
The enactment of this reform is first and foremost a triumph for the public—for the women who will not be raped and the children who will not be molested because we have strengthened the legal system’s tools for bringing the perpetrators of these atrocious crimes to justice.  

I. INTRODUCTION

According to the most recent data, “[e]very two minutes, somewhere in America, someone is sexually assaulted.” Studies also estimate that “1 in 4 imprisoned rape and sexual assault offenders has a prior history of convictions for violent crimes, and 1 in 7 has been previously convicted of a violent sex crime.” In 1994, in an attempt to reduce similar staggering statistics, Congress passed Federal Rules of Evidence 413 and 414 pursuant to the Violent Crime Control Act. These new evidentiary rules superceded Rule 404(b) by allowing the introduction of propensity evidence in cases of sexual assault and child sexual abuse.

3. Lawrence A. Greenfield, Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault, NCJ-163392, 22 (Feb. 1997) (analyzing data on sexual assaults), available at http://www.ojp.usdoj.gov/bjs/.
5. See FED. R. EVID. 404(b) (prohibiting prior bad acts evidence to demonstrate propensity to commit crime). Federal Rule of Evidence 404(b) reads:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Id.; see FED. R. EVID. 413 (allowing propensity evidence in cases of sexual assault). Rule 413 states, in relevant part: “In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant’s commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which is relevant.” FED. R. EVID. 413(a); see FED. R. EVID. 414 (allowing propensity evidence in cases of child molestation). Rule 414 reads, in relevant part: “In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant’s commission of another offense or offenses of child molestation is admissible, and may be considered for its
In light of the long-standing rationale in American jurisprudence that “the defendant need answer only for the crime he or she is currently charged with,” the new Federal Rules faced much opposition and controversy. Proponents of the rules, however, argued that the general exclusionary rule needed to be changed to promote accurate fact-finding and just results in cases of sexual assault. They also emphasized that many state courts have long recognized similar propensity exceptions via lustful disposition exceptions or through expansive interpretations of the established exceptions to the character evidence rule in sexual assault prosecutions.

Since the adoption of the new rules, several states have implemented similar evidentiary standards. Massachusetts is not such a state. Despite the purported prohibition of propensity evidence in Massachusetts, case law demonstrates that “evidence of uncharged sexual misconduct, when not too remote in time, is competent to prove an inclination to commit the acts charged in the indictment.” In spite of judiciary attempts to distinguish between “propensity” and “inclination” evidence, this Note suggests that Massachusetts law, in fact, provides an exception to the general ban on character evidence in some cases of sexual assault. Massachusetts should therefore look to Federal Rules of Evidence 413 and 414 as guidelines for evidentiary reform in sexual assault and child molestation cases.

This Note will explore the general policy against propensity evidence and the history of Federal Rules 413 and 414. Next, this Note will discuss the

bearing on any matter to which it is relevant.” Federal Rules of Evidence 414(a); see Federal Rules of Evidence 415 (applying evidentiary standard of Rules 413 and 414 to civil cases).


8. See id. at 23 (describing special common-law rules of admissibility in some sex offense cases). Karp argues that the new rules offer a “reasonable and honest alternative” to the expansion and distortion of evidentiary rules in cases of sexual violence. Id. at 35.


12. See Hanlon, 694 N.E.2d at 365 n.5 (describing terms “propensity,” “inclination,” and “disposition” as “closely related” and often “interchangeable”).

13. See infra Part VI (exploring Massachusetts case law allowing exception to ban on propensity evidence).

14. See infra Parts II, III (detailing history of prohibition of propensity evidence and adoption of Federal
implementation of these rules in both federal circuits and state jurisdictions that have enacted similar rules, focusing on the present state of the law in California and Arizona. Finally, after exploring the current state of Massachusetts law in the area of propensity evidence, this Note will suggest that Massachusetts follow Federal Rules 413 and 414 as guidelines for evidentiary reform in cases of sexual assault and child molestation.

II. HISTORY OF PROPENSITY EVIDENCE

Traditionally, American common law barred the government from producing evidence of prior bad acts to prove a defendant’s guilt, character, or propensity to commit a crime. The rationale for excluding propensity evidence was the concern that such evidence would persuade a jury to convict a defendant based on his prior acts rather than on the merits of the case. As early as 1901, however, American courts began to recognize exceptions to the general rule banning evidence of prior bad acts. In 1975, Congress enacted the Federal Rules of Evidence and codified the common-law ban of character evidence and its exceptions. Federal Rule of Evidence 404(b) specifies that while evidence of prior bad acts is impermissible to prove propensity to commit a crime, such evidence is admissible for other purposes such as proof of “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

Rules 413 and 414).

15. See infra Part V (discussing application of Federal Rules 413 and 414 and similar rules in Arizona and California).

16. See infra Parts V, VI (exploring Massachusetts law and advocating adoption of Federal Rules 413 and 414).


18. See Ewenkelried, supra note 6, § 2:18, at 2-5 (emphasizing jury’s potential to overestimate relevance and importance of uncharged misconduct evidence); see also Michelson v. United States, 335 U.S. 469, 475-76 (1948) (affirming need to ban propensity evidence because of unduly persuasive effect on jury). The Michelson court noted, “[t]he inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him opportunity to defend against a particular charge.” Michelson, 335 U.S. at 475-76.

19. See People v. Molineux, 61 N.E. 286, 293 (N.Y. 1901) (developing framework for admissibility of uncharged misconduct evidence). The New York Court of Appeals held that if there was a substantial issue of the defendant’s motive, identity, intent, modus operandi, or general plan or scheme, the prosecution could offer evidence of the defendant’s prior bad acts. Id. at 293.


21. Fed. R. Evid. 404(b) (permitting character evidence only to prove other crimes, wrongs, or acts). Federal case law has held that the list of exceptions in Rule 404(b) is not exhaustive. See, e.g., United States v.
Despite the general exclusionary rule against propensity evidence, early courts often took a liberal approach to admitting character evidence in sexual misconduct cases. Following Congress’ implementation of the Federal Rules of Evidence, this trend continued in the form of judiciary expansion and manipulation of Rule 404(b). However, some jurisdictions recognized a special lustful disposition exception to the general exclusionary rule, rather than distorting the “other purposes” doctrine of Rule 404(b).

