608 F.3d at 60; MERRITT & SIMMONS, *supra* note 1, at 402.

97. *See Martínez*, 608 F.3d at 59–62 (holding the original FRE 403 balancing test should be applied); United States v. LeMay, 260 F.3d 1018, 1022, 1027–28 (9th Cir. 2001) (articulating a rigid five-factor frame that district judges must use in applying FRE 403 balancing test in the context of FRE 414); *Guardia*, 135 F.3d at 1330 (holding that the same 403 analysis should be applied, but with careful attention to both "the significant probative value and the strong prejudicial qualities" of the evidence, and providing several factors to consider in determining the probative value of evidence); United States v. LeCompte, 131 F.3d 767, 768 (8th Cir. 1997) (holding that a lenient FRE 403 balancing test should be applied).

98. *See Martínez,* 608 F.3d at 59–62; *LeCompte*, 131 F.3d at 768 (holding that a lenient FRE 403 balancing test should be applied in the context of FRE 414, and stating that "[w]e do so in order to give effect to the decision of Congress, expressed in recently enacted Rule 414, to loosen to a substantial degree the restrictions of prior law on the admissibility of such evidence.").

99. *Martínez*, 608 F.3d at 59–62 ("We reject these approaches and have no reason to adopt special rules constraining district courts' usual exercise of discretion under Rule 403 when considering evidence under Rule 415.").

100. *See id.*; *LeMay*, 260 F.3d at 1022, 1027–28 (articulating five factors district judges must evaluate in applying FRE 403 balancing test in the context of FRE 414).

1. The Lenient FRE 403 Balancing Test

In *United States v. LeCompte*, the Eighth Circuit adopted a lenient FRE 403 balancing test, holding that FRE 403 must be read "to give effect to the decision of Congress . . . to loosen to a substantial degree the restrictions of prior law on the admissibility of such evidence."[101] Thus, in *LeCompte*, the Court emphasized that "Rule 403 must be applied to allow Rule 414 its intended effect,"[102] stressing that "[t]he presumption is in favor of admission."[103]

In *LeCompte*, the defendant was charged with sexually abusing an eleven-year-old child, "C.D.," and moved to exclude evidence of a prior sexual molestation of another child, "T.T."[104] Although the district court found that "[t]he sexual offenses committed against T.T. were substantially similar to those allegedly committed against C.D.," and that "the time lapse between incidents 'may not be as significant as it appears at first glance,'"[105] the court excluded the evidence under FRE 403 based on "the danger of unfair prejudice . . . [of the] 'unique stigma' of child sexual abuse, on account of which LeCompte might be convicted not for the charged offense, but for his sexual abuse of T.T."[106] The Eighth Circuit reversed the district court's decision, holding that "the District Court erred in its assessment that the probative value of T.T.'s testimony was substantially outweighed by the danger of unfair prejudice."[107] It emphasized that the evidence does not present any danger of unfair prejudice beyond that which "all propensity evidence in such trials presents."[108]

2. The Original FRE 403 Balancing Test

In *Martínez v. Cui*, the First Circuit held that there is no reason to adopt special rules constraining a district court's usual exercise of discretion under FRE 403 when considering evidence under FRE 415.[109]

In *Martínez*, the plaintiff was brought to the emergency department of a Massachusetts hospital after a car accident.[110] She alleged that the defendant, Dr. Cui, digitally raped her when examining her.[111] She wanted to introduce the testimony of another woman, B.H., that Dr. Cui allegedly inserted his finger in B.H.'s vagina.[112] The district court excluded B.H.'s testimony "as potentially unfairly prejudicial and, therefore, likely

101. 131 F.3d at 768.
102. *Id.* at 769.
103. United States v. Sumner, 119 F.3d 658, 662 (8th Cir. 1997) (citing 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari)).
104. *LeCompte*, 131 F.3d at 768.
105. *Id.* at 769–70 (internal citation omitted).
106. *Id.* at 770.
107. *Id.* at 769.
108. *Id.* at 770.
109. 608 F.3d 54, 59–62 (1st Cir. 2010).
110. *Id.* at 56.
111. *Id.*
112. *Id.* at 58–59.

to confuse the issues or mislead the jury,"[113] based on two reasons: 1) the medical treatment in B.H.'s case was distinct from that of the plaintiff (B.H.'s treatment allowed vaginal examination);[114] and 2) B.H.'s testimony would lead to a "minitrial," "which would have been unduly prejudicial and likely to confuse the issue and mislead the jury."[115]

The plaintiff argued that the district applied FRE 403's balancing test too stringently.[116] The First Circuit, after reviewing the different approaches other courts have used to apply the balancing test in the context of FRE 413–415, rejected all these approaches, stating "[w]e . . . have no reason to adopt special rules constraining district courts' usual exercise of discretion under Rule 403 when considering evidence under Rule 415."[117] Although the First Circuit admitted that "[o]f course district court must apply Rule 403 with awareness that Rule 415 reflects a congressional judgment to remove the propensity bar to admissibility of certain evidence,"[118] it noted "[n]othing in the text of Rules 413–415 suggests these rules somehow change Rule 403."[119]

After adopting this original FRE 403 balancing test, the First Circuit affirmed the district court's exclusion of evidence, emphasizing that B.H.'s testimony would involve collateral issues "likely to confuse the jury."[120]

3. The Original Balancing Test with an Emphasis on Both the Probative Value and the Prejudicial Risk of the Evidence

In *United States v. Guardia*, the Tenth Circuit held that "a court must perform *the same* 403 analysis that it does 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 413."[121]

In *Guardia*, the defendant, Dr. Guardia, was charged with sexually abusing two of his patients in the course of gynecological examination.[122] The prosecutor tried to admit evidence, under FRE 413, of the testimony of four other women allegedly abused by Dr. Guardia in a similar manner.[123] The district court excluded the evidence after applying FRE 403's balancing test, finding that "the risk of jury confusion substantially outweighed the probative value of the Rule 413 evidence."[124] In affirming the district court's ruling, the Tenth Circuit explained the potential jury

113. *Id.* at 61.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 60.
118. *Id.*
119. *Id.* at 61.
120. *Id.* at 61–62.
121. 135 F.3d 1326, 1330 (10th Cir. 1998) (emphasis added).
122. *Id.* at 1327.
123. *Id.*
124. *Id.*

confusion, stating that the admission of the other four women's testimony would "make it difficult for the jury to separate the evidence of the uncharged conduct from the charged conduct;"[125] each incident required testimony from both lay witnesses and medical experts, and that the "factual distinctions among these incidents" was too subtle.[126]

The Tenth Circuit—concluding that "[c]ourts have never found, however, that because the drafters made exceptions to the general rule of 404(a), they tempered 403 as well"[127]—held that district judges "should not alter [their] normal process of weighing the probative value of the evidence against the danger of unfair prejudice,"[128] but give attention to both the "significant probative value and the strong prejudicial qualities inherent in all evidence submitted under 413."[129] The Tenth Circuit emphasized that FRE 413's propensity evidence "has indisputable probative value."[130] To determine the varying degree of probative value, the court proposed several considerations, including "the similarity of the prior acts to the acts charged . . ., the closeness in time of the prior acts to the charged acts . . ., and the need for evidence beyond the testimony of the defendant and alleged victim."[131]

