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HE SAID, SHE SAID, SHE SAID:
WHY PENNSYLVANIA SHOULD ADOPT
FEDERAL RULES OF EVIDENCE 413 AND 414

"[T]hey persist in surviving—not only to survive, but to testify. The victims
 elect to become witnesses."1

I. Introduction

In 1998, a mother reported to police that her son’s uncle, Howard Nevison, had been molesting her seven-year-old son since 1993; the molesta-
tion began when the boy was just three years old.2 Nevison had threatened to kill the boy if he told anyone.3 The uncle was a “popular”
cantor at a New York temple.4 The defense attacked the boy’s credibility,
questioning his memory.5 The prosecution sought to introduce, and the
trial court admitted, evidence that Nevison had molested two other family
members forty years earlier.6

In Commonwealth v. Nevison,7 the Pennsylvania Superior Court re-
versed the trial court’s ruling and excluded the testimony from Nevison’s
other victims.8 The Pennsylvania Supreme Court denied the Common-
wealth’s appeal.9 Ultimately, the prosecution reached a plea agreement
with Nevison, dropping the charge of aggravated indecent assault.10
When Nevison accepted the deal, the victim’s family said that it was

1. Elie Wiesel, One Generation After 38 (Lily Edelman & Elie Wiesel trans.,
1970).
2. See Keith Herbert, August Trial Set for Ex-Cantor Accused of Molesting Nephew,
PHILA. INQUIRER, Apr. 29, 2005, at B1 (stating that “alleged abuse occurred during
holidays and family gatherings when Nevison visited relatives in Lower Merion”).
3. See John Grogan, One Outrage Follows Another, PHILA. INQUIRER, Sept. 25,
2006, at B1 (describing Nevison as “very large and very intimidating”).
4. See Keith Herbert, N.Y. Cantor Avoids Prison Term for Sexual Assaults on
Nephew, PHILA. INQUIRER, Sept. 20, 2006, at B4 (noting that judge called Nevison “a
perfect citizen” before this accusation).
5. See Gaiutra Bahadur, Nevison’s Lawyers Target Nephew’s Credibility, PHILA.
INQUIRER, Sept. 5, 2002, at B2 (explaining defense theory that boy’s memory was
unreliable due to head injuries and therapy).
6. See Herbert, supra note 2 (noting that trial court ruled evidence was admiss-
able to show “common scheme, plan or design”).
trial court’s admission of other crimes evidence), aff’d, 863 A.2d 1145 (Pa. 2004)
(unpublished table decision) (affirming exclusion of other crimes evidence).
8. See id. (excluding other crimes evidence).
ble decision) (affirming exclusion of other crimes evidence).
10. See Herbert, supra note 4 (noting that this was felony and most serious
charge). Under Pennsylvania law:

[A] person who engages in penetration, however slight, of the genitals or
anus of a complainant with a part of the person’s body for any purpose

(641)
"pleased that justice will be served . . . and that the trauma of a trial can be avoided for [the victim]."

But was justice achieved?

It is impossible to know what would have happened if the courts had allowed the other victims to testify about Nevison’s attacks on them: Would prosecutors still have made a deal or would they have gone to trial? After Nevison’s lawyers reached a plea agreement with the prosecutor, Montgomery County Judge Paul W. Tressler sentenced Nevison to probation. The judge said that Nevison "posed little threat to the com-

other than good faith medical, hygienic or law enforcement procedures commits aggravated indecent assault if:

1. the person does so without the complainant’s consent;
2. the person does so by forcible compulsion;
3. the person does so by threat of forcible compulsion that would pre-

vent resistance by a person of reasonable resolution;
4. the complainant is unconscious or the person knows that the com-

plainant is unaware that the penetration is occurring;
5. the person has substantially impaired the complainant’s power to ap-

praise or control his or her conduct by administering or employing, with-

out the knowledge of the complainant, drugs, intoxicants or other means

for the purpose of preventing resistance;
6. the complainant suffers from a mental disability which renders him

or her incapable of consent;
7. the complainant is less than 13 years of age; or
8. the complainant is less than 16 years of age and the person is four or

more years older than the complainant and the complainant and the per-

son are not married to each other.

18 PA. CONS. STAT. ANN. § 3125(a) (West Supp. 2006) (defining aggravated in-

decent assault). In his plea, Nevison did not admit his guilt for any crime, but did

admit that prosecutors would probably prevail at trial on misdemeanor charges.

See Herbert, supra note 4 (noting that Nevison entered “Alford plea” on charges of

indecency assault, simple assault, terrorist threats, corruption of minors and en-

dangering welfare of child, and that prosecutors dropped charge of aggravated

indecency assault).

11. Keith Herbert, An Uncle Admits Molesting His Nephew, PHILA. INQUIRER,

June 13, 2006, at B3 (noting that “victim’s parents said they were ‘pleased’ that

Nevison admitted to ‘unconscionable acts’ committed against their son”); see also

Keith Herbert, How the Child-Abusing Cantor Avoided Time in Prison, PHILA. INQUIRER,

Sept. 27, 2006, at B5 (noting that victim wanted case to end).

12. See Grogan, supra note 3 (arguing that sentence was unjust given “repul-

sive, unforgivable crime”); Herbert, supra note 11 (quoting First Assistant District

Attorney Risa V. Fermo who stated plea agreement “didn’t give a child molester a

pass, but it allows the 17-year-old man to get on with his life”).

13. See Tamara Larsen, Sexual Violence Is Unique: Why Evidence of Other Crimes

Should Be Admissible in Sexual Assault and Child Molestation Cases, 29 HAMLINE L. REV.

177, 208 (2006) (arguing that “admission of prior bad acts at trial is vital to a

prosecutor’s decision to move forward”); Herbert, supra note 11 (noting that judge

believed ruling excluding other crimes evidence “made it extremely difficult, if not

impossible, for the D.A. to prosecute the felony”).

14. See Herbert, supra note 4 (adding that judge ordered Nevison to visit

prison "so that he understands what lies ahead should he violate probation"). The

term of probation was twelve years. See id. (noting that judge also ordered Nevison

to have contact with children under age twelve).
15. Id. (describing judge’s statements at sentencing). Later, the judge explained that he did not sentence Nevison to jail because Nevison was “65, suffer[ed] from diabetes, and had a ‘spotless’ record,” and because psychiatrists had found that Nevison was not a pedophile. See Herbert, supra note 11 (noting that Nevison’s sentence “was in the low end of the state’s sentencing guidelines” and that “standard-range sentence could have included up to six months in jail”).

16. See 18 PA. CONS. STAT. ANN. § 3125(c)(1) (West Supp. 2006) (designating indecent sexual assault as second degree felony); 18 PA. CONS. STAT. ANN. § 1103 (West 1998) (providing that court may sentence person convicted of second degree felony to up to ten years); 42 PA. CONS. STAT. ANN. § 9795.1(b) (West Supp. 2006) (listing crimes that subject person to lifetime registration requirement). Even based on Nevison’s plea, the judge could have sentenced Nevison to up to nineteen years in jail. See Herbert, supra note 11 (noting that prosecutor acknowledged judge might also sentence Nevison to probation).

17. For a further discussion of sex crimes statistics, see infra notes 18-20 and accompanying text.

18. See U.S. Dep’t of Justice, Office of Justice Programs, Bureau of Justice Statistics, Criminal Victimization in the United States, 2004 Statistical Tables, tbl.26 (2004), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus0402.pdf (noting that there were 207,240 incidents of rape or sexual assault in United States in 2004). An incident is “[a] specific criminal act involving one or more victims and offenders.” U.S. Dep’t of Justice, Office of Justice Programs, Bureau of Justice Statistics, Criminal Victimization in the United States, 2004 Statistical Tables, Methodology (2004), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus/cvus04mt.pdf (explaining that “[f]or example, if two people are robbed at the same time and place, this is classified as two robbery victimizations but only one robbery incident”). A victimization is defined as “[a] crime as it affects one individual or household.” Id. (defining household as “[a] person or group of people meeting either of the following criteria: (1) people whose usual place of residence is the same housing unit, even if they are temporarily absent; (2) people staying in a housing unit who have no usual place of residence elsewhere”). “For personal crimes, the number of victimizations is equal to the number of victims involved.” Id. (defining personal crimes as “[r]ape, sexual assault, personal robbery, assault, purse snatching and pocket picking”). The data in this report was collected from the National Crime Victimization Survey. See id. (explaining methodology of survey).


Sex crimes prosecutions are particularly difficult. One study found that less than half of rape arrests lead to conviction, "making it 30 percent more likely that a robber is convicted than a rapist." Further, "over half of all rape prosecutions result in either a dismissal or an acquittal, almost double the number for murder and almost 30 percent higher than for robbery." Another study found that "90 percent of all child [sexual] abuse cases do not go forward to prosecution due to the trauma on the child victim and evidentiary/procedural factors." Because of the low rate of success, prosecutors may be reluctant to bring rape charges in the first place, fearing that societal stereotypes about rape victims make their cases "unwinnable."
In order to address the high number of sex crimes and assist in the prosecution of these crimes, Congress enacted Federal Rules of Evidence 413 and 414 in 1994.26 These rules facilitate admission of the defendant’s past acts of sexual assault in sexual assault cases and past acts of child molestation in child molestation cases.27

Federal Rules 413 and 414 were intended to be a model that states could use in reforming their rules of evidence related to sex crimes.28 Since the enactment of these federal rules, ten states have adopted versions of them; Pennsylvania is not one of these states.29 In addition, at least nine states have common law exceptions that admit propensity evidence in sex crimes cases.30 Pennsylvania has a “lustful disposition” exception, bringing a case” because “they are reluctant to spend scarce resources on cases where juries will not convict”.


27. See Fed. R. Evid. 413(a) (stating that “[i]n a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant’s commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant”); Fed. R. Evid. 414(a) (stating that “[i]n a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant’s commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant”).


29. See Joyce R. Lombardi, Because Sex Crimes Are Different: Why Maryland Should (Carefully) Adopt the Contested Federal Rules of Evidence 413 and 414 that Permit Propensity Evidence of a Criminal Defendant’s Other Sex Offenses, 34 U. Balt. L. Rev. 103, 116 (2004) (listing Alaska, Arizona, California, Colorado and Illinois as states that enacted rules in their entirety and listing Florida, Indiana, Louisiana, Missouri and Texas as states that enacted rules only with respect to child molestation cases).

30. See id. at 116, 110-11 (listing Arkansas, Washington, D.C., Georgia, Indiana, Nebraska, North Carolina, Oregon, West Virginia and Wisconsin as having common law “other sex crime exceptions”) (citing Mosley v. State, 929 S.W.2d 693, 695 (Ark. 1996)) (upholding admissibility of evidence that defendant had pleaded guilty to raping his stepdaughter in trial where defendant was accused of raping his daughter); Johnson v. United States, 610 A.2d 729, 730 (D.C. 1992) (affirming admissibility of evidence of defendant’s prior sexual abuse of three other teenage girls where defendant was charged with sexually assaulting two teenagers); Goin v. State, 571 S.E.2d 195, 198 (Ga. Ct. App. 2002) (upholding admissibility of evidence regarding prior conviction for rape, sodomy and sexual abuse as relevant to show defendant’s “lustful disposition, his bent of mind toward molesting children under the age of consent, and his course of conduct”); Kuchel v. State, 501 N.E.2d 1092,
1033 (Ind. 1986) (upholding admissibility of evidence of defendant’s “prior deviate conduct” because “evidence of former similar offenses is admissible in sex crimes involving a ‘depraved sexual instinct’”); State v. Stephens, 466 N.W.2d 781, 785-86 (Neb. 1991) (stating that “sexual crimes have consistently been classified as offenses in which evidence of other similar sexual conduct has been recognized as having independent relevancy”); State v. Reeder, 413 S.E.2d 580, 583 (N.C. Ct. App. 1992) (upholding admission of evidence regarding defendant’s prior sexual assault on young girls); State v. Fears, 688 P.2d 88, 90 (Or. Ct. App. 1984) (finding modus operandi evidence admissible to rebut defense of consent in “a case involving forcible sexual acts”); State v. Parsons, 589 S.E.2d 226, 234 (W. Va. 2003) (allowing other crimes evidence in child sexual assault cases as evidence of defendant’s lustful disposition); State v. Fishnick, 378 N.W.2d 272, 277-78 (Wis. 1985), aff’d, 378 N.W.2d 272 (Wis. 1985) (declining to revisit previous holding that “[a] ‘greater latitude of proof as to other like occurrences’ is clearly evident in Wisconsin cases dealing with sex crimes, particularly those involving incest and indecent liberties with a minor child”).

31. See Commonwealth v. Wattley, 880 A.2d 682, 686-87 (Pa. Super. Ct. 2005) (holding that common law “lustful disposition” exception remained valid even though it was not codified in Pennsylvania Rules of Evidence), appeal granted, 901 A.2d 498 (Pa. 2006). One justice dissented, arguing that by deciding not to adopt Federal Rules 413 and 414, the Pennsylvania Supreme Court had rejected the lustful disposition exception. See id. at 689 (McEwen, J., dissenting) (stating that he is “of the view that under the Pennsylvania Rules of Evidence, the evidence of appellant’s conviction in another jurisdiction, for acts which occurred subsequent to the offenses at issue in this trial, was inadmissible under the facts of this case”).

