

## ESSAY

# PROPENSITY OR STEREOTYPE?: A MISGUIDED EVIDENCE EXPERIMENT IN INDIAN COUNTRY

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*In a significant break with traditional evidence rules and policies, the Federal Rules of Evidence concerning rape and child abuse, Rules 413 and 414, permit the government to admit the accused's prior sexual misconduct as evidence of character and propensity. Although these rules have been roundly criticized, insufficient attention has been paid to the fact that in allowing propensity evidence for federal sex offenses (as opposed to offenses under state law), these rules disproportionately affect one distinct civilian population: Indians.*

*The de facto concentration of Rules 413–414 cases in Indian Country raises troubling questions regarding what it means to have just and neutral evidence rules. The selective application of these character rules to a particular population violates important goals of evidence law, such as equal application, fair process, and focus on the event charged. The concentration of Indians among criminal defendants subject to Rules 413–414 exposes Indians to rules that allow jurors to convict relying on the accused's propensities and prior sex offenses. This focus on prior bad acts can be unfair to the accused and distracting for the jury. It may also perpetuate stereotypes about Indians, subtly influencing the development and application of the rules.*

*Relying on theories of how fact-finders use stereotypes, this Essay posits that applying Rules 413–414 to a discrete minority makes the pro-*

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*propensity arguments seem more intuitively appealing, because the appearance of Indians as regulars at the defense table works to reinforce the perception that propensity evidence is valuable. Therefore, this Essay argues, the evidence experiment in Indian Country has helped pave the way for judicial acceptance of a dangerous new doctrine permitting propensity evidence in sex offense cases.*

INTRODUCTION.....	174
I. RULES 413–414: SPECIAL CHARACTER RULES FOR THOSE ACCUSED OF SEX CRIMES .....	178
A. <i>Constitutional Challenges to Rules 413–414</i> .....	180
B. <i>Overview of the Case Law</i> .....	182
II. THE EFFECTS OF RULES 413–414 ON INDIANS .....	184
A. <i>The Unfairness of Harsher Rules</i> .....	184
B. <i>The Interaction between Propensity Evidence and             Stereotypes</i> .....	187
C. <i>Concern about Victims</i> .....	196
III. HOW THE OVERREPRESENTATION OF INDIANS IN FEDERAL SEX-CRIME CASES MAY SUBTLY REINFORCE THE SWAY OF PROPENSITY THINKING .....	198
CONCLUSION.....	203

## INTRODUCTION

In 1995, Congress enacted new Federal Rules of Evidence specifically targeting those accused of rape and child molestation.<sup>1</sup> Rules 413–414 of the Federal Rules of Evidence allow prior sex offenses by the accused (whether the prior bad-acts were formally charged or not) to be admitted for any relevant purpose.<sup>2</sup> These rules contravene centuries of legal tradition by permitting jurors to use such prior offenses to assess the accused’s character and propensities;<sup>3</sup> jurors may use this evidence circumstantially to reason that the accused is more likely to be guilty of the crime charged because he committed similar wrongs in the past.

Much has been written—little of it complimentary—on the wisdom and fairness of Rules 413–414. Scholars have raised serious concerns

<sup>1</sup> See Violent Crime Control and Law Enforcement Act of 1994 § 320935, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

<sup>2</sup> See FED. R. EVID. 413–414.

<sup>3</sup> The common law of lustful disposition, however, provided an exception to the ban on propensity evidence. See generally *Lannan v. State*, 600 N.E.2d 1334, 1335–38 (Ind. 1992) (discussing and rejecting the lustful disposition exception); Lisa M. Segal, *The Admissibility of Uncharged Misconduct Evidence in Sex Offense Cases: New Federal Rules of Evidence Codify the Lustful Disposition Exception*, 29 SUFFOLK U. L. REV. 515 (1995) (discussing the history and policy implications in Rhode Island of adopting Rules 413–415, which replaced the common law of lustful disposition exception).

about the rules' fairness and constitutionality.<sup>4</sup> Congress passed the new rules as statutes, in circumvention of the regular rule-making process,<sup>5</sup> over the objection of the Judicial Conference and its Advisory Committees on the Federal Rules of Evidence and the Federal Rules of Criminal Procedure.<sup>6</sup>

However, insufficient attention has been paid to the fact that allowing propensity evidence disproportionately affects two distinct populations: soldiers and Indians.<sup>7</sup> Rape and child abuse are usually prosecuted as state crimes; crimes committed on federal property or on Indian land, however, are prosecuted as federal crimes.<sup>8</sup> As a result, al-

<sup>4</sup> See, e.g., CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* §§ 5411–16, 5411A–17A (Supp. 2009); James Joseph Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95, 114–15 (1994); Margaret C. Livnah, *Branding the Sexual Predator: Constitutional Ramifications of Federal Rules of Evidence 413 Through 415*, 44 CLEV. ST. L. REV. 169, 181 (1996) (noting the increased risk of due process violation because juries may be prejudiced by explicit reference to prior bad sexual acts); Dale A. Nance, *Foreword: Do We Really Want to Know the Defendant?* 70 CHI.-KENT L. REV. 3 (1994) (summarizing various arguments against the sexual propensity rules); Louis M. Natali, Jr. & R. Stephen Stigall, “Are You Going to Arraign His Whole Life?”: *How Sexual Propensity Evidence Violates the Due Process Clause*, 28 LOY. U. CHI. L.J. 1 n.34 (1996); Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663 (1999) [hereinafter Orenstein, *No Bad Men!*]; Myrna S. Raeder, *American Bar Association Criminal Justice Section Report to the House of Delegates, reprinted in* 22 FORDHAM URB. L.J. 343 (1995); Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57, 82 (1995) (“Rule 413 erodes the presumption of innocence in violation of the Fifth Amendment’s Due Process Clause.”).

<sup>5</sup> Cf. Paul R. Rice & Neals-Erik William Delker, *Federal Rules Decisions: A Short History of Too Little Consequence*, 191 F.R.D. 678 (2000) (summarizing the federal rulemaking process and describing particular problems in the process for the Federal Rules of Evidence).

<sup>6</sup> See Eileen A. Scallen, *Analyzing “The Politics of [Evidence] Rulemaking,”* 53 HASTINGS L.J. 843, 856 (2002) (recounting the opposition of the Judicial Conference to Fed. R. Evid. 413–414).

<sup>7</sup> I have struggled with the nomenclature. As Paul Gonzales observed, it is galling to be named Indians “because some explorer was looking for a different country to conquer.” Paul Gonzales, *Appropriation of Culture*, <http://www.hanksville.org/sand/stereotypes/gonzales.html> (last visited on Aug. 31, 2009). I have stuck with the term “Indian” for three reasons. First, it is what most Indians call themselves. As Alan Velie explains, “‘Indian’ is still the word that most Indians use, at least in ‘Indian Country,’ that is, Oklahoma, Montana, New Mexico, and other states with large Indian populations. On the ‘rez’—that is among working class Indians on reservations—‘Indian’ is virtually the only term ever used. Accordingly, with apologies to those who object to the term, ‘Indian’ is the word I will use here.” Alan Velie, *Indian Identity in the Nineties*, 23 OKLA. CITY U. L. REV. 189, 190 (1998). Second, the crimes all occurred in the legally cognizable place called “Indian Country,” which is why the federal rules apply at all. Third, to the extent that the term “Indian” evokes an image and certain stereotypes, those reactions may be instructive for understanding the relationship between the disproportionate representation of Indians in the jurisprudence and the new propensity focus of Rules 413–414.

<sup>8</sup> The relevant jurisdictional statute reads:

§ 1153. Offenses committed within Indian country:

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnap-

most all of the federal cases interpreting Rules 413–414 apply to events that transpired in the military or in Indian Country. Burgeoning jurisprudence demonstrates that aside from soldiers,<sup>9</sup> the occasional Internet pornographer,<sup>10</sup> a federal prison guard accused of rape,<sup>11</sup> or someone transporting a child across state lines,<sup>12</sup> it is predominantly Indians who are affected by this exception to the traditional propensity rules.<sup>13</sup>

The impact on Indians was noted by scholars at the time of the rules' proposal. The ABA Criminal Rules Committee observed that "as a practical matter, in federal criminal cases, the effect will be felt in Indian Territory where what would otherwise be state crimes are prosecuted in federal court."<sup>14</sup> The report asked, "Other questions of fairness aside,

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ping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

18 U.S.C. § 1153 (2006); *see also* Duane, *supra* note 4.

<sup>9</sup> *See, e.g.*, United States v. Parker, 59 M.J. 195 (C.A.A.F. 2003); United States v. Valentin-Nieves, 57 M.J. 691 (N-M. Ct. App. 2002); United States v. Bailey, 55 M.J. 38 (C.A.A.F. 2001); United States v. Wright, 53 M.J. 476 (C.A.A.F. 2000). The issue of rape in the military raises special issues of gender relations in the military. Currently the United States military is struggling with issues of rape and domestic violence. *See, e.g.*, Michael Janofsky, *Air Force Begins an Inquiry of Ex-Cadets' Rape Charges*, N.Y. TIMES, Feb. 20, 2003, at A18; Associated Press, *Accused Academy Graduates Remain in the Military*, N.Y. TIMES, Oct. 5, 2003, at A21; Michael Moss, Michael Janofsky & Diana Jean Schemo, *Pentagon Faces New Questions on Old Problem*, N.Y. TIMES, Mar. 2, 2003, at A26. There is a palpable sense in some of the military rape cases that no harm was done—where the women (often drunk or violating other social fraternization norms) were sexual anyway, and somehow "asking for it." In other words, at least some of the military rape cases construe the event as romance gone wrong, where everyone, alleged perpetrator and alleged victim alike, is portrayed as blameworthy. *See, e.g.*, Parker, 59 M.J. at 198.

<sup>10</sup> *See, e.g.*, United States v. Dhingra, 371 F.3d 557 (9th Cir. 2004) (charging defendant with using the Internet to solicit sex from a minor); United States v. Angle, 234 F.3d 326 (7th Cir. 2000).

<sup>11</sup> *See, e.g.*, United States v. Akram, No. 97 CR 78, 1997 U.S. Dist. LEXIS 9894 (N.D. Ill. July 8, 1997).

<sup>12</sup> *See, e.g.* United States v. Meacham, 115 F.3d 1488 (10th Cir. 1997) (charging defendant with transporting a minor in interstate commerce with intent to engage in sexual intercourse with her); United States v. Larson, 112 F.3d 600 (2d Cir. 1997) (charging defendant with transporting a minor from Connecticut to Massachusetts with the intent that the minor engage in sexual conduct with him); United States v. Mays, No. 8:06-cr-514-T-23MSS, 2007 WL 1839480 (M.D. Fla. June 26, 2007) (charging defendant with molesting a child on an airplane).

<sup>13</sup> *See* Duane, *supra* note 4, at 114–15 ("Not surprisingly, therefore, federal sex crime prosecutions are disproportionately targeted at Native American defendants. In the year ending September 30, 1993, for example, Native Americans made up 80% of all defendants convicted of sexual abuse crimes in federal court but less than 1% of the country's population.") (citations omitted).

<sup>14</sup> Raeder, *supra* note 4, at 352.

should such a significant and controversial rule change be adopted which will primarily impact Native Americans?"<sup>15</sup> Despite the many objections to Rules 413–414—as well as the policies, goals, and values of evidence law—the disparate impact on the population of Indian defendants has not received the attention it deserves.

