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Comments: 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

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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

I. INTRODUCTION

In the fall of 1982, a fifteen-year-old boy named Matthew Curtis arrived at Saint James School,¹ an Episcopal boarding school near Hagerstown, Maryland.² A self-described “farm kid” who felt adrift among the more privileged students of St. James, Curtis sought solace in the church.³ He soon encountered Father Kenneth Behrel, the school’s thirty-year-old chaplain, who paid special attention to Curtis, eventually promoting him to sacristan,⁴ an acolyte’s highest station.

According to Curtis, after a gradual progression of late night television watching, foot rubbing, wine drinking, and marijuana smoking, he and Father Behrel began having oral and anal sex.⁵ The sexual activity, said Curtis, was not coerced,⁶ and continued for about two years.⁷ This sexual activity often incorporated pornographic materials that Behrel kept in a footlocker in the living room of his on-campus apartment.⁸

As an adult, Curtis found himself struggling with shame and anger over his relationship with Behrel, suffering from health and psychological problems, and unable to do anything with his life.⁹ He eventually pressed charges against Behrel in 1998.¹⁰

At trial in Washington County, Maryland, Behrel denied having any sexual contact with Curtis.¹¹ Behrel further testified that Curtis had continued an amicable relationship with him after they both left St. James, and also produced several parishioners to vouch for his good character.¹²

1. Behrel v. State, 151 Md. App. 64, 103, 823 A.2d 696, 718 (2003), *cert. denied*, 376 Md. 546 (2003).

2. Behrel, 151 Md. App. at 75, 823 A.2d at 702.

3. See *id.* at 104-05, 823 A.2d at 719.

4. See *id.* at 103, 823 A.2d at 719.

5. *Id.*

6. See *id.* at 105, 823 A.2d at 720.

7. See *id.* at 104, 823 A.2d at 719.

8. See *id.*

9. See *id.* at 106-08, 823 A.2d at 720-21.

10. *Id.* at 105, 823 A.2d at 719.

11. *Id.* at 113, 823 A.2d at 724.

12. *Id.* at 113-14, 823 A.2d at 724.

To bolster Curtis' credibility, the prosecution entered into evidence an affidavit containing the testimony of Jeffrey Miller, a former St. James student.¹³ Miller stated that Behrel had also promoted him to sacristan, and had initiated a sexual relationship that progressed from foot rubs and wine to oral and anal sex that incorporated the pornographic materials in Behrel's footlocker.¹⁴ The trial judge admitted the affidavit on the ground that it described Behrel's handiwork, or his distinctive pattern of grooming his young acolytes for sexual abuse, and thus had special relevance.¹⁵

The jury found Behrel guilty,¹⁶ but the Court of Special Appeals of Maryland vacated the conviction in May, 2003, and remanded the case.¹⁷ The court held that Miller's testimony was inadmissible under Maryland's "propensity evidence" rule, which presumptively bans any evidence of prior offenses used to demonstrate a defendant's propensity to commit a certain type of crime.¹⁸ Though this blanket rule, codified in Maryland Rule 5-404(b), has a remarkable number of exceptions,¹⁹ Miller's testimony—despite its high credibility and overwhelming similarity to Curtis' allegations—did not neatly fit into any of them.²⁰

The *Behrel* reversal is no anomaly. It illustrates the fact that, sound as Maryland's antiquated "propensity rule" might be in other contexts, it fails to provide justice for the victims in many sex offense cases.²¹ Unlike victims of, say, carjacking or assault, many sex crime victims are, like Matthew Curtis, steeped in shame and particularly reluctant to come forward publicly.²² This secrecy ensures that most sex crimes yield no witnesses and little physical evidence.²³ This is especially true in child sex abuse cases, which often distill down to a credibility contest between an adult abuser and a frightened, easily discredited child.²⁴ Furthermore, the ban on propensity evidence is especially strict in Maryland, where Rule 5-404(b) is construed more narrowly,

13. *See id.* at 78, 823 A.2d at 704.

14. *See id.* at 80-81, 823 A.2d at 705. In a subsequent and separate trial, another Washington County jury convicted Behrel of sexually abusing Miller. *Id.* at 75, 823 A.2d at 702. Curtis testified briefly at Miller's trial, but not about his own alleged sexual relationship with Behrel. *Id.* at 139, 823 A.2d at 739.

15. *See id.* at 121-22, 823 A.2d at 729.

16. *Id.* at 75, 823 A.2d at 702. The jury's task was facilitated by evidence that police had seized a footlocker at Behrel's apartment years later that was full of pornographic material, sexual aids and nude photographs. *See id.* at 78-81, 823 A.2d at 704-05.

17. *Id.* at 76, 823 A.2d at 702.

18. *See id.* at 130-32, 823 A.2d at 734-35.

19. *See infra* note 36.