Powers, 59 F.3d 1460, 1464 (4th Cir. 1995) (describing list of exceptions under Rule 404(b) as inclusive); United States v. Mendez-Ortiz, 810 F.2d 76, 79 (6th Cir. 1986) (describing list of permissible purposes as “neither exhaustive nor conclusive”); United States v. Aleman, 592 F.2d 881, 885 (5th Cir. 1979) (admitting extrinsic evidence when relevant to issue other than accused’s character). In order for evidence of other crimes or bad acts to be admissible, it is imperative that the probative value of the evidence outweigh the danger of undue prejudice. FED. R. EVID. 404 advisory committee’s note, 56 F.R.D. 183, 221 (noting Rule 404 subject to balancing test of Rule 403); see FED. R. EVID. 403 (setting forth evidentiary balancing test). Rule 403 states: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” FED. R. EVID. 403.

22. See, e.g., People v. Patterson, 36 F. 436, 437 (Cal. 1894) (describing cases of incest or adultery as “well-settled” exceptions to general exclusionary rule); Taylor v. State, 35 S.E. 161, 163 (Ga. 1900) (holding prior bad acts evidence admissible in incest case); Commonwealth v. Bemis, 136 N.E. 597, 598 (Mass. 1922) (noting exception to exclusionary rule in cases involving illicit sexual intercourse). The Bemis court went on to state that “evidence of the commission of similar crimes by the same parties . . . if not too remote in time, is competent to prove an inclination to commit the act charged . . . and is relevant to show the probable existence of the same passion or emotion at the time in issue.” 136 N.E. at 598; see also Thomas J. Reed, Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sexual Offense Cases, 21 AM. J. CRIM. L. 127, 166-67 (1993) [hereinafter Reed, Gaol Revisited] (describing common use of uncharged sexual misconduct evidence in early American incest cases).

23. See Mark A. Sheft, Federal Rule of Evidence 413: A Dangerous New Frontier, 33 AM. CRIM. L. REV. 57, 62-63 (1995) (suggesting broadened application of Rule 404(b)’s other purposes essentially allows introduction of propensity evidence). Sheft highlights the expansion of the definition of “scheme” and the admission of prior bad acts evidence on the issue of intent as the most problematic reasons for the erosion of Rule 404(b). Id.; see also DOJ CRIMINAL HISTORIES REP., supra note 17, at 710 (discussing usage of prior crimes evidence at trials). The report concluded that “free use of propensity evidence in prosecutions of sex crimes is widespread.” DOJ CRIMINAL HISTORIES REP., supra note 17, at 710; see, e.g., United States v. Sneezier, 983 F.2d 920, 924 (9th Cir. 1992) (allowing prior uncharged sex offense as evidence of intent); United States v. Cuch, 842 F.2d 1173, 1177 (10th Cir. 1988) (admitting evidence of prior sexual assault to show intent); United States v. Dia, 826 F. Supp. 1237, 1241 (D. Ariz. 1993) (admitting prior bad acts evidence to show “intent, identity and common scheme or plan”).

24. See IMWINKELRIED, supra note 6, § 4:14, at 49-50 (describing courts implementing “lustful disposition” exception as yielding to “intellectual honesty”); Reed, Gaol Revisited, supra note 22, at 189 n.340 (listing twenty-nine states, including Massachusetts, employing “lustful disposition” exception); see also John David Collins, Character Evidence and Sex Crimes in Alabama: Moving Toward the Adoption of New Federal Rules 413, 414, & 415, 51 ALA. L. REV. 1651, 1662-63 (2000) (describing “lustful dispensation” exception and justifications for it). The lustful dispensation exception is a common law exception to the general exclusionary rule against propensity evidence. Collins, supra, at 1662-63. Although many jurisdictions employ such a common law exception, there is wide variance in its applicability among state courts. Id. While some jurisdictions apply the exception to admit only evidence of a defendant’s misconduct against the complainant, other jurisdictions have broadened the scope of the exception to allow evidence of similar prior bad acts in cases involving third parties. Id. Reasons for allowing such evidence include the frequent lack of direct evidence in cases of sexual assault and the high probative value of prior bad acts evidence. Id.
III. FEDERAL RULES 413 AND 414

Congress enacted Rules 413 and 414 as part of the Violent Crime Control and Law Enforcement Act of 1994. The rules bypassed the usual judicial review available under the Rules Enabling Act, sparking controversy. In response, Congress compromised by agreeing to reconsider the legislation if the Judicial Conference submitted recommendations for amendments to the new rules within 150 days of the Act’s enactment. Despite the Conference’s timely report and suggested changes, Congress enacted the rules on July 9, 1995, as originally drafted.

Congress enacted the new rules to promote accurate fact-finding and to achieve just results in sexual assault and child molestation cases. Proponents of the rules emphasized the importance of admitting evidence of similar crimes

25. See supra notes 4-5 and accompanying text (discussing Act and defining Rules 413 and 414); see also Michael S. Ellis, The Politics Behind Federal Rules of Evidence 413, 414, and 415, 38 SANTA CLARA L. REV. 961, 968-69 (1998) (summarizing legislative history of Rules 413-15). Having unsuccessfully proposed the amendments to the Federal Rules of Evidence in the Women’s Equal Opportunity Act and then in the Sexual Assault Prevention Act, proponents of the amendments achieved success on November 5, 1993 when the Senate passed the proposed rules by a vote of seventy-five to nineteen. Ellis, supra, at 969.


27. See Violent Crime Control and Law Enforcement Act § 320935 (setting forth guidelines for recommendations and amendments to rules).

28. See FED. R. EVID. 413 advisory committee’s note (containing Report of Judicial Conference). The Conference report suggested that Congress reconsider enacting the new rules or, in the alternative, incorporate the new rules into the already existing rules as amendments. Id. The Conference stated concerns that the new rules would permit more hearsay, would not be subject to Rule 403’s balancing test, and would necessitate mini-trials to decide whether to admit previous bad acts. Id.