The federal cases applying Rules 413–414 fall into interesting patterns based on the demography of the accused and the specific nature of the crimes (adult rape vs. child molestation). What follows are observations and conjectures about how the case law can be understood when considered not only from a doctrinal perspective, but also from a larger, more functional view of outcomes and effects. In turn, this Essay considers the ramifications of these rules on the justice- and credibility-seeking goals of the Federal Rules of Evidence.

First, the concentration of the practical effects of Rules 413–414 in Indian Country raises troubling question both of fairness to Indians and of what it means to have just and neutral evidence rules. That these arguably radical rules apply disproportionately to a minority population that has traditionally suffered from discrimination and maltreatment deserves notice and concern.

Second, the concentration of the effects of Rules 413–414 in Indian Country raises questions about the goals of evidence law other than truth-seeking.<sup>16</sup> Even if the “truth” is that all the Indians charged with sex crimes are guilty, the *de facto* selective application and operation of these character rules may violate other goals of evidence law, such as equal application,<sup>17</sup> fair process, and focus on the event charged.

Third, this Essay examines how this concentration of Indians as accuseds subject to Rules 413–414 may have subtly affected the acceptance of the new evidence rules. Relying on theories of how fact-finders use stereotypes, this Essay posits that applying Rules 413–414 to one discrete population makes the propensity arguments underlying those Rules seem more intuitively appealing. It concludes by arguing that the application of these rules in Indian Country arguably paved the way for the rules’ acceptance, despite their historical deviation from traditional evidence jurisprudence.

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<sup>15</sup> *Id.*

<sup>16</sup> See generally Symposium, *Truth and Its Rivals: Evidence Reform and the Goals of Evidence Law*, 49 HASTINGS L.J. 289 (1998).

<sup>17</sup> Here a loose analogy can be drawn to the difference in federal sentencing between crack and powder cocaine. By statutory design, federal sentencing for crack cocaine used in inner-cities has historically been much harsher than the punishment meted out for powdered cocaine, a drug of choice for wealthy suburbanites. See William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2008 n.178 (2008) (“[P]ossession of one gram of crack cocaine is punished as severely as possession of one hundred grams of cocaine powder.”) (citing David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995)).

## I. RULES 413–414: SPECIAL CHARACTER RULES FOR THOSE ACCUSED OF SEX CRIMES

Federal Rules of Evidence 413–414 allow evidence of the accused’s prior sex offenses to be admitted in federal sex-crime prosecutions.<sup>18</sup> The two rules are identical except that Rule 413 applies to rape, while Rule 414 applies to child molestation; the case law does not differentiate between them, and law developed for one rule applies to the other.<sup>19</sup> These rules declare that evidence of the accused’s prior similar wrongful sex acts in rape and child molestation cases “is admissible, and may be considered for its bearing on any matter to which it is relevant.”<sup>20</sup> The accused need not take the stand for his prior bad sex acts to be admitted; these prior bad acts are admissible in the prosecutor’s case-in-chief, although the prosecutor must give advance notice of his intent to admit such evidence.<sup>21</sup> Rules 413–414 override the general prohibition on propensity evidence and allow the use of evidence of the accused’s past acts to argue that the accused has the propensities and character of a sex offender and is therefore more likely to have committed the crime charged.<sup>22</sup>

<sup>18</sup> See FED. R. EVID. 413–414.

<sup>19</sup> See, e.g., *United States v. Dewrell*, 55 M.J. 131, 138 n.4 (C.A.A.F. 2001) (“As Rules 413 and 414 are essentially the same in substance, the analysis for proper admission of evidence under either should be the same.”).

<sup>20</sup> FED. R. EVID. 413–414. Both rules were adopted by Congress as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994). Contrary to the hopes of the Rules’ proponents, however, their adoption by states has not been rapid, though it is still significant. See 140 CONG. REC. S10,276 (daily ed. Aug. 2, 1994) (statement of Sen. Dole) (noting the “leadership role” of the Federal Rules and observing that once the new rules were adopted “it’s possible—perhaps even likely—that the States may follow suit and amend their own rules of evidence as well”). Some states have adopted rules very similar or identical to Rules 413–414. These states also rely on the federal cases to interpret the state rules, although sometimes with interesting variations. See FLA. STAT. ANN. § 90.404 (West 1999); 725 ILL. COMP. STAT. ANN. 5/115-7.3 (West 1998) (child molestation); Ariz. Rev. Stat. ANN. § 13-1420 (2008). For a complete review of state adoptions, see Joyce R. Lombardi, Comment, *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 (reviewing adoption in the states, but misstating the law in Indiana where the Supreme Court of Indiana has refused to adopt a version of Rule 414 despite legislative action).

<sup>21</sup> See FED. R. EVID. 413(a)–(c), 414(a)–(c).

<sup>22</sup> See *id.* 413–414; *United States v. Hawpetoss*, 478 F.3d 820, 823 (7th Cir. 2007) (“[Rules 413–414] create an exception to the general prohibition against ‘propensity evidence’ found in Federal Rule of Evidence 404(b) (evidence of other crimes may not be used to ‘prove the character of a person in order to show action in conformity therewith.’)”). The rules do not admit all character evidence or all arguably relevant specific wrongs, but are limited instead to evidence of prior sex offenses similar to those with which the accused is charged. The rules also include a notice requirement—the prosecutor must disclose, in advance, any evidence of the uncharged offenses to the defendant, including statements of witnesses or a summary of the substance of any testimony that will be offered.

The accused's prior sex offense need not have been the subject of a conviction.<sup>23</sup> Jurors need only reasonably believe that a prior bad sex act occurred.<sup>24</sup> Prior bad acts that occurred twenty to thirty years earlier are regularly admitted as evidence against the accused to show his propensity to commit similar sexual offenses.<sup>25</sup>

Despite the command that evidence of the accused's commission of another sex offense "is admissible," Rules 413–414 require an additional step of judicial balancing under Rule 403,<sup>26</sup> whereby the trial judge may exclude the evidence 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."<sup>27</sup> The application of Rule 403 is highly discretionary. Elsewhere, I have argued that in the context of Rules 413–414, Rule 403 has been transformed into "403-lite" and actu-

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<sup>23</sup> See *United States v. Fitzgerald*, No. 02-4978, 2003 U.S. App. LEXIS 23326, at \*86 (4th Cir. Nov. 17, 2003) ("The defendant does not have to have been convicted of, or even charged with, the prior act.").

<sup>24</sup> This standard, that the jury could reasonably find by a preponderance of the evidence that the other acts had occurred, derives from *Huddleston v. United States*, 485 U.S. 681, 690 (1988), and is regularly applied in Rule 413–414 cases. See *United States v. Norris*, 428 F.3d 907, 913–14 (9th Cir. 2005) ("The Supreme Court's decision in *Huddleston* controls the standard of proof required to admit evidence under Rules 413–415 . . . [T]he court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence.") (quoting *Huddleston*, 485 U.S. at 690); *United States v. Schroder*, 65 M.J. 49, 54 n.2 (C.A.A.F. 2007) (stating that the military judge's instruction to the jury "that 'the jury could reasonably find . . . by a preponderance of the evidence' that the other acts had occurred" did not suggest misapplication of the law).

<sup>25</sup> See, e.g., *United States v. Benally*, 500 F.3d 1085 (10th Cir. 2007) (affirming admission of rape of sister-in-law forty years before charged offense under Rule 414); *United States v. Drewry*, 365 F.3d 957, 960 (10th Cir. 2004) (finding "[s]ufficient factual similarity" between twenty-five-year-old uncharged child molestation and the charged offense permitted admission of evidence "that might otherwise be inadmissible due to staleness"); *United States v. Gabe*, 237 F.3d 954, 959–60 (8th Cir. 2001) (upholding admission of sexual molestation committed twenty years before charged offenses where prior acts were "almost identical" to charged crimes).

<sup>26</sup> See *United States v. Crawford*, 413 F.3d 873, 875 (8th Cir. 2005) ("Evidence admitted under Rule 413 is still subject to Rule 403."). There is actually some disagreement among the circuits about the method of applying Rule 403. As the court in *United States v. Kelly*, 510 F.3d 433 (4th Cir. 2007), observed, "There is a circuit split on whether a district court must address these or other specific factors and make findings. The Ninth Circuit requires this, whereas the Seventh Circuit adopts a more flexible approach and does not dictate a specific analysis." *Id.* at 437 n.3 (comparing *United States v. LeMay*, 260 F.3d 1018, 1027–28 (9th Cir. 2001), with *Hawpetoss*, 478 F.3d at 825–26).

<sup>27</sup> FED. R. EVID. 403. The Advisory Committee's Note to Rule 403 defines unfair prejudice as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." FED. R. EVID. 403 advisory committee's note; see also *Old Chief v. United States*, 519 U.S. 172, 180 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.").

ally provides little real protection to the accused.<sup>28</sup> Rather than scrutinize the individual facts of the cases, courts rely on the rules' legislative history to deem the probative value of the evidence high,<sup>29</sup> and denigrate any unfair prejudice as merely the dangers inherent in propensity evidence that are built into the rules' design.<sup>30</sup> As the court in *United States v. Withorn* observed, "The district court was obligated to take into account Congress's policy judgment that Rule 413 was 'justified by the distinctive characteristics of the cases it will affect,' and that Rule 414 evidence is 'exceptionally probative' of a defendant's sexual interest in children."<sup>31</sup> Courts have forsaken the traditional, discretionary gate-keeping role of Rule 403 and substituted a "presumption of admissibility."<sup>32</sup> The toothless application of Rule 403 analysis in this context is all the more ironic because only the individual balancing provided by the Rule guarantees the constitutionality of Rules 413–414.<sup>33</sup>

### A. *Constitutional Challenges to Rules 413–414*

Courts have rejected various constitutional challenges to Rules 413–414. Despite the historical ban on propensity evidence, all courts that have considered the question have determined that Rules 413–414 do not violate due process. In *United States v. Enjady*, for example, the

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<sup>28</sup> Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487 (2005) [hereinafter Orenstein, *Deviance, Due Process*]. Where the trial court fails to conduct a Rule 403 balancing test at all, however, the conviction will be reversed. See *United States v. Velarde*, 214 F.3d 1204, 1212 (10th Cir. 2000).

<sup>29</sup> See *Benally*, 500 F.3d at 1090 ("Consistent with congressional intent regarding the admission of evidence tending to show the defendant's propensity to commit sexual assault or child molestation, 'courts are to "liberally" admit evidence of prior uncharged sex offenses.'") (quoting *United States v. Meacham*, 115 F.3d 1488, 1492 (10th Cir.1997)); *United States v. LeCompte*, 131 F.3d 767, 769 (8th Cir. 1997) (describing the "strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible").

<sup>30</sup> See *United States v. Horn*, 523 F.3d 882, 888 (8th Cir. 2008) (noting that the testimony is prejudicial to the accused "for the same reason it is probative—it tends to prove his propensity to commit sexual assaults on vulnerable female members of his family when presented with an opportunity to do so undetected"); *United States v. Mound*, 149 F.3d 799, 802 (8th Cir. 1998) ("There is no evidence that the prior conviction presented any danger of unfair prejudice beyond that which 'all propensity evidence in such trials presents,' but is now allowed by Rule 413.") (quoting *LeCompte*, 131 F.3d at 770); *LeCompte*, 131 F.3d at 769 ("Rule 403 must be applied to allow Rule 414 its intended effect.").

<sup>31</sup> *United States v. Withorn*, 204 F.3d 790, 794 (8th Cir. 2000) (quoting *Mound*, 149 F.3d at 801).