After announcing this rule, the Tenth Circuit affirmed the district judge's exclusion of evidence of the defendant's prior sexual assaults, given "the danger that the proffered testimony would confuse the issues in the case, thereby misleading the jury" due to the "minitrials" required to evaluate the prior four women's sexual abuse cases.[132]

4. The Five-Factor Rigid Framework of the FRE 403 Balancing Test

In *LeMay*, the Ninth Circuit articulated a rigid, five-factor framework when applying FRE 403's balancing test to evidence of prior sexual assaults or child molestation.[133] The district court judges *must* evaluate the following five factors: (1) "the similarity of the prior acts to the acts charged,"[134] (2) the "closeness in time of the prior acts to the acts charged,"[135] (3) "the frequency of the prior acts,"[136] (4) the "presence or lack of intervening circumstances,"[137] and (5) "the necessity of the evidence beyond the testimonies already offered at trial."[138] Although the

125. *Id.* at 1332.
126. *Id.*
127. *Id.* at 1331.
128. *Id.*
129. *Id.* at 1330.
130. *Id.* at 1331.
131. *Id.*
132. *Id.* 1331–32.
133. United States v. LeMay, 260 F.3d 1018, 1022, 1027–28 (9th Cir. 2001).
134. *Id.* (quoting Doe *ex rel.* Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1268 (9th Cir. 2000)).
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*

five factors are necessary, they are not exclusive; district judges should consider other factors relevant to individual cases.[139]

In *LeMay*, the defendant was charged with child molestation, and the prosecutor wanted to introduce evidence of the defendant's prior sexual misconduct (juvenile rape conviction for child molestation when the defendant was twelve).[140] The defendant opposed the introduction of evidence of the prior conviction; the district court, however, after applying FRE 403 balancing test, admitted the prior child molestation, limiting its use to prove the credibility of witnesses, but not as "evidence of guilt in this case of the defendant, per se."[141] The defendant was convicted and appealed to the Ninth Circuit, challenging both the constitutionality of FRE 414 and the admission of evidence of his prior child molestation during trial under FRE 403.[142]

First, the Ninth Circuit held that Rule 414 was constitutional under a due process challenge, emphasizing that "Rule 403 . . . if conscientiously applied, will protect defendants from propensity evidence so inflammatory for example to jeopardize their right to a fair trial."[143] The Ninth Circuit then stated that "[b]ecause of the inherent strength of the evidence that is covered by [FRE 414], when putting this type of evidence through the [FRE 403] microscope, a court should pay 'careful attention to both the significant probative value and the strong prejudicial qualities' of that evidence."[144] The Ninth Circuit outlined the five factors, mentioned above, that district court judges *must* evaluate in applying FRE 403's balancing test to determine whether to admit evidence of prior sexual assaults or child molestation evidence.[145] It subsequently held that the district court did not err in admitting defendant's prior child molestation evidence, stating that although the district court did not explicitly consider each of five factors (the factors were proposed after *LeMay* was decided in the district court), the district court judge "exercised his discretion to admit the evidence in a careful and judicious manner."[146]

F. A Hint at a Better Solution: the Exception to Propensity Reasoning Under FRE 609 and the Special Balancing Test

One of the goals of the Federal Rules of Evidence is uniformity among the nation's courts.[147] The current conflict among federal circuits

139. *Id.*
140. *Id.* at 1022–23.
141. *Id.* at 1023–24.
142. *Id.* at 1022.
143. *Id.*
144. *Id.* at 1027 (quoting *Glanzer*, 232 F.3d at 1268).
145. *Id.* at 1027–28.
146. *Id.*
147. Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S., *A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts*, 30 F.R.D. 73, 109–10 (1962) [hereinafter *Preliminary Report*].

on using the FRE 403 balancing test to prevent due process challenges to FRE 413–415, however, seriously undermines this goal of uniformity.[148] Also, as discussed below in Part III, FRE 403's ordinary balancing test is insufficient to guarantee defendants' due process protection in cases involving sexual assaults or child molestation charges.[149] Fortunately, a potential solution may already exist: FRE 609(a)(1)(B)'s special balancing test.

Similar to FRE 413–415, FRE 609 creates another exception to FRE 404(a)'s general prohibition of using character evidence to prove the defendant's propensity to commit misconduct.[150] Under FRE 609(a), a witness' prior criminal conviction is admissible to prove the "witness's propensity to lie or tell the truth."[151] Specifically, FRE 609(a)(1)(B) applies when the witness is the defendant in a criminal case, mandating that evidence of the defendant's prior felony conviction to be admissible to prove propensity for lying if "the probative value of the value *outweighs* its prejudicial effect to that defendant."[152] In contrast, when the witness is someone other than the defendant in a criminal case, FRE 609(a)(1)(A) mandates the admission of prior felony conviction evidence to prove propensity for lying and explicitly states that the admission is "subject to Rule 403."[153] Therefore, FRE 609(a)(1)(B)'s exception to FRE 404(a)'s general prohibition against propensity evidence requires a "lower threshold for excluding evidence than Rule 403 does" when the witness is the defendant in a criminal case.[154]

III. ANALYSIS

One of the purposes of adopting the Federal Rules of Evidence was uniformity among the courts in the nation.[155] But there are conflicting views among the federal circuits regarding how to use FRE 403 balancing test in the context of FRE 413–415, in order to provide the defendants with the due process guaranteed by the Constitution.[156] "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 . . . ."[157]

148. *See supra* Part II.E.

149. *See infra* Part III.

150. FED. R. EVID. 404(a)(1), 609(a); MERRITT & SIMMONS, *supra* note 1, at 397.

151. FED. R. EVID. 609(a); MERRITT & SIMMONS, *supra* note 1, at 397.

152. FED. R. EVID. 609(a)(1)(B) (emphasis added).

153. FED. R. EVID. 609(a)(1)(A).

154. FED. R. EVID. 404(a)(1), 609(a)(1)(A), 609(a)(1)(B); MERRITT & SIMMONS, *supra* note 1, at 252.

155. *See generally Preliminary Report*, *supra* note 147.

156. *See* U.S. CONST. amend. V, XIV; Martínez v. Cui, 608 F.3d 54, 60 (1st Cir. 2010); MERRITT & SIMMONS, *supra* note 1, at 402.

157. Jeffrey A. Palumbo, *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*, 9 SETON HALL CIR. REV. 1, 24 (2012) (advocating for a uniform approach in performing the FRE 403 balancing test to determine whether to admit evidence of prior sexual misconduct and cautioning about the potential disaster of the lack of a standardized approach).