29. See Karp, supra note 7, at 19 (discussing arguments in favor of newly- enacted rules). David Karp, Senior Counsel in the Office of Policy Development of the U.S. Department of Justice and author of the new rules, suggests that common sense supports the admission of propensity evidence because such evidence demonstrates that the defendant has “the combination of aggressive and sexual impulses that motivates the commission of such crimes . . . and that the risks involved do not deter him.” Id. at 20. Karp also argues that public interest calls for the admission of all significant evidence in sex offense cases, including evidence of prior sexual misconduct, particularly in light of the secretive nature of such crimes and the frequent absence of neutral witnesses. Id.; see also 140 CONG. REC. S12,990-01 (daily ed. Sept. 12, 1994) (statement of Sen. Dole) (emphasizing need for new rules). Senator Robert Dole, in conjunction with Representative Susan Molinari, initially proposed the new rules and advocated for their adoption, highlighting similar arguments made by Karp in a presentation to the Evidence Section of the Association of American Law Schools on January 9, 1993. 140 CONG. REC. S12,990-01. But see Joseph Aluise, Note, Evidence of Prior Sexual Misconduct in Sexual Assault and Child Molestation Proceedings: Did Congress Err in Passing Federal Rules of Evidence 413, 414, and 415?, 14 J.L. & POL. 153, 174-79 (1998) (examining weakness of arguments for new rules based on recidivism rates).
to lend credibility to the victim’s allegation when consent is at issue or when there is little corroborating evidence.  

Additionally, advocates argued that the rules offered an honest and reasonable alternative to the inconsistent and unreliable application of Rule 404(b) in sexual assault cases.  

Nevertheless, the rules’ opponents argued that admission of propensity evidence created an unfair prejudice against the defendant, who should be tried solely for the current crime and not for past behavior.  

Opponents also suggested that the rules created the need for time-consuming “mini-trials,” necessary to determine the admissibility of propensity evidence.  

Finally, opponents contended that the rules raised constitutional concerns.  

The legislative history of the rules demonstrates the drafters’ attention to such concerns.  

Specifically, advocates of the rules emphasized the continued
applicability of Rule 403’s balancing test. Proponents also clarified that the new rules allowed admission of evidence in the same manner as evidence of uncharged offenses admitted under Rule 404(b). In addition, the rules themselves specified provisions intended to protect defendants’ rights.

IV. RULES APPLIED IN FEDERAL COURTS

Following the adoption of the new rules, federal courts faced the task of interpretation and implementation. In United States v. Guardia, the Tenth Circuit Court of Appeals directed its attention to the general applicability of the rules, setting forth a three-part test to determine whether evidence was appropriately within the reach of Rule 413. Several other courts also addressed the constitutionality of the rules, holding that they do not violate defendants’ due process or equal protection rights.

It is now well-settled among federal circuits that Rule 403 applies to

36. Karp, supra note 7, at 19 (noting relevant evidence still subject to exclusion under Rule 403). The intent of the rules was to “put evidence of uncharged offenses in sexual assault and child molestation cases on the same footing as other types of evidence that are not subject to a special exclusionary rule.” Id. Karp noted that within the new rules is a presumption in favor of admission of propensity evidence, which is thought to be relevant and probative in sexual misconduct cases. Id. Addressing concern that the rules diffuse the focus of the proceedings, Karp emphasized the rules’ requirement that any evidence of prior uncharged acts must be similar in nature to the crime charged. Id. at 22.

37. Karp, supra note 7, at 24 (noting admission of evidence under Rule 404(b) does not require conviction). Karp emphasized that no preliminary finding that the defendant committed the previous crime is needed to admit uncharged offense evidence. Id. at 26; see Huddleston v. United States, 485 U.S. 681, 690-91 (1988) (stating evidentiary rule for admitting uncharged offense evidence). The Court held that such evidence is properly admitted so long as the jury could reasonably conclude that the defendant committed the uncharged offense. Huddleston, 485 U.S. at 690-91.

38. FED. R. EVID 413(b) & 414(b) (stating notice and disclosure requirements). Both rules state, in relevant part: “In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant . . . at least fifteen days before the scheduled date of the trial . . . .” Id.; see Karp, supra note 7, at 24-25 (highlighting these requirements as safeguards to defendant’s procedural rights).

39. See United States v. Mound, 149 F.3d 799, 802 (8th Cir. 1998) (discussing applicability of cautionary jury instruction to evidence offered under Rule 413); United States v. Castillo, 140 F.3d 874, 883 (10th Cir. 1998) (holding Rule 414 does not violate due process or equal protection rights of defendant); United States v. LeCompte, 131 F.3d 767, 769 (8th Cir. 1997) (noting strong legislative intent in favor of ordinary admissibility of prior sexual offense evidence); United States v. Meacham, 115 F.3d 1488, 1492 (10th Cir. 1997) (determining rules impose no time limit on uncharged offenses).

40. 135 F.3d 1326 (10th Cir. 1998).

41. Id. at 1328 (stating three threshold requirements evidence must satisfy). The court held that in order for evidence offered under Rule 413 to be admissible, the following requirements must be satisfied: (1) the defendant must be accused of an offense of sexual assault; (2) the evidence to be admitted must be evidence that the defendant committed another offense of sexual assault; and (3) the evidence proffered must be relevant. Id.; see FED. R. EVID. 401 (defining “relevant evidence”). Relevant evidence is that which “ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FED. R. EVID. 401.

42. See, e.g., United States v. LeMay, 260 F.3d 1018, 1026-27 (9th Cir. 2001) (holding rules do not violate Constitution, particularly in light of Rule 403’s applicability); United States v. Withorn, 204 F.3d 790, 796 (8th Cir. 2000) (affirming constitutionality of rules); United States v. Enjady, 134 F.3d 1427, 1433-34 (10th Cir. 1998) (concluding rules do not violate defendant’s right to fair trial).
evidence proffered under the rules. In *Guardia*, for instance, the court held that such evidence was only admissible if it successfully passed the balancing test of Rule 403 as applied in undiluted form. Proving that Rule 403 could effectively bar relevant evidence offered under the new rules, the Tenth Circuit Court of Appeals affirmed the trial judge’s decision to exclude the uncharged crimes evidence after finding that the prejudicial effect of the evidence substantially outweighed its probative value.