20. *See Behrel v. State*, 151 Md. App. 64, 131-32, 823 A.2d 696, 735 (2003).

21. *See infra* Part II.B (discussing other Maryland sex crime cases applying Rule 5-404(b)).

22. *See infra* Part III.A.

23. *See infra* Part III.A.

24. *See infra* Part III.A.

and perhaps less consistently, than its counterpart in other jurisdictions.²⁵

Recognizing this obstacle to achieving justice in child sex abuse cases, Maryland Delegate Pauline Menes of Prince George's County and Maryland Senator Jennie Forehand of Montgomery County sponsored a bill in January 2004 that would facilitate admissibility of other sex offenses as propensity evidence in trials of child molesters.²⁶ The proposed statute, which effectively creates a "propensity evidence" exception in Maryland Rule of Evidence 5-404(b), is modeled after Federal Rule of Evidence 414,²⁷ but provides additional safeguards for defendants.²⁸

Although two Maryland General Assembly committees shelved the proposed bill in the 2004 legislative session,²⁹ this comment will explain why the Maryland General Assembly should not only amend the propensity rule for child sex abuse cases, but also ultimately adopt a modified version of the federal adult sex crime rule as well.³⁰ The discussion will begin with an explanation of the long-standing ban in Anglo-American law against propensity evidence and how that rule is applied in Maryland.³¹ Next, it will present an overview of Federal Rules of Evidence 413, 414, and 415,³² in addition to the statutes of

25. See *infra* Part II.B.

26. For the General Assembly's 218th session in 2004, the bill numbers were H.B. 401 and S.B. 718. See *infra* note 29. One of the original proponents of the bill is Dr. Robert Wack, director of the Carroll County Pediatric Sexual Assault Forensic Examination Clinic (SAFE), whose experience testifying on behalf of sexually abused children convinced him that the rule barring evidence of a sex abuser's past victims disserved young victims. (Notes on file with author.)

27. See *infra* note 98 for text of FED. R. EVID. 414. Note that Maryland legislators did not propose to adopt the two companion rules, 413 and 415, which allow propensity evidence in sex offense crimes against adults, and in civil sexual harassment trials, respectively. See *infra* notes 97, 99.

28. See H.D. 401, 2004 Leg., 218th Sess. (Md. 2004), available at <http://mlis.state.md.us/2004rs/bills/hb/hb0401f.rtf>; see also S. 718, 2004 Leg., 218th Sess. (Md. 2004), available at <http://mlis.state.md.us/2004rs/bills/sb/sb0718f.rtf> (providing safeguards that include advance notice to the defendant of the evidence's proposed use at trial, a closed hearing on the evidence's admissibility, and judicial discretion as to the circumstances of admissibility).

29. The Maryland House Judiciary Committee rejected House Bill 401 on March 27, 2004. Maryland Assembly Bill Status and Information, H.D. 401, 2004 Leg., 218th Sess. at <http://mlis.state.md.us/2004rs/billfile/hb0401.htm> (last modified Aug. 10, 2004). On April 15, 2004 the Senate Judicial Proceedings Committee gave an unfavorable report to Senate Bill 718. Maryland Assembly Bill Status and Information, S. 718, 2004 Leg., 218th Sess., at <http://mlis.state.md.us/2004rs/billfile/sb0718.htm> (last modified Aug. 10, 2004).

30. Admissibility of sex crime evidence in civil cases is outside the scope of this comment.

31. See discussion *infra* Parts III.A,B.

32. See discussion *infra* Part II.C.

the ten states that have adopted some version of these rules.³³ The comment will then discuss the four most compelling reasons for adopting the amended rules in sex crimes cases,³⁴ followed by a discussion, based on how other jurisdictions have implemented these rules, of how the five main fears of opponents are unjustified.³⁵

II. BACKGROUND FACTS AND LEGAL DOCTRINES

A. *Maryland's Ban on Propensity Evidence Is Remarkably Elastic*

Maryland's common law ban on propensity evidence is codified in Maryland Rule 5-404(b), which provides in relevant part that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."³⁶ In other words, evidence admitted only to prove a defendant's bad character, or propensity to commit certain types of crime, is inadmissible. Like its counterparts in other jurisdictions and Federal Rule of Evidence 404(b), upon which it is modeled, Maryland's rule has evolved from the long-standing Anglo-American principle that information about a defendant's other crimes would so repel or confuse jury members that they would ignore the merits of the case at bar and unfairly punish the defendant for his evil nature.³⁷ The fear is that, for example, a jury might decide that a man accused of carjacking is probably guilty since he was convicted of robbing a pawn shop three years ago.