Therefore, it is important to have a uniform balancing test that can act as a due process guarantor for propensity evidence admitted under the controversial FRE 413–415.[158] Moreover, since the current approaches applying the FRE 403 balancing test are not adequate to serve this intended role as the constitutional guarantor of due process, a better balancing test is needed.[159]

A. The Lenient FRE 403 Balancing Test

In *LeCompte*, the Eighth Circuit adopted a lenient FRE 403 balancing test, holding that FRE 403 must be read "to give effect to the decision of Congress . . . to loosen to a substantial degree the restrictions of prior law on the admissibility of such evidence."[160] The Eighth Circuit emphasized that "Rule 403 must be applied to allow Rule 414 its intended effect."[161] The court stressed that "[t]he presumption is in favor of admission."[162] In analyzing the case, the Eighth Circuit emphasized that the evidence does not present any danger of unfair prejudice beyond that which "all propensity evidence in such trials presents" and admitted evidence of the defendant's prior child molestation to convict the defendant.[163]

This test is based on the assumption that the danger of the "unique stigma" of prior sexual misconduct was the reason why "the evidence was previously excluded,"[164] and Congress precisely intended to overrule putting too much weight on this danger.[165]

This approach has a big advantage. The rule favors the introduction of evidence by saying that the prejudice that "all propensity evidence in such trials presents" should not weigh against admissibility,[166] and thus is consistent with Congressional "presumption in favor of admission" of evidence of prior sexual misconduct.[167] This approach is similar to the weakly applied FRE 403 balancing test in *United States v. Meacham*,[168] in which the Tenth Circuit affirmed a district court's admission of testimony regarding the defendant's sexual molestation of his stepdaughter more than thirty years before the present child molestation offense.[169] Applying

158. FED. R. EVID. 413–415.

159. *See infra* Part III.E.

160. United States v. LeCompte, 131 F.3d 767, 768 (8th Cir. 1997).

161. *Id.* at 769.

162. United States v. Sumner, 119 F.3d 658, 662 (8th Cir. 1997) (citing 140 CONG. REC. H8992 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari)).

163. *LeCompte*, 131 F.3d at 770.

164. *Id.*

165. *Id.*

166. *Id.*

167. *See* 140 CONG. REC. H8992 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) ("The presumption is in favor of admission.").

168. United States v. Meacham, 115 F.3d 1488, 1495 (10th Cir. 1997) (affirming a district court's decision to admit evidence under FRE 414 despite its potential for prejudice).

169. *Id.*; *see* R. Wade King, Comment, *Federal Rules of Evidence 413 and 414: By Answering the Public's Call for Increased Protection from Sexual Predators, Did Congress Move Too Far Toward En-*

the balancing test weakly, the Tenth Circuit quoted the district court's reasoning that "evidence admissible pursuant to the proposed rules is typically relevant and probative, [and] that its probative value is normally not outweighed by any risk of prejudice or other adverse effect."[170] This lenient and weakly applied balancing test maximally preserved Congress' intent to admit evidence of prior sexual misconduct under FRE 413–415.[171]

Due to the broad admissibility afforded by this approach, however, it bears a debilitating weaknesses. First, the rules "contain[] no language that supports an especially lenient application of Rule 403."[172] In Guardia—a case involving admitting prior sexual misconduct under FRE 413—the Tenth Circuit in *Guardia* rejected the Government's proposition to apply a lenient FRE 403 balancing test,[173] noting the lack of language in FRE 413 to support a lenient application of FRE 403's balancing test.[174]

Second, in other exceptions to the general ban on propensity reasoning evidence, courts applied FRE 403 in undiluted form.[175] Similar to FRE 413–415, these rules "carve out exceptions to Rule 404(a)(1) and reflect a legislative judgment that certain types of propensity evidence should be admitted," however, "[c]ourts have never found . . . that because the drafters made exceptions to the general rule of 404(a)[(1)], they tempered 403 as well."[176]

On balance, the debilitating disadvantages of this lenient FRE 403 balancing test outweighs its advantage of preserving Congress' presumption in favor of admission because of the lack of support for this lenient test in the language of FRE 413–415 and courts' precedent to use undiluted FRE 403 balancing tests in the context of other exceptions to FRE 404(a)(1)'s general prohibition against propensity reasoning evidence.[177]

B. The Original FRE 403 Balancing Test—the Undiluted Form

In *Martínez*, the First Circuit held that there is no reason to adopt special rules constraining a district court's usual exercise of discretion under FRE 403 when considering admitting evidence under FRE 415, thus adopting an undiluted FRE 403 balancing test simply weighs whether the probative value is substantially outweighed by the prejudicial val-

couraging Conviction Based on Character Rather than Guilt?, 33 TEX. TECH L. REV. 1167, 1185 (2002) (analyzing the opinions of the district court and the Tenth Circuit in *Meacham*).

170. *Meacham*, 115 F.3d at 1493.

171. *See* 140 CONG. REC. H8992 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) ("The presumption is in favor of admission.").

172. United States v. Guardia, 135 F.3d 1326, 1331 (10th Cir. 1998).

173. *Id.* at 1331.

174. *Id.*

175. FED. R. EVID. 404(a)(2)(A)–(C); *Guardia*, 135 F.3d at 1331 (stating that courts apply undiluted FRE 403 balancing test to FRE 404(a)(2)(A)–(C) which allow a criminal defendant to use character evidence of himself and his victim on a propensity reasoning basis).

176. *Guardia*, 135 F.3d at 1331.

177. FED. R. EVID. 404(a)(1), 413–415; *Guardia*, 135 F.3d at 1331.

ue of evidence of prior sexual misconduct.[178] The First Circuit especially stressed that they found no reason to adopt a special FRE 403 balancing test in this circumstance.[179]

The test has its advantages. First, it is consistent with courts' topical application of the FRE 403 balancing test when considering exceptions to the general ban on propensity evidence. For example, courts apply an undiluted FRE 403 balancing test in FRE 404(a)(2)'s exception that allow criminal defendants to use character evidence of himself and his victim on a propensity-reasoning basis.[180]

Second, it is consistent with the language of FRE 413–415 since the rules "contain[] no language that supports an especially lenient application of Rule 403."[181] Unlike the lenient admissibility approach in *LeCompte*, this approach avoids the doubt that a lenient rule is baseless given the language of FRE 413–415 and courts' precedent.[182]

Third, under this approach, judges have more discretion without the limitation of *LeCompte*'s lenient FRE 403 balancing test—that the prejudice "all propensity evidence in such trials presents" should not bar the admissibility of evidence of prior sexual misconduct.[183] FRE 403 grants judges broad discretion in excluding evidence when its probative value is substantially outweighed by its prejudicial danger.[184] The adoption of FRE 403 suggests that it is intended to give trial judges great discretion:[185] in the preliminary draft of FRE 403, it was mandatory for judges to exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice.[186] Due to the concern about the constraint on judges' discretion to exclude evidence, in the final draft of FRE 403,

178. Martínez v. Cui, 608 F.3d 54, 59–62 (1st Cir. 2010).

179. *Id*.