32. See Commonwealth v. Dunkle, 602 A.2d 830, 838-39 (Pa. 1992) (holding that testimony that defendant had watched victim showering and fondled her breasts prior to charged offense was admissible “[t]o show a passion or propensity for illicit sexual relations with the particular person concerned in the crime on trial”) (quoting McCormick, EVIDENCE § 190, at 449 (2d ed. 1972)); Wattley, 880 A.2d at 686-88 (allowing evidence of defendant’s conviction for sexually abusing his daughter in case where he was charged with similar crime); Commonwealth v. Knowles, 637 A.2d 331, 333 (Pa. Super. Ct. 1994) (stating that “[e]vidence of prior sexual relations between defendant and his or her victim is admissible to show a passion or propensity for illicit sexual relations with the victim”).

33. For a further discussion of why Pennsylvania should adopt Rules 413 and 414, see infra notes 38-75 and accompanying text. For a further discussion of consistency of Rules 413 and 414 with Pennsylvania law, see infra notes 175-97 and accompanying text.

34. For a further discussion of the distinguishing factors of sex crimes and the rationale behind enacting Federal Rules of Evidence 413 and 414, see infra notes 38-75 and accompanying text.

35. For a further discussion of potential concerns with implementing Federal Rules 413 and 414, see infra notes 76-138 and accompanying text.
the Pennsylvania Rules of Evidence to trends in Pennsylvania case law.36 Part V explores how several recently enacted Pennsylvania statutes, unlike the Pennsylvania Rules of Evidence, reflect an acknowledgement that sex crimes should be treated differently than other crimes.37

II. UNIQUE CHARACTERISTICS OF SEX CRIMES JUSTIFY ADOPTING FEDERAL RULES OF EVIDENCE 413 AND 414

A. Characteristics of Sex Crimes Lead to Focus on the Victim's Credibility

Sex crimes are different from other types of crimes.38 Most notably, sex crimes often lack witnesses because perpetrators choose to attack their victims in secluded locations.39 Furthermore, physical evidence is often lacking in sex crimes cases.40 This lack of physical evidence may be due to the victim's inability to physically resist his or her attacker.41 When the victim does not resist, there are frequently no visible physical injuries.42

36. For a further discussion of the tension between the Pennsylvania Rules of Evidence and trends in Pennsylvania case law, see infra notes 139-74 and accompanying text.

37. For a further discussion of how recently enacted Pennsylvania statutes recognize uniqueness of sex crimes, see infra notes 175-97 and accompanying text.

38. See Larsen, supra note 13, at 192-202 (arguing for change in Minnesota Rules of Evidence based on unique characteristics of sex crimes including delays in reporting, lack of physical evidence, societal views about sex crimes and reluctance to believe women and children); Lombardi, supra note 29, at 117 (stating that lack of witnesses and physical evidence distinguish sex crimes from other crimes); Todd, supra note 20, at 489-90 (arguing that sexual abuse of children is characterized by lack of physical injuries sustained by victims, "conspiracy of silence" among adults who fail to protect children and high recidivism rates among molesters).

39. See Lombardi, supra note 29, at 117 (noting that sex crimes "often take place in secret, leaving no witnesses"); Todd, supra note 20, at 502 (citing Press Release, U.S. Dep't of Justice, Sixty Percent of Convicted Sex Offenders Are on Parole or Probation: Rapes and Sexual Assaults Decline (Feb. 2, 1997), available at http://www.ojp.usdoj.gov/bjs) (noting that Department of Justice reported that "almost 60% of the rapes and sexual assaults took place in the victim's home or at the home of a friend, relative or neighbor, as reported by victims in the Bureau of Justice Statistics Survey").

40. See Larsen, supra note 13, at 197 (explaining that lack of physical evidence places additional emphasis on credibility); Lombardi, supra note 29, at 117 (noting lack of "current physical evidence" due to delays in reporting); Todd, supra note 20, at 497 (noting that sexually abused children "may exhibit no physical signs of harm").

41. See Larsen, supra note 13, at 197 (explaining that victims may not physically resist due to "fear of being further harmed or due to emotional trauma"). Further, child victims are less likely to physically resist than adult victims. See id. (explaining that children's inability to resist and elastic nature of their skin contribute to lack of physical injuries).

42. See Lynne Hecht Schafran, Barriers to Credibility: Understanding and Countering Rape Myths, in UNDERSTANDING SEXUAL VIOLENCE: THE JUDICIAL RESPONSE TO STRANGER AND NONSTRANGER RAPE AND SEXUAL ASSAULT, Tab 2, 9 (Nat'l Judicial Educ. Program 1994) (stating "[p]hysical injuries apart from the rape itself are rare and sexual assault leaves no visible physical 'evidence' different from consen-
Sexual assault victims often do not report the crime immediately.\textsuperscript{43} Adult victims hesitate to report the crime due to feelings of shame or fear that no one will believe them, or because they blame themselves for what happened.\textsuperscript{44} Child victims may not report sexual crimes immediately because they do not understand the significance of the sexual act or they fear that adults will not believe them.\textsuperscript{45} A delay in reporting may result in the disappearance of physical evidence.\textsuperscript{46}

Lack of physical evidence and witnesses makes the credibility of the victim and the accused the focus of the case.\textsuperscript{47} Some people are reluctant to believe that a rape occurred when there is no physical evidence that

\begin{itemize}
  \item sexual sexual activities\textquoteright;\textsuperscript{48}
  \item TASLITZ, supra note 21, at 6 (arguing that \textquotedblleft we demand corroboration in the form of physical evidence of force,	extquotedblright but that \textquotedblleft the majority of rape cases leave no wounds, not even bruises or scratches	extquotedblright;); Larsen, supra note 13, at 197 (noting that \textquotedblleft police often expect to find serious, visible injuries as proof to corrobore the rape\textquotedblright).

43. See Schafran, supra note 42, at 11 (noting that according to one study, of sixteen percent of women who report rape at all, approximately one-quarter report within twenty-four hours); Larsen, supra note 13, at 193 (arguing that delay in reporting damages victim's credibility).

44. See Schafran, supra note 42, at 12-15 (listing reasons for failure to report rape: \textquotedblleft Not knowing the assault was legally rape; [d]enial and suppression; [p]sychogenic amnesia, [f]ear of retaliation; [f]ear of being disbelieved and blamed; [f]ear of loss of privacy; [f]ear of the criminal justice system\textquotedblright;); see also TASLITZ, supra note 21, at 6 (stating \textquotedblleft many women are so shocked, ashamed, and fearful that they long delay reporting the crime\textquotedblright); Larsen, supra note 13, at 194 (explaining that \textquotedblleft self-blame is magnified in circumstances where, for example, the victim was drinking or invited the rapist into her home\textquotedblright).

45. See \textsc{John E. B. Myers, Legal Issues in Child Abuse and Neglect Practice} 137 (2d ed. 1998) (\textquotedblleft Some abused children are threatened into silence. Others are too embarrassed to tell. Some abused children suffer psychological trauma that interferes with disclosure.\textquotedblright;) (internal citations omitted); Larsen, supra note 13, at 196 (noting that adults frequently do not believe children who report sexual abuse); Todd, supra note 20, at 489 (referring to \textquotedblleft conspiracy of silence among adults in the home who look the other way or refuse to believe or protect the child\textquotedblright).

46. See James Wilson Harshaw III, Comment, \textit{Not Enough Time?: The Constitutionality of Short Statutes of Limitations for Civil Child Sexual Abuse Litigation}, 50 \textit{Ohio St. L.J.} 753, 764 (1989) (noting that physical evidence in child molestation cases \textquotedblleft disappears quickly\textquotedblright;); see also Larsen, supra note 13, at 197 (explaining that evidence disappears when victims wash their bodies and clothes, evidence of date rape drugs disappears over time, and evidence in general may become tainted over time); David P. Leonard, \textit{Character and Motive in Evidence Law}, 34 \textit{Law. L.A. L. Rev.} 439, 490 (2001) (noting that \textquotedblleft physical evidence . . . often has been destroyed by the time the [sexual] crime is reported and investigated\textquoteright;).

47. See TASLITZ, supra note 21, at 6 (\textquotedblleft With rape, the victim's truthfulness is almost always challenged: she is covering a pregnancy, hiding an affair, seeking revenge for advances spurned. Or the problem is her character: a slut, drug addict, 'nut' case, or congenital liar. Consequently, we demand corroboration. . . . Yet, the majority of rape cases leave no wounds. . . .\textquotedblright;); Larsen, supra note 13, at 193 (\textquotedblleft It is not uncommon for victims of rape and child molestation to delay reporting the crime to authorities; thus, reducing their credibility.\textquotedblright;); Lombardi, supra note 29, at 117 (stating \textquotedblleft sex offense cases often result in a credibility contest between two parties, between whom there is usually a great disparity of power\textquotedblright;).
indicates that the victim resisted. Delays in reporting may cause the jury to question the credibility of the victim, a problem which, in some states, is magnified by jury instructions. Victims are often at a disadvantage because many people do not want to believe accusations of rape and child molestation. Furthermore, society has historically viewed women and children, who comprise the majority of sexual assault and child molestation victims, as less credible than men.

48. See Schafran, supra note 42, at 9-10 (arguing "[m]any judges and juries want evidence of physical damage, which they perceive as proof of the victim's lack of consent"); see also Taslitz, supra note 21, at 7 (noting that while law no longer requires corroboration, "juries demand corroboration"); Michelle J. Anderson, Reviving Resistance in Rape Law, 1998 U. ILL. L. REV. 953, 991 (1998) (arguing that women should resist attackers in order to prevent rape, create evidence of lack of consent and reduce their own psychological trauma).

49. See STAFF OF S. COMM. ON THE JUDICIARY, 103d CONG., THE RESPONSE TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE 2 (Comm. Print 1993) (quoting "[j]uries, and some of the others, are routinely subject to legal hurdles other victims will never face"); see also PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS 4.13A(3) (2005) (stating that jury "must not consider [name of victim]'s [failure to make] [delay in making] a complaint as conclusive evidence that the act did not occur or that it did occur but with [his] [her] consent"); PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS 4.13A(2):

The evidence of [name of victim]'s [failure to complain] [delay in making a complaint] does not necessarily make [his] [her] testimony unreliable, but may remove from it the assurance of reliability accompanying the prompt complaint or outcry that the victim of a crime such as this would ordinarily be expected to make. Therefore, the [failure to complain] [delay in making a complaint] should be considered in evaluating [his] [her] testimony and in deciding whether the act occurred [at all] [with or without [his] [her] consent].

Id.; PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS 4.13A(3) (stating that "[name of victim]'s failure to complain [at all] [promptly] [and the nature of any explanation for that failure] are factors bearing on the believability of [his] [her] testimony and must be considered by you in light of all the evidence in the case"). Instruction 4.13 "is not appropriate where a child or a person otherwise incapable, by mental infirmity, of promptly reporting the incident is the alleged victim." PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS 4.13A, advisory committee's note (clarifying application of 4.13A).

50. See Schafran, supra note 42, at 34 (explaining that women subconsciously think: "[l]f I can distance myself from you—if I can tell myself that I would never go to a bar or a man's apartment or accept a ride from someone I only knew slightly, then I don't have to acknowledge my own vulnerability"); Larsen, supra note 13, at 198 (explaining that women in particular do not want to believe that such horrible crimes are possible); Julie A. Wright, Using the Female Perspective in Prosecuting Rape Cases, 29-FEB PROSECUTOR 19 (1995) (arguing female jurors feel need to "reassure themselves that they are safe by distinguishing themselves from the victim and blaming the victim for what has happened to her").

51. See Larsen, supra note 13, at 199 (quoting Christie Floyd, Admissibility of Prior Acts Evidence in Sexual Assault and Child Molestation Cases in Kentucky: A Proposed Solution that Recognizes Cultural Context, 38 BRANDEIS L.J. 133, 150 (1991)) (noting "females comprise 93% of sexual assault victims and 77% of child molestation victims" and arguing that "[w]omen's accusations were often attributed to a desire for money, marriage, or to attain personal revenge, unconscious wishes for the sexual
In addition, jurors may doubt the credibility of the victim if the circumstances of the case do not match their preconceived notions of what a rapist and a rape victim should look like. In particular, people are reluctant to believe a victim who was under the influence of alcohol or drugs during the rape, had a prior relationship with the attacker, had filed a rape complaint before or was mentally disabled. Knowing that people hesitate to believe certain vulnerable individuals, some rapists seek out victims who they think will appear uncredible.

In addition to the other problems relating to credibility determinations, victims of sex crimes also face the unique challenge of convincing a jury that they did not consent to the sexual act. In the words of one rape victim:

experience, and masochistic tendencies`). The Kobe Bryant and Michael Jackson cases provide evidence that people still make assumptions about women and children who accuse a rich person of sexual assault or molestation. See id. at 199-200 (stating "[m]edia reports of both allegations commonly included accusations that the victims were only seeking to get money from the celebrities"); see also STAFF OF S. COMM. ON THE JUDICIARY, 103rd CONG., THE RESPONSE TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE 27 (Comm. Print 1993) (stating female rape victims face prejudice when "police officers refuse to take a report; prosecutors encourage defendants to plead to minor offenses; judges rule against victims in evidentiary matters; and juries, despite instructions to the contrary, continue to lay the blame on the survivor").

52. See Schafran, supra note 42, at 1-2 (arguing that in "stereotyped narrative about 'real rape'... rape is an infrequent crime in which a degenerate, sex-starved, knife-wielding stranger jumps from the bushes to attack a blameless, nude, young woman"); see also TASLITZ, supra note 21, at 8, 15-43 ("Whom jurors believe turns on the consistency of each witness's testimony with the plausible stories that juries create based upon their preexisting stock."); Larsen, supra note 13, at 200-01 n.145 (noting that "mythical" rape victim is "timid, beautiful, and most likely crying or otherwise visibly upset" and mythical rapist is "African American, Hispanic, poor, or uses poor grammar").