In *Huddleston v. United States*, the Supreme Court held that, in the context of uncharged misconduct evidence offered under Rule 404(b), the standard of admission does not require the trial judge to make a preliminary finding; rather the “court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact—[whether the defendant committed the prior act]—by a preponderance of the evidence.” In *Johnson v. Elk Lake School District*, the Third Circuit Court of Appeals held that the *Huddleston* standard for admission of uncharged misconduct evidence also applies to evidence offered under the new rules. The Third Circuit also

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44. See *Guardia*, 135 F.3d at 1331 (requiring application of Rule 403’s balancing test “with all its vigor”).

45. Guardia, 135 F.3d at 1327. At trial, the government sought to admit testimony of four additional alleged victims under Rule 413. Id. After determining that the proffered evidence was relevant under Rule 413, the court applied Rule 403’s balancing test and ultimately excluded the evidence because of concern that the evidence would confuse the issues and mislead the jury. Id. at 1331-32.

46. 485 U.S. 681 (1988)

47. Id. at 690 (setting standard for screening uncharged conduct evidence).

48. 283 F.3d 138 (3d Cir. 2002)

49. See id. at 151-56 (discussing standard for admission of Rule 415 evidence).
discussed and defined the relationship between Rule 403’s balancing test and the presumption in favor of admitting evidence proffered under Rules 413 and 414.\textsuperscript{50} The court held that when the prosecution proves the prior acts evidence with specificity and demonstrates that the prior behavior is sufficiently similar to the crime with which the defendant is currently charged, the presumption in favor of admission is appropriate.\textsuperscript{51} However, when the prior conduct is not significantly similar and/or when it has not been proved with specificity, the court held that there is no justification for such presumption.\textsuperscript{52}

V. STATES ADOPT SIMILAR RULES

Prosecution of sexual assault cases is very rare in federal courts.\textsuperscript{53} Therefore, the rules were enacted, in part, as a model for states to consider and follow in amending their own evidentiary rules.\textsuperscript{54} Nevertheless, very few states have followed suit since the adoption of the new federal rules.\textsuperscript{55}
A. California Evidence Code Section 1108

In 1995, California amended its Code of Evidence to permit the admission of evidence of a defendant’s prior sexual misconduct in criminal actions involving charges of a sexual offense. \(^{56}\) Modeled on Federal Rules 413 and 414, Section 1108 of California’s Evidence Code supercedes the general rule prohibiting character evidence while maintaining all other evidentiary safeguards. \(^{57}\) The statute explicitly preserves the applicability of Section 352, which provides for the exclusion of relevant evidence when the potential for undue prejudice substantially outweighs the evidence’s probative value. \(^{58}\)

In the wake of the new legislation, California courts have affirmed the constitutionality of the statute, holding that it does not violate defendants’ due process or equal protection rights. \(^{59}\) In People v. Fitch,\(^{60}\) for example, the appellate court held that admission of uncharged sex offense evidence under Section 1108 does not impair a defendant’s right to a fair trial because such evidence remains subject to the balancing test of Section 352. \(^{61}\) The court further held that Section 1108 does not violate equal protection rights because the statute withstands rational-basis scrutiny. \(^{62}\)

\(^{56}\) See CAL. EVID. CODE § 1108 (West 2004) (setting forth evidentiary rule for admission of prior sexual offense evidence). Section 1108(a) states: “In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.” Id.; see also People v. Fitch, 63 Cal. Rptr. 2d 753, 759 (Ct. App. 1997) (describing policy motivation behind amendment to Evidence Code). The evidentiary reform resulted from a legislative determination that “the need for this evidence is ‘critical’ given the serious and secretive nature of sex crimes and the often resulting credibility contest at trial.” Fitch, 63 Cal. Rptr. 2d at 759.

\(^{57}\) See CAL. EVID. CODE § 1108, 1995 Legislation Historical and Statutory Notes (West 2004) (clarifying intent of section 1108). A letter written by Assembly Member Rogan, author of the evidentiary amendment, emphasizes the intent to follow the Federal Rules of Evidence 413-15. Id. This letter also points out that while the new amendment supercedes section 1101’s general ban on character or disposition evidence, section 1108 remains subject to other provisions of the Evidence Code such as hearsay restrictions and the balancing test of section 352. Id. Rogan clarifies that there are no exacting requirements of similarity between the prior acts and those charged, but rather both must be sexual offenses as described by the statute and the evidence must be “rationally probative” to the case at bar. Id.

\(^{58}\) See CAL. EVID. CODE § 1108 (West 2004) (stating mandatory application of section 352); CAL. EVID. CODE § 352 (West 2004) (setting forth evidentiary balancing test). Section 352 provides: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” CAL. EVID. CODE § 352.

\(^{59}\) See, e.g., People v. Falsetta, 986 P.2d 182, 190 (Cal. 1999) (holding “court’s discretion to exclude propensity evidence . . . saves section 1108 from defendant’s due process challenge”); People v. Vichroy, 90 Cal. Rptr. 2d 105, 108 (Ct. App. 1999) (affirming holding of prior cases stating constitutionality of section 1108); Fitch, 63 Cal. Rptr. 2d at 760-61 (holding section 1108 does not violate due process or equal protection clauses).

\(^{60}\) 63 Cal. Rptr. 2d 753 (Ct. App. 1997).

\(^{61}\) Id. at 760 (holding section 1108 does not violate Due Process Clause). The court held that section 352 provides a check on the admission of uncharged sex offense evidence that preserves defendants’ due process rights. Id.