<sup>32</sup> See *United States v. Larson*, 112 F.3d 600, 604 (2d Cir. 1997) (quoting congressional sponsors' statements that "[t]he presumption is that the evidence admissible pursuant to these rules is typically relevant and probative, and that its probative value is not outweighed by any risk of prejudice").

<sup>33</sup> See *United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998) ("[W]ithout the safeguards embodied in Rule 403 we would hold [Rule 413] unconstitutional."). See generally, Orenstein, *Deviance, Due Process*, *supra* note 28 (discussing the importance of Rule 403 as it pertains to the constitutionality of Rules 413 and 414).



accused argued that “admission of propensity evidence creates the danger of convicting a defendant because he is a ‘bad person,’ thus denying him a fair opportunity to defend against the charged crime.”<sup>34</sup> The Tenth Circuit “agree[d] that Rule 413 raises a serious constitutional due process issue,”<sup>35</sup> but ultimately concluded that Rule 413, though a major departure from the traditional evidentiary protections offered to the accused, does not violate due process.<sup>36</sup> The court explained that the due process standard will only be violated when “‘fundamental conceptions of justice which lie at the base of our civil and political institutions’” are violated in contravention of “‘fundamental fairness.’”<sup>37</sup> In rejecting the due process argument, the court observed “[t]hat the practice is ancient does not mean it is embodied in the Constitution.”<sup>38</sup>

In addition, accuseds have challenged Rules 413–414 on equal protection grounds. One version of the equal-protection argument is that the rules treat sex offenders differently from those accused of other crimes.<sup>39</sup> As sexual offenders are not a suspect class and discriminating against their particular crimes seems rational, such equal-protection arguments have been essentially laughed out of court.<sup>40</sup>

Another more persuasive variation of the equal protection argument arises from the fact that because rape and child molestation are federal crimes in only certain jurisdictions, the new rules have a disproportionate effect on Indians (who, unlike military personnel, did not enlist for their special jurisdiction). For instance, in *United States v. LeMay*, the defendant argued before the Ninth Circuit that Rule 414 has a far greater impact on Indians because they are far more likely than members of other

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<sup>34</sup> *Enjady*, 134 F.3d at 1430 (10th Cir. 1998) (citing *Michelson v. United States*, 335 U.S. 469, 475–76 (1948)); see also D. Craig Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 WASH. L. REV. 289, 326 (1989) (describing “diminished regret about possible error in a determination of guilt when the fact finder learns that the accused is an evil person”).

<sup>35</sup> *Enjady*, 134 F.3d at 1430.

<sup>36</sup> See *id.* at 1433.

<sup>37</sup> *Id.* at 1430 (quoting *Dowling v. United States*, 493 U.S. 342, 352–53 (1990)).

<sup>38</sup> *Id.* at 1432.

<sup>39</sup> See *United States v. Julian*, 427 F.3d 471, 487 (7th Cir. 2005) (“Based on the special treatment that Rule 413 accords to prior sexual assault offenses in prosecutions charging a defendant with sexual assault, Julian suggests that the rule deprives him of equal protection of the law.”).

<sup>40</sup> See, e.g., *id.* (“[T]he more sweeping rule of admissibility that [Rule 413] creates for a defendant’s prior acts in cases involving sexual assault does not violate equal protection principles so long as the rule has a rational basis.”); *United States v. Enjady*, 134 F.3d 1427, 1435 (10th Cir. 1998); *United States v. Mound*, 149 F.3d 799, 801 (8th Cir. 1998), (“Because Rule 413 does not ‘burden[] a fundamental right,’ and because sex-offense defendants are not a ‘suspect class,’ we must “‘uphold the legislative classification so long as it bears a rational relation to some legitimate end . . . . Promoting the effective prosecution of sex offenses is a legitimate end.”) (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996)).

racers to be prosecuted federally for child molestation.<sup>41</sup> The court acknowledged that such disproportion might exist—it seems incontrovertible—but viewed that disproportion merely as a quirk of federal jurisdiction.<sup>42</sup> The *LeMay* court noted that no evidence existed of any congressional intent to discriminate, and thus dismissed the claim as meritless.<sup>43</sup>

Concededly, under current constitutional doctrine, Indians cannot argue lack of equal protection because there is no intent to discriminate against them; the subject-matter jurisdiction of the federal courts simply has that effect.<sup>44</sup> Additionally, because of the special political status of Indian Nations, the equal-protection doctrine has often not been applied to Indians, and their exemption from equal protection jurisprudence has often inured to their benefit.<sup>45</sup> This does not, however, mean that the de facto targeting of accuseds in Indian Country is good policy, fair process, or good for the development of evidence doctrine.

## B. *Overview of the Case Law*

Since the passage of Rules 413–414 there have been approximately one hundred twenty cases implicating these Rules in federal court. Of these, approximately sixty arose in Indian Country, and approximately thirty in military cases.<sup>46</sup> Non-military Rules 413–414 cases are concentrated in Indian Country, and tend to cluster in the Eighth and Tenth Circuits. After some initial reversals on appeal because the trial court failed to follow proper procedures, only a handful of the published and

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<sup>41</sup> *United States v. LeMay*, 260 F.3d 1018, 1030 (9th Cir. 2001). The accused argued that Rule 414 “has a far greater impact on Native Americans because they are far more likely than members of other races to be prosecuted federally for child molestation. *LeMay* may be correct that a disproportionately large number of federal child molestation prosecutions involve Indian defendants. But this disproportion, if true, would arise simply 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.” *Id.*

<sup>42</sup> *See id.*

<sup>43</sup> *See id.* (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976) (requiring discriminatory intent, not just effect, to show violation of equal protection)).

<sup>44</sup> *See id.*

<sup>45</sup> *Cf. Morton v. Mancari*, 417 U.S. 535, 537–38 (1974) (upholding congressional employment preference for qualified Indians under the Indian Reorganization Act of 1934, determining that preferences for Indians did not constitute “invidious racial discrimination” and observing that the Constitution itself allows Congress to regulate commerce with Indian tribes thereby permitting separate federal legislation with respect to Indians); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1277–78 (9th Cir. 2004) (noting that membership in a tribe is a political and not a racial classification, and hence not subject to “suspect class” analysis, but only a rational basis test).”

<sup>46</sup> The rest arose in other federal territories, or involved government officials acting under color of state law, child pornography on the internet, human trafficking, and interstate travel. *See United States v. Hawpetoss*, 478 F.3d 820, 825 (7th Cir. 2007), (mentioning “the relative paucity of case law in this area”).

unpublished cases have held that the sexual propensity evidence was inadmissible.<sup>47</sup>

Overwhelmingly, the trial courts admit prior sex offenses under Rules 413–414, and the appellate courts approve. The standard of review is abuse of discretion, which, in part, explains deference to the trial judges in close cases.<sup>48</sup> Furthermore, the appellate courts generally do not see the questions raised by Rules 413–414 as close so long as the district court applied the correct standards and engaged in Rule 403 balancing.<sup>49</sup> The appellate courts tend to praise the trial judge and dismiss the accused’s objections as frivolous, intimating that the accused simply does not understand the changes wrought by Rules 413–414.<sup>50</sup>

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<sup>47</sup> Research uncovered only four such cases. See *United States v. Begay*, No. 08-2149, 2009 WL 301828, at \*\*2–6 (10th Cir. Feb. 9, 2009) (affirming trial court’s rejection of prior uncharged conduct under Rule 403 for potential confusion and unfairness); *United States v. Dillon*, 532 F.3d 379, 389–91 (5th Cir. 2008) (rejecting prior sex offenses under Rule 413 as being too prejudicial and dissimilar from the crime charged); *United States v. Guardia*, 135 F.3d 1326, 1327, 1332 (10th Cir. 1998) (in a non-Indian case, the Tenth Circuit sustained the trial court’s exclusion under Rule 403, and the court excluded evidence of prior “improper touching” and “suggestive comments” made to other patients by a physician on a military base); *United States v. Papakee*, No. 06-CR-162-1-LRR, 2007 WL 1058471, at \*\*3–4 (N.D. Iowa Apr. 5, 2007) (finding that evidence failed the Rule 403 balancing test because the probative value of a dissimilar sex offense twelve years earlier was low). In *Papakee*, the “court recognize[d] that Rule 413 evidence is not often excluded under Rule 403. This case is the exception, not the rule.” *Papakee*, 2007 WL 1058471, at \*5; see also *United States v. Bentley*, 475 F. Supp. 2d 852, 857 n.4 (N.D. Iowa 2007) (“It appears that the Eighth Circuit Court of Appeals has never reversed a district court for admitting Rule 414 evidence over a Rule 403 objection.”).

<sup>48</sup> See, e.g., *United States v. Seymour*, 468 F.3d 378, 386 (6th Cir. 2006) (“The district court clearly outlined its reasons for admitting the prior-assault evidence, and we find that the admission of this evidence was not an abuse of discretion.”); *United States v. Tail*, 459 F.3d 854, 858 (8th Cir. 2006) (“We give ‘great deference to the district court’s balancing of the probative value and the prejudicial impact,’ and we see no abuse of the court’s discretion in this case.”) (quoting *United States v. Looking Cloud*, 419 F.3d 781, 785 (8th Cir. 2005)).

<sup>49</sup> See, e.g., *Hawpetoss*, 478 F.3d at 827 (“The district court very carefully considered the disputed evidence and determined it to be both relevant and non-violative of Federal Rule of Evidence 403. We certainly see no abuse of discretion in admitting evidence of Mr. Hawpetoss’ molestation of both S.C. and M.W.”); *United States v. Benally*, 500 F.3d 1085, 1092 (10th Cir. 2007) (“Considering the record as a whole, this court sees nothing to suggest the district court abused its discretion when ruling on the admissibility of Benally’s four prior victims. Benally has not presented any argument regarding the application of the *Enjady* factors or *Guardia* considerations that persuades us otherwise.”); *Seymour*, 468 F.3d at 386 (“Rule 413 was enacted as an exception to the default position set forth in Rule 404(b) that propensity evidence is presumptively more prejudicial than probative. The district court clearly outlined its reasons for admitting the prior-assault evidence, and we find that the admission of this evidence was not an abuse of discretion.”); *United States v. Benais*, 460 F.3d 1059, 1063 (8th Cir. 2006) (“The evidence was probative and the only prejudice was that prejudice made admissible by Rule 413. There was no *unfair* prejudice as required for exclusion under Rule 403.”)

<sup>50</sup> One notable exception is Judge Morris Arnold’s dissent to the denial of rehearing en banc in *United States v. Mound*, 157 F.3d 1153, 1153 (8th Cir. 1998). Judge Arnold argued that the full court needed to look carefully at the constitutionality of the new rules, observing that:

## II. THE EFFECTS OF RULES 413–414 ON INDIANS

A. *The Unfairness of Harsher Rules*

Indians are often identifiable from the accused's names, which become the case moniker: Medicine Horn, Sioux, Bear Stops, Fool Bull, Eagle, etc.<sup>51</sup> In fact, to establish federal jurisdiction, the court often affirmatively locates the crime in Indian Country and highlights the accused's membership in an Indian Nation.<sup>52</sup> There is no equivalent for state-based cases where the racial, ethnic, or national identity of the accused appears prominently as a regular feature of the procedural history. It would be hard to imagine the relevance of identifying an accused rapist as African-American, of Mexican descent, or of Albanian lineage. However, sentences describing the accused as “a Native American who lives on the Menominee Indian Reservation in Wisconsin,”<sup>53</sup> or as “a mem-

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Fed. R. Evid. 413 runs counter to a centuries-old legal tradition that views propensity evidence with a particularly skeptical eye. The common law, of course, is not embodied in the Constitution, but the fact that a rule has recommended itself to generations of lawyers and judges is at least some indication that it embodies fundamental conceptions of justice.