53. See Larsen, supra note 13, at 195 (noting people fail to focus on fact that these characteristics also increase victim's vulnerability); see also TASLITZ, supra note 21, at 28 (noting media "focus on stranger rapes" makes people skeptical about acquaintance rape); id. at 39 (noting "arguments that the woman . . . consumed alcohol decrease the likelihood that people will that find there was a rape"); Schafran, supra note 42, at 30-31 (arguing "[w]omen who drink to excess are held responsible for the men's behavior as well as their own").

54. See Bonnie Brandl and Julie Rozwadowski, Responding to Domestic Abuse in Later Life, 5 Marq. Elder's Advisor 108, 117 (2003) ("Often abusers look for victims who are not competent or not considered 'good reporters' because they see them as easy prey."); David P. Bryden and Sonja Lengnick, Rape in the Criminal Justice System, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1358 (1997) (noting that "a study of gang rape found that the rapists usually select victims known to have a 'bad reputation'"); Larsen, supra note 13, at 195 (indicating convicted rapists have said some rapists intentionally choose victims with credibility problems).


Alleged consent by the victim is rarely an issue in prosecutions for other violent crimes—the accused mugger does not claim that the victim freely handed over this wallet as a gift—but the defendant in a rape case often
Rape is the only felony that places the onus on the survivor. If an assailant held you at knifepoint, asked you for your wallet, and you complied, there is no question that a crime was committed. You would not be asked if you had consented. You would not be asked if you had tried to resist. Only survivors of rape are asked these questions.\(^{56}\)

Furthermore, rape victims also face questions about their prior sexual history, while victims of other crimes do not have to answer questions about their past.\(^{57}\) Although rape shield laws limit the admission of evidence about the victim’s sexual history, they do not completely protect the victim from inquiries into the victim’s sexual past.\(^{58}\) Consequently, the

... contends that the victim engaged in consensual sex and then falsely accused him.

\textit{id.}; Lucy Berliner, \textit{Sex Offenders: Policy and Practice}, 92 Nw. U. L. Rev. 1203, 1204 (1998) ("It is the issue of consent, whether by virtue of capacity to consent or because there is coercion, that defines rape and child molestation as crimes."); Larsen, supra note 13, at 193 (noting reluctance of victims to report rape).


57. See Staff of S. Comm. on the Judiciary, 103d Cong., \textit{The Response to Rape: Detours on the Road to Equal Justice} 6 (Comm. Print 1993) ("We must demand to know why prior sexual history is relevant in a rape case, when prior financial history is irrelevant in a robbery case."); Michelle J. Anderson, \textit{Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine}, 46 Vill. L. Rev. 907, 936 (2001):

Women know what has happened to rape victims in the past and what often continues to happen today: embarrassing questions by the police and prosecutors in private and by defense attorneys in public about a victim’s sexual history, the implicit argument that the woman assumed the risk of sexual violence by looking or acting ‘provocatively’ and the focus on the woman’s failure to employ sufficient resistance against the man she now claims attacked her.


58. See Michelle J. Anderson, \textit{From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law}, 70 Geo. Wash. L. Rev. 51, 55 (2002) (arguing exceptions in rape shield laws “routinely gut the protection they purport to offer”). For example, the federal shield and state shields allow evidence of the victim’s sexual history when it is offered to show consent and when it involves sex with the defendant. \textit{See id.} at 56 (arguing this exception “cracks the shield because men with whom the complainant has been previously intimate commit 26% of all rapes”). An exception in some shield laws that allows evidence of the victim’s sexual history when “its exclusion would violate defendant’s constitutional rights,” is problematic because courts “routinely misinterpret and exaggerate the scope of the defendant’s constitutional right to inquire into the complainant’s sexual history, particularly when the complainant is deemed promiscuous with the defen-
defense's introduction of this evidence makes it more difficult for victims to convince the jury that they did not consent to the sexual act.\textsuperscript{59}

Finally, the increasing emphasis placed on DNA evidence often means that a lack of DNA evidence calls into question the victim's credibility.\textsuperscript{60} This response to lack of DNA evidence ignores the possibility that DNA evidence is missing because the rapist used a condom or the evidence disappeared before the victim reported the crime.\textsuperscript{61} Because people have come to expect DNA evidence, a lack of such evidence undermines the victim's credibility.\textsuperscript{62}

B. Recidivism Among Sex Offenders

Another distinguishing factor of sex crimes is the high recidivism rates among sex offenders.\textsuperscript{63} According to a 2003 Department of Justice report, sex offenders were rearrested for new sex crimes within three years

...
of release at a rate four times greater than other released convicts.\textsuperscript{64} Department of Justice data concluded that "[r]eleased rapists were 10.5 times as likely as non-rapists to be arrested for rape" and that people convicted of sexual assault were "7.5 times as likely as those convicted of other crimes to be arrested for a new sexual assault."\textsuperscript{65} Furthermore, these statistics may even underestimate recidivism rates among sex offenders because of the underreporting problem.\textsuperscript{66} One study found that "[i]ncarcerated rapists have usually raped two or three times before being apprehended.”\textsuperscript{67} In addition, "[a]n interview with 377 men who were guaranteed confidentiality and immunity from prosecution revealed each having engaged in sexual activity with an average of 19.8 young girls and 150.2 young boys within their lifetimes."\textsuperscript{68}

C. Addressing Unique Characteristics of Sex Crimes Through Federal Rules of Evidence 413 and 414

In order to address the problems created by the unique characteristics of sex crimes, Congress enacted Federal Rules of Evidence 413 and 414.\textsuperscript{69} The section-by-section analysis of the rules stated that "[t]he willingness of the courts to admit similar crimes evidence in prosecutions for serious sex crimes is of great importance to effective prosecution in this area, and hence to the public’s security against dangerous sex offend-

\textsuperscript{64} See Lombardi, supra note 29, at 118-19 (arguing that “[s]ex offenders are unique: other criminals usually do not commit sex offenses”).

\textsuperscript{65} Todd, supra note 20, at 513 (citing Press Release, U.S. Dep’t of Justice, supra note 19) (noting sex offenders "are substantially more likely than other violent offenders to be rearrested for a new violent sex offense"). The Justice Department also found, however, that sex offenders are not greater recidivists than other criminals. See id. (finding sex offenders "have a generally lower rate of re-arrest than other violent offenders").

\textsuperscript{66} See Lombardi, supra note 29, at 120 (noting that "studies consistently show that many convicted child molesters each have committed numerous, even hundreds, of sex offenses that are never reported"); Recent Legislation: Criminal Law—Sex Offender Notification Statute—Washington State Community Prevention Act Serves as Model for Other Initiatives by Lawmakers and Communities—1990 Wash. Laws Ch. 3, §§ 101-1406 (Codified as Amended in Scattered Sections of Wash. Rev. Code), 108 HARV. L. REV. 787, 790 (noting that “sex offenses are dramatically underreported crimes”); Sherry L. Scott, Comment, Fairness to the Victim: Federal Rules of Evidence 413 and 414 Admit Propensity Evidence in Sexual Offender Trials, 35 HOU. L. REV. 1729, 1741 (1999) (“Sex crimes are highly underreported.”).

\textsuperscript{67} Scott, supra note 66, at 1740 (concluding that “sexual offenses involve highly repetitive behavior”).

\textsuperscript{68} Id. (asserting that some child molesters "are habitual offenders, basically incurable, and should be incarcerated for life").

\textsuperscript{69} See Fed. R. Evid. 413, 414 (explaining admissibility of evidence of other similar crimes in sexual assault and child molestation cases). For the relevant text of these rules, see supra note 27. At the same time, Congress also enacted Rule 415 that pertains to civil suits involving sexual assault or child molestation. See Fed. R. Evid. 415 (allowing, in civil cases based on sexual assault or child molestation, evidence of defendant’s "commission of another offense or offenses of sexual assault or child molestation").
ers.”

This report indicated that other crimes evidence is necessary to help the jury assess the credibility of the victim. Representative Susan Molinari, the Principal House Sponsor of the bill, recognized that rules 413 and 414 were necessary to help establish the credibility of the victim, especially when consent was at issue. Further, the analysis of the bill stated that evidence of prior sex crimes is an indication “that the defendant had the motivation or disposition to commit sexual assaults, and lack of inhibitions against acting on such impulses.”

Like Congress, the Pennsylvania legislature has recognized that sex offenders pose a particular danger of recidivism, and are likely to reoffend even after having been convicted. The Pennsylvania legislature, however, does not have the power to adopt new rules of evidence that are in tension with the rules created by the Pennsylvania Supreme Court.

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70. 137 CONG. REC. S3238-99 (daily ed. Mar. 13, 1991) (noting “the approach of the courts [regarding admission of other crimes in sex crimes cases] has been characterized by considerable uncertainty and inconsistency”).

71. See id. (noting need for other crimes evidence particularly in child molestation cases, where defense attacks credibility of child victims).

72. See 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) (arguing centrality of credibility is distinguishing characteristic in sex crimes cases). Representative Molinari said:

Alleged consent by the victim is rarely an issue in prosecutions for other violent crimes—the accused mugger does not claim that the victim freely handed over [his] wallet as a gift—but the defendant in a rape case often contends that the victim engaged in consensual sex and then falsely accused him.

Id. (arguing that “[k]nowledge that the defendant has committed rapes on other occasions is frequently critical in assessing the relative plausibility of these claims and accurately deciding cases that would otherwise become unresolvable swearing matches”). Senator Dole also stressed the importance of evidence of other sex crimes in aiding the jury in assessing the credibility of the complainant. See 140 CONG. REC. S10276 (daily ed. Aug. 2, 1994) (arguing that in child molestation cases “it is crucial that all relevant evidence that may shed some light on the credibility of the charge be admitted at trial”).

73. 137 CONG. REC. S3239 (daily ed. Mar. 13, 1991) (noting that other crimes evidence “could be considered for its bearing on any matter to which it is relevant”). In cases of child molestation, evidence of the defendant having previously molested other children is “exceptionally probative because it shows an unusual disposition of the defendant—a sexual or sadosexual interest in children—that simply does not exist in ordinary people.” 140 CONG. REC. H8991 (daily ed. Aug. 20, 1994) (statement of Rep. Molinari) (arguing Rules 413 and 414 were “critical to the protection of the public from rapists and child molesters”).

74. See 42 PA. CONS. STAT. ANN. § 9791 (West Supp. 2006) (finding that “sexually violent predators pose a high risk of engaging in further offenses even after being released from incarceration or commitments”).

75. See PA. CONST. art. V, § 10(c) (“The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts. . . . All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.”).
III. ADDRESSING CRITICISMS OF RULES 413 AND 414

Critics of Federal Rules 413 and 414 argue that these rules unfairly use other crimes evidence to prove the bad character of the defendant.\(^\text{76}\) Second, opponents charge that the rules admit evidence that is prejudicial to the defendant.\(^\text{77}\) Third, critics have expressed concerns about the admission of evidence regarding uncharged acts and acts that occurred many years prior to the charged offense.\(^\text{78}\) Fourth, some argue that rape shield laws that exclude evidence of the victim's sexual past mandate similar treatment of the defendant's sexual past.\(^\text{79}\) Finally, critics have argued that Rules 413 and 414 are unconstitutional.\(^\text{80}\)

\(^{76}\) See 140 CONG. REC. S10276 (daily ed. Aug. 2, 1994) (statement of Sen. Biden) (arguing Rules 413 and 414 would allow prosecutor to admit other crimes evidence to show defendant "is a bad guy").

\(^{77}\) See id. (arguing that Rules 413 and 414 would "allow total, uncorroborated, unsubstantiated testimony about something that could have happened—anything—from the day before to 30 years before into a trial"); 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 Encouraging Conviction Based on Character Rather Than Guilt?, 33 TEX. TECH. L. REV. 1167, 1190 (2002) (arguing "evidence that the defendant has committed similar acts of sexual misconduct...serves only to demonstrate the defendant's bad character or propensity to commit such acts" and provides no proof that "defendant committed the charged act").

\(^{78}\) See 140 CONG. REC. S10277 (daily ed. Aug. 2, 1994) (statement of Sen. Biden) (giving example that under new rules, witness can testify that 47-year-old defendant tried to force her to have sex with him when he was 15 years old); King, supra note 77, at 1190 (quoting Dowling v. United States, 493 U.S. 342, 362 (1990) (Brennan, J., dissenting)) (arguing that where uncharged prior acts are admitted, "the jury may believe that the defendant 'should be punished for that activity even if he is not guilty of the offense charged'").

\(^{79}\) See Thomas C. Goldstein, et al., RELEVANCE AND ITS LIMITS, in THE EVIDENCE PROJECT: PROPOSED REVISIONS TO THE FEDERAL RULES OF EVIDENCE WITH SUPPORTING COMMENTARY, 171 F.R.D. 330, 490 (Thomas C. Goldstein ed., 1997) (arguing rape shield laws spare victims embarrassment of discussing sexual history but Federal Rules 413 and 414 "disregard any such rights when applied to a defendant"); Goldstein argues that rape shield laws de-emphasize the probative value of prior sexual history, but Rules 413 and 414 stress the high probative value of prior sexual history. See id. (arguing "the legislature has contradicted itself"); see also Rosanna Cavallaro, A Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape, 86 J. CRIM. L. & CRIMINOLOGY 815, 854 (1996) (stating "the rationale for halting the practice of impeaching a complainant's testimony as to consent by use of her prior sexual history is applicable, with nearly equal force, to the admission of prior bad acts against a rape defendant"); Adam Kargman, Note, Three Maelstroms and One Tweak: Federal Rules of Evidence 413 to 415 and Their Arizona Counterpart, 41 ARIZ. L. REV. 963, n.242 ("By allowing plaintiffs [and prosecutors] to dirty up defendants, but prohibiting defendants from dirtying up plaintiffs [and complainants], the federal rules tilt trials heavily against defendants.").