180. FED. R. EVID. 404(a)(2)(A)–(C); *Guardia*, 135 F.3d at 1331; United States v. LeCompte, 131 F.3d 767, 770 (8th Cir. 1997).

181. *Guardia*, 135 F.3d at 1331.

182. *Id.*; *LeCompte*, 131 F.3d at 768.

183. *LeCompte*, 131 F.3d at 770.

184. FED. R. EVID. 403; Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 441 (1989) ("Rule 403 authorizes a trial court to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice or by considerations of trial efficiency. As such, although cautioning judges against its frequent use, Rule 403 grants *broad* power to a trial judge to exclude otherwise admissible evidence.") (emphasis added); Victoria B. Lutz, Note, *Balanced Evidence: Discretion of the Gatekeeper to Admit Prior Convictions and Acts*, 77 DENV. U. L. REV. 507, 531 (2000) (arguing that FRE 403 "granted judges broad discretion to act as gatekeepers").

185. FED. R. EVID. 403; Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S., *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161, 225 (1969) [hereinafter *Preliminary Draft*]; Mengler, *supra* note 184, at 441 ("As originally drafted, the Rule mandated exclusion of unduly prejudicial evidence, but merely permitted exclusion of evidence for efficiency considerations. The enacted version of Rule 403 drops that distinction and states that relevant evidence 'may be excluded' for any of the stated reasons."); Lutz, *supra* note 184, at 531–32 (summarizing the process of the adoption of FRE 403, and citing the preliminary draft of FRE 403, which included a *mandatory* provision requiring judges exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice).

186. *Preliminary Draft*, *supra* note 185.

judges have broad discretion to exclude or admit evidence if its probative value is substantially outweighed by the danger of unfair prejudice.[187]

This approach to apply the original FRE 403 balancing test without any modification, however, suffers from lack of guidance for the trial judges. Just as it grants maximum discretion to trial judges in applying FRE 403 balancing test in the context of FRE 413–415, it also lacks guidance on determining the probative value versus the prejudicial value of prior sexual misconduct.[188] Unlike *LeCompte*—where the Eighth Circuit gave at least one guidance that the prejudice all propensity evidence in sexual assaults or child molestation trials presents should not weigh against admissibility[189]—in refusing to make any modification to the existing FRE 403 balancing test, the First Circuit gave zero guidance to trial judges.[190] Also, unlike *Guardia* and *LeMay*, where the Tenth and Ninth Circuits respectively, adopted some factors for trial judges when deciding the admissibility of prior sexual misconduct evidence under the FRE 403 balancing test,[191] the First Circuit did not provide any factor that can be utilized by the judges in applying the undiluted and broad-discretionary FRE 403 balancing test.[192]

C. The Original FRE 403 Balancing Test with an Emphasis on Both the Probative Value and the Prejudicial Risk of the Evidence

In *Guardia*, the Tenth Circuit held that "a court must perform *the same* 403 analysis that it does 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 413."[193] The Tenth Circuit emphasized that propensity evidence under FRE 413 "has indisputable probative value."[194] The Tenth Circuit also proposed several factors to guide the determination of the probative value of evidence of the defendant's prior sexual misconduct, including "the similarity of the prior acts to the acts charged, the closeness in time of the prior acts to the charged act, and the need for evidence beyond the testimony of the defendant and alleged victim."[195] Trial judges are not required to consider these factors in their FRE 403 balancing.[196]

This approach is similar to the one adopted by the First Circuit in *Martínez* because they both agreed that an undiluted balancing test should be applied.[197] However, the Tenth Circuit emphasized that judges

187. FED. R. EVID. 403; Mengler, *supra* note 184, at 441.
188. Martínez v. Cui, 608 F.3d 54, 59–62 (1st Cir. 2010).
189. United States v. LeCompte, 131 F.3d 767, 770 (8th Cir. 1997).
190. *Martínez*, 608 F.3d at 59–62.
191. United States v. LeMay, 260 F.3d 1018, 1022, 1028 (9th Cir. 2001); United States v. Guardia, 135 F.3d 1326, 1331 (10th Cir. 1998).
192. *Martínez*, 608 F.3d at 59–62.
193. *Guardia*, 135 F.3d at 1330 (emphasis added).
194. *Id.* at 1331.
195. *Id.*
196. *Id.*
197. *Martínez*, 608 F.3d at 59–62; *Guardia*, 135 F.3d at 1330–31.

should consider "both the significant probative value and the strong prejudicial qualities inherent in all evidence submitted" under FRE 413–415.[198] Generally, prior criminal conduct, including sexual misconduct, is considered to be prejudicial instead of probative when offered for propensity reasoning.[199] But this difference may not be as large as it first seems to be since FRE 413–415 "explicitly require judge[s] to recognize the probative value of prior sexual assaults and child molestation."[200] Thus, the First Circuit emphasized that "[o]f course district court[s] must apply Rule 403 with awareness that Rule 415 reflects a congressional judgment to remove the propensity bar to admissibility of certain evidence."[201] Also, the Tenth Circuit in *Guardia* emphasized that "while Rule 413 removes the per se exclusion of character evidence, courts should continue to consider the traditional reasons for the prohibition of character evidence as 'risks of prejudice' weighing against admission."[202]

Therefore, the difference between this approach and the First Circuit's undiluted and original FRE 403 balancing test lies in the proposed factors in guiding the trial judges: 1) the similarity of the prior acts to the acts charged,[203] 2) the closeness in time of the prior acts to the charged act,[204] and 3) the need for evidence beyond the testimony of the defendant and alleged victim.[205]

This approach has the advantages of the First Circuit's undiluted FRE 403 balancing test.[206] First, it is consistent with the language of FRE 413–415, which lacks indication to apply a lenient approach.[207] Second, it is consistent with the application of FRE 403's balancing test in other exceptions to the FRE 404(a)(1)'s general prohibition against propensity reasoning evidence.[208] Third, granting a broad discretion to trial judges is consistent with the intent underlying the adoption of FRE 403.[209]

Moreover, because of the several factors the court proposed to guide trial judges in determining the probative value of evidence of the defendant's prior sexual misconduct, this approach overcomes part of the major disadvantage of the First Circuit's undiluted FRE 403 balancing test: the lack of guidance to trial judges.[210]

198. *Guardia*, 135 F.3d at 1330 (emphasis added).
199. FED. R. EVID. 404(a)(1); MERRITT & SIMMONS, *supra* note 1, at 399.
200. *Martínez*, 608 F.3d at 60; MERRITT & SIMMONS, *supra* note 1, at 398.
201. *Martínez*, 608 F.3d at 60; MERRITT & SIMMONS, *supra* note 1, at 398.
202. *Guardia*, 135 F.3d at 1330.
203. *Id.* at 1331.
204. *Id.*
205. *Id.*
206. *See supra* Part III.B.
207. *Id.*
208. *Id.*
209. *Id.*
210. *Guardia*, 135 F.3d at 1331; *see supra* Part III.B.