\(^{62}\) Id. at 761 (holding section 1108 withstands relaxed analysis of rational basis test). The court held that a rational basis for the statute resulted from the Legislature’s determination that, “the nature of sex offenses,
Recently, several California courts have also held that admission of propensity evidence necessitates a limiting jury instruction to prevent the misuse of such evidence. While similar offense evidence is admissible under Section 1108 to show a defendant’s propensity to commit sex crimes, such evidence cannot be used as a substitute for proof of the current crime charged. Therefore, judges must instruct juries that propensity evidence alone cannot meet the prosecution’s burden of proving the elements of the charged offense.

California case law also requires appellate courts to consider certain factors when examining a lower court’s decision to admit evidence of uncharged sex crimes under Section 352’s balancing test. In People v. Branch, the appellate court held that the lower court properly admitted propensity evidence after weighing the probative value of such evidence against the following factors: “(1) the inflammatory nature of the uncharged conduct; (2) the possibility of confusion of issues; (3) remoteness in time of the uncharged offenses; and (4) the amount of time involved in introducing and refuting the evidence of uncharged offenses.” The court further emphasized both their seriousness and their secretive commission which results in trials that are primarily credibility contests, justification of the admission of relevant evidence of a defendant’s commission of other sex offenses.”

63. See, e.g., Falsetta, 986 P.2d at 194-95 (describing need to properly instruct jury on restricted use of propensity evidence); People v. James, 96 Cal. Rptr. 2d 823, 830-31 (Ct. App. 2000) (holding conviction improper where based solely on defendant’s propensity); People v. Orellano, 93 Cal. Rptr. 2d 866, 870 (Ct. App. 2000) (reversed due to improper jury instruction limiting use of propensity evidence).

64. See James, 96 Cal. Rptr. 2d at 833 (emphasizing requirement for jury to find ultimate facts beyond a reasonable doubt to support conviction). The James court opined that, “it is not proper to instruct the jury that if it finds the defendant committed other similar offenses it may infer he was disposed to commit and did commit the current offense.” Id. at 830-31. To better safeguard the due process rights of defendants, the court suggested the following instruction:

If you conclude [by a preponderance of the evidence] the defendant committed an uncharged offense, you may consider that evidence and weigh it together with any other evidence received during the trial to help you determine whether the defendant is guilty of the charged crime. The weight and significance of any evidence are for you to decide. However, if you find the defendant committed any or all of the uncharged offenses, that is not sufficient, by itself, to prove he committed the charged crime. You may not find the defendant guilty unless you are satisfied that each element of the charged crime has been proven beyond a reasonable doubt.

Id. at 833 n.8.

65. See supra note 64 and accompanying text (outlining jury instructions recommended in James); see also Falsetta, 986 P.2d at 194 (describing two essential aspects of jury instructions regarding propensity evidence). The Falsetta court suggested first that the jury instruction should indicate that the jury could use the prior sex offense evidence to find that defendant had a propensity to commit similar crimes, which in turn could show that he committed the charged offenses. Falsetta, 986 P.2d at 194. Second, to help ensure that the defendant is convicted for the present charge and not his prior behavior, the jury must be instructed not to convict the defendant based solely on the evidence of his prior sex offenses. Id.

66. See People v. Branch, 109 Cal. Rptr. 2d 870, 875-76 (Ct. App. 2001) (balancing probative value of evidence against four factors); People v. Harris, 70 Cal. Rptr. 2d 689, 695-97 (Ct. App. 1998) (listing factors to consider in applying section 352 to section 1108 evidence).

67. 109 Cal. Rptr. 2d 870 (Ct. App. 2001).

68. Id. at 876-78 (weighing evidence against each factor). While the court held that the record did not evince any confusion of the issues, it noted that the potential for confusion increases when the prior offense did not result in a conviction. Id. at 877. With regard to the issue of “remoteness,” the court indicated that there are no specific time limits for assessing when evidence of an uncharged offense becomes inadmissible. Id. at
that Rule 352 only allows exclusion of relevant evidence if it is “unduly prejudicial” and the prejudice “substantially” outweighs the probative value of the evidence.69

B. Arizona’s Rule 404(c)

In 1997, Arizona codified an exception to its propensity rule to allow relevant character evidence in sexual misconduct cases.70 Unlike the California statute and the Federal Rules, Arizona’s Rule 404(c) provides an exception to the general ban on propensity evidence rather than creating a separate evidentiary rule.71 Rule 404(c) also differs from the Californian and Federal statutes in that 404(c) provides a more limited approach to the admissibility of propensity evidence by specifying criteria that must be met to admit such evidence.72 In addition, Rule 404(c) requires clear and convincing evidence that the defendant actually committed the relevant prior bad act to admit such evidence in a criminal case.73

878. The court further explained that remoteness is often “balance[d] out” when the prior act and the currently charged offense are very similar in nature. Id. Applying this reasoning, the court held that prior uncharged acts occurring thirty years prior to the offense charged were not too remote to be admissible because of the “remarkable similarity” between the acts. Id.

69. Id. at 878-79 (discussing concept of “undue prejudice”). The court clarified that to be excluded under section 352, the evidence must be more than inconvenient, undermining, or damaging to the opponent. Id. “[evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them . . . to reward or punish one side because of the jurors' emotional reaction.” Id. at 879 (quoting Vorse v. Sarasy, 62 Cal. Rptr. 2d 164, 170 (Ct. App. 1997)).

70. ARIZ. R. EVID. 404(c) (2002) (creating an exception to general ban on character evidence to prove conduct). Rule 404(c) states in relevant part:

In a criminal case in which a defendant is charged with having committed a sexual offense, or a civil case in which a claim is predicated on a party's alleged commission of a sexual offense, evidence of other crimes, wrongs, or acts may be admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged. Id. Rule 404(c) was intended to codify Arizona case law allowing propensity evidence in cases involving a sexual offense. See ARIZ. R. EVID. 404(c) Comment to 1997 Amendment (stating rationale behind exception).

71. See Robinson, supra note 9, at 1394 (describing differences between Arizona's rule and those of California and United States Congress). Robinson points out that Arizona's Rule 404(c) is similar to the recommendation made to Congress by the Judicial Conference regarding Federal Rules of Evidence 413-15. Id. The Judicial Conference suggested an exception to Federal Rule 404, rather than separate evidentiary rules. Id. at 1394 n.194.