\(^{80}\) See, e.g., United States v. LeMay, 260 F.3d 1018, 1031 (9th Cir. 2001) (rejecting defendant's arguments that Rule 414 violated due process, equal protection and Eighth Amendment); United States v. Mound, 149 F.3d 799, 801 (8th Cir. 1998) (rejecting defendant's arguments that Rule 413 violated due process and equal protection); United States v. Castillo, 140 F.3d 874, 878 (10th Cir. 1998) (rejecting defendant's arguments that Rule 414 violated due process, equal protec-
A. Rules 413 and 414 Are Not About Bad Character

Contrary to the assertions of critics, Rules 413 and 414 are not about proving bad character in general.\(^{81}\) Rather than allowing evidence of just any uncharged bad acts, the rules focus only on relevant similar sexual acts.\(^{82}\) Only evidence of other crimes of the same type as the crime charged is admissible under the rules.\(^{83}\)

B. Rules 413 and 414 Do Not Allow Evidence That Is Overly Prejudicial

Critics who argue that evidence of other acts will be prejudicial miss the point. Evidence should not be excluded merely because it is prejudicial; rather, it should be excluded only if its probative value is outweighed by its prejudicial effect.\(^{84}\) Critics who argue that admission of evidence of other acts is overly prejudicial give too little weight to the fact that Rules 413 and 414 allow, but do not require, the admission of other acts evidence in sex crimes cases.\(^{85}\)

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\(^{81}\) See, e.g., United States v. Enjady, 134 F.3d 1427, 1433-34 (10th Cir. 1998) (rejecting defendant's arguments that Rule 413 violated due process and equal protection).

\(^{82}\) See 137 CONG. REC. S3240 (daily ed. Mar. 13, 1991) (adding that rules do not allow admission of evidence merely to show defendant "has a general disposition to engage in crime").

\(^{83}\) See id. (stressing that "the evidence must relate to other crimes by the defendant that are of the same type—sexual assault or child molestation—as the crime with which he is formally charged"); David J. Karp, Evidence of Propensity and Probability in Sex Offense Cases and Other Cases, 70 CHI.-KENT L. REV. 15, 22 (1994) (noting "[t]his limits the number of incidents for which evidence may be offered . . . [and] tends to ensure that the uncharged acts will have a high degree of probative value. . . ."). Karp wrote Rules 413 and 414 while he was senior counsel at the Office of Policy Development of the U.S. Department of Justice. See 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) (stating Karp's address "provided a detailed account of the views of the legislative sponsors and the administration concerning the proposed reform, and should also be considered an authoritative part of its legislative history").

\(^{84}\) See 137 CONG. REC. S3240 (daily ed. Mar. 13, 1991) (stressing that "Rules [413 and 414] do not authorize an open-ended inquiry into all the 'bad acts' the defendant may have committed in the course of his life"); Karp, supra note 82, at 22 (noting that "requirement of similarity in kind to charged offense tends to ensure that uncharged acts will have a high degree of probative value, and will not be mere distractions from the main issues").

\(^{85}\) See Fed. R. Evid. 403 (providing for weighing of probative value of evidence against prejudicial effect, not for exclusion of all prejudicial evidence); Commonwealth v. Gordon, 673 A.2d 866, 870 (Pa. 1996) (noting that other crimes evidence was prejudicial, but was not "unduly prejudicial" in this case). Furthermore, all evidence presented by the prosecution, not just other crimes evidence, is prejudicial in that it increases the likelihood of conviction. See Karp, supra note 82, at 22 (noting that most opponents of Rule 413 and 414 go beyond merely arguing that other crimes evidence is prejudicial and instead argue that it is overly prejudicial).

\(^{86}\) See Karp, supra note 82, at 19 (stating "these are rules of admissibility, and not mandatory rules of admission"). Numerous cases have declined to admit other crimes evidence in sex crimes cases since the enactment of Rules 413 and 414. See, e.g., United States v. Larson, 112 F.3d 600, 602 (2d Cir. 1997) (noting trial court...
Furthermore, Rule 403, which requires exclusion of evidence that is substantially more prejudicial than probative, continues to apply. Cases interpreting Rules 413 and 414 continue to apply the Rule 403 balancing analysis, admitting or excluding evidence based on the balance between probative value and prejudice to the defendant. For example, in United States v. Larson and United States v. Guardia, the courts excluded evidence of other sex crimes after finding it was more prejudicial than probative. In Larson, the defendant was charged with transporting a child for

excluded evidence where it found "any probative value is substantially outweighed by the resulting danger of unfair prejudice to [defendant] in having to defend allegations so remote in time"; United States v. Guardia, 955 F. Supp. 115, 119 (D.N.M. 1997), aff'd, 135 F.3d 1326 (10th Cir. 1998) (noting that "trial court has the authority, if not the duty, to exclude evidence which will likely confuse the jury on peripheral issues").

86. See 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) (clarifying that "general standards of the rules of evidence will continue to apply"); FED. R. EVID. 403 (stating that "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").

87. See, e.g., United States v. Guidry, 456 F.3d 493, 503 (5th Cir. 2006) (finding that "[a] district court must apply the Rule 403 balancing test when considering the admission of evidence under Rule 413"); United States v. Norris, 428 F.3d 907, 914 (9th Cir. 2005) (finding trial court "properly balanced the probative value of the prior act evidence against its prejudice as it is required to do"); United States v. Julian, 427 F.3d 471, 487 (7th Cir. 2005) (concluding that "Rule 413 does not displace the court's authority pursuant to Rule 403 to exclude evidence of a prior act if its probative value is substantially outweighed by the danger of unfair prejudice"); United States v. Fitzgerald, 80 F. App'x 857, 863 (4th Cir. 2003) (holding "[e]vidence that is relevant under Rule 413 is also subject to Rule 403 . . . [and] must satisfy three elements: (1) the defendant must be accused of an offense of sexual assault as defined by Rule 415(d); (2) the evidence must pertain to the defendant's commission of another sexual assault offense; (3) and the evidence must be relevant"); United States v. Larson, 112 F.3d 600, 604-05 (2d Cir. 1997) (excluding evidence under Rule 403 and stating "[w]e view Rule 403 analysis in connection with evidence offered under Rule 414 to be consistent with Congress's intent as reflected in the legislative history"); United States v. Sumner, 119 F.3d 658, 662 (8th Cir. 1997) (noting "[i]t is logical that Rule 403 applies to Rule 414 . . . and nothing in the language of Rule 414 precludes the application of Rule 403"); Petersen v. United States, 352 F. Supp. 2d 1016, 1025 (D.S.D. 2005) (commenting "trial court was well aware of the requirements of Rule 403 and properly applied the Rule to the facts and circumstances present"); United States v. Akram, No. 97 CR 78, 1997 WL 392220, at *3 (N.D. Ill. July 8, 1997) (applying Rule 403 test and finding "close factual and temporal connection between the assaults on [other crimes witness] and the assaults on [complainants] make [witness's] additional testimony highly probative"); United States v. Guardia, 955 F. Supp. 115, 117-18 (D.N.M. 1997), aff'd, 135 F.3d 1326 (10th Cir. 1998) (noting "developing" consensus of judges, lawyers, and legal scholars who believe that Rule 403 applies to Rule 413 and using 403 test to exclude evidence).

88. 112 F.3d 600 (2d Cir. 1997).
89. 955 F. Supp. 115 (D.N.M. 1997).
90. See Larson, 112 F.3d at 602 (noting trial court "perform[ed] a Rule 403 balancing analysis, weighing the probative value of the evidence against its potential for unfair prejudice"); Guardia, 955 F. Supp. at 117 (concluding that "common
the purpose of committing sex crimes and the trial court excluded evidence that the defendant committed sex crimes more than twenty years earlier. 91 In Guardia, the court excluded evidence that the defendant, a gynecologist charged with inappropriately touching a patient, behaved similarly towards other patients. 92 The court found that the testimony of the other patients would confuse the jury. 93

In addition, restrictions on hearsay evidence continue to protect the defendant from accusations based on unsubstantiated rumors. 94 The Federal Rules of Evidence generally prohibit hearsay, defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." 95 Furthermore, by imposing notice requirements on the prosecution, Rules 413 and 414 provide the defendant with an additional procedural protection. 96

A defendant faced with evidence of other sexual crimes "still has the same opportunities to respond to the proposed evidence of uncharged

91. See Larson, 112 F.3d at 602 (admitting other evidence of more recent crimes similar to charged crime).

92. See Guardia, 955 F. Supp. at 118-20 (noting that two non-complaining witnesses testified that defendant fondled their breasts and buttocks and made inappropriate comments).

93. See id. at 118-19 (noting differences among witnesses’ experiences and necessity of expert testimony).

94. See Scott, supra note 66, at 1737-38 (noting legislative history indicates intent to subject Rules 413 and 414 to existing standards); see also United States v. Gabe, 237 F.3d 954, 957-58 (8th Cir. 2001) (finding doctor’s testimony inadmissible hearsay because victim told him defendant had sexually abused her since she was in first grade); United States v. Sumner, 119 F.3d 658, 662 (8th Cir. 1997) (agreeing with Larson court that legislators intended hearsay rules to apply to Rule 414); Larson, 112 F.3d at 604 (quoting Congressional Record to indicate legislative intent to subject Rule 414 to hearsay restrictions).

95. Fed. R. Evid. 801(c) (defining hearsay); see Fed. R. Evid. 802 (providing that hearsay is usually inadmissible); Fed. R. Evid. 803-807 (listing exceptions to general inadmissibility of hearsay evidence).

96. See Fed. R. Evid. 413(b), 414(b) ("In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant . . . at least fifteen days before the scheduled date of trial . . ."); see also 137 Cong. Rec. S3240 (daily ed. Mar. 13, 1991) (stressing importance of advance notice to defendant of prior acts evidence to be offered at trial); Scott, supra note 66, at 1756-57 (noting that notice requirement “does not exist when the defendant is formally and individually charged with all of the offenses”).
sexual offenses as if it were a formally charged offense."97 At trial, the
defense has the opportunity to challenge the other crimes evidence by
cross-examining witnesses and presenting rebuttal evidence.98

Concern that jurors will place too much weight on evidence of past
crimes "discredits the ability of jurors to behave reasonably in evaluating
evidence."99 Even when courts admit evidence of prior sexual crimes, jur-
ies may still find defendants not guilty.100 In Commonwealth v. Booth,101
the defendant, a sheriff, was charged with sexually assaulting a prisoner,
among other charges.102 The jury heard testimony from a number of in-
mates that the defendant also invited them into his living quarters, gave
them alcohol and sexually assaulted them.103 Even after hearing this testi-
mony, the jury acquitted the defendant of all of the sexual charges.104

97. Scott, supra note 66, at 1736 (noting defendant may file pre-trial motion
to exclude prejudicial evidence); see also Karp, supra note 82, at 24 ("The defen-
dant has the same rights and opportunities to respond to evidence of uncharged
offenses that he has in relation to a formally charged offense, including the assis-
tance of counsel, cross-examination of witnesses, and presentation of rebuttal evi-
dence."); Lombardi, supra note 29, at 125 (noting that "federal rules [413 and 414]
provide greater procedural protection to the defendant than if the defendant was
charged with an offense that was not of a sexual nature").

98. See Lisa Marie De Sanctis, Bridging the Gap Between the Rules of Evidence and
Justice for Victims of Domestic Violence, 8 YALE J.L. & FEMINISM 359, 387 (1996) (ac-
knowledging argument that Rules 413 and 414 will be costly and time-consuming
"because the defendant must have the opportunity to defend himself against any
uncharged priors"); Karp, supra note 82, at 18 (arguing that notice requirement
"ensures that the defendant will have an opportunity to prepare any response or
rebuttal"); Scott, supra note 66, at 1737 (arguing that rules do not deny defendant
fair trial).

99. Scott, supra note 66, at 1739 (explaining why jurors should be allowed to
consider other crimes evidence in sex offense trials); see also United States v. Cas-
tillo, 140 F.3d 874, 884 (10th Cir. 1998) (finding juries capable of following "in-
structions to them that they consider only the crime charged in deciding whether to
convict").

(holding that admission of prior acts evidence was appropriate because "a com-
mon plan or design was established"); Kathryn Holzka, Ex-Cop Found Guilty of Abuse:
Man Convicted on 6 of 44 Counts, ALBUQUERQUE J. (N.M.), Nov. 20, 2005, at 2
(describing case where jury found defendant not guilty of thirty-eight counts of
moisting his stepdaughter despite fact that jury convicted defendant on six counts
"alleg[ing] the same basic criminal conduct"); William Booth, Jury Acquits Jackson
on All Charges, WASH. POST, June 14, 2005, Bus. Sec. (explaining jury acquitted
Michael Jackson of molestation charges even after hearing evidence that Jackson
molested other children).


102. See id. at 1222 (listing offenses of "involuntary deviate sexual intercourse,
furnishing contraband, . . . indecent assault . . . facilitating escape, obstructing
administration of the law, and official oppression").