D. The Five-Factor, Rigid Framework of the FRE 403 Balancing Test

In *LeMay*, the Ninth Circuit articulated a rigid, five-factor framework when applying FRE 403 balancing test to evidence of prior sexual assaults or child molestation.[211] The district judges *must* evaluate the following five factors: (1) "the similarity of the prior acts to the acts charged,"[212] (2) the "closeness in time of the prior acts to the acts charged,"[213] (3) "the frequency of the prior acts,"[214] (4) the "presence or lack of intervening circumstances,"[215] and (5) "the necessity of the evidence beyond the testimonies already offered at trial."[216] Although the five factors are necessary, they are not exclusive; district judges should consider other factors relevant to individual cases.[217]

In *LeMay*, the Ninth Circuit quoted *Doe ex rel. Rudy-Glanzer v. Glanzer,*[218] stating that "[b]ecause of the inherent strength of the evidence that is covered by [Rule 414], when putting this type of evidence through the [Rule 403] microscope, a court should pay 'careful attention to both the significant probative value and the strong prejudicial qualities' of that evidence."[219] In fact, *Glanzer* quoted *Guardia* for this statement.[220] Therefore, this approach is similar to the approach in *Guardia* in that it recognizes both the probative value and the prejudicial quality of the prior sexual misconduct, while applying the undiluted FRE 403 balancing test.[221] It differs, however, from *Guardia*'s approach in that it *mandates* the trial judges to evaluate the five factors it articulated.[222]

Similar to the *Guardia* approach, it enjoys the advantage of consistency with the language of FRE 413–415—which lacks indication to apply a lenient approach—and with the undiluted application of FRE 403's balancing test to other exceptions to FRE 404(a)(1)'s general prohibition against propensity reasoning evidence.[223]

Due to its mandatory, rigid, five-factor framework, however, this approach suffers from a major flaw—it deprives the wide discretion trials judges enjoy when applying FRE 403's balancing test, which is inconsistent with the rule's express language granting such discretion.[224] The

211. United States v. LeMay, 260 F.3d 1018, 1022, 1028 (9th Cir. 2001).
212. *Id.* (citing Doe *ex rel.* Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1268 (9th Cir. 2000)).
213. *Id.* (citing *Glanzer*, 232 F.3d at 1268).
214. *Id.* (citing *Glanzer*, 232 F.3d at 1268).
215. *Id.* (citing *Glanzer*, 232 F.3d at 1268).
216. *Id.* (citing *Glanzer*, 232 F.3d at 1268).
217. *Id.* (citing *Glanzer*, 232 F.3d at 1268).
218. 232 F.3d 1258.
219. *LeMay*, 260 F.3d at 1022, 1028 (citing *Glanzer*, 232 F.3d at 1268).
220. *Glanzer*, 232 F.3d at 1268 (quoting United States v. Guardia, 135 F.3d 1326, 1330 (10th Cir. 1998)).
221. *Id.* (quoting *Guardia*, 135 F.3d at 1330).
222. *LeMay*, 260 F.3d at 1022, 1028 (citing *Glanzer*, 232 F.3d at 1268).
223. *See supra* Part III.B–C.
224. United States v. Hawpetoss, 478 F.3d 820, 825 (7th Cir. 2007) ("[W]e are hesitant to cabin artificially the discretion of the district courts through the imposition of a relatively rigid multi-factor test."); *see* Mengler, *supra* note 184, at 441 (arguing that "the [Federal Rules of Evidence's] generality alone consequently means that trial courts have substantial discretion" and that "[t]he language of

originally drafted FRE 403 mandated exclusion of evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, or of misleading the jury," permitting discretionary exclusion of evidence if "its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[225] As enacted, however, FRE 403 discarded the mandatory part, and permits the general discretionary exclusion of unduly prejudicial evidence.[226]

In *United States v. Hawpetoss*,[227] a case charging the defendant with both attempting to engage and engaging in sexual acts with his minor children, the Seventh Circuit affirmed the District Court's admission of evidence of the defendant's prior sexual assaults and child molestation committed under FRE 413 and 414.[228] In refusing to adopt *LeMay*'s rigid, five-factor framework, 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."[229] The Seventh Circuit noted the departure of *LeMay* from *Guardia* by adopting too rigid a framework,[230] and expressed favor for "a more flexible approach than *LeMay* and one more in harmony with the outlined approach of the Tenth Circuit in *Guardia* when it foresaw that district courts would consider 'innumerable' factors."[231] Apparently, the Seventh Circuit preferred a more flexible approach, and criticized the rigid approach adopted by the *LeMay* court for restraining the discretion of trial judges.[232] Specifically, the Seventh Circuit stated that "[g]iven the relative paucity of case law in this area, we are hesitant to cabin artificially the discretion of the district courts through the imposition of a relatively rigid multi-factor test."[233] "[W]hile the factors articulated in *LeMay* are certainly a helpful guide for a district court in making the discretionary determination on the admissibility of such evidence, the more flexible course . . . is both the wise and prudent course."[234]

Therefore, *LeMay* five-factor rigid framework for applying FRE 403 balancing test in the context of FRE 413–415 is a less favorable approach than the more flexible approach of *Guardia*.

[FRE 403] expressly acknowledges that the trial court's authority is discretionary."); John Matson, Note, *Huskers Jump on Congress's Fumble: Nebraska Rules of Evidence 413-15 Correct the Facial Deficiencies of Federal Rules of Evidence 413-15*, 45 CREIGHTON L. REV. 277, 304–05 (2011) (citing *Hawpetoss*, 478 F.3d 820 and *LeMay*, 260 F.3d 1018).

225. FED. R. EVID. 403 (Proposed Official Draft 1969), 46 F.R.D. 161, 225 (1969).
226. FED. R. EVID. 403; Mengler, *supra* note 184, at 441.
227. 478 F.3d 820.
228. *Id.* at 821–22.
229. *Id.* at 825 (quoting United States v. Julian, 427 F.3d 471, 487 (7th Cir. 2005)).
230. *Id.*
231. *Id.* (citing United States v. Guardia, 135 F.3d 1326, 1331 (10th Cir. 1998)).
232. *See id.*
233. *Id.*
234. *Id.* at 825–26.