*Id.* (internal quotations omitted).

Furthermore, he wrote:

It also cannot be irrelevant that the members of two committees, consisting of 40 persons in all, and appointed by the Judicial Conference of the United States to examine Fed. R. Evid. 413 before its passage, all but unanimously urged that Congress not adopt the rule because of deep concerns about its fundamental fairness.

*Id.*

<sup>51</sup> See, e.g., *United States v. Medicine Horn*, 447 F.3d 620 (8th Cir. 2006); *United States v. Sioux*, 362 F.3d 1241 (9th Cir. 2004); *Bear Stops v. United States*, 339 F.3d 777 (8th Cir. 2003); *United States v. Fool Bull*, 32 F. App'x 778 (8th Cir. 2002); *United States v. Eagle*, 137 F.3d 1011 (8th Cir. 1998). The Indian Country cases also involve victims with clearly identifiable Indian names such as Shannon Cloud. See, e.g., *United States v. Gabe*, 237 F.3d 954 (8th Cir. 2001). But see *United States v. Stamper*, 106 F. App'x 833, 834 (4th Cir. 2004) (accused's name is not recognizably Indian and the only hint of an Indian connection comes in reference to the jurisdictional statute, 18 U.S.C. § 1153 (2006), which begins “Any Indian”).

<sup>52</sup> See, e.g., *U.S. v. Bahe*, 40 F.Supp.2d 1302, 1303 (D. N.M. 1998) (accused charged “with aggravated sexual abuse of a child who had not attained the age of twelve years, in violation of 18 U.S.C. § 2241(c), said offense alleged to have been committed in Indian Country, in violation of 18 U.S.C. § 1153”).

<sup>53</sup> *United States v. Hawpetoss*, 478 F.3d 820, 821 (7th Cir. 2007). Occasionally courts will just cite to the statute that provides jurisdiction without mentioning the tribal membership of the accused or the fact that the crime took place in Indian Country, but this is rare. Some of these cases have identifiably Indian names. See, e.g., *United States v. Chief*, 561 F.3d 846 (8th Cir. 2009); *United States v. Red Eagle*, 293 F. App'x 506 (9th Cir. 2008); *United States v. Birdsbill*, 97 F. App'x 721 (9th Cir. 2004). Others could only be identified as involving Indians because of the jurisdiction. See, e.g., *United States v. Granbois*, 119 F. App'x 35, 37 (9th Cir. 2004); *Stamper*, 106 F. App'x at 834; *United States v. Curry*, 328 F.3d 970 (8th Cir. 2003); *United States v. Tyndall*, 263 F.3d 848 (8th Cir. 2001); *United States v. Fred*, No. CR 05-801 JB, 2006 WL 4079618 (D. N.M. Dec. 1, 2006); *United States v. Benally*, No. 2:03-CR-799 TS, 2006 WL 1493227 (D. Utah May 25, 2006); *United States v. Walker*, 261 F. Supp. 2d 1154 (D. N.D. 2003).

ber of the Tohono O’Odham Indian Nation”<sup>54</sup> or a “Navajo Medicine Man,”<sup>55</sup> are typical.

Indians should not be the lab rats for a new and arguably dangerous experiment in character evidence. Whatever the benefits of Rules 413–414, they clearly disadvantage criminal defendants. The Rules’ de facto targeting of Indians is problematic even if this focus reflects an historical accident or a jurisdictional quirk, and even if the accuseds are actually guilty of the crimes charged.<sup>56</sup> The fact that there are only a small number of cases simply does not matter. Even, or perhaps especially, if the propensity rules were not expanded to the states, the jurisdictional impact on Indians seems particularly unfair and unseemly. A discrete population has become subject to different, harsher rules that are intended to increase convictions. That the burden of these Federal Rules falls on a minority that historically has suffered tremendously at the hands of the federal government adds to their overall unfairness.<sup>57</sup>

<sup>54</sup> United States v. Norris, 428 F.3d 907, 909 (9th Cir. 2005).

<sup>55</sup> United States v. Mann, 145 F.3d 1347, No. 96-2283, 1998 WL 171845, at \*1 (10th Cir. Apr. 13, 1998).

<sup>56</sup> The focus on Indians also raises serious issues for teachers of evidence, who must consider what impression the many Indian defendants encountered in Evidence class make on law students. These questions arise not only with Rules 413–414, but with all rules that touch on sex crimes. For example, the Supreme Court, in *Tome v. United States*, 513 U.S. 150 (1995), applied Federal Rule of Evidence 801(d)(1)(B) in a felony sexual abuse on a Navajo Indian reservation of a four-year-old daughter where the child victim reported “that the accused ‘gets drunk and he thinks I’m his wife.’” *Id.* at 154. Also, the hearsay exception for statements made for medical diagnosis often involves sex-crime investigations. See, e.g., *United States v. Iron Shell*, 633 F.2d 77, 80–81 (8th Cir. 1980) (holding that nine-year-old’s victim statements to a physician with the Indian Health Service fell within the Rule 803(4) hearsay exception, and involving witnesses named Jeanne Brave, William Burning Breast, and Mae Small Bear).

Evidence teachers cannot simply ignore the facts of the cases and hope that the students simply do not notice, or notice but make no assumptions about Indians and draw no conclusions about the neutrality of evidence law. As teachers, we have an obligation to acknowledge the fact that Indians are appearing as criminal defendants—mostly child molesters—with some regularity in our class discussions. Such acknowledgment provides an opportunity to review the jurisdiction of the Federal Rules, teach our students about the growth of evidence law, ponder the relationship between evidence law and culture, and talk about the subtle effect of the case method in creating and reinforcing stereotypes. Cf. Ann Althouse, *The Lying Woman, The Devious Prostitute, and Other Stories from the Evidence Casebook*, 88 Nw. U. L. REV. 914, 916 (1994) (critiquing Evidence casebooks’ portrayal of women, noting that “[r]ather than inviting professional students to find common humanitarian ground, these stories exacerbate prejudices and feelings of exclusion and private pain”).

<sup>57</sup> For a summary of the broken promises and other cultural crimes committed against Native Americans, see Lindsay Glauner, *The Need for Accountability and Reparation: 1830–1976 The United States Government’s Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 DEPAUL L. REV. 911 (2002). American Indians are by most standards the poorest ethnic group in the country and unemployment rates on reservations are much higher than among any other subgroup of the population. See Dirk Johnson, *Economics Come to Life on Indian Reservations*, N.Y. TIMES, July 3, 1994, at A1.

These special sexual propensity rules makes prosecuting Indians accused of rape or child molestation far easier. When jurors hear that the accused committed a prior sex crime similar to the one for which he is being tried, they will engage in the type of propensity thinking that is otherwise expressly forbidden by the Evidence Rules.<sup>58</sup> This type of evidence thinking has traditionally been considered dangerous because it tends to be overvalued by the jury.<sup>59</sup> What little probative value the evidence might have is magnified, and the unfair prejudice of associating the accused with similar bad behavior far outweighs the legitimate value of such evidence.<sup>60</sup> The potential unfairness also arises from the fact that good police work often begins with investigating those with similar prior crimes. Investigation methods and decisions to prosecute rely heavily on this initial police identification, so it is plausible to imagine that many accuseds will have in their past allegations of similar bad acts, but that some of those who have a guilty past did not commit the crimes with which they are currently charged. Additionally, because we as a society share a special horror of sex crimes, particularly those committed against children, an accused with prior sex offenses is likely to prompt juror hatred and disgust.

In some cases, evidence of the accused's guilt is overwhelming. However, there are a few cases where the evidence is sufficiently questionable that the prior sexual wrongs of the accused seem to make the difference between a conviction and a not-guilty verdict. And with harsh rules like 413–414, it is impossible to know how many accuseds just accept a plea, convinced that their prior bad acts will deafen the jury to all claims of innocence no matter how plausible.

For instance, in *United States v. Velarde*, the accused was convicted of molesting his girlfriend's eight-year-old daughter. Evidence indicated that the girl felt hostile to the accused because when he visited she was unable to sleep in her mother's bedroom, which she was accustomed to doing because she was afraid to sleep in her own room.<sup>61</sup> When the

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<sup>58</sup> See FED. R. EVID. 404(b) (“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”).

<sup>59</sup> See *Michelson v. United States*, 335 U.S. 469, 475–76 (1948).

<sup>60</sup> See *id.*:

Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt . . . . The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice. (notes and citations omitted).

<sup>61</sup> See *United States v. Velarde*, 88 F. App'x 339, 340 (10th Cir. 2004).

accused visited, the victim slept in an upper bunk bed with her older brother, where the alleged molestation transpired.<sup>62</sup> There was no physical evidence of sexual abuse.<sup>63</sup> The victim testified that Velarde “tried to stick his private part into [her] private part.”<sup>64</sup> Based on the evidence, the accused could only have been with the child for less than five minutes, when according to his version of events, he went to the bathroom with intestinal distress.<sup>65</sup> The witness to the prior sex offense, who testified about a molestation which occurred approximately twenty years earlier, was Velarde’s sister, with whom he was involved in a property dispute.<sup>66</sup> The evidence pointing to guilt seemed weak given the bias of the victim, her general fearfulness, the fact that the crime was alleged to have commenced in a room where her brothers were sleeping, and the brief time frame available for committing the offense. One can fairly conclude this was a case where the alleged prior sex act was crucial in securing a conviction.

#### B. *The Interaction between Propensity Evidence and Stereotypes*

Allowing propensity evidence when the accused is a member of a disadvantaged and historically despised minority is especially troubling when it reinforces negative stereotypes about the accused’s group or otherwise serves to distract the jury from the facts of the case at hand. Propensity arguments shift the focus from the actual events charged to the prior history and proclivities of the accused. Add to that the natural tendency of fact-finders to rely on group stereotypes,<sup>67</sup> and the case presents even more distraction from key events in question, and instead results in increased attention to the character, habits, and affiliations of the accused. The accused thus becomes the sum of his past actions and his racial or ethnic connections.

Other bad-act evidence is sometimes admitted under Rule 404(b), when such evidence is introduced for another purpose, such as to prove

<sup>62</sup> See *id.* at 341.

<sup>63</sup> See *United States v. Velarde*, 214 F.3d 1204, 1206–07 (10th Cir. 2000) (the factual background is described in more detail in the first appeal of the case than in the second).

<sup>64</sup> *Id.* at 1206

<sup>65</sup> See *United States v. Velarde*, 88 F. App’x 339, 341 (10th Cir. 2004).

<sup>66</sup> See *id.* at 341–42.