103. See id. at 1226 (noting that "[a]ll of the alleged acts were of similar
character").

104. See id. (stating that "[p]erhaps the best indication that the jury was not
inflamed by the 'other crimes' testimony is that they acquitted [defendant] of all
sex offenses").
Finally, courts that are concerned about juries placing too much weight on other crimes evidence may give cautionary instructions.105

C. Uncharged and Remote Acts Should Be Admissible When Relevant and Not Overly Prejudicial

Evidence of uncharged crimes or crimes that happened many years before the charged offense is not necessarily more prejudicial than probative, as critics claim.106 First, uncharged crimes were admissible in all types of cases even before Rules 413 and 414.107 Second, evidence of uncharged crimes may be "valid and important for [uncharged crimes'] bearing on a charged offense."108 Third, prosecutors already have incentives to charge offenses; they do not need the additional incentive of a rule that disallows evidence of uncharged acts.109 Fourth, where a defendant

105. See, e.g., Petersen v. United States, 352 F. Supp. 2d 1016, 1025 (D.D.C. 2005) (noting that "any prejudice that may have occurred was minimized by the limiting instruction given to the jury immediately after the evidence was admitted"). The jury instruction stated that "[Rule 413 evidence] certainly does not prove that the [D]efendant sexually assaulted his estranged wife at the time alleged by the [G]overnment." Id. at n.5 (noting that other crimes evidence was "relevant and substantially similar to the aggravated sexual abuse offense [defendant] was convicted of").


107. See Fed. R. Evid. 404(b):
Evidence of other crimes, wrongs, or acts ... may ... 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 also Huddleson v. United States, 485 U.S. 681, 685 (1988) (holding evidence of uncharged acts similar to charged offense admissible where "there is sufficient evidence to support a finding by the jury that the defendant committed the similar [uncharged] act"); Karp, supra note 82, at 24 (stressing that uncharged acts were already admissible under Rule 404(b)).

108. 137 Cong. Rec. S3241 (daily ed. Mar. 13, 1991) (noting that there are "entirely legitimate reasons" why it is "impossible, or undesirable" to bring charges in some cases). One such reason is that "the uncharged offenses may have taken place in a different jurisdiction." Id. (explaining that "[t]his would occur in a state prosecution of a rapist or child molester whose earlier known crimes were committed in a different state"). Additionally, there may be "insufficient evidence or other practical difficulties in prosecuting all of the defendant's prior offenses as separate counts [while at the same time] the evidence regarding the earlier offenses is legitimately relevant to proof of the charged offense." Id. (noting this occurs when "fathers or stepfathers ... are accused of molesting their daughters" repeatedly over many years).

109. See id. (listing existing incentives). For example, "[c]harging a larger number of counts tends to reduce the risk that the defendant will be entirely acquitted if the jury is not persuaded concerning a particular charge or charges." Id. (arguing existing incentives are sufficient). In addition, a prosecutor who brings multiple charges has a greater chance of getting convictions on multiple counts,
has committed crimes in more than one jurisdiction it may be impossible to charge all crimes in one court.\textsuperscript{110} Fifth, victims who would find an entire trial too demanding might be able to testify as part of another case.\textsuperscript{111}

Like evidence of uncharged acts, evidence of crimes that are remote in time to the charged offense was admissible before the enactment of Rules 413 and 414.\textsuperscript{112} Furthermore, evidence of crimes remote in time from the date of the crime charged should be admissible when it is still probative.\textsuperscript{113} In \textit{United States v. Meacham},\textsuperscript{114} the defendant was charged with transporting his minor relative across state lines for the purpose of engaging in sexual acts.\textsuperscript{115} The appeals court held that evidence that the defendant had molested his stepdaughters more than thirty years earlier when they were children was admissible.\textsuperscript{116} The court found that the prosecution could use such evidence to “show defendant’s intent, at the time he induced this minor relative to accompany him on an interstate trip, to sexually molest her.”\textsuperscript{117}

which will increase the defendant’s sentence. \textit{See id.} (stating that “[u]nder the federal sentencing guidelines, for example, uncharged offenses may be given some weight in sentencing, but the largest determinants of the sentence are normally the offenses for which the defendant is convicted and his record of prior convictions”).

\textsuperscript{110} \textit{See} Karp, \textit{supra} note 82, at 25 (arguing in this situation that only way to make jury “aware of all relevant criminal conduct of the defendant” is to admit evidence of uncharged offenses).

\textsuperscript{111} \textit{See id.} (noting that victims of rape or child molestation are often “too traumatized, intimidated, or humiliated to file a complaint and go through the full course of proceedings in a criminal prosecution” but “are often willing to bear the more limited burden of testifying at the offender’s trial for raping or molesting another person, when they find out that the person who marred their lives has also victimized others”); \textit{cf.} Rachel L. Melissa, \textit{Comment, Oregon’s Response to the Impact of Domestic Violence on Children}, 82 OR. L. REV. 1125, 1141 (2003) (noting that one “factor[ ] [that] contribute[s] to trauma resulting from testimony in criminal trials” is “number of times the child has to testify and length of the trial”).

\textsuperscript{112} \textit{See} 140 \textit{CONG. REC.} H8992 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) (discussing cases where courts admitted evidence of crimes that occurred fifteen and twenty years before charged offense).

\textsuperscript{113} \textit{See} 137 \textit{CONG. REC.} S3242 (daily ed. Mar. 13, 1991) (stating “there is no justification for categorically excluding offenses that occurred before some arbitrarily specified temporal limit”); Lombardi, \textit{supra} note 29, at 126 (discussing \textit{United States v. Meacham}, 115 F.3d 1488 (10th Cir. 1997), where court held that evidence that defendant molested other relatives thirty years earlier was admissible).

\textsuperscript{114} 115 F.3d 1488 (10th Cir. 1997).

\textsuperscript{115} \textit{See Meacham}, 115 F.3d at 1490 (noting that defendant was charged with violation of 18 U.S.C. § 2423).

\textsuperscript{116} \textit{See id.} at 1495 (concluding “stepdaughters’ testimony suggests a similar pattern of sexual abuse of female minor relatives made possible by exploitation of familial authority”).

\textsuperscript{117} \textit{Id.} at 1492 (noting that such evidence would be admissible under Rule 404(b) or Rule 414).
On the other hand, courts have excluded evidence of old crimes if they find such evidence to be unfair to the defendant.118 For example, in Larson, the court admitted evidence of prior crimes that occurred sixteen to twenty years before trial but excluded evidence that occurred twenty-one to twenty-three years before trial.119 The court found that the “probative value [of the older evidence was] substantially outweighed by the resulting danger of unfair prejudice to [the defendant]. . . .”120

D. Rules 413 and 414 Are Not Inconsistent with Rape Shield Laws

The criticisms that Rules 413 and 414 are inconsistent with rape shield laws are not justified because the two types of evidence involved serve different purposes.121 Rape shield laws encourage victims to come forward; on the other hand, excluding evidence about the defendant’s past does not encourage the defendant to talk to authorities.122 Further, rape shield laws protect victims’ privacy, but “[v]iolent sex crimes [committed by the defendant] are not a private act.”123 Moreover, evidence of

118. See Lombardi, supra note 29, at 126 (discussing United States v. Larson, 112 F.3d 600 (2d Cir. 1997), where court excluded some evidence of prior crimes); see also United States v. Acevedo, No. 96-2149, 1997 WL 392253, at *1-4 (10th Cir. July 14, 1997) (affirming district court’s admission evidence of prior sex crimes for rebuttal, where district court had held evidence was not admissible in prosecution’s case-in-chief because it was “too remote in time”).

119. See Larson, 112 F.3d at 602 (noting witnesses were to testify that defendant sexually assaulted them when they were minors in case where defendant was charged with transporting minor across state lines with intent to engage in sexual acts with him).

120. Id. (stating that events were “too remote in time to have any probative value in this case”).

121. See 137 CONG. REC. S3241 (daily ed. Mar. 13, 1991) (analysis of rules) ("The sound policies that underlie the rape victim shield laws provide no support for comparable restrictions in relation to the conduct of the defendant."); Karp, supra note 82, at 22-24 (calling criticism of rules based on comparison to rape shield laws “superfluous”).


123. Karp, supra note 82, at 24 (arguing that "defendant can claim no privacy interest in suppressing [evidence of violent sex crimes] when they are relevant to the determination of a later criminal charge"); see also 137 CONG. REC. S3241 (daily ed. Mar. 13, 1991) (analysis of rules) ("[V]iolent sex crimes are not private acts, and the defendant can claim no legitimate interest in suppressing evidence that he has engaged in such acts when it is relevant to the determination of a later criminal charge."); Park, supra note 122, at 277 (stating that defendant’s “personal interest in maintaining the secrecy of his criminal act is not one that society need to accept as valid”).
defendant's past sex crimes is more probative than evidence of the victim's sexual history. Many argue that the victim's sexual history is not probative regarding whether she consented to sex with the defendant, while the defendant's prior rapes are probative regarding whether he is capable of such a crime. Thus, it does not make sense to compare rape shield laws that protect victims' sexual history to the admissibility of evidence regarding the defendant's past violent sexual acts.

E. Rules 413 and 414 Are Constitutional

Courts have held that Rules 413 and 414 do not, on their face, violate due process or equal protection. Defendants have alleged that Rules 413 and 414 violate due process because they conflict with a tradition of excluding propensity evidence, "create[ ] a presumption of guilt," and allow a jury to punish the defendant for past acts. The rules do not violate due process, however, because courts have historically admitted

124. See Karp, supra note 82, at 24 (noting "[i]nquiry into [victim's] sexual history will normally disclose nothing that particularly distinguishes her from the general population"). Further, rape shield laws allow evidence of the victim's sexual history in certain circumstances when it may be probative and arguably in some cases even when it is not probative. See Anderson, supra note 58, at 55-56 (criticizing exceptions in federal rape shield law that allow evidence of victim's sexual history with defendant and admission of victim's sexual history generally when exclusion would violate defendant's constitutional rights).

125. See Karp, supra note 82, at 24 (arguing "evidence showing that the defendant has committed sexual assaults on other occasions places him in a small class of depraved criminals"); Park, supra note 122, at 277-78 (arguing that evidence "the victim frequently consented to casual sex . . . tends to show, however slightly, that she is more likely to have consented to casual sex on a particular occasion than another woman who never consents. It also tends, however, to show that she does not readily make accusations of rape").

126. For a further discussion of the inherent differences between the victim's sexual history and defendant's prior convictions for sexual offenses, see supra notes 121-25 and accompanying text.

127. See United States v. LeMay, 260 F.3d 1018, 1027 (9th Cir. 2001) (holding Rule 414 did not violate due process); United States v. Mound, 149 F.3d 799, 801 (8th Cir. 1998) (holding Rule 413 did not violate due process or equal protection); United States v. Castillo, 140 F.3d 874, 883 (10th Cir. 1998) (holding Rule 414 did not violate due process or equal protection); United States v. Enjady, 134 F.3d 1427, 1433-34 (10th Cir. 1998) (holding Rule 413 did not violate due process or equal protection).

128. See LeMay, 260 F.3d at 1024 (rejecting defendant's argument that "traditional rule precluding the use of a defendant's prior bad acts to prove his disposition to commit the type of crime charged is so ingrained in Anglo-American jurisprudence as to be embodied in the due process clause of the Constitution"); Enjady, 134 F.3d at 1432:

The due process arguments against the constitutionality of Rule 413 are that it prevents a fair trial, because of 'settled usage'—that the ban against propensity evidence has been honored by the courts for such a long time that it 'must be taken to be due process of law'; because it creates a presumption of guilt that undermines the requirement that the prosecution must prove guilt beyond a reasonable doubt; and because if tendered to demonstrate the defendant's criminal disposition it licenses
propensity evidence and because Rule 403 protects the defendant by excluding evidence that is overly prejudicial.\textsuperscript{129}

As for equal protection, the rules do not “burden a fundamental right” and defendants in sex crimes cases are not a “suspect class.”\textsuperscript{130} Therefore, courts “must uphold the legislative classification so long as it bears a rational relation to some legitimate end.”\textsuperscript{131} Courts have held that “effective prosecution of sex offenses is a legitimate end.”\textsuperscript{132} Congress acted rationally in adopting Rules 413 and 414 because it had “good reasons” to believe “the rule[s] [were] justified by the distinctive characteristics of the cases it will affect.”\textsuperscript{133}

the jury to punish the defendant for past acts, eroding the presumption of innocence that is fundamental in criminal trials.\textit{Id.} (internal citations omitted).

\textsuperscript{129} See LeMay, 260 F.3d at 1025-27 (finding “there is nothing fundamentally unfair about the allowance of propensity evidence under Rule 414”). The court found that historical practice was unclear and did not completely resolve the due process issue. See id. at 1025 (noting that “Supreme Court has held that the primary guide for determining whether a rule is so ‘fundamental’ as to be embodied in the Constitution is historical practice”). While courts generally exclude propensity evidence, courts have allowed such evidence in sex crimes cases. See id. at 1025-26 (discussing history and current “lustful disposition” exceptions).

\textsuperscript{130} See Mound, 149 F.3d at 801 (explaining why rational basis review applied). As another court stated, defendants have “no fundamental right to have a trial free from relevant propensity evidence that is not unduly prejudicial.” \textit{LeMay}, 260 F.3d at 1030 (noting “Rule 403 ensures that evidence which is so prejudicial as to jeopardize a defendant’s right to a fair trial will be excluded”). In \textit{LeMay}, the court rejected a Native American defendant’s equal protection argument, finding that even if Federal Rules 413 and 414 disproportionately affected Native Americans, this was “because the federal government only has jurisdiction over crimes such as child molestation when they arise on Indian Reservations, military bases, or other federal enclaves.” See \textit{id.} (finding no congressional intent to discriminate).