72. See ARIZ. R. EVID. 404(c) (2002) (stating requirements for evidentiary exception to apply). In order for evidence of other crimes, wrongs, or acts to be admissible, Rule 404(c) requires that the court find the following:

(A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act. (B) The commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged. (C) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403.

Just as evidence admitted under Federal Rules 413 and 414 is subject to Rule 403, evidence admitted under Arizona Rule 404(c) is subject to the equivalent evidentiary balancing test of Arizona Rule 403.74 Unlike the Federal Rules, however, Rule 404(c) requires consideration of additional factors, beyond the scope of Arizona Rule 403, in determining the admissibility of propensity evidence.75 Rule 404(c) also requires the judge to provide limiting jury instructions regarding the proper use of any admitted propensity evidence.76

Arizona case law involving the application of Rule 404(c) demonstrates judicial sensitivity to the importance of analyzing propensity evidence under Rule 403.77 In State v. Garcia,78 for example, the court held that the trial court must balance the probative value of propensity evidence against the risk of unfair prejudice to the defendant in determining the evidence’s admissibility, even when the propensity evidence consists of prior acts the defendant committed against the same victim.79 Similarly, in State v. Arner,80 the court emphasized the required applicability of Rule 403 to evidence offered under Rule 404(c), particularly in light of Rule 404(c)’s more relaxed standard of proof for admission of propensity evidence.81 The court pointed out that while propensity evidence is presumably admissible when there is a “reasonable basis” to infer that the defendant’s criminal sexual proclivity is probative, such evidence remains subject to assessment and exclusion under Rule 403.82
VI. MASSACHUSETTS EVIDENTIARY LAW

There is some ambiguity regarding the admissibility of propensity evidence in sexual misconduct cases in Massachusetts. At first glance, the law appears settled in this area, prohibiting the admission of prior bad acts evidence to show the defendant’s bad character or propensity to commit crimes similar to those charged. Under this view of the law, prior bad acts are only admissible for some other purpose, such as evidence of the defendant’s state of mind, common scheme, pattern of operation, absence of mistake, identity, intent, or motive. Case law following this evidentiary restriction also requires the court to conduct a balancing test of the evidence to ensure that the evidence’s prejudicial effects do not substantially outweigh its probative value. In addition, limiting jury instructions are often necessary to ensure proper use of the prior bad acts evidence.

Despite this purportedly well-settled and long-standing ban on propensity evidence, some case law suggests that Massachusetts in fact has a lustful

83. See Commonwealth v. Hanlon, 694 N.E.2d 358, 365 n.5 (Mass. App. Ct. 1998) (describing current state of Massachusetts evidentiary law). “While prohibiting the admission of testimony to demonstrate a defendant’s propensity to commit the crime charged, our cases also . . . permit evidence of prior bad acts to demonstrate the defendant’s inclination or disposition, notwithstanding the closely related and in many contexts interchangeable use of the terms ‘propensity,’ ‘inclination,’ and ‘disposition.’” Id. (citations omitted).

84. See Richard W. Bishop, 17B MASS. PRAC. Prima Facie Case § 52.73 (4th ed. 2002 & Supp. 2003) (describing evidentiary rules involving evidence of character of defendant). While the defendant may ordinarily offer evidence to prove good character, the prosecution may not introduce evidence of prior bad acts to show bad character or propensity to commit a crime, except in rebuttal to character evidence admitted by the defendant. Id.; see also Commonwealth v. Stone, 73 N.E.2d 896, 898 (Mass. 1947) (emphasizing rule prohibiting admission of evidence merely to prove criminal disposition).

85. See Commonwealth v. Helfant, 496 N.E.2d 433, 440-41 (Mass. 1986) (listing “other purposes” allowing admissibility of prior bad acts evidence); see also Bishop, supra note 84 (describing permissible reasons for admitting prior bad acts evidence). Once the prosecution establishes that the evidence pertains to some “other purpose,” the judge must be satisfied that the government has shown by a preponderance of the evidence that “(1) the act occurred, and (2) that the defendant was the actor.” Bishop, supra note 84 (Supp. 2003). The court must also be satisfied that the prosecution has sufficiently shown that there is some proximity in time and place between the prior bad act and the crime charged. Id. Finally, the court must consider whether the prejudicial effect of the evidence outweighs its probative value. Id.


87. See Commonwealth v. Mills, 713 N.E.2d 1028, 1032 (Mass. App. Ct. 1999) (holding trial judge’s failure to instruct jury on limited use of evidence constituted reversible error); see also Commonwealth v. Marrero, 691 N.E.2d. 918, 924 (Mass. 1998) (approving instructions limiting jurors’ use of prior bad acts evidence). The Marrero court reasoned that the trial judge adequately limited the jury’s use of the evidence by telling jury members that “the bad acts evidence was relevant only as to the defendant’s state of mind, his pattern of conduct, his relationship with the victim, or his intent at the time of the victim’s death.” Marrero, 691 N.E.2d. at 924. In addition, the defendant’s rights were preserved by the judge’s repeated instruction that the defendant could only be convicted on the basis of evidence produced at trial, and that the prosecution retained the burden of proving all the essential elements of the crime beyond a reasonable doubt. Id.
disposition exception that remains in effect today. Initially, such an evidentiary exception existed only in cases involving prior bad acts against the victim in the present case. Courts admitted evidence of a defendant’s prior unlawful acts against the same victim in cases involving a charge of illicit sexual intercourse to demonstrate the defendant’s disposition to commit the crime. The judiciary also allowed evidence of prior bad acts to show that it was not unlikely that the defendant committed the alleged crime.

In Commonwealth v. King, the Massachusetts Supreme Judicial Court extended this exception to allow evidence of prior bad acts involving different victims. The King court specified that such evidence was only admissible when connected “in time, place, or other relevant circumstances to the particular sex offense for which the defendant is being tried.” While a majority of the court upheld the lower court’s admission of prior bad acts evidence for the purpose of showing a common pattern of conduct toward the victim and her brother, the dissent suggested that “[t]he only effect of showing that this defendant sexually abused the victim’s brother [was] to show that he [was] a lewd person who would be likely to commit the crime with which he [was] charged.