<sup>67</sup> See ZIVA KUNDA, *SOCIAL COGNITION: MAKING SENSE OF PEOPLE* 323 (1999) (“There is also a great deal of evidence that group stereotypes triggered under conditions that permit controlled processing can be used in judgments about group members.”); Justin D. Levinson, *Race, Death, and the Complicitous Mind*, 58 *DEPAUL L. REV.* 599, 605–07 (2009) (arguing that stereotypes have a significant impact on how defendants are perceived in criminal trials); see also *United States v. Benally*, 560 F.3d 1151, 1152 (10th Cir. 2009) (denying rehearing of appeal based on Sixth Amendment challenge that foreman of jury acknowledged racial prejudice against Native American defendant during deliberations).

intent, knowledge, or absence of mistake.<sup>68</sup> Though it exposes jurors to character-like evidence, Rule 404(b) does not technically operate as an exception to the rule against character evidence because the other bad acts are not offered for propensity purposes.<sup>69</sup> As a practical matter, however, the danger of stereotyped thinking is inherent whenever prior-bad-act evidence is admitted, even for other purposes under Rule 404(b). Professor Chris Chambers Goodman has expressed concern over the application of Rule 404(b), arguing that some forms of 404(b) evidence expose the jury to negative racial stereotypes.<sup>70</sup> Goodman explains how jurors can use such evidence, even when it is ostensibly admitted only for non-propensity purposes, to reinforce their belief in the accused's guilt.<sup>71</sup> To the extent that, for instance, a juror has internalized a negative stereotype of Latinos as drug dealers, hearing about another drug deal under Rule 404(b), even if it is offered for some other purpose than propensity, may tap into the prohibited propensity thinking.<sup>72</sup>

The unfair prejudice is vastly increased when the evidence is offered with a naked propensity purpose, as occurs with Rules 413–414, where the jury is positively invited to think in terms of character traits and tendencies. It is a small step to include not only the propensity of sexual misconduct, but the stereotyped propensities of the minority group in the mix of thinking that “those people” are just “like that.”

The impact of Rules 413–414 on Indians is, therefore, particularly unfortunate given America's historical wariness of Indians as dangerous, drunk, and uncivilized.<sup>73</sup> The image of the white settlers' western trek includes “circling the wagons” to protect women and children from the savage Indians.<sup>74</sup> America's western expansion into Indian Territory

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<sup>68</sup> See Fed. R. Evid. 404(b).

<sup>69</sup> See *id.*

<sup>70</sup> See Chris Chambers Goodman, *The Color of Our Character: Confronting The Racial Character of Rule 404(b) Evidence*, 25 L. & INEQ. 1, 1 (2007).

<sup>71</sup> See *id.* at 1–2, 57.

<sup>72</sup> See *id.* at 26.

<sup>73</sup> See Raymond Cross, Essay, *American Indian Education: The Terror of History and the Nation's Debt to the Indian Peoples*, 21 U. ARK. LITTLE ROCK L. REV. 941, 945–46, n.20 (1999) (discussing how the “one-dimensional portrayal of the ‘Indian as warrior’ fed into the popular 19th Century stereotype that the American Indians must be eradicated by the advancing white civilization as were other dangerous predators such as the wolves, coyotes and lynx”).

<sup>74</sup> See WARD CHURCHILL, *FANTASIES OF THE MASTER RACE* 232 (City Lights Books 1998) (“We have seen the tipi and the buffalo hunt, the attack on the wagon train and the ambush of the stagecoach until they are scenes so totally ingrained in the American consciousness as to be synonymous with the very concept of the American Indian.”). Images of the dangerous Indian are also common in American film. For instance in *Cattle Queen of Montana*, Ronald Reagan, as “Farrell,” is enlisted to defend the settlers from a band of Indians. See *CATTLE QUEEN OF MONTANA* (VCI Entertainment 1955). Similarly, in *Red River* (a Howard Hawks production starring John Wayne and Montgomery Clift), Indians are portrayed as savage killers. See *RED RIVER* (Monterey Productions 1948). Even the children's classic book



was justified in various self-serving and Indian-denigrating ways: from Manifest Destiny (how great Western culture is) to protection from the “red devil” (how dangerous Indians are) to a noblesse oblige rationale that combines the two (how much the savage Indian would benefit from Western civilizing influences).<sup>75</sup> To the extent that part of America’s treatment of Indians was designed to uplift them from their supposed childlike savagery and provide them with the benefits of Western culture, this patronizing function of the “white man’s burden” is reflected in the special focus on Indians in Rules 413–414. If the white man is to teach the Indian about how to be civilized, what better way is there than by emphasizing rules against rape and the ban on incest, one of Western culture’s great civilizing taboos?

Interestingly, almost all of the child molestation cases under Rule 414 involve family members, usually nieces or grandchildren. This may in part reflect the fact that Indians have more frequent and closer ties to their extended families, many of whom live on the reservation.<sup>76</sup> Sometimes, however, the tone of the opinion seems critical or mocking of the intricate family connection. For example in *United States v. King*, the court wrote:

[The victim] considers Mr. King his uncle. In actuality, Michael’s mother was once married to Mr. King’s brother, who is now involved in a relationship with Michael’s sister. Michael lives with his mother and one

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series, *Little House on the Prairie*, by Laura Ingalls Wilder, portrays the Osage Indians as dangerous and not entitled to the land on which the Ingalls family is squatting, in violation of a treaty. See Rachel F. Seidman, *This Little House of Mine*, COMMON-PLACE, Apr., 2003, <http://www.common-place.org/vol-03/no-03/seidman/seidman-3.shtml> (offering a nuanced analysis of the racism in Wilder’s books).

<sup>75</sup> See *United States v. Sandoval*, 231 U.S. 28, 39, 46 (1913) (describing Indians as “essentially a simple, uninformed, and inferior people” and noting that “as a superior and civilized nation [the U.S. has] the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders”) (cited in William Bradford, “*With a Very Great Blame on Our Hearts*”: *Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 32 n.151); JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 21 (1996) (arguing that the trust doctrine is a “form of scientific racism” that posits that whites have a duty to “wean native peoples from their ‘backward’ ways and to ‘civilize’ them”) (cited in Bradford, *supra*, at n.150); Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 131–32 (1993) (noting the Supreme Court’s justified extension of jurisdiction over Indians by citing “the white man’s burden,” under which the federal government was duty-bound to lead “its indigenous charges toward a more ‘enlightened’ way of life”).

<sup>76</sup> See Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585, 603 n.94 (1995) (“[T]he dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of . . . relatives who are counted as close, responsible members of the family.”) (quoting *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs*, 93d Cong. 18 (1974) (statement of William Byler, then-Executive Director of the Association on American Indian Affairs)).

of his brothers in one of five homes located in close proximity to one another and occupied by Michael's extended family.<sup>77</sup>

There is also some anecdotal evidence that courts portray Indian families as dysfunctional, depicting the mother as failing to protect her children. For instance, in *Unites States v. Seymour*, the court observed: "According to D.H. [mother of the victim], she did not report the rape out of embarrassment, and she subsequently allowed Seymour to share a bed with her daughter C.P. because she did not think that he would harm her children."<sup>78</sup> The mother's motivation for allowing Seymour to share a bed with her child is irrelevant to the crime of child molestation, but is representative of a blame-the-victim mentality.

Additionally, at least five cases include gratuitous references to the mobile home or trailers in which events transpired or the accused or victim resides, and the courts thereby summon the image of the impoverished Indian reservation.<sup>79</sup> Although poverty does not equal criminality, the notion that only poor, uneducated people commit incest is entrenched. Rule 413–414 evidence thus reinforces stereotypes about the lives of Indians, and makes it harder to see the accuseds as unique individuals.

A startling number of federal cases interpreting Rules 413–414 also include information about the accused's use of alcohol. While there certainly is evidence that rape and child molestation correlates with addictive behavior, such as alcoholism, and sometimes events relating to alcohol are necessary to tell the story of the case,<sup>80</sup> the focus on the drunkenness of the Indian defendants is marked, and the effect is pernicious.

<sup>77</sup> *United States v. King*, 221 F.3d 1353, No. 99-2363, 2000 WL 1028228, at \*1 (10th Cir. Jul. 26, 2000).

<sup>78</sup> *United States v. Seymour*, 468 F.3d 378, 382 (6th Cir. 2006).

<sup>79</sup> See, e.g., *United States v. Medicine Horn*, 447 F.3d 620, 622 (8th Cir. 2006); *United States v. Norris*, 428 F.3d 907, 910 (9th Cir. 2005) (noting that the police substation was a trailer); *United States v. Velarde*, 88 F. App'x 339, 340–41 (10th Cir. 2004) (mentioning mobile home); *King*, 2000 WL 1028228, at \*1 (mentioning trailer homes); *United States v. LeCompte*, 131 F.3d 767, 768 (8th Cir. 1997) (same); *United States v. Randolph Valentino Kills in Water*, 293 F.3d 432, 434 (8th Cir. 2002) (mentioning trailer in rape case on Indian reservation); *United States v. Ortiz*, 125 F.3d 863, No. 96-CR-5, 1997 WL 608733, at \*1 (10th Cir. Oct. 3, 1997) (same).

<sup>80</sup> Child molesters often live chaotic and shameful lives in which alcohol or drugs serve as an escape. Furthermore, alcohol can serve as a source of deniability—the perpetrator need not admit that he was attracted to a child and instead claims that he was drunk and did not know what he was doing. Thanks to Jessica Hersch, MSW, LCSW, for this observation. In this regard, it is also particularly interesting that the Catholic Church has often sent sex-offending priests to treatment centers for alcohol and drug addiction. See generally Raymond C. O'Brien, *Clergy, Sex, and the American Way*, 31 PEPP. L. REV. 363 (2004) (explaining the Church's support and assistance to priests through treatment at alcohol and drug rehabilitation centers). Furthermore, a Westlaw search for alcohol in state sex crime cases resulted in over ten thousand hits.

cious.<sup>81</sup> In *United States v. Medicine Horn*, for example, the court recounted that the accused, Jerry Medicine Horn, “gathered at a building on the powwow grounds to drink alcohol.”<sup>82</sup> The court focused on the fact that charged conduct and the prior uncharged offenses all alleged that the accused procured alcohol for the minors he later molested.<sup>83</sup> This commonality made the prior offense particularly probative.<sup>84</sup>

The *Medicine Horn* case also emphasized alcohol in another way: one issue on appeal was the accused’s challenge to the District Court’s jury instruction that voluntary intoxication is not a defense in sexual abuse offenses.<sup>85</sup> *Medicine Horn* objected that the instruction was faulty and prejudicial because he never asserted intoxication as a defense; instead, he denied sexual contact entirely.<sup>86</sup> *Medicine Horn* claimed that the instruction distracted the jury from his actual defense.<sup>87</sup> The Eighth Circuit court responded that “[b]ecause a considerable amount of evidence was introduced at trial about *Medicine Horn*’s intoxicated state . . . the District Court did not abuse its discretion by giving the intoxication instruction.”<sup>88</sup> The Eighth Circuit further observed:

*Medicine Horn* admitted that he was drinking heavily during the party that preceded the assault. He testified that when he arrived at the Wade residence he was “buzzed” and that in the four hours before the attack, he consumed six to eight twelve-ounce cans of beer, six sixteen-ounce cans of beer, and shots from three different bottles of liquor.<sup>89</sup>

The District Court’s instruction may not only have distracted the jury, but may also have reminded the jurors and the judge of the stereotype of the drunken Indian.

It is often implied, if not explicitly stated, that it was not just the perpetrator who had been drinking, but the victim or the negligent parent as well. Given the small number of Rule 414 cases, the evidence must necessarily be anecdotal, but the chosen emphasis on alcohol and, in one

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<sup>81</sup> See, e.g., *King*, 2000 WL 1028228; *United States v. McHorse*, 179 F.3d 889, 894 (10th Cir. 1999); *United States v. Withorn*, 204 F.3d 790, 793 (8th Cir. 1999); *United States v. Beaulieu*, 194 F.3d 918, 919 (8th Cir. 1999); *United States v. Enjady*, 134 F.3d 1427, 1429 (10th Cir. 1998).

<sup>82</sup> *Medicine Horn*, 447 F.3d at 621.

<sup>83</sup> See *id.* at 623.

<sup>84</sup> See *United States v. Medicine Horn*, 447 F.3d 620, 623 (8th Cir. 2006).

<sup>85</sup> *Id.* at 623–24.