\textsuperscript{131} \textit{Mound}, 149 F.3d at 801 (quoting Romer v. Evans, 517 U.S. 620, 631 (1996)) (asserting “[a]ppellate courts should not and do not try ‘to determine whether [the statute] was the correct judgment or whether it best accomplishes Congressional objectives; rather, [courts] determine [only] whether Congress’[s] judgment was rational’”).

\textsuperscript{132} \textit{Id.} (applying first step in rational basis review); see also United States v. Castillo, 140 F.3d 874, 883 (10th Cir. 1998) (quoting \textit{Enjady}, 134 F.3d at 1433 (“Congress’[s] objective of enhancing effective prosecution of sexual assaults is a legitimate interest.”)).

\textsuperscript{133} \textit{LeMay}, 260 F.3d at 1028 (quoting 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinaro)) (noting “characteristics included the reliance of sex offense cases on difficult credibility determinations that ‘would otherwise become unresolvable swearing matches,’ as well as, in the case of child sexual abuse, the ‘exceptionally probative’ value of a defendant’s sexual interest in children’); see also Castillo, 140 F.3d at 883 (“The government has a particular need for corroborating evidence in cases of sexual abuse of a child because of the highly secretive nature of these sex crimes and because often the only available proof is the child’s testimony.”); \textit{Enjady}, 134 F.3d at 1434 (“The nature of sex offense prosecutions frequently involves victim-witnesses who are traumatized and unable to effectively testify, and offenders often have committed many similar crimes before their arrest on the charged crime.”).
Courts have also held that Rules 413 and 414 do not violate the Eighth Amendment. 134 Defendants have argued that Rules 413 and 414 violate the Eighth Amendment because admitting evidence of prior crimes has such a prejudicial effect that it constitutes punishment. 135 This argument is ineffective because “[t]he rule[s] do[] not impose criminal punishment at all; [they are] merely . . . evidentiary rule[s].” 136 Furthermore, admission of other crimes evidence is not so prejudicial that juries would convict based on uncharged crimes. 137 Thus, Rules 413 and 414 withstand multiple constitutional challenges. 138

IV. THE DISPARITY BETWEEN THE PENNSYLVANIA RULES OF EVIDENCE AND PENNSYLVANIA CASE LAW

A. The Pennsylvania Rules

In 1998, Pennsylvania adopted Rules of Evidence modeled after the Federal Rules. 139 Under the Pennsylvania Constitution, the Pennsylvania

134. See LeMay, 260 F.3d at 1031 (holding Rule was not cruel and unusual punishment); Castillo, 140 F.3d at 884 (holding Rule 414 "does not impose criminal punishment"). The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments be inflicted." U.S. CONST. amend. VIII (prohibiting government from imposing cruel and unusual punishment).

135. See Castillo, 140 F.3d at 884 (rejecting defendant's argument "that because the evidence [of other crimes] has such a strong prejudicial effect on juries, Rule 414 works as a de facto punishment for one’s status as a sex offender").

136. Id. (rejecting defendant's argument that Rule 414 "punishes him for his status as a person with a sexual interest in minors"); see also LeMay, 260 F.3d at 1031 (relying on Castillo court's rationale).

137. See Castillo, 140 F.3d at 884 (reasoning that for other crimes evidence to be so prejudicial that it amounts to punishment, "juries would have to ignore courts' instructions to them that they consider only the crime charged in deciding whether to convict"). The court stressed that "[t]he central assumption of our jurisprudence is that juries follow the instructions they receive." Id. (rejecting argument that evidence was so prejudicial as to be punishment); see also LeMay, 260 F.3d at 1051 (finding that "prosecution's other witnesses provided enough evidence that we are convinced that LeMay was not convicted for his status as a sex offender").

138. For a discussion of the constitutionality of Rules 413 and 414, see supra notes 127-37 and accompanying text.

Supreme Court has the power to create rules of evidence.\textsuperscript{140} Among the Federal Rules that Pennsylvania chose not to adopt were Rules 413 and 414.\textsuperscript{141}

While opting not to adopt Rules 413 and 414, Pennsylvania did adopt Rule of Evidence 404(b), which governs the admissibility of evidence of "other crimes, wrongs or acts" in all types of cases, making no exception for sex crimes cases.\textsuperscript{142} According to Rule 404(b), evidence of other acts is not admissible to prove bad character.\textsuperscript{143} Other acts evidence is admissible, however, "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."\textsuperscript{144}

B. Trends in Caselaw

At one point before Pennsylvania adopted its Rules of Evidence, the Pennsylvania Supreme Court held that:

[W]hen a defendant is charged with the commission of a sexual offence the law is more liberal in admitting as proof of his guilt evidence of similar sexual offences committed by him than it is in admitting evidence of similar offences when a defendant is charged with the commission of non-sexual crimes.\textsuperscript{145}

In Commonwealth v. Shively,\textsuperscript{146} however, a plurality of the Pennsylvania Supreme Court subsequently held that the admissibility of prior acts evidence is no different for sex crimes cases than for other cases.\textsuperscript{147} An ex-

\begin{footnotesize}
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\item See generally Binder, supra note 139 (noting that Article 5, Section 10(c) of Pennsylvania Constitution gives Court power "to prescribe general rules governing practice, procedure and the conduct of all courts" in state).
\item Compare Fed. R. Evid. art. IV (listing Rules 401 through 415), with Pa. R. Evid. art. IV (adopting Rules 401 to 411, which are similar or identical to corresponding Federal Rules, but not Rules 412 to 415).
\item See Pa. R. Evid. 404(b) (excluding other crimes evidence generally and providing limited exceptions).
\item See Pa. R. Evid. 404(b)(1) (stating "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith").
\item Pa. R. Evid. 404(b)(2) (providing, in limited circumstances, exception to general rule of exclusion).
\item Commonwealth v. Kline, 65 A.2d 348, 352 (Pa. 1949), overruled by Commonwealth v. Shively, 424 A.2d 1257, 1259-60 (Pa. 1981) (stating "we explicitly overrule Kline . . . and hold that sexual and non-sexual crimes must be treated alike in deciding whether evidence of prior criminal activity should be admitted").
\item 424 A.2d 1257 (Pa. 1981).
\item See id. at 1259-60 (citing McCormick, Evidence, § 190 n.40 (1972 2d ed.)) (stating "sexual and non-sexual crimes must be treated alike in deciding whether evidence of prior criminal activity should be admitted"). One court noted, however, that this statement in Shively was in a plurality opinion, and found that Kline was still valid law. See Commonwealth v. Powers, 577 A.2d 194, 197 n.1 (Pa. Super. Ct. 1990) (noting "[n]o subsequent decision by our Supreme Court has embraced the dictum of the lead opinion of the Shively plurality").
\end{enumerate}
\end{footnotesize}
amination of recent case law on sex crimes reveals a tension between the text of Rule 404(b) and the Shively opinion on one hand, and a trend toward admitting evidence of other acts in sex crimes cases to bolster the victim’s credibility on the other.\textsuperscript{148}

For example, recent Pennsylvania case law contains a number of exceptions that permit the admission of other acts evidence that are not explicitly included in the Rules of Evidence.\textsuperscript{149} Specifically, both before and after the Pennsylvania Supreme Court adopted the Rules of Evidence, Pennsylvania courts have held that evidence of other acts is admissible to show:

(1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme plan or design embracing commission of two or more crimes so related to each other that proof of one tends to prove the others; or (5) to establish the identity of the person charged with the commission of the crime on trial.\ldots \textsuperscript{150}

Further, evidence of other acts is admissible when it is “part of the history of the case and forms part of the natural development of the facts.”\textsuperscript{151} Finally, evidence of other acts is admissible to “show a passion or propensity for illicit sexual relations with the particular person concerned in the crime on trial.”\textsuperscript{152} Some have questioned the continued validity of

\textsuperscript{148} For a further discussion of the trend towards admitting other acts evidence in sex crimes cases, see infra notes 163-74 and accompanying text.

\textsuperscript{149} For a further discussion of Pennsylvania case law exceptions that permit admission of other acts evidence, see infra notes 149-55 and accompanying text.

\textsuperscript{150} Commonwealth v. Bradley, 364 A.2d 944, 946 (Pa. Super. Ct. 1976) (quoting Commonwealth v. Peterson, 307 A.2d 264, 269 (Pa. 1973)) (holding other crimes evidence was inadmissible due to lapse of time between offenses); see also Commonwealth v. Judd, 897 A.2d 1224, 1231 (Pa. Super. Ct. 2006) (refuting argument that “common scheme or plan” exclusion has been called into doubt based on the fact that it is not listed in Rule 404(b)(2)); Commonwealth v. Lauro, 819 A.2d 100, 107 (Pa. Super. Ct. 2003) (holding trial court properly consolidated cases where defendant was charged with molesting his daughter and stepdaughter).

\textsuperscript{151} Lauro, 819 A.2d at 107 (quoting Commonwealth v. Collins, 703 A.2d 418, 422 (Pa. 1997)) (noting that Post Conviction Relief Act Court had found defendant’s molestation of his daughter and stepdaughter were “of similar character and suggested a common plan”); see also Commonwealth v. Wattley, 880 A.2d 682, 687-88 (Pa. Super. Ct. 2005) (upholding admission of evidence of defendant’s prior conviction for sex crime in Texas because it was “part of the history and natural development of the events and offenses for which the defendant [was] charged”), appeal granted, 901 A.2d 498 (Pa. May 30, 2006) (No. 896 MAL 2005); Commonwealth v. Stansbury, 640 A.2d 1368, 1372 (Pa. Super. Ct. 1994) (upholding admission of defendant’s prior uncharged sex crimes against victim in part because they were “part of the history of the instant assault”).

\textsuperscript{152} Commonwealth v. Buser, 419 A.2d 1233, 1235 (Pa. Super. Ct. 1980) (quoting MCCORMICK ON EVIDENCE § 190, at 449) (upholding admission of defendant’s testimony about previous incidents in which defendant, her father, sexually abused her); see also Commonwealth v. Dunkle, 602 A.2d 830, 831, 839 (Pa. 1992) (upholding admission of testimony that defendant, charged with sexually assaulting his stepdaughter, had watched her showering and fondled her breasts on previ-
the "lustful disposition" exception because the Rules of Evidence do not mention it.\footnote{153} The Pennsylvania Supreme Court, however, has declined to adhere to a specific list of exceptions, instead choosing to admit evidence of other crimes whenever the probative value outweighs the potential for prejudice.\footnote{154} For example, the Pennsylvania Supreme Court has recognized the "common plan, scheme or design" exception, which is not listed in the Rules of Evidence, as recently as 2004.\footnote{155}

Although once opposed to admission of other acts evidence in sex crimes cases, Pennsylvania courts appear to be increasingly willing to admit such evidence and have recently recognized that such evidence may be necessary to "bolster the victim's credibility."\footnote{156} In 1976, in \textit{Commonwealth v. Wattrley}, 880 A.2d at 684-85, 686-87 (upholding, on numerous grounds including "lustful disposition exception," admission of evidence that defendant had subsequently sexually abused same victim in another state); \textit{Commonwealth v. Ritchie}, 472 A.2d 220, 223 (Pa. Super. Ct. 1984) (upholding admission of thirteen-year-old victim's testimony that defendant "had been sexually molesting her three or four times a week for a period of about four years," even though victim could not recall precise dates of previous incidents), \textit{remanded on other grounds by} 502 A.2d 148 (Pa. Dec 11, 1985) (No. 69 W.D. 1984) (holding defendant had right to view Children and Youth Services file), \textit{cert. granted}, Pennsylvania v. Ritchie, 476 U.S. 1139 (U.S. May 27, 1986) (No. 85-1347) \textit{aff'd in part and rev'd in part,} 480 U.S. 39 (1987) (holding defendant could not view Children and Youth Services file, but trial court could).


154. See \textit{Commonwealth v. Lark}, 543 A.2d 491, 303 (Pa. 1988) (finding that list of "'special circumstances' [previously articulated by court] is not exclusive, and this Court has demonstrated it will recognize additional exceptions to the general rule where the probative value of the evidence outweighs the tendency to prejudice the jury"); see also \textit{Pa. R. Evid. 404(b)} ("Evidence of other crimes, wrongs, or acts may be admitted for ... purposes[ ] such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.") (emphasis added); \textit{Commonwealth v. Horvath}, 781 A.2d 1243, 1246 (Pa. Super. Ct. 2001) (stating there is no set list of purposes for which other crimes evidence is admissible and "the Court has demonstrated it will recognize additional exceptions to the general rule where the probative value of evidence outweighs the tendency to prejudice the jury").

155. See \textit{Commonwealth v. Robinson}, 864 A.2d 460, 481 (Pa. 2004) (stating evidence of other crimes was admissible to show "common plan, scheme or design embracing commission of multiple crimes"). \textit{But see Edward D. Ohlbaum, OHILBAUM ON THE PENNSYLVANIA RULES OF EVIDENCE} § 404.22[4] (Matthew Bender 2006) (calling sex crimes cases that relied solely on "common plan, scheme, or design" exception "of questionable utility in light of Rule 404(b)"). The \textit{Judd} court responded to questions raised by Ohlbaum and other scholars, stating it was a "settled rule" that evidence of other crimes is admissible to show "common plan, scheme or design." \textit{Judd}, 897 A.2d at 1231 ("[O]ur Pennsylvania Supreme Court recently reiterated the settled rule of admissibility regarding evidence which demonstrates a defendant's criminal tendencies by way of a common plan, scheme or design.").

v. Bradley, the court reversed the defendant’s conviction for forcible anal sodomy of a mentally handicapped child, holding that the trial court had improperly admitted evidence that the defendant sodomized other mentally handicapped children at the same school. In Bradley, two former students testified at trial that the defendant had repeatedly molested them and two former students testified that they had seen the defendant sodomize other students. The appellate court found that the prior acts were too remote to be considered part of a common scheme or plan because the incidents could have happened three years before the charged offense. The court also questioned the credibility of the mentally handicapped children, but, at the same time, said that the testimony of the victim of the charged offense might be sufficient for a conviction. Further, the court noted that “the Commonwealth may suffer certain practical problems” due to the inability to present the testimony of the other children but that “its case is not totally destroyed.”