E. Current Approaches to Applying the FRE 403 Balancing Test Are Inadequate to Curtail the Potential Evil Created by FRE 413–415

Courts rely on FRE 403's balancing test as the constitutional guarantor for FRE 413–415.[235] Propensity reasoning is very common in everyday life.[236] For example, we will not trust a friend who frequently lies to us. Therefore, propensity reasoning is very powerful in the courtroom because of a juror's familiarity with it in his or her everyday life experience.[237] A jury hearing evidence that a defendant committed crimes before will likely base its verdict on the general bad character propensity reasoning rather than on specific evidence regarding the current charge, thus raising due process concerns.[238] Defendants sometimes argue that the ban on propensity evidence to prove a disposition to commit the charged crime is so fundamental as to be embodied in the Due Process Clause of the Constitution, and thus, by allowing evidence of prior sexual assaults or child molestation committed, FRE 413-415 violate the Due Process Clause.[239] Courts, however, generally conclude that there is nothing fundamentally unfair about admitting evidence of prior sexual misconduct, as long as the protections of the FRE 403 balancing test "remain in place to ensure that potentially devastating evidence of little probative value will not reach the jury, the right to a fair trial remains adequately safeguarded."[240]

As analyzed above, the FRE 403 balancing test, at least as currently applied in federal circuits, is not sufficient to protect criminal defendants against due process concerns generated by FRE 413–415's admission of evidence of a defendant's prior sexual misconduct.[241] Generally, as one scholar noted, "[i]n practice, despite their dicta to the contrary, the courts have weakened Rule 403 by tending to admit evidence of prior sexual offenses automatically" under FRE 403.[242] Therefore, "the courts discuss Rule 403, but in the same breath undermine its applicability."[243]

For example, the Eighth Circuit in *LeCompte* applied a lenient FRE 403 balancing test, requiring courts to ignore the prejudice normally associated with evidence of prior sexual misconduct when used in all trials involving sexual assaults or child molestation, in order to give full effect

235. *See* United States v. LeMay, 260 F.3d 1018, 1027 (9th Cir. 2001) (holding that "Rule 414 does not violate the Due Process Clause of the constitution" as long as FRE 403 applied properly); in *United States v. Charley*, the Tenth Circuit stated: "Rule 414 is not unconstitutional on its face, 'because Rule 403 applies to Rule 414 evidence . . . .'" 189 F.3d 1251, 1259 (10th Cir. 1999) (quoting United States v. Castillo, 140 F.3d 874, 884 (10th Cir. 1998)); Orenstein, *Deviance, Due Process, and the False Promise*, *supra* note 5, at 1517–18.

236. MERRITT & SIMMONS, *supra* note 1, at 314.

237. *Id.*

238. *See LeMay*, 260 F.3d at 1024; MERRITT & SIMMONS, *supra* note 1, at 314.

239. U.S. CONST. amend. V, XIV; *see LeMay*, 260 F.3d at 1024.

240. *LeMay*, 260 F.3d at 1026.

241. *See supra* Part III.A–D.

242. Orenstein, *Deviance, Due Process, and the False Promise*, *supra* note 5, at 1520.

243. *Id.*

to the congressional presumption in favor of admission.[244] Under this lenient approach, the FRE 403 balancing test is not "in place to ensure that potentially devastating evidence of little probative value will not reach the jury, the right to a fair trial remains adequately safeguarded,"[245] because the judges just ignore the huge prejudicial impact of propensity evidence of prior sexual misconduct on the jury's decision.[246] The Eighth Circuit's pro-admission approach has been criticized as "the most cursory, admission-happy Rule 403 balance,"[247] which fails to effectively guard against due process violations by ensuring that "the right to a fair trial remains adequately safeguarded" through the exclusion of propensity evidence of little probative value but of huge prejudicial risk.[248]

Similarly, even though the Tenth and First Circuits adopted a seemingly undiluted FRE 403 balancing test, requiring judges to consider the prejudicial value of the propensity evidence of prior sexual offenses, they are inadequate to ensure the right to a fair trial under the Due Process Clause of the Constitution.[249] As discussed in Part III.C, the Tenth Circuit's approach explicitly emphasized that the propensity evidence of prior sexual offenses "has indisputable probative value."[250] Although the First Circuit did not say so explicitly, it specifically emphasized that district courts must apply the FRE 403 is balancing test with awareness that FRE 413–415 reflect a "congressional judgment to remove the propensity bar to admissibility of certain evidence."[251] Obviously, the congressional judgment is that evidence of prior sexual offenses is so particularly probative that it deserves a special exception to the general ban on propensity reasoning.[252] Therefore, given that FRE 403's balancing test only allows judges to exclude evidence when the probative value is *substantially outweighed* by the prejudicial value, even the First Circuit's and the Tenth Circuit's seemingly undiluted approaches are inadequate since they put too much emphasis on the special, even exceptional, probative value of prior sexual misconduct.[253] Therefore, when trial judges are re-

244. United States v. LeCompte, 131 F.3d 767, 768 (8th Cir. 1997).

245. *LeMay*, 260 F.3d at 1026.

246. MERRITT & SIMMONS, *supra* note 1, at 402.

247. Orenstein, *Deviance, Due Process, and the False Promise*, *supra* note 5, at 1524.

248. *LeMay*, 260 F.3d at 1026.

249. Martínez v. Cui, 608 F.3d 54, 60 (1st Cir. 2010); United States v. Guardia, 135 F.3d 1326, 1330–31 (10th Cir. 1998).

250. *Guardia*, 135 F.3d at 1331.

251. *Martínez*, 608 F.3d at 60.

252. FED. R. EVID. 404(a)(1); *see* 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) ("In child molestation cases, for example, a history of similar acts tends to be *exceptionally probative* because it shows an unusual disposition of the defendent [sic]—a sexual or sadosexual interest in children—that simply does not exist in ordinary people.") (emphasis added); 140 CONG. REC. H2433 (daily ed. Apr. 19, 1994) (statement of Rep. Molinari) ("The past conduct of a person with a history of rape or child molestation provides evidence that he or she has the combination of aggressive and sexual impulses that motivates the commission of such crimes and lacks the inhibitions against acting on these impulses. A charge of rape or child molestation has greater plausibility against such a person.").

253. *Martínez*, 608 F.3d at 59–60; *Guardia*, 135 F.3d at 1330–32; *see* 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) ("In child molestation cases, for example, a history of similar acts tends to be *exceptionally probative* because it shows an unusual disposition of the de-

quired to pay special attention to the special probative value of evidence of the defendant's prior sexual misconduct under FRE 413–415, it is difficult for the prejudicial risk to outweigh the probative value *substantially*. Accordingly, one scholar stated that even the Tenth Circuit's approach in *Guardia* clearly sent the message that "the exclusion of evidence under Rule 403 should be used infrequently, reflecting Congress' legislative judgment that the evidence 'normally' should be admitted."[254]

In the same vein, the Ninth Circuit's five-factor, rigid application of the FRE 403 balancing test in the context of FRE 413–415 fails to adequately serve as the constitutional guarantor, because it is based on the Tenth Circuit's undiluted test while also departing from it by requiring rigid application of five factors in determining the probative value of evidence of the defendant's prior sexual misconduct.[255]

In sum, the current approaches used by different federal circuits in applying the FRE 403 balancing test are inadequate to permit the test to function as the *constitutional guarantor* for FRE 413–415, which is the role originally intended by the courts.