<sup>86</sup> See *id.* at 624.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

case, gambling (a more modern association with Indians)<sup>90</sup> displays insensitivity, if not subtle bias. Alcoholism is a serious social concern on Indian reservations.<sup>91</sup> Unfortunately, the firmly rooted stereotype in American culture of the drunken Indian—one who swaps valuable land for “fire-water”—is, in its own way, equally pernicious.<sup>92</sup> The propensity thinking that Rules 413–414 encourage seems particularly unfortunate in light of the pre-existing stereotypes that white judges and jurors may already possess concerning Indians.

An example of a blatant resort to negative stereotypes arose in *Soap v. Carter*, a manslaughter case, in which, in the words of the dissent, the prosecutor “‘summon[ed] that thirteenth juror, prejudice,’ to its side.”<sup>93</sup> The prosecutor stated in the closing argument:

I believe the evidence shows that you have got a fellow—and it isn’t unusual—you know, it is sad to see, but when you see an Indian that drinks liquor, you see a man that can’t handle it. There is just something about it that they can’t manage it. That’s what I say to you happened this particular night.<sup>94</sup>

The prosecutor made clear that it was not about just one “fellow,” but about a “class of people” who could not change:

<sup>90</sup> See *United States v. Gabe*, 237 F.3d 954, 957 (8th Cir. 2001) (highlighting a mother’s bi-weekly bingo game, noting that when the mother was out gambling, the accused would prey upon the children).

<sup>91</sup> See Roger Clawson, *The Alarming Increase in Alcohol-Damaged Children*, THE ALICE PATTERSON FOUNDATION, <http://www.aliciapatterson.org/APF1302/Clawson/Clawson.html> (1990) (reporting that “[i]n a recent survey reported by the Indian Health Service, nearly 70 percent of Indian adults said they started drinking before they reached their teens . . . 33 percent of reservation youth 9 to 12 were regular drinkers[.]” and that Fetal Alcohol Syndrome is a tremendous problem).

<sup>92</sup> See Robert J. Miller & Maril Hazlett, “*The Drunken Indian*”: *Myth Distilled into Reality Through Federal Indian Alcohol Policy*, 28 ARIZ. ST. L.J. 223 (1996) (discussing stereotypes concerning the myth of the drunken Indian); Alan R. Velie, *Indian Identity in the Nineties*, 23 OKLA. CITY U. L. REV. 189, 205 (1998) (“Today, white Americans cling to a series of myths and misconceptions that Indians find very annoying. Both left and right in America practice a form of condescension that is maddening to Indians. Bigots of the right think of Indians as unemployed drunks. Those of the left evince no rancor, and in fact claim to be ‘on the side of the Indians,’ yet when the subject of Indians arises, the first things they mention are alcoholism and joblessness.”); James Falcon, *Alcoholism, the Reservation, and the Government*, <http://www.americanchronicle.com/-articles/1878> (Aug. 15, 2005) (“Along with living in teepees, frequenting casinos, and scalping (and I don’t mean tickets to the Fighting Sioux games), alcoholism has also become one of the many stereotypes that are forever etched into the minds of many when they think about Native Americans.”).

<sup>93</sup> *Soap v. Carter*, 632 F.2d 872, 877 (10th Cir. 1980) (Seymour, J., dissenting) (quoting *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 659 (2d Cir. 1946) (Frank, J., dissenting)).

<sup>94</sup> *Id.* at 878.

You try to impress upon people that they can change—they should change, and there is a decent way of going through life without violence, without committing crimes and still you can enjoy life and obtain things and goals in your life, but some people just don't live that way, and they won't live that way. That's what you have in this case. You have a class of people and a situation that exists that you and I can't change irrespective of what we do.<sup>95</sup>

Amazingly, less than thirty years ago, a court tolerated these overt prejudicial comments, with their appeal to negative stereotypes about Indians, and held that they did not violate due process.<sup>96</sup> In this egregious example, the prosecutor consciously summoned racial stereotypes to insinuate guilt and to designate Indians as different.<sup>97</sup>

Understanding the power of stereotypes, which are pervasive in human cognition, is crucial to understanding the fate of Indian accuseds, facing the sexual propensity rules. Stereotypes are embedded in our culture, perpetuated at home and at school.<sup>98</sup> They are not consciously evoked, and need not be overt to be effective.<sup>99</sup> Psychologists explain that stereotypes are cognitive tools that serve as energy-saving devices to process information.<sup>100</sup> They are evolutionarily adaptive shortcuts for making sense of the world around us; they simplify the way we process

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<sup>95</sup> *Id.*

<sup>96</sup> The majority in *Soap* held that the unobjected-to comments by the prosecutor “must be considered in the context of the entire trial. Those present at the Duncan home were all Cherokees and had been drinking. The claim of prejudice because of racial statements, emphasizes, out of all proportion, a minor incident in the trial to which no objection was made.” *Id.* at 876.

<sup>97</sup> *See id.*

<sup>98</sup> *See* RUPERT BROWN, *PREJUDICE: ITS SOCIAL PSYCHOLOGY* 83 (Blackwell Publishing 1995) (discussing the theoretical origins of stereotype creation and development over time). My research assistant, Elliot Anderson, reports that he was asked a bonus question on an eighth grade Social Studies test concerning the biggest problem that has faced American Indians in the last three centuries. He answered “colonization.” The answer accepted as correct was alcohol abuse.

<sup>99</sup> *See* C. Neil Macrae, Alan B. Milne & Galen V. Bodenhausen, *Stereotypes as Energy-Saving Devices: A Peek Inside the Cognitive Toolbox*, 66 *J. PERSONALITY & SOC. PSYCHOL.* 37, 44 (1994) (explaining that we use stereotypes even when we are not aware of doing so, and preserve our attention capacity whether or not we perceive our reliance on “strategic deployment of stereotypical thinking . . . This executive function, moreover, is not simply a reflection of deliberative, strategic processing. It occurs in the absence of perceivers’ explicit intention to instigate stereotype-based modes of thought.”).

<sup>100</sup> *See id.* at 37.

information.<sup>101</sup> By contrast, individuation—seeing a person for the individual he or she is—requires cognitive time and effort.<sup>102</sup>

People tend to rely on stereotypes more heavily when the demands of their environment are more taxing and when they are cognitively stressed.<sup>103</sup> This explains why people are stubborn about challenging their own stereotypes,<sup>104</sup> and why “[s]tereotypes are notoriously difficult to change.”<sup>105</sup> People tend to discount information that contradicts their preconceived notions.<sup>106</sup>

Not surprisingly, judges and jurors who are cognitively taxed by the demands of the trial would seem to be particularly susceptible to unconscious reliance on the shortcut of stereotypes. Research suggests that the use of stereotypes is quite likely when the determination of a person’s guilt or innocence hangs in the balance.<sup>107</sup> In trials, where the narrative is often fractured, the evidence disjointed, and the available information suboptimal, decision-makers apply stereotypes to simplify complex judg-

<sup>101</sup> See *id.* at 4 (“[S]tereotyping is a functional, adaptive process that plays a central role in human social cognition . . . . Through stereotype application, perceivers can economize cognition by managing the demands imposed on their processing capacity.”); see also STEVEN PINKER, *THE BLANK SLATE* 201 (Viking 2002) (“[T]he brain evolved fallible yet intelligent mechanisms that work to keep us in touch with aspects of reality that were relevant to the survival and reproduction of our ancestors.”). Sometimes stereotypes harm the one who utilizes them, such as a boss who rejects the better job candidate or a landlord who rejects the more reliable tenant, because of a stereotype. See Macrae, et al., *supra* note 99, at 44. But, more often, the efficient, unconscious, automatic process is beneficial to the user, even if the results are flawed. See *id.* at 45 (“Through stereotype application, perceivers are able to derive viable, although potentially erroneous, target-based impressions at very little cognitive cost.”). Steven Pinker argues that stereotypes are not merely social constructs but have their roots in evolutionarily adaptive categories based on observation, and hence, though not always accurate, are not based on falsehood. See PINKER, *supra*, at 202–05. I agree with Professor Brown that even if stereotypes emerge from grains of truth, they may often, in the case of negative stereotypes merely reflect socio-economic circumstances. See BROWN, *supra* note 98, at 84. Their origins or aggregate “truth” is less important than their function in harming individuals. *Id.* Even Pinker concedes that the “partial accuracy of many stereotypes does not, of course, mean that racism, sexism, and ethnic prejudice are acceptable.” PINKER, *supra*, at 205.

<sup>102</sup> See Macrae et al., *supra* note 99, at 44 (“Individuation, in its many guises, is a rather time consuming and effortful affair.”) (citations omitted).

<sup>103</sup> See *id.* at 37 (noting “increased reliance on stereotypes when social perception occurs under taxing or resource-depleting conditions”).

<sup>104</sup> In the words of Macrae, Milne, & Bodenhausen, they are “reluctant, and at worst incapable,” and will not do so without “critical cognitive and motivational criteria.” *Id.* at 44.

<sup>105</sup> Ziva Kunda & Kathryn C. Oleson, *Maintaining Stereotypes in the Face of Disconfirmation: Constructing Grounds for Subtyping Deviants*, 68 J. PERSONALITY & SOC. PSYCHOL. 565, 565 (1995).

<sup>106</sup> When faced with disconfirming facts, individuals will tend to latch on to neutral information to create a subtype within the stereotyped group to explain the difference (for instance, distinguish women lawyers from all lawyers). See *id.* at 577.

<sup>107</sup> See Ron Tamborini, Ren-He Huang, Dana Mastro & Reiko Nabashi-Nakahara, *The Influence of Race, Heuristics, and Information Load on Judgments of Guilt and Innocence*, 58 COMM. STUD. 341, 341–42 (2007).

ment tasks and to process information more easily.<sup>108</sup> Other factors such as time constraints, high volumes of information, ambiguity, and fatigue, which are all aspects of the trial experience, can influence those facing weighty legal determinations.<sup>109</sup> As a result, the jurors may, consciously or not, turn to the use of stereotypes in the process.<sup>110</sup>

Reliance on stereotypes in the courtroom is particularly harmful because our society seeks to mete out individual justice, not to reward or punish group affiliation. The presumption of innocence demands that verdicts be uninhibited by the bonds of improper influence, but a juror's stereotypes may unfairly infect the judgment process.<sup>111</sup> Procedural safeguards are generally incapable of reducing the impact of stereotyping by judges or jurors, particularly because such stereotypes are generally not a topic for courtroom discussion and are not susceptible to witness testimony or cross examination.<sup>112</sup>

In light of the cognitive ease into which all of us slip into stereotypical thinking, we must question the fairness of applying this relatively new regime of Rules 413–414 to a discrete minority population. We must also examine the potential synergistic effect of societal stereotypes about minorities and the impact of propensity evidence on the process of proof.

Whether consciously prejudiced or not, finders of fact will already have to overcome stereotypes about Indians. The addition of another form of propensity-thinking fostered by Rules 413–414 increases the unfairness. The Indian accused, already traveling with the baggage of stereotypes about his drunkenness, poverty, and uncivilized nature, is also saddled with information about his propensity to commit similar sex offenses. These types of propensity thinking not only distract from the particulars of the case at bar, but mutually reinforce each other. The accused receives a double whammy of prejudice that affects his chance for acquittal and also, as this Essay will argue in Part III, has the potential to pave the way for judicial acceptance of and acclimation to Rules 413–414.

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<sup>108</sup> See *id.* at 342.

<sup>109</sup> See *id.*; Roger Giner-Sorolla, Shelly Chaiken & Stacey Lutz, *Validity Beliefs and Ideology Can Influence Legal Case Judgments Differently*, 26 LAW & HUM. BEHAV. 507, 508 (2002).