88. See Commonwealth v. Bemis, 136 N.E. 597, 598 (Mass. 1922) (describing exception to rule forbidding propensity evidence). The court stated:
   One of the recognized exceptions invariably followed in this commonwealth is that when a defendant is charged with any form of illicit sexual intercourse evidence of the commission of similar crimes by the same parties, though committed in another place, if not too remote in time, is competent to prove an inclination to commit the act charged in the indictment and is relevant to show the probable existence of the same passion or emotion at the time in issue (citations omitted).


90. See supra note 88 and accompanying text (describing rationale behind allowing prior bad acts evidence); see also supra note 24 and accompanying text (exploring lustful disposition exception).

91. See Piccerillo, 152 N.E. at 747 (discussing reasons for admitting evidence of “criminal intimacy” between defendant and victim).

92. 441 N.E.2d 248 (Mass. 1982).

93. Id. at 253 (affirming decision to admit evidence of defendant’s sexual conduct with victim not named in indictment). This decision marked the first time a Massachusetts court admitted evidence of a defendant’s prior bad acts against a child other than the one named in the indictment. Id. at 252. The court noted that several other states had admitted similar evidence and also reasoned that, in the case at bar, the uncharged conduct was “so closely related in time, place, age, family relationship of the victim, and form of the sexual acts” that the evidence was admissible to show a common pattern of conduct. Id. at 252-53.

94. Id. at 251-52 (discussing previous case law allowing admission of prior bad acts evidence). The King court indicated that because there was a “temporal and schematic nexus” between the prior bad acts and the crime charged, the trial judge did not err in allowing the evidence to be admitted. Id. at 253 (quoting Commonwealth v. Gallison, 421 N.E.2d 757, 766 (Mass. 1981)).

95. Id. at 256 (O’Connor, J., dissenting) (opposing admission of evidence of other crimes to show
In Commonwealth v. Hanlon, the Massachusetts Appeals Court again upheld the admission of evidence of uncharged sexual offenses the defendant committed against persons other than the victim. The court held that the trial court properly admitted the evidence to show the defendant’s pattern of behavior and ongoing plan, as well as to corroborate the victim’s testimony. In reaching its conclusion, the court also noted the doctrinal inconsistency within Massachusetts law that prohibits “propensity” evidence but allows prior bad acts evidence to show a defendant’s “inclination” or “disposition” to commit the charged act. Discussing the issue of remoteness, the court held that the uncharged sexual offense evidence was admissible despite a six to nine year gap separating those events from the currently charged offense. Finally, the court noted that by giving limiting jury instructions, the trial judge sufficiently cured any undue prejudice that may have resulted from admitting evidence of the defendant’s previous uncharged sexual misconduct.

VII. ANALYSIS

In an effort to provide more efficient justice to victims of sexual assault, Massachusetts should reform its rules of evidence in accordance with the Federal Rules of Evidence. Factors such as the high incidence of sexual assault, the secretive nature of the crime, and the unique considerations present criminal disposition). Justice O’Connor argued that the majority improperly weakened the long standing rule prohibiting propensity evidence, which is intended to protect defendants’ rights. Id. at 256-57.

97. Id. at 366 (discussing relevant case law supporting admission of such evidence). The Hanlon court upheld the trial court’s decision to admit evidence of uncharged sexual offenses against persons other than the complaining victim because “a schematic similarity and a temporal connection” existed between the prior acts and the offense charged. Id. In this case, the state convicted the defendant, a Roman Catholic Priest, of two counts of forcible rape of a child under the age of sixteen. Id. at 361. The trial court allowed testimony of persons other than the named victim who alleged the defendant had also abused them in a similar location and manner. Id. at 362-63.
98. Id. at 366 (describing rationale for admitting evidence).
99. Id. at 365 n.5 (highlighting inconsistency of Massachusetts case law in area of prior bad acts evidence). The court pointed out that while cases such as Helfant explicitly rejected the admissibility of propensity evidence, other Massachusetts cases such as Bemis and Piccerillo remain good law today and allow prior bad acts evidence to show the defendant’s inclination or disposition. Id.
100. Hanlon, 694 N.E.2d at 366 (noting lack of bright line test for measuring remoteness). The court held that the allowable time between the events is greater where there is particular similarity between the act charged and the prior offense. Id. Furthermore, the court noted that the uncharged sexual offense evidence was admissible despite the lengthy separation of time because the evidence demonstrated the defendant’s on-going pattern of behavior. Id. at 367.
101. Id. at 368 (noting jurors presumed to follow instructions). The trial judge instructed the jury that they were not to substitute evidence of the defendant’s prior bad acts as proof that the defendant committed the current crimes charged. Id. at 367-68. The court also instructed the jury that they could only consider such evidence on the issue of whether the defendant committed the charged offense as part of a common plan or scheme, and could not use the uncharged offense evidence as proof that the defendant possessed a criminal personality or propensity to commit crimes. Id. at 368.
102. Supra note 29 and accompanying text (outlining rationale behind the new federal rules).
in sexual assault litigation dictate the need for evidentiary reform. Particularly when the accused asserts consent as a defense or when there is minimal evidence to corroborate the victim’s allegation, the victim’s credibility is central to the case, and evidence of a defendant’s similar prior bad acts can be critical to successful litigation.

Massachusetts evidentiary law needs reform to create a more dependable system that provides consistent results. The judiciary should no longer have to stretch the “other purposes” doctrine to admit evidence of prior sexual misconduct. Likewise, victims of sexual assault should not have to rely on the judiciary’s ability or willingness to arbitrarily modify the existing rules.

Moreover, the fact that Massachusetts already allows propensity evidence in cases involving the same parties provides compelling support for the expansion of this exception. Case law already requires consideration of factors such as dissimilarity and remoteness in determining whether to admit such evidence; therefore, modifying the evidentiary law to allow propensity evidence in cases involving different victims poses little change. Furthermore, by following Arizona’s lead and codifying an exception to the general exclusionary rule, Massachusetts could develop more specific requirements that would better safeguard defendants’ rights while simultaneously providing additional judicial protection for sexual assault victims.