IV. RECOMMENDATION

As discussed in Part III, the current approaches of applying the FRE 403 balancing test in the context of FRE 413–415 suffer some weaknesses that undermine the effectiveness of using the FRE 403 balancing test to guard the constitutionality of FRE 413–415.[256] In order to achieve the goal to "ensure that potentially devastating evidence of little probative value will not reach the jury, [and] the right to a fair trial remains adequately safeguarded" through applying balancing test in the context of FRE 413–415, a better balancing test is one that combines the special balancing test utilized in FRE 609(a)(1)(B) and the factors articulated in *LeMay* by the Eighth Circuit Court.[257]

Similar to FRE 413–415, FRE 609 creates another exception to FRE 404(a)'s general ban on propensity evidence.[258] Under FRE 413–415, prior sexual misconduct evidence, such as sexual assaults or child molestation, is admissible to prove the defendant's propensity to commit

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fendent [sic]—a sexual or sado-sexual interest in children—that simply does not exist in ordinary people.") (emphasis added).

254. Orenstein, *Deviance, Due Process, and the False Promise*, *supra* note 5, at 1521 (quoting United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998)).

255. *See supra* Part III.D.

256. *See supra* Part III.

257. FED. R. EVID. 609(a)(1)(B); United States v. LeMay, 260 F.3d 1018, 1026–28 (9th Cir. 2001) (quoting Doe *ex rel.* Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1268 (9th Cir. 2000)) ("We also articulated several factors that district judges must evaluate in determining whether to admit evidence of a defendant's prior acts of sexual misconduct. These factors are: (1) 'the similarity of the prior acts to the acts charged,' (2) the 'closeness in time of the prior acts to the acts charged,' (3) 'the frequency of the prior acts,' (4) the 'presence or lack of intervening circumstances,' and (5) 'the necessity of the evidence beyond the testimonies already offered at trial.'").

258. FED. R. EVID. 404(a)(1), 609(a); MERRITT & SIMMONS, *supra* note 1, at 397.

the sex crime charged in the current trial.[259] Similarly, under FRE 609(a), a witness' prior criminal conviction is admissible to prove the "witness's propensity to lie or tell the truth[.]"[260] These two exceptions to the general ban on propensity evidence utilize the same prohibited reasoning—since the defendant did something bad in the past, he or she is more likely to behave badly in the current proceeding.[261] Specifically, FRE 609(a)(1)(B) applies when the witness is the defendant in a criminal case, mandating that evidence of prior felony conviction is admissible to prove propensity to lie if "the probative value of the evidence *outweighs* its prejudicial effect to that defendant."[262] FRE 609(a)(1)(B)'s exception to the general prohibition against propensity evidence requires a "lower threshold for excluding evidence than Rule 403 does" when the witness is the defendant in a criminal case.[263]

Similar to FRE 609(a)(1)(B), which governs admission of prior felony conviction against the defendant only, under FRE 413–415, the prior sexual misconduct is introduced against the defendant.[264] Importantly, prior felony convictions and prior sexual misconduct both have the potential to mislead the jury to base its verdict on the prohibited propensity reasoning.[265] Therefore, the special balancing test in FRE 609(a)(1)(B) is the reasonable source for a balancing test to be used in the context of FRE 413–415.

As discussed in Part III.E, the current balancing tests utilized by federal circuits are inadequate because courts give too much weight to the probative value of prior sexual misconduct, and in order to exclude evidence under the FRE 403 balancing test, the probative value must be *substantially outweighed* by the prejudicial risk of evidence of the defendant's prior sexual misconduct.[266] Therefore, it is really hard for defendants in sexual assault or child molestation cases to convince courts to preclude evidence of prior sexual misconduct under the different approaches in applying the FRE 403 balancing test currently available in federal courts.[267]

Accordingly, a lower-threshold, pro-exclusion balancing test—based upon the special balancing test utilized under FRE 609(a)(1)(B) in determining whether to admit prior felony conviction of the defendant in a criminal case[268]—is a more promising constitutional guarantor for the

259. FED. R. EVID. 413–415.

260. FED. R. EVID. 609(a); MERRITT & SIMMONS, *supra* note 1, at 397.

261. FED. R. EVID. 413–415, 609(a); MERRITT & SIMMONS, *supra* note 1, at 397.

262. FED. R. EVID. 609(a)(1)(B) (emphasis added).

263. FED. R. EVID. 609(a)(1)(A)–(B); MERRITT & SIMMONS, *supra* note 1, at 252; *see* Aviva Orenstein, *Insisting That Judges Employ a Balancing Test Before Admitting the Accused's Convictions Under Federal Rule of Evidence 609(a)(2)*, 75 BROOK. L. REV. 1291, 1294 (2010) ("[Under FRE 609(a)(1), t]he harm is magnified if the prior crime being used to impeach the testifying accused and the actual crime charged are similar. The jury may jump to the wrong type of propensity inference.").

264. FED. R. EVID. 413–415, 609(a)(1)(B).

265. *Id.*; MERRITT & SIMMONS, *supra* note 1, at 314.

266. *See supra* Part III.E.

267. *See id.*

268. FED. R. EVID. 609(a)(1)(B).

controversial FRE 413–415.[269] Also, in order to take into account the special nature of sexual assault or child molestation cases, and the special probative value of prior sexual misconduct evidence, this balancing test should include the five factors proposed by the Ninth Circuit in *LeMay* to guide trial judges in evaluating the probative value of evidence regarding the defendant's prior sexual misconduct,[270] but should not mandate that judges consider these factors.[271]

Under this new approach, trial judges can admit evidence of the defendant's prior sexual misconduct *only* if its probative value *outweighs* the prejudicial effect (instead of admitting evidence *unless* the probative value of the evidence is *substantially outweighed* by its prejudicial effect[272]). At the same time, trial judges can take the following factors (*LeMay* factors) into consideration when determining the probative value of evidence of the defendant's prior sexual misconduct: (1) "the similarity of the prior acts to the acts charged,"[273] (2) the "closeness in time of the prior acts to the acts charged,"[274] (3) "the frequency of the prior acts,"[275] (4) the "presence or lack of intervening circumstances,"[276] and (5) "the necessity of the evidence beyond the testimonies already offered at trial."[277] The five factors are not mandatory, but provide guidance for trial judges, similar to *Guardia*'s undiluted FRE 403 balancing test.[278]

This approach is much better than the existing approaches applying the FRE 403 balancing test because it not only serves as a better constitutional guarantor against due process challenge, but also provides reasonable guidance for trial judges through the five *LeMay* factors. More importantly, similar to the *Guardia* balancing test, this approach avoids putting too much restraint on trial judges' discretion in applying the balancing test, as is the case for the *LeMay* framework, which mandates the trial judges to consider the five factors.[279] Also, it is consistent with Congress' intent in enacting FRE 413–415: it allows the admission of prior sexual misconduct evidence when the evidence is more probative than prejudicial. Furthermore, compared with currently available approaches in federal circuits, this approach utilizes a lower-threshold pro-exclusion balancing test, thus it is easier for defendants in sexual assault or child molestation cases to convince courts to preclude unfairly prejudicial prior sexual misconduct evidence.[280]