<sup>110</sup> See Giner-Sorolla et al., *supra* note 109, at 508 (discussing a number of research studies completed on the effects and on the use of stereotypes in pseudo-legal environments).

<sup>111</sup> See Carolyn Lown, *Legal Approaches to Juror Stereotyping by Physical Characteristics*, 1 LAW & HUM. BEHAV. 87, 92 (1977) (discussing perceived constitutional due process violations that arise when juries use stereotypes to organize information and reach verdicts).

<sup>112</sup> See *id.* But see Jody Armor, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 735 (1995) (suggesting jury instructions that consciously mention race and sensitize the jury to the potential of bias in their deliberations and verdict).

### C. *Concern about Victims*

In acknowledging the special hardships Indians have suffered, it is also important to note that the victims in these cases are often Indian women and children. Professor Sarah Deer writes that sexual violence is “one of the most devastating threats to contemporary indigenous culture.”<sup>113</sup> In a special report, Amnesty International decries the severe problems that Indian women face regarding sex crimes committed against them.<sup>114</sup> The report cites data from the Department of Justice indicating that “Native American and Alaskan Native women are more than 2.5 times more likely to be raped or sexually assaulted than women in the USA generally.”<sup>115</sup> The 2005 extension of the Violence Against Women Act also highlighted the issue of violent assaults against Indian women,<sup>116</sup> including in its findings that “Indian tribes require additional criminal justice and victim services resources to respond to violent assaults against women,”<sup>117</sup> and “the unique legal relationship of the United States to Indian tribes creates a Federal trust responsibility to assist tribal governments in safeguarding the lives of Indian women.”<sup>118</sup>

The Amnesty report detailed the problems for Indian victims, including a Byzantine maze of jurisdictional issues (state, federal, and tribal jurisdictions with unclear jurisdictional demarcations among them and officials all too happy to pass the buck).<sup>119</sup> Also, Indian women are subject to the same stereotypes as Indian men. They are suspected of

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<sup>113</sup> Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL’Y 121, 121 (2004) (arguing that indigenous women have been “invisible in legal social and historical discourse” about rape and suggesting the development of a rape jurisprudence growing out of indigenous law and values).

<sup>114</sup> See AMNESTY INTERNATIONAL, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007), <http://www.amnestyusa.org/women/maze/report.pdf>.

<sup>115</sup> *Id.* at 2 (citing STEVEN W. PERRY, U.S. DEP’T OF JUSTICE, AMERICAN INDIANS AND CRIME—A BJS STATISTICAL PROFILE 1992–2002 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/aic02.pdf>). The Amnesty report observes that the estimate that more than one in three Indians will be raped during her lifetime is probably artificially low given the tendency of women not to report such sexual violence and the difficulty in collecting information from women living in rural areas without telephone service.

<sup>116</sup> Violence Against Women Act, Pub. L. No. 109-162, § 901, 119 Stat. 3077 (2006) (finding that “Indian women experience 7 sexual assaults per 1,000, compared with 4 per 1,000 among Black Americans, 3 per 1,000 among Caucasians, 2 per 1,000 among Hispanic women, and 1 per 1,000 among Asian women”). The *National Violence Against Women Survey* reported that 34.1% of Indian women will be raped during their lifetime. See Deer, *supra* note 113, at 123 (citing PATRICIA TJADEN & NANCY THOENNES, U.S. DEP’T OF JUSTICE, FULL REPORT ON THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 22 (2000)).

<sup>117</sup> Violence Against Women Act, § 901.

<sup>118</sup> *Id.*

<sup>119</sup> Jurisdictional questions are complicated by the fact that tribal nations and the federal government often have concurrent jurisdiction, though the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–03 (2006), restricts the punishments that tribal courts can impose, and the



drinking and are assumed to have been responsible for the attack if they consumed alcohol.<sup>120</sup>

Even if Indian women are disproportionately victims of sexual assault, they do not deserve the “protections” of Rules 413–414 if those evidence rules are unfair and are applied invidiously. Further, Rules 413–414 may negatively impact Indian women and children in at least two respects. First, the rules perpetuate stereotypes that are bad for all Indians, including women and children. Indian victims may be legitimately concerned about the application of a facially neutral rule that relies on and furthers negative stereotypes about their own people. Ironically, Indian woman and children who testify about being victims of sex crimes are placed in the position of simultaneously seeking justice and participating in the process of demonizing and stereotyping their own people.<sup>121</sup> Likewise, in arguing for the development of an indigenous jurisprudence of rape, Professor Deer recognizes the importance of cultural affiliation for Indian women and observes that “[a] woman’s ability to seek justice in her own community may facilitate healing and emotional wellness.”<sup>122</sup>

Second, the existence of these rules may have a boomerang effect and actually cause fewer cases to be brought on behalf of Indian victims. The Amnesty report complained that prosecutions of sex crimes are infrequent in Indian Country.<sup>123</sup> In part, the problem stems from jurisdictional overlaps where it is unclear whether state, Indian, or federal law applies and, as a result, nobody prosecutes.<sup>124</sup> However, according to

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United States Supreme Court has held that tribal nations have no criminal jurisdiction over non-Indian accuseds. *See* Deer, *supra* note 113, at 127–28.

<sup>120</sup> *See* AMNESTY INTERNATIONAL, *supra* note 114, at 47. It is a common phenomenon to blame the victim, charging that the rape was the result of her incautious behavior. She is disbelieved or the harm to her is discounted if she consumed alcohol. *See* Mary I. Coombs, *Telling the Victim’s Story*, 2 TEX. J. WOMEN & L. 277, 283 (discussing how provocative dress or consumption of alcohol triggers rape myths); *cf.* United States v. Benais, 460 F.3d 1059, 1060–61 (8th Cir. 2006) (stating that the accused plied fourteen year old with liquor, raped her when she passed out and “told her that what had happened was her fault”).

<sup>121</sup> The obvious analog is the reaction of Black women to rape trials that rely on racist stereotypes but are intended to protect Black women. *See, e.g.,* Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN’S STUD. 387, 481–87 (1996). Thanks to my student, David Lundeen, of Indiana University Maurer School of Law, for raising this point.

<sup>122</sup> Deer, *supra* note 113, at 126.

<sup>123</sup> *See* AMNESTY INTERNATIONAL, *supra* note 114, at 61–62.

<sup>124</sup> *See id.* Additionally, a partial explanation derives from the post 9/11 transformation of the Federal Bureau of Investigation (FBI), which has caused the FBI to adopt new responsibilities and to see its mission expressed in terms of global rather than individual crimes. *See id.* at 43 (“A federal prosecutor told Amnesty International that the FBI was ‘spread really thin since 9/11.’”). *See generally* Federal Bureau of Investigation, *Our Post 9/11 Transformation*, <http://www.fbi.gov/aboutus/transformation.htm> (last visited Sept. 3, 2009) (describing the changes at the FBI since 9/11 as such, “[W]e’ve realigned our structure, created new capabili-

Amnesty, even when jurisdiction is clear, federal prosecutors seem reluctant to prosecute.<sup>125</sup> As the organization reports, “a widespread perception exists among those working on sexual violence and other issues affecting Native Americans in Oklahoma that cases are frequently declined for prosecution and that federal prosecutors are unlikely to take a case unless a conviction is virtually guaranteed.”<sup>126</sup>

Although it is true that Rules 413–414 make prosecution easier when the accused has a sexual wrong in his history, they may, ironically, make cases without such propensity evidence even less desirable to try. Prosecutors may essentially wait until the accused has at least one other accusation (whether charged or not) to make the case easier. Therefore, one practical effect of Rules 413–414 may be to discredit the victims who bring first-time charges. For a case of rape or child molestation to be taken seriously, the prosecutor may require evidence of at least one other person who had a similar experience with the accused to corroborate the victim’s story and to strengthen the prosecution of the case. Hence, when applying Rules 413–414, a single victim represents a data point, not a crime, and sex offenders who are not recidivists and do not fit the stereotype of the mad rapist or the out-of-control pedophile will not be prosecuted.

### III. HOW THE OVERREPRESENTATION OF INDIANS IN FEDERAL SEX-CRIME CASES MAY SUBTLY REINFORCE THE SWAY OF PROPENSITY THINKING

I posit that Rules 413–414 damage not only Indians, but also the law of evidence itself. The over-representation of Indians in the burgeoning caselaw may have subtly promoted judicial acceptance of these otherwise objectionable, non-traditional rules. Jurors in federal cases, who are drawn from a wide pool and are unlikely to be Indians themselves, are susceptible to negative stereotypes about Indians that correlate with propensity arguments and influence the determination of guilt. Furthermore, I think that the standard objections to Rules 413–414 prove particularly salient in cases involving an accused Indian, who may be perceived as strange or exotic. Jurors may overvalue the probative value of prior bad-act evidence and may use the evidence of prior sex crimes to punish the accused for past misdeeds or for being a terrible person. They may be tempted to abandon the presumption of innocence and may con-

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ties, hired different talents, and shifted more personnel into intelligence and terrorism operations—all to meet our now overriding priority to protect the U.S. from terrorist attacks.”).

<sup>125</sup> See AMNESTY INTERNATIONAL, *supra* note 114, at 66 (federal prosecutors “may be applying overly stringent criteria for selecting cases for prosecution”).

<sup>126</sup> *Id.* at 67; see also *id.* at 42–43 (discussing the failure of the FBI to investigate sex crimes against Indian women and their reluctance to spend resources, particularly post-9/11, on such matters).

vict even when there is reasonable doubt—asking themselves why a perpetrator of past horrible sex crimes walks free. Jurors are ill-equipped to handle such challenges in the face of overwhelming information about the accused's past sex crimes.

Nevertheless, my focus here is on judges rather than juries. Whatever damage stereotypes about Indians or information about past sex acts may inflict in individual cases against individual accuseds, jurors are not repeat players. They do not directly screen the evidence. Instead, they work with what the judge allows them to hear and, thus, their contribution in shaping law is attenuated at best. Jurors have little formal role in measuring the fairness of the evidence; they consider only its relevance, utility, and persuasiveness.

Judges, on the other hand, not only apply but create the rules of evidence on the ground. True, Congress passed Rules 413–414, and judges, even if they are persuaded by the arguments of law professors and civil libertarians that these rules are wrong, cannot simply ignore them. But, as I have argued elsewhere, the judge's role as gatekeeper under Rule 403 can play a major role in the practical operation of these rules.<sup>127</sup> Under Rule 403, judges must balance the probative value of the evidence against potential harms—such as unfair prejudice, distraction, and potential confusion of the prior bad sex acts—against the probative value of such evidence. In conducting this crucial Rule 403 balance, judges may be subtly and even unconsciously influenced by the nature of and their attitudes toward the population of the accuseds.

The status of the Indian as a savage “other” might affect acceptance of a doctrine that constructs and applies notions of propensity. The propensity argument, which is anathema to the long traditions of Anglo-American common law, may seem more intuitively appealing to a judge who is exclusively exposed to one small sub-population of accuseds whom he perceives as very different from himself—poor, drunken, savage, and uncivilized.

Relying on stereotypes (whether consciously or not) in justifying propensity rules, therefore, not only hurts the accused individually and Indians as a group, but also damages our system of justice. If judges have preconceptions of Indians as drunken savages, propensity evidence may further reinforce these unconscious negative images and expand the stereotype to include child molesters and rapists. Information that the accused was a sexual predator in the past may subtly encourage judges to rely on stereotypes and see such group-identity categories as particularly valid. As a consequence, the stereotype and the propensity rules become

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<sup>127</sup> See Orenstein, *Deviance, Due Process*, *supra* note 28, at 1549–57.

mutually reinforcing.<sup>128</sup> Hence, judges themselves may overestimate the probative value of prior bad acts by the accused and underestimate the unfair prejudice arising from knowledge of those bad acts.