Twenty years later, however, in Commonwealth v. Gordon, the Pennsylvania Supreme Court recognized the need to admit the testimony of prior victims in order to strengthen a case that consisted of the uncorroborated testimony of the victim. In Gordon, the defendant, a lawyer charged with indecently assaulting a client, had previously been convicted...
of similar assaults on other clients.\textsuperscript{165} The court recognized the need to admit other crimes evidence because it was difficult for the Commonwealth to establish lack of consent without any evidence beyond the victim’s personal testimony:

Whether relevant evidence is unduly prejudicial is a function in part of the degree to which it is necessary to prove the case of the opposing party. Here, the Commonwealth was required to prove that a non-consensual touching occurred, the purpose of which was sexual gratification. [Defendant] denies that the touching occurred, and since the uncorroborated testimony of the alleged victim in this case might reasonably lead a jury to determine that there was a reasonable doubt as to whether [defendant] committed the crime charged, it is fair to conclude that the other crimes evidence is necessary for the prosecution of the case.\textsuperscript{166}

In cases since \textit{Gordon}, Pennsylvania courts seem more willing to admit other crimes evidence, recognizing the need to bolster the credibility of sex crimes victims.\textsuperscript{167} For example, in \textit{Commonwealth v. O’Brien},\textsuperscript{168} the victim was just ten years old when the defendant “attempted to insert his penis into [the victim’s] anus,” and the victim did not report the assault immediately because “he was afraid it was his fault.”\textsuperscript{169} The appellate court found that where the victim’s credibility was in doubt due to his delay in reporting the crime, evidence that the defendant engaged in similar sexual acts with another child was admissible to “bolster the victim’s credibility.”\textsuperscript{170}

There is reason to question the continued validity of the Pennsylvania Supreme Court’s statement that evidence of other acts should be treated no differently in sex crimes cases than in other cases.\textsuperscript{171} Pennsylvania

\textsuperscript{165} See \textit{id.} at 869 (listing numerous similarities between circumstances of crime charged and previous crimes).

\textsuperscript{166} Id. at 870 (noting indecent assault requires lack of consent and “touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in either person”).


\textsuperscript{169} Id. at 968 (quoting trial court opinion and noting victim did not disclose abuse until his mother found him sexually assaulting his brother); see also \textit{Commonwealth v. Dunkle}, 602 A.2d 830, 831, 836 (Pa. 1992) (recognizing unique problems of child victims of sexual abuse that may cause children to delay reporting crime, omit details of crime and forget exact dates of crime).

\textsuperscript{170} See \textit{O’Brien}, 836 A.2d at 968, 970 (finding evidence of similar crimes showed “common, scheme plan or design”).

\textsuperscript{171} For a further discussion of Shively, see \textit{supra} notes 145-70 and accompanying text.
cases have recognized the unique characteristics of sex crimes, and even suggested that evidence of other crimes is sometimes necessary to help the prosecution in light of challenges such as the lack of evidence beyond the victim’s testimony and the need to prove lack of consent.\textsuperscript{172}

While Pennsylvania courts, in cases involving the admission of evidence of other crimes, have gradually moved towards recognizing the unique characteristics of sex crimes, the courts have more explicitly recognized the unique nature of sex crimes in cases involving Megan’s Law.\textsuperscript{173} The courts' discussion of sex offenders' recidivist tendencies in Megan’s Law jurisprudence supports the argument that evidence of other sex crimes is particularly probative and that standards for its admission should be adjusted accordingly.\textsuperscript{174}

V. STATUTORY EVIDENCE OF PENNSYLVANIA’S RECOGNITION OF UNIQUE NATURE OF SEX CRIMES

Beginning in the mid-1990s, the Pennsylvania legislature has adopted laws recognizing the unique characteristics of sex crimes, including recidivism among offenders.\textsuperscript{175} Perhaps the clearest example of this trend was the enactment of Megan’s Law, which the Pennsylvania legislature passed

\textsuperscript{172} For a discussion of Pennsylvania case law treatment of admissibility other crimes evidence, see supra notes 164-70 and accompanying text (discussing recent cases where courts have admitted other crimes evidence in light of challenges in prosecuting sex crimes cases).

\textsuperscript{173} See Commonwealth v. Maldonado, 838 A.2d 710, 716 n.8 (Pa. 2003) (quoting McKune v. Lile, 536 U.S. 24, 34 (2002)) (“When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.”); Commonwealth v. Williams, 832 A.2d 962, 981 (Pa. 2001) (quoting same passage); Commonwealth v. Miller, 664 A.2d 1310, 1318 (Pa. 1995) (stating evidence of other crimes may not be introduced for sole purpose of “indicat[ing] the defendant’s propensity to commit similar crimes”); abrogation on other grounds recognized by Commonwealth v. McCrae, 832 A.2d 1026, 1037 (Pa. 2003) (stating “Court abrogated the relaxed waiver rule”); Commonwealth v. Mullins, 5 A.2d 1009, 1017 (Pa. Super. Ct. 2006) (quoting Guttshall v. Sundquist, 193 F.3d 466, 476 (6th Cir. 1999)) (“In this regard, it has been noted that ‘Congress, and the legislatures of the several states, have considered the egregiousness of sexual crimes, particularly where children are concerned, and studies have indicated that sexual offenders have high rates of recidivism.’”). For a further discussion of Megan’s Law, see infra notes 175-82 and accompanying text.

\textsuperscript{174} See United States v. Mann, 193 F.3d 1172, 1174 (10th Cir. 1999) (“Uncharged prior sexual acts are probative if they are similar to the charged crimes.”); 140 CONG. REC. H8991 (daily ed. Aug. 20, 1994) (statement of Rep. Molinari) (arguing that evidence of defendant’s past acts of molestation is “exceptionally probative because it shows an unusual disposition of the defendant—a sexual or sadosexual interest in children—that simply does not exist in ordinary people”); Karp, supra note 82, at 22 (noting that evidence of similar sexual offenses “has a high degree of probative value, and will not be [a] mere distraction[ ] from the main issues”).

\textsuperscript{175} For a further discussion of Megan’s law, recent increases in sentences for sex offenses, recent addition of certain sex crimes to three strikes law, Jessica’s Law and SB 1054, see infra notes 176-97 and accompanying text.
unanimously without debate in 1995.\textsuperscript{176} Megan’s Law requires all convicted sex offenders to register with the state police.\textsuperscript{177} Additional provisions apply when an offender is found to be a “sexually violent predator.”\textsuperscript{178} First, the police must notify the community where the off-

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\textsuperscript{176} See 42 PA. CONS. STAT. ANN. §§ 9791, 9792, 9795.1-9799.4, 9799.7-9799.9 (West Supp. 2006) (providing special rules for convicted sex offenders in order to protect public); Michael Bell, \textit{Pennsylvania’s Sex Offender Community Notification Law: Will it Protect Communities from Repeat Sex Offenders?}, 34 DUQ. L. REV. 635, 637 (1996) (arguing community notification provision would not protect public from repeat sex offenders).
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\textsuperscript{177} See 42 PA. CONS. STAT. ANN. § 9795.1 (West Supp. 2006) (requiring either ten-year or lifetime registration, depending on crime committed). A ten-year registration requirement applies to:
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- individuals convicted of any of the following offenses: 18 Pa.C.S. § 2901 (relating to kidnapping) where the victim is a minor; 18 Pa.C.S. § 2910 (relating to luring a child into a motor vehicle); 18 Pa.C.S. § 3124.2 (relating to institutional sexual assault); 18 Pa.C.S. § 3126 (relating to indecent assault) where the offense is a misdemeanor of the first degree; 18 Pa.C.S. § 4302 (relating to incest) where the victim is 12 years of age or older but under 18 years of age; 18 Pa.C.S. §5902(b) (relating to prostitution and related offenses) where the actor promotes the prostitution of a minor; 18 Pa.C.S. § 5903(a)(3), (4), (5) or (6) (relating to obscene and other sexual materials and performances) where the victim is a minor; 18 Pa.C.S. § 6312 (relating to sexual abuse of children); 18 Pa.C.S. § 6318 (relating to unlawful contact with a minor); 18 Pa.C.S. § 6320 (relating to sexual exploitation of children).

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\textsuperscript{178} See infra notes 179-80 and accompanying text (discussing community notification and counseling requirements). A “sexually violent predator” is:
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- [a] person who has been convicted of a sexually violent offense as set forth in section 9795.1 (relating to registration) and who is determined to be a sexually violent predator under section 9795.1 (relating to assessments) due to mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses. The term includes an individual determined to be a sexually violent predator where the determination occurred in the United States or one of its territories or possessions, another state, the District of Columbia, the Commonwealth of Puerto Rico, a foreign nation or by court martial.

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\textsuperscript{42} PA. CONS. STAT. ANN. § 9792 (West Supp. 2006) (defining sexually violent predator for purposes of community notification and counseling provisions). After a person is convicted of an offense requiring registration, a member of the State Sexual Offenders Assessment Board performs an assessment to determine whether to classify the offender as a sexually violent predator. 42 PA. CONS. STAT.
fender lives.\textsuperscript{179} Second, a “sexually violent predator” must attend counseling.\textsuperscript{180}

Megan’s Law is unique in that there is no comparable statute that provides for registration and community notification with regard to non-sexual offenses.\textsuperscript{181} One of the legislative findings behind Megan’s Law was that “sexually violent predators pose a high risk of engaging in further offenses even after being released from incarceration or commitments and that protection of the public from this type of offender is a paramount governmental interest.”\textsuperscript{182}

The Pennsylvania legislature’s view that sex crimes are different from other crimes is also evident in the 2002 amendments to sections 3121 and 3123 of Title 18.\textsuperscript{183} These amendments increased the penalties for rape of a child and involuntary deviate sexual intercourse with a child from twenty to forty years; they increased the penalties for rape of a child with serious bodily injury and involuntary deviate sexual intercourse with a child with serious bodily injury from twenty years to life.\textsuperscript{184} In contrast, the maximum sentence for all other non-homicide first degree felonies is only twenty years.\textsuperscript{185} The Pennsylvania House of Representatives passed the amendments to sections 3121 and 3123 unanimously.\textsuperscript{186} Representa-

\begin{footnotes}
\footnote{\textsuperscript{180} \textsuperscript{179}} \\
\footnote{\textsuperscript{180} See 42 Pa. Cons. Stat. Ann. § 9798(b) (West Supp. 2006) (providing that police must notify neighbors, “director of the county children and youth service agency,” various school officials, day care providers and colleges and universities). The notification must contain: (i) The name of the convicted sexually violent predator. (ii) The address or addresses at which he resides. (iii) The offense for which he was convicted, sentenced by a court, adjudicated delinquent or court martialed. (iv) A statement that he has been determined by court order to be a sexually violent predator, which determination has or has not been terminated as of a date certain. (v) A photograph of the sexually violent predator, if available.} \\
\footnote{\textsuperscript{183} See Kimberly B. Wilkins, \textit{Sex Offender Registration and Community Notification Laws: Will These Laws Survive?}, 57 U. Rich. L. Rev. 1245, 1260 (2003) (“The legal status of a sex offender is altered because all sex offenders are subject to burdensome registration and notification requirements from which other criminals and citizens are exempt.”).} \\
\footnote{\textsuperscript{184} See id. (presenting amendments and remarks by Rep. Marisco in support of amendments).} \\
\footnote{\textsuperscript{186} See H. Legis. J., 186th Sess. 2169 (statement of Rep. Marisco) (noting Senate had failed to act thus far on amendment).}
\end{footnotes}
tive Marsico, who sponsored the amendment, stressed the abhorrent nature of child molestation.\textsuperscript{187} He argued that the state needed to increase the punishment to match the severity of the crime.\textsuperscript{188}

Further, the Pennsylvania legislature recently amended the three strikes law, adding aggravated indecent assault, incest and sexual assault to the list of "crimes of violence."\textsuperscript{189} These are the only three crimes listed that are not first degree felonies.\textsuperscript{190} While the legislative history does not

\textsuperscript{187} See id. ("[R]ape is always a heinous crime, but it is never more horrific than when the victim is a child.").

\textsuperscript{188} See id. (arguing judges are limited by current maximums).