269. FED. R. EVID. 413–415.
270. United States v. LeMay, 260 F.3d 1018, 1022, 1028 (9th Cir. 2001).
271. *See supra* Part III.D.
272. FED. R. EVID. 403.
273. *LeMay*, 260 F.3d at 1028 (citing Doe *ex rel.* Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1268 (9th Cir. 2000)).
274. *Id.* (citing *Glanzer*, 232 F.3d at 1268).
275. *Id.* (citing *Glanzer*, 232 F.3d at 1268).
276. *Id.* (citing *Glanzer*, 232 F.3d at 1268).
277. *Id.* (citing *Glanzer*, 232 F.3d at 1268).
278. United States v. Guardia, 135 F.3d 1326, 1330–31 (10th Cir. 1998).
279. *LeMay*, 260 F.3d at 1027–28; *Guardia*, 135 F.3d at 1330; *see supra* Part III.C–D.
280. *See supra* Part III.E.

Therefore, a better balancing test to curtail the potential evil created by FRE 413–415, while still respecting the Congressional intent to admit prior sexual misconduct evidence, is one that allows trial judges to exclude evidence of prior sexual misconduct if its probative value is equal to, or outweighed by, the prejudicial effect—instead of only allowing trial judges to exclude evidence if its probative value is *substantially* outweighed by the prejudicial effect as dictated by FRE 403[281]—and at the same time offers trial judges guidance when weighing evidence through the five *LeMay* factors.[282] But trial judges are not required to analyze the five factors in performing the proposed balancing test. The factors only provide guidance, and it is the sole discretion of trial judges whether to utilize any of these five factors.

V. CONCLUSION

Generally, in recognition of the significant potential prejudicial power of character evidence to mislead jury and create unfair prejudice to the defendants,[283] the Federal Rules of Evidence prohibit the use of character evidence for propensity reasoning—the inference that because the defendant did something bad in the past, he must also have committed the bad act in this particular case.[284] In response to the public outrage over the insufficiency of the then-existing legal system to protect the society from sexual crimes,[285] however, Congress adopted FRE 413–415, which allow the admission of a specific type of character evidence—evidence of the defendant's prior sexual assaults or child molestation.[286]

Because FRE 413–415 pose the risk of misleading a jury to base its verdict on a defendant's prior sexual misconduct, rather than on specific evidence regarding the presently charged sexual misconduct, the rules engender many concerns and criticism, including the possibility that they violate the Due Process Clause of the Constitution.[287] Several federal circuit courts, however, held that FRE 413–415 are constitutional as long as FRE 403's balancing test remains in place to exclude unfairly prejudicial evidence of the defendant's prior sexual misconduct.[288]

281. FED. R. EVID. 403.

282. *LeMay*, 260 F.3d at 1027–28.

283. FED. R. EVID. 404(a)(1); MERRITT & SIMMONS, *supra* note 1, at 314–15.

284. FED. R. EVID. 404(a)(1); MERRITT & SIMMONS, *supra* note 1, at 314.

285. Ellis, *supra* note 17, at 974.

286. FED. R. EVID. 413–415.

287. U.S. CONST. amend. V, XIV §1; Orenstein, *Deviance, Due Process, and the False Promise*, *supra* note 5, at 1505.

288. United States v. LeMay, 260 F.3d 1018, 1027 (9th Cir. 2001) (citing courts of appeals that reached the same conclusion that FRE 413–415 is constitutional as long as FRE 403 is in place); *see, e.g.*, United States v. Charley, 189 F.3d 1251, 1259 (10th Cir. 1999) (quoting United States v. Castillo, 140 F.3d 874, 884 (10th Cir. 1998)) (stating that "Rule 414 is not unconstitutional on its face, 'because Rule 403 applies to Rule 414 evidence.'"); *Castillo*, 140 F.3d at 883 ("[A]pplication of Rule 403 to Rule 414 evidence eliminates the due process concerns posed by Rule 414."); *see* United States v. Enjady, 134 F.3d 1427, 1430–35 (10th Cir.1998) (affirming the constitutionality of FRE 413); United States v. Mound, 149 F.3d 799, 800–802 (8th Cir.1998) (concluding that FRE 413 is constitutional if FRE 403 protections remain in place).

Due to the difficulties in applying the FRE 403 balancing test in the context of FRE 413–415, federal circuits are split on the appropriate approach of applying FRE 403's balancing test to determine the admissibility of evidence of a defendant's prior sexual misconduct.[289]

As discussed in Part III, the current approaches utilized by federal circuits are insufficient to permit the FRE 403 balancing test to act as the constitutional guarantor of FRE 413–415.[290] Therefore, we need a new approach that takes into account both the Congressional intent to admit evidence of the defendant's prior sexual misconduct and the unfair prejudice of propensity reasoning that character evidence of this kind can generate.[291]

The approach proposed in this Note can serve as a better constitutional guarantor for FRE 413–415 because it can better "ensure that potentially devastating evidence of little probative value will not reach the jury" and thus safeguard the right of the defendant to a fair trial.[292] This proposed new approach combines the lower-threshold, pro-exclusion balancing test utilized in FRE 609(a)(1)(B),[293] and the specifically designed five factors listed in *LeMay* to evaluate the probative value of evidence of the defendant's prior sexual misconduct.[294] This approach allows the trial judges to admit evidence of the defendant's prior sexual misconduct *only if* its probative value outweighs its prejudicial value, and in deciding the probative value of the evidence, trial judges are free to utilize any of the five *LeMay* factors.[295]

Compared with the currently available approaches utilized by different federal circuits in applying FRE 403's balancing test, the proposed approach avoids restraining trial judges' discretion in performing the balancing test by allowing them to make the discretionary decision whether or not to utilize any of the five *LeMay* factors.[296] Also, due to its lower threshold of excluding unfairly prejudicial evidence, it can better protect a defendant's right to a fair trial by excluding unfairly prejudicial evidence of prior sexual misconduct.[297]

Therefore, the proposed approach is a promising balancing test to curtail the potential evil of FRE 413–415 and to guard their constitutionality, a role that several federal circuit courts intended FRE 403 balancing test to play, but unfortunately it has failed to play so far.[298]

289. *See supra* Part II.
290. *See supra* Part III.E.
291. *See* FED. R. EVID. 404(a)(1), 413–415; MERRITT & SIMMONS, *supra* note 1, at 314–15.
292. *LeMay*, 260 F.3d at 1026.
293. FED. R. EVID. 609(a)(1)(B).
294. *LeMay*, 260 F.3d at 1026; *see supra* Part IV.
295. *LeMay*, 260 F.3d at 1026; *see supra* Part IV.
296. *LeMay*, 260 F.3d at 1026; *see supra* Part IV.
297. *See supra* Part IV.
298. *See supra* Part III.E–IV.