The concern that judges may overestimate the probative value of prior sex offenses dovetails with the chief policy explanation for the sexual propensity rules and the main justification for the departure from the traditional ban on using prior bad acts for propensity. As the author of Rules 413–414 clearly indicated, the impetus for the rules stemmed from the belief that there are discrete pockets of deviant individuals in American society who have predatory propensities that are so unique and recidivist that the propensity rules are particularly probative.<sup>129</sup> Senator Bob Dole, a chief sponsor of Rules 413–414, remarked: “In child molestation cases, for example, a history of similar acts tends to be exceptionally probative because it shows an unusual disposition of the defendant . . . that simply does not exist in ordinary people.”<sup>130</sup> The theory is that such perpetrators are significantly different from the rest of society. The nature of their past offenses and their extreme deviance set them apart in ways that make propensity arguments in sex cases highly relevant and much more persuasive than other types of prior bad acts.

By focusing on American Indians, Catholic priests,<sup>131</sup> or any other small, non-mainstream group, one may reinforce the myth that only certain people or groups commit sex crimes because of their odd culture or deviant proclivities. By its repetitive focus on one small subgroup, the caselaw may reinforce the notion that there is a “type” of person or series of character traits that are inexorably linked to rape or child abuse. This conclusion both overstates what psychology tells us about sexual violence and creates the illusion that such abuse is not a general problem among all segments of society.<sup>132</sup> Because, outside of the military, the

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<sup>128</sup> See Armor, *supra* note 112, at 750–72 (discussing the psychological and cognitive mechanism by which stereotypes are reinforced).

<sup>129</sup> David Karp, author and chief promoter of Rules 413–414 in the Department of Justice observed: “Ordinary people do not commit outrages.” David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15, 20 (1994); see also Orenstein, *No Bad Men!* *supra* note 4, at 691 (“Rule 413 assumes that some facet of a rapist’s character exists that makes him not only a recidivist, but particularly aberrational and dangerous.”).

<sup>130</sup> 140 CONG. REC. S12990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole); see also 140 CONG. REC. H2433 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) (same).

<sup>131</sup> Though Catholic priests are clearly not singled out for special jurisdiction or punishment, their status as a discrete and different group makes it easier to construe the problem of sex abuse as arising only from small segments of society.

<sup>132</sup> Although child abusers and rapists may have some identifiable character traits (failure of empathy), cognitive lapses (sincere belief that victim enjoys unwanted sexual attention), and employ similar modus operandi (gaining trust of lonely individuals, leading a youth group), one cannot spot a sexual predator. They come from all races, ethnicities, religions, and socio-economic backgrounds (hence the next-door-neighbor’s shock when interviewed on television). See ELI COLEMAN, S. MARGRETTA DWYER, & NATHANIEL J. PALLONE, *SEX OFFENDER*

federal jurisdiction of rape and child molestation cases restricts the pool of defendants to the exotic, uncivilized, drunken Indian “other,” the cognitive construct and theoretical justification of the new evidence rules seem vindicated. Another drunken Indian abuses a child on a reservation? Another Indian woman is raped? Clearly, thinks the judge who is performing the Rule 403 balancing test in these cases, this propensity theory makes some sense! The facts of rape or molestation cases involving Indian plaintiffs or defendants seem so similar that there appears to be a template for certain sex crimes. Hence, a supposed predictable profile of the abuser emerges in the judge’s mind. In such a context, the use of propensity evidence may seem more justifiable and less troubling to the trial judge, despite the historic ban on such evidence.

It is outside the scope of this Essay to consider the very different set of concerns that arise among the soldiers accused of sexual offenses in military cases. I hope that others will consider these cases in depth because they provide a wealth of information about the rules themselves, stereotypes about warriors, and military culture. Overall, the military courts seem slightly more reluctant to admit evidence on the grounds of the new rules, more skeptical in their belief that the past offenses actually occurred, and more rigorous in their application of Rule 403<sup>133</sup> (though if my conversations with military defenders are any indication, that is not saying much). The explanation for the differences, although many-faceted, seems to depend on the fact that the military caseload differs from the nature of the caseload that arises in Indian Country. Generally, most Indian cases involve child molestation, while most military cases involve rape.<sup>134</sup>

Some, but certainly not all, of the military cases seem markedly hostile to the application of Rule 413, and skeptical in their belief of statements made by the victim in the case at issue and the accused’s alleged former victims. In sifting through the probative value of the prior-act evidence, some military cases are startling in their reliance on

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TREATMENT: PSYCHOLOGICAL AND MEDICAL APPROACHES 68, 118 (1992) (stating that demographic diversity of pedophiles supports the conclusion that “pedophiles are as different as they are alike”); *id.* (supplying data on the variability of demographic and socio-economic backgrounds of pedophiles); *see also* AMERICAN PSYCHOLOGICAL ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 566-68 (4th ed. Text Revision, 2000) (noting that cultural and religious variations in sexual norms make it difficult to make statements on the frequency of paraphilias across cultures, except that most paraphilias are very rare in women).

<sup>133</sup> *See, e.g.*, *United States v. Berry*, 61 M.J. 91, 95 (C.A.A.F. 2005) (holding that evidence of prior consensual sodomy was wrongfully admitted where in the prior case, the accused and the victim were both minors, and in the case at issue both the accused and the victim were adults, because the trial judge did not conduct a thorough Rule 403 balancing test).

<sup>134</sup> *See supra* note 9 and accompanying text.

rape myths and misogynistic attitudes.<sup>135</sup> This lack of respect for the women who testify about the alleged offenses (both the charged offenses and prior sexual offenses offered under Rule 413) arguably correlates with the negative attitudes towards women that often arise in a male-dominated, warrior culture. Such bias is particularly acute where the victim is not a soldier, though it is clearly moderated when the victim is a member of the military and not an “other.”<sup>136</sup> Of equal importance is that military courts tend to apply the Rule 403 balancing test more rigorously.<sup>137</sup>

Moreover, the issue of “otherness” makes for an interesting comparison between the Indian cases and the military ones. Read broadly, all of these cases indicate that acceptance of propensity thinking correlates with the perception of the accused. Whereas we all see ourselves as individuals despite our cultural, ethnic, gender, racial, or religious affiliation, it is harder to see others that way, and harder still if the others whom we are asked to judge are perceived as very different from ourselves. The logic of propensity thinking is most persuasive when group characteristics dominate the judge’s method of organizing his thoughts about the accused.

The restricted defendant pool and the repetitive fact patterns may explain the growth and judicial acceptance of Rules 413–414. Trial court judges, who serve as evidence gatekeepers and whose sensibilities must be engaged to identify and limit unfair prejudice under Rule 403, may be subtly influenced by disproportionate representation of Indians in the federal sex-crime caseload. The concentration of alleged federal sex-crime offenders in Indian Country, as the locus for almost all the non-military cases, has skewed the population of the accused and may have affected judges’ willingness to engage in propensity-like thinking. I hy-

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<sup>135</sup> See, e.g., *United States v. Parker*, 54 M.J. 700, 708 (A. Ct. Crim. App. 2001) (“In addition to KD’s credibility problem, her description of how she manifested her lack of consent during the second rape raises a substantial question whether a reasonable person would have perceived her nonconsent under the circumstances. In our judgment, her assertion that she did not consent to sexual intercourse during the second rape is not convincing. KD testified that she tried to fight the appellant, but he was pulling her hair ‘real bad,’ so ‘I didn’t fight much; I was too afraid.’ Without providing any other details on how she manifested her nonconsent to the appellant, KD testified as conclusions that she did not consent and that the appellant forcibly sodomized her, pulled her pubic hair to maintain control of her, and penetrated her vaginally. Under these facts, we are not convinced beyond a reasonable doubt that the appellant did not mistakenly believe that KD consented to sexual intercourse and sodomy.”).

<sup>136</sup> Cf. *United States v. Sentence*, No. ACM 34693, 2004 WL 190075, at \*5 (A.F. Ct. Crim. App. Jan. 7, 2004) (“The offenses are further aggravated by the fact that the victims were fellow service members and the crimes occurred on military installations.”).

<sup>137</sup> See Orenstein, *Deviance, Due Process*, *supra* note 28, at 1510; see, e.g., *United States v. Dewrell*, 55 M.J. 131, 138 (C.A.A.F. 2001) (“The military [trial] judge’s careful and reasoned analysis on the record satisfied the constitutional requirement that evidence offered under Rule 413 be subjected to a thorough balancing test pursuant to Mil. R. Evid. 403.”).

pothesize that recurring fact patterns that involve the same sub-populations reinforce a cognitive loop. The otherwise jarring notion of propensity evidence seems more just—or at least more justified—in light of the repetitive fact patterns the judges observe in their courtrooms.

In sum, not only do Rules 413–414 rely upon propensity and potentially perpetuate stereotypes about Indians, but their jurisdictional limitation to Indian Country may subtly influence the acceptance, development, and application of the rules. Indeed, I hypothesize that the concentrated application of Rules 413–414 in Indian Country, with Indians as the regulars at the defense table, may reinforce the perceived value of propensity evidence. Indians, the quintessential “savage” outsiders, are not only easily susceptible to demonization, but their regular appearance as accuseds in federal court may give credence to the use of propensity evidence and may reinforce the appearance that the propensity theory is grounded in common sense. This paves the way for eventual acceptance of a new, dangerous doctrine.

For the judge, such thinking may be part of an unconscious cognitive shortcut that is helpful for ruling on a Rule 403 motion. Most of the costs fall on the person who has been historically stereotyped—the one who, in the case of sex crimes, is perceived as more strange, savage, or intoxicated and, hence, more likely to have committed the crime. Furthermore, unlike interpersonal interactions, which only affect individuals, stereotypes in the courtroom damage the judicial system’s ability to deliver justice.

#### CONCLUSION

The Indian population presents a regrettable target for the launch of controversial and anti-accused character rules. Even though Rules 413–414 raise no technical equal protection problem, they create serious legal and social issues because of the targeted populations upon whom the brunt of the rules falls: Indians, soldiers, and the occasional person taking a minor across states lines for illicit purposes. Propensity evidence about Indian accuseds causes extra harm because it relies upon and perpetuates negative stereotypes about Indians. Revealingly, in *United States v. Koruh*, the court reported that the accused “took the stand and denied that he had sexual contact with either of his nieces. He testified that Jane Doe B had been sexually abused but that the abuse was by another Indian.”<sup>138</sup> With such limited jurisdiction (outside of the military) it stands to reason that the child molester had to be “another Indian,” not just another person.

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<sup>138</sup> *United States v. Koruh*, 210 F.3d 390, No. 99-2138, 2000 WL 342252, at \*1 (10th Cir. Apr. 3, 2000) (summarizing, not quoting the accused’s testimony).

Equally important, the concentrated application of Rules 413–414 in Indian Country, and their focus on Indian accuseds, may have eased judicial acceptance of the new rules. Rules 413–414 are premised on the notion that centuries of traditional thought regarding evidence should be abandoned. They rest on the idea that rapists and child molesters are deviant and inherently different from the rest of us—so much so that rules of propensity have particular force, overcoming evidence law’s traditional wariness of admitting character evidence. How much easier it is to accept this premise when the accuseds all hale from a discrete minority that is stereotyped as drunken, savage, and uncivilized.