33. See discussion *infra* Part II.D.

34. See discussion *infra* Part III.A-D.

35. See discussion *infra* Part III.E.

36. MD. R. EVID. 5-404(b). The rule continues: "It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident." *Id.*

37. See, e.g., Lynn McLain, "Other Acts" Evidence: Recent Decisions by the Court of Appeals Undermine the Efficacy of Maryland Rule 5-404(b), 31 U. BALT. L.F. 5, 6-7 (2000) (describing history of propensity rule); *United States v. Enjady*, 134 F.3d 1427, 1430 (10th Cir. 1998), explaining:

The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. 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 prejudice 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.

Enjady, 134 F.3d at 1430 (quoting *Michelson v. United States*, 335 U.S. 469, 475-76 (1948)).

Despite the strong language of this principle and its indignant defenders,³⁸ the propensity rule is nonetheless riddled with a remarkable number of exceptions.³⁹ Recognizing that some evidence is simply too relevant and probative to keep out,⁴⁰ Maryland's propensity rule allows evidence of other crimes to be admitted if it is "substantially relevant to some contested issue in the case."⁴¹ The second sentence of Maryland Rule 5-404(b) codifies eight possible exceptions: proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.⁴² These exceptions are also widely used in federal and other jurisdictions under which the evidence may be deemed "substantially relevant," and thus admissible.⁴³ In addition to these enumerated exceptions, Maryland courts have created several additional common law exceptions for "substantial relevance."⁴⁴ The propensity rule, in short, is eminently elastic.⁴⁵

Furthermore, as its broad title suggests, the rule on "other crimes, wrongs, or acts"⁴⁶ encompasses a wide range of misconduct.⁴⁷ In Maryland, as elsewhere, this includes not only convictions,⁴⁸ but other "bad" acts that are not necessarily crimes,⁴⁹ as well as uncharged of-

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38. A defender of the existing propensity evidence rule stated that "[the proposed bill] is trying to turn over 300 years of jurisprudence." Del. Menes' Proposal: Hearing on H.D. 401 Before the Md. House Judiciary Comm., 2004 Leg., 218th Sess. (2004) (quoting statement of a Baltimore City criminal defense attorney).
 39. See *Oesby v. State*, 142 Md. App. 144, 160-61, 788 A.2d 662, 671-72 (2002) (detailing Maryland's exceptions to Rule 5-404(b) and noting that the categories often overlap).
 40. See McLain, *supra* note 37, at 6-7.
 41. *Behrel v. State*, 151 Md. App. 64, 124, 823 A.2d 696, 731; *Harris v. State*, 324 Md. 490, 500, 597 A.2d 956, 961 (1991).
 42. MD. R. EVID. 5-404(b).
 43. See FED. R. EVID. 404(b); see also *Ross v. State*, 276 Md. 664, 669-70, 350 A.2d 680, 684 (1976).
 44. *Behrel*, 151 Md. App. at 124-25, 823 A.2d at 731.
 45. See *id.* at 125, 823 A.2d at 731; see also McLain, *supra* note 37, at 7.
 46. MD. R. EVID. 5-404(b).
 47. See, e.g., *Huddleston v. United States*, 485 U.S. 681, 685 (1988) (stating that FED. R. EVID. 404(b) applies in both civil and criminal cases and generally pertains to any extrinsic act that might adversely reflect on the actor's character); *United States v. Cooper*, 577 F.2d 1079, 1087-88 (6th Cir. 1978) (stating that FED. R. EVID. 404(b) is not limited only to evidence of other crimes, but rather its broad language includes "any conduct of the defendant which may bear adversely on the jury's judgment of his character").
 48. See, e.g., *Whitehead v. State*, 54 Md. App. 428, 436, 458 A.2d 905, 909-10 (1983) (allowing admission of defendant's prior convictions for purposes of impeaching defendant).
 49. See, e.g., *Synder v. State*, 361 Md. 580, 585, 762 A.2d 125, 128 (2000) (noting that evidence showing defendant and murder victim had stormy relationship is admissible to show motive under MD. R. EVID. 5-404(b)); *Duckworth v. State*, 323 Md. App. 532, 544, 594 A.2d 109, 114 (1991) (upholding, under the absence of mistake exception in Rule 5-404(b), the admission of evidence that defendant, who was on trial for accidentally shooting a three

fenses⁵⁰ and acquittals.⁵¹ It also includes convictions that happened prior to, concurrent with,⁵² or after⁵³ the charges in the defendant's current trial.

Such evidence is not automatically admitted, however. A three-step approach, first articulated in 1989 in *State v. Faulkner*,⁵⁴ governs the admissibility of other crimes evidence. First, the trial court must determine if the evidence fits within one or more of the pre-existing exceptions to the rule. If so, the trial court must determine whether the accused's involvement in the other crimes is established by clear and convincing evidence.⁵⁵ Finally, the trial court must use its discretion to balance the probative value of the other crimes evidence against any unfair prejudice likely to result from its admission.⁵⁶ This last test has been codified into Maryland Rule of Evidence 5-403, which provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."⁵⁷

year old with a BB gun, of an earlier incident in which the defendant had also accidentally shot the victim with a BB gun).