Following the guidance of Federal Rules 413 and 414 would ensure the constitutionality of any evidentiary reform in Massachusetts. Specifically, the continued applicability of other evidentiary requirements, including the necessary balancing of the evidence’s prejudicial effect versus its probative value, would protect defendants’ due process and equal protection rights. Also, by applying a standard similar to that set forth in Guardia, Massachusetts could establish a higher screening standard for uncharged conduct evidence by requiring courts to consider additional factors before admitting propensity evidence. Courts’ consideration of factors such as the similarity between the

103. Supra notes 29-30 and accompanying text (highlighting need for new rules and explaining essential nature of new rules).
104. Supra note 30 and accompanying text (noting difficulties present in most sexual assault cases).
105. Supra note 31 and accompanying text (discussing need for reliable justice in cases of sexual assault).
106. Supra note 23 and accompanying text (discussing erosion of “other purposes” doctrine resulting from expansive application).
107. Supra note 31 and accompanying text (emphasizing need for consistent and reliable justice).
108. Supra notes 88-89 and accompanying text (describing Massachusetts’ lustful disposition exception).
109. Supra note 88 and accompanying text (noting exception requires similarity in nature of crimes and lack of remoteness in time).
110. See supra notes 72-73 and accompanying text (describing Arizona’s more limited approach to admitting propensity evidence).
111. Supra note 42 and accompanying text (affirming constitutionality of rules 413 and 414).
112. See supra notes 42-43 and accompanying text (discussing applicability of Rule 403 balancing test to propensity evidence).
113. See supra note 44 and accompanying text (outlining factors to consider when applying Rule 403 to Rule 413 evidence).
crime charged and the prior crime committed, the proximity in time between the two incidents, and the frequency of the previous misconduct, would better ensure the admission of only evidence with substantial probative value.\textsuperscript{114}

Federal case law clearly demonstrates that courts should not blindly admit propensity evidence under Rules 413 and 414.\textsuperscript{115} Even in jurisdictions where there is a presumption in favor of admitting propensity evidence in sexual assault cases, such evidence must establish a clear pattern of similar conduct to that which the defendant is accused.\textsuperscript{116} When evidence is not sufficiently similar or specific, there is no justification for a presumption in favor of admission and courts should apply Rule 403’s balancing test with full force.\textsuperscript{117} Some jurisdictions provide additional protection against possible prejudice to the defendant by requiring Rule 403’s application in its undiluted form in all scenarios, regardless of the specificity or similarity of the propensity evidence.\textsuperscript{118} Massachusetts could follow either model in an effort to allow in propensity evidence while also maintaining appropriate protection for defendants.\textsuperscript{119}

The California and Arizona rules provide excellent models for Massachusetts evidentiary reform.\textsuperscript{120} The requirement for limiting jury instructions is particularly useful because it negates the concern that a defendant will be convicted solely on the basis of propensity evidence.\textsuperscript{121} These instructions also help preserve the government’s burden of proof, requiring that the prosecution prove each element of the crime beyond a reasonable doubt to justify a conviction.\textsuperscript{122}

Arizona’s higher standard of proof requiring that the government prove the defendant’s prior bad acts by clear and convincing evidence serves as an additional guide for Massachusetts.\textsuperscript{123} The specificity of Arizona’s rule exemplifies an effort to develop a consistent approach to admitting propensity evidence.\textsuperscript{124} The rule explicitly delineates the necessary factors for courts to consider in balancing the evidence’s prejudicial effect against its probative value, thereby offering sexual assault victims in Arizona access to a more

\textsuperscript{114} See \textit{supra} note 44 and accompanying text (listing variety of considerations to weigh in conducting balancing test).

\textsuperscript{115} See \textit{supra} notes 43-52 and accompanying text (describing standards set for reviewing and admitting propensity evidence).

\textsuperscript{116} \textit{Supra} note 51 and accompanying text (describing evidence warranting presumption in favor of admittance).

\textsuperscript{117} \textit{Supra} note 52 and accompanying text (discussing evidence not justifying presumption).

\textsuperscript{118} \textit{Supra} note 44 and accompanying text (rejecting lenient application of Rule 403).

\textsuperscript{119} See \textit{supra} notes 43-52 and accompanying text (outlining different standards for reviewing and admitting propensity evidence).

\textsuperscript{120} See \textit{supra} notes 56-76 and accompanying text (outlining evidentiary rules in California and Arizona).

\textsuperscript{121} See \textit{supra} notes 64-65 and accompanying text (discussing requirement for limited jury instructions).

\textsuperscript{122} See \textit{supra} notes 64-65 and accompanying text (discussing intended effects of limited jury instructions).

\textsuperscript{123} See \textit{supra} note 73 (describing Arizona’s standard of proof for admission of propensity evidence).

\textsuperscript{124} See \textit{supra} notes 72-75 and accompanying text (outlining Arizona’s statute).
dependable judicial system.\textsuperscript{125} Massachusetts should avail this type of system to sexual assault victims in its Commonwealth.\textsuperscript{126}

\section*{VII. CONCLUSION}

Federal Rules 413 and 414 offer sexual assault victims the protection they deserve while preserving defendants’ constitutional rights. States such as Arizona and California prove that these Federal Rules can serve as models for evidentiary reform at the state level. By following the basic framework of the Federal Rules and incorporating additional aspects of the statutes in Arizona and California, Massachusetts can offer a more reliable judicial system to victims of sexual violence. This proposed evidentiary reform maintains the integrity of American jurisprudence and ensures fairness to defendants, while better serving the needs of victims and protecting the community at large.

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\textsuperscript{125} Supra note 72 and accompanying text (listing requirements for courts to consider in balancing test).
\textsuperscript{126} Supra note 72 and accompanying text (outlining Arizona’s evidentiary rules pertaining to sexual assault cases).