\textsuperscript{190} See 42 Pa. Cons. Stat. Ann. § 9714(g) (West Supp. 2006) (defining "crime of violence" for purposes of three strikes provision). The statute defines the following crimes as "crimes of violence" as:

murder of the third degree, voluntary manslaughter, aggravated assault as defined in 18 Pa.C.S. § 2702(a)(1) or (2) (relating to aggravated assault), rape, involuntary deviate sexual intercourse, aggravated indecent assault, incest, sexual assault, arson as defined in 18 Pa.C.S. § 3301(a) (relating to arson and related offenses); kidnapping; burglary of a structure adapted for overnight accommodation in which at the time of the offense any person is present; robbery as defined in 18 Pa.C.S. § 3701(a)(1)(i), (ii) or (iii) (relating to robbery), or robbery of a motor vehicle, or criminal attempt, criminal conspiracy or criminal solicitation to commit murder or any of the offenses listed above, or an equivalent crime under the laws of this Commonwealth in effect at the time of the commission of that offense or an equivalent crime in another jurisdiction.

address this provision of the bill, it appears significant that the bill singles out sex crimes that are second degree felonies, especially since some first degree felonies were not included on the list.\textsuperscript{191}

As recently as November 2006, the Pennsylvania legislature has continued to pass legislation aimed at sex offenders.\textsuperscript{192} One of these laws, Jessica’s Law, increased the minimum sentence for rape, involuntary deviate sexual intercourse or aggravated indecent assault of a child from five to ten years.\textsuperscript{193} Jessica’s Law also requires a mandatory minimum sentence of twenty-five years for an offender’s second conviction for most sexual offenses and a mandatory life sentence for a third such conviction.\textsuperscript{194} Finally, Jessica’s Law toughens the penalty for sex offenders who violate Megan’s Law and uniquely allows the use of global positioning system technology to track offenders.\textsuperscript{195} Another measure signed into law in No-


\textsuperscript{191} See Sen. Legis. J., 184th Sess. 1535 (Pa. 2000) (discussing Megan’s Law aspect of Act); Sen. Legis. J., 184th Sess. 1273 (Pa. 2000) (discussing registration changes to Megan’s Law and applicability of Megan’s Law to out-of-state offenders who move to Pennsylvania). The first degree felonies that were not included in the three strikes law include intentionally or knowingly causing a catastrophe. See 18 Pa. Cons. Stat. Ann. § 3302(a) (West Supp. 2006) ("A person who causes a catastrophe by explosion, fire, flood, avalanche, collapse of building, release of poison gas, radioactive material or other harmful or destructive force or substance . . . commits a felony of the first degree if he does so intentionally or knowingly.").

\textsuperscript{192} See Gov. Rendell Signs Bills to Protect Children, Aid Victims of Sexual Assault, Toughen Penalties for Sex Offenders, supra note 22 (presenting governor’s press release after signing four new bills into law). For a discussion of two of the laws, Jessica’s Law and SB 1054, see infra notes 193-98 and accompanying text. The two additional measures signed at the same time standardized rape kits and created a system of interpreters for courts and administrative agencies. Id. (quoting Governor Rendell, who said of the rape kit provision: “Rape cases are some of the most difficult cases to prosecute, but this new law will ensure that hospitals gather the kind of evidence that will secure solid convictions.”).

\textsuperscript{193} See S.B. 944, 190th Gen. Assem., Reg. Sess. (Pa. 2006) (listing offenses to which mandatory minimum applies); Gov. Rendell Signs Bills to Protect Children, Aid Victims of Sexual Assault, Toughen Penalties for Sex Offenders, supra note 22 (noting that at time of law’s enactment, average sentence for rape of child was six years); Alison Hawkes, Senators Get Tougher on Sex Offenders, BUCKS COUNTY COURIER TIMES, Mar. 21, 2006 (discussing earlier version of bill passed by Senate committee). Jessica’s Law was first passed in Florida after a registered sex offender killed 9-year-old Jessica Lunsford. See id. ("The case showed the limitations of requiring sex offenders to list their addresses in public databases under Megan’s Law.").

\textsuperscript{194} See S.B. 944, 190th Gen. Assem., Reg. Sess. (Pa. 2006); Gov. Rendell Signs Bills to Protect Children, Aid Victims of Sexual Assault, Toughen Penalties for Sex Offenders, supra note 22 (quoting Governor Rendell, who said: “It is past time that the criminals who commit these despicable acts receive the severe punishment they deserve.”).

\textsuperscript{195} See S.B. 944, § 8, 190th Gen. Assem., Reg. Sess. (Pa. 2006) ("The Pennsylvania Board of Probation and Parole and county probation authorities may impose supervision conditions that include offender tracking through global positioning system technology."); Gov. Rendell Signs Bills to Protect Children, Aid Victims of Sexual Assault, Toughen Penalties for Sex Offenders, supra note 22 (describing provisions of four sex-offender bills Governor Rendell signed into law).
November 2006 increased the statute of limitations for bringing criminal child molestation charges. This law also extended reporting requirements for those who care for children, recognizing that children often do not report the molestation they suffer. All these changes in the law indicate that the Pennsylvania legislature recognizes the unique nature of sex crimes.

VI. Conclusion

Sex crimes have unique characteristics that differentiate them from other crimes, including a lack of physical evidence, a lack of witnesses other than the victim, delays in reporting, societal bias against believing women and children who report sexual crimes and an overall focus on the victim's credibility. Furthermore, sex crimes are characterized by significant recidivism among offenders. The federal government concluded that the unique nature of sex crimes requires special rules of evidence regarding the admission of evidence of prior acts. Despite the federal

196. See S.B. 1054, § 7 190th Gen. Assem., Reg. Sess. (Pa. 2006) (stating prosecution may be brought for "any sexual offense committed against a minor who is less than 18 years of age any time up to the later of the period of limitation provided by law after the minor has reached 18 years or the date the minor reaches 50 years of age"); Gov. Rendell Signs Bills to Protect Children, Aid Victims of Sexual Assault, Toughen Penalties for Sex Offenders, supra note 22 (noting that prior to law, charges could be brought until victim reached age thirty, and new law allowed charges to be brought until victim reached age fifty).

197. See Gov. Rendell Signs Bills to Protect Children, Aid Victims of Sexual Assault, Toughen Penalties for Sex Offenders, supra note 22 (noting law "requires that those who care for children report suspected abuse, regardless of whether the child reports the abuse [and] deletes a requirement in the current child abuse reporting law that says that only child abuse committed by a parent, guardian or person living in the same home as the child or the child's parent, must be reported"); David O'Reilly & Julie Shaw, New Law Expands Sex Abuse Sanctions: Gov. Rendell is Expected to Sign the Measure, A Response to the Grand Jury Report on Abuse of Children by Clergy, PHILA. INQUIRER, Nov. 22, 2006, at A1 (quoting District Attorney Lynne M. Abraham, who stated: "No longer does the child need to be the one to report the crime.").

Another provision of this law imposes criminal penalties on employers who "place the child in the care of someone known to be dangerous to children." Gov. Rendell Signs Bills to Protect Children, Aid Victims of Sexual Assault, Toughen Penalties for Sex Offenders, supra note 22 (noting law also imposes penalties for "preventing or interfering with the reporting of suspected child abuse"). Further, the law mandates criminal background checks for people who work with children and increases the amount of information about sex offenders that must be placed on the Megan's Law website. Id. (noting that additional information includes whether victim was minor).

198. For a discussion of the unique characteristics of sex crimes, see supra notes 38-62 and accompanying text (discussing characteristics that make sex crimes difficult to prosecute).

199. For a discussion of high recidivism rates among sex offenders, see supra notes 63-68 and accompanying text (discussing studies of recidivism among sex offenders).

200. For a discussion of the justification for the applicability of special rules of evidence in sex crimes cases, see supra notes 69-75 and accompanying text (discuss-
government's findings, the Pennsylvania Supreme Court decided not to include Federal Rules of Evidence 413 and 414 in the Pennsylvania Rules of Evidence.\textsuperscript{201} The Pennsylvania courts, however, have been inching towards recognizing that evidence of other crimes is necessary in sex crimes cases, where the credibility of the victim is often at issue and where there is often a dearth of evidence beyond the victim's testimony.\textsuperscript{202} Furthermore, the Pennsylvania legislature has repeatedly recognized the danger of recidivism among sex offenders.\textsuperscript{203}

The laws enacted by the Pennsylvania legislature are not enough to protect the people of Pennsylvania from recidivist sex offenders.\textsuperscript{204} While Megan's Law is a start, it faces constitutional and practical problems.\textsuperscript{205} Long sentences are helpful, but first prosecutors need help getting convictions.\textsuperscript{206} Beyond the challenges that all prosecutors face when trying sex crimes cases, Pennsylvania prosecutors face additional hurdles, such as jury instructions that suggest that the jury take into consideration the victim's delay in reporting in assessing the victim's credibility.\textsuperscript{207}

\begin{itemize}
  \item 201. For an illustration of Pennsylvania's refusal to adopt Rules 413 and 414, see supra note 141 and accompanying text (comparing Federal Rules of Evidence to Pennsylvania Rules of Evidence).
  \item 202. For a discussion of the trend toward admitting other crimes evidence, see supra notes 166-70 and accompanying text (discussing recent sex crimes cases where other crimes evidence has been admitted).
  \item 203. For a discussion of the Pennsylvania legislature's recognition of the unique nature of sex crimes cases, see supra notes 175-97 and accompanying text (discussing statutory provisions that recognize unique nature of sex crimes).
  \item 204. For a discussion of the present inadequacy of Pennsylvania laws, see infra notes 204-10 and accompanying text (discussing challenges Pennsylvania sex crimes prosecutors face).
  \item 205. See Todd, supra note 20, at 533-34 (explaining that many sex offenders subject to Megan's Law provide false addresses or do not provide addresses at all and that police departments are unable to locate sex offenders who do not register). In 2004, Pennsylvania's then Auditor General, Robert P. Casey, reported that "the Pennsylvania State Police repeatedly issued notices to communities that were wrong, late, and ineffective." Id. at 534-35 (noting Auditor Casey performed an audit to track compliance with Megan's Law). Further, Auditor Casey found that "the State Police gave incorrect information to local police departments, schools, and child care centers nearly half of the time, resulting in families not knowing that a sexually violent predator was living nearby, sometimes for weeks and even months." Id. at 535 (noting that Auditor Casey believed "deficiencies with the community notification requirements of Megan's Law demand[ed] immediate attention").
  \item 206. For a discussion of the relative difficulty of prosecuting sex crimes compared to other crimes, see supra notes 21-25 and accompanying text.
  \item 207. See Pennsylvania Suggested Standard Criminal Jury Instructions 4.13A (2005) (instructing that delay in reporting is not conclusive evidence that sex crime did not occur or that victim consented, but does bear on reliability of victim's testimony).
\end{itemize}
Furthermore, Pennsylvania prosecutors may not introduce expert testimony to explain why a child might delay reporting sexual abuse.\textsuperscript{208} Moreover, child victims may be subject to taint hearings, where the defense has an additional opportunity to challenge the victim's credibility.\textsuperscript{209} Pennsylvania prosecutors need Federal Rules 413 and 414 as an additional tool to convict sex offenders.\textsuperscript{210} When courts exclude evidence of other sexual crimes and an offender like Howard Neison escapes punishment, what will happen when the offender molests another child?\textsuperscript{2211} If courts continue to exclude evidence of other sex crimes, some sexual offenders are likely to continue to sexually assault victim after victim without ever being punished.\textsuperscript{212}

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\textsuperscript{208} See Commonwealth v. Dunkle, 602 A.2d 830, 836-38 (Pa. 1992) (holding that experts may not testify “about behavior patterns generally exhibited by abused children” or about why children delay reporting sexual abuse and omit details of crimes when they do report). Courts in the following states have allowed expert testimony to explain behavior of sexually abused children in general: Arizona, California, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Jersey, Nebraska, New Jersey, New York, North Carolina, Ohio, Oklahoma, South Dakota, Texas, Wisconsin and Wyoming. See Elizabeth Trainor, Annotation, \textit{Admissibility of Expert Testimony on Child Sexual Abuse Accommodation Syndrome (CSAAS) in Criminal Case}, 85 A.L.R. 5th 595 (West 2001 & Supp. 2006) (noting common traits among sexually abused children are: “(1) secrecy; (2) helplessness; (3) entrapment and accommodation; (4) delayed, conflicted, and unconvincing disclosure; and (5) retraction”).

\textsuperscript{209} See Commonwealth v. Delbridge, 855 A.2d 27, 39 (Pa. 2003) (holding that taint hearings are appropriate when there is accusation that child was manipulated and noting that New Jersey, Delaware, Michigan, Washington and Wyoming accepted idea, while Alaska, Kentucky and Ohio rejected it). While the majority in \textit{Delbridge} stated that taint hearings are not about questioning the credibility of the victim, two dissenting justices disagreed with this contention. See \textit{id.} at 47 (Nigro, J., dissenting) (“I disagree with the majority’s conclusion that taint is a matter of competency, rather than credibility.”); \textit{id.} at 49 (Eakin, J., concurring in part and dissenting in part) (disagreeing with contention “that ‘taint’ always goes to competency” and disagreeing with “use of expert witnesses on what is really a credibility issue”).

\textsuperscript{210} For a further discussion of problems prosecuting sex crimes in general, see \textit{supra} notes 21-25 and accompanying text. For a further discussion of the problems caused by the focus on the victim’s credibility, see \textit{supra} notes 38-62 and accompanying text. For a further discussion of the particular problems Pennsylvania prosecutors face, see \textit{supra} notes 208-09 and accompanying text.

\textsuperscript{211} For a further discussion of recidivism rates among sex offenders, see \textit{supra} notes 63-68.

\textsuperscript{212} See Herbert, \textit{supra} note 11 (quoting judge who said exclusion of evidence that Neison molested other relatives was “a pivotal ruling in the case that made it extremely difficult, if not impossible, for the D.A. to prosecute the felony”); see also Larsen, \textit{supra} note 13, at 208 (noting admission or exclusion of other crimes evidence is important in prosecutor’s decision as to whether to proceed).