50. See, e.g., *State v. Faulkner*, 314 Md. 630, 642-43, 552 A.2d 896, 902 (1989) (upholding the admission of evidence of three prior uncharged burglaries in defendant's burglary trial under the *modus operandi* exception); see also *Anaweck v. State*, 63 Md. App. 239, 257, 492 A.2d 658, 667-68 (1985), *rev'd on other grounds*, *Wynn v. State*, 351 Md. 307, 718 A.2d 588 (1998) (upholding admission in drug trial of evidence about defendant's prior uncharged drug sales).
51. See *Wise v. State*, 47 Md. App. 656, 669-70, 425 A.2d 652, 660 (1981) (stating that evidence of an act that resulted in an acquittal is admissible under "other crimes" law, but is subject to judicial scrutiny).
52. See, e.g., *Oesby v. State*, 142 Md. App. 144, 157, 788 A.2d 662, 669 (2002) (holding that evidence of rapes of three other victims within a nine-day period, each of which had separate but roughly concurrent trials, were all admissible in the rape trial of a fourth victim since the crimes were similar enough to fit under the *modus operandi* exception to Rule 5-404(b)).
53. See, e.g., *United States v. Hadaway*, 681 F.2d 214, 217 (4th Cir. 1982) (applying FED. R. EVID. 404(b) and stating that "subsequent conduct may be highly probative of prior intent").
54. 314 Md. at 634-35, 552 A.2d at 898.
55. See *id.* This standard is much higher than its federal counterpart, FED. R. EVID. 404(b), which requires only that the other crimes evidence be admitted "if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act." *Huddleston v. United States*, 485 U.S. 681, 685 (1988) (rejecting a preponderance of the evidence standard for evidence admitted under FED. R. EVID. 404(b) exceptions).
56. *Faulkner*, 314 Md. at 634-35, 552 A.2d at 898; see also *Behrel v. State*, 151 Md. App. 64, 124-25, 823 A.2d 696, 730-31 (2003) (citing an updated version of the three-step test in which MD. R. EVID. 5-403 replaces the common law probative value balancing test in the third prong of the *Faulkner* test).
57. MD. R. EVID. 5-403.

B. Yet, Despite the Numerous Exceptions, Much Sex Crimes Evidence Still Does Not Fit Through Maryland's Propensity Rule

Although all the exceptions fuel the popular perception that, as one Maryland trial judge stated, "you can drive a Mack truck through 5-404(b),"⁵⁸ the high courts of Maryland seem to feel otherwise.⁵⁹ Indeed, in 1991 the Court of Appeals of Maryland emphasized that Rule 5-404(b) should be one of exclusion—not inclusion—and its exceptions applied only after much scrutiny.⁶⁰ Furthermore, Chief Justice Joseph Murphy of the Court of Special Appeals of Maryland acknowledged that Maryland's rule on propensity evidence "is more pro-defense than the rules in many jurisdictions, including the federal rules."⁶¹

Given the rule's somewhat schizophrenic elastic-but-exclusive nature, it is not surprising that it continues to be murkily interpreted and inconsistently applied.⁶² This is especially true in sex crimes cases, where Maryland's rule is so narrowly drawn it excludes an enormous amount of sex crimes evidence—even more so than in other jurisdictions with a similar rule.⁶³ The unfortunate result, as Dr. Wack⁶⁴ and other sex crime victim advocates testified in Annapolis in February and March, 2004, is that many of Maryland's repeat sex offenders escape conviction, in part because highly relevant and probative evidence of their other crimes simply does not appear before the jury.⁶⁵

1. Maryland's Exception for Sex Crime Evidence Is Unusually Narrow

The first distinguishing feature of Maryland's 5-404(b) application is the unusual narrowness of its sex crime exception.⁶⁶ Formally

58. Telephone Interview with the Honorable James J. Lombardi, Associate Judge, Prince George's County Circuit Court, 7th Judicial Circuit, Md. (Jan. 10, 2004) (notes on file with author).

59. See, e.g., *Harris v. State*, 324 Md. 490, 494-95, 597 A.2d 956, 959 (1991).

60. See *id.* "We have re-examined the principles governing admissibility of evidence of other bad acts and have considered the current legal literature discussing the "inclusionary" and "exclusionary" approaches to the problem. . . . [W]e conclude that continued adherence to the "exclusionary" approach is appropriate." *Id.*

61. Honorable Joseph Murphy, Comments to his Evidence class at the University of Baltimore School of Law (Mar. 31, 2004) (notes on file with author).

62. See, e.g., *McLain*, *supra* note 37.

63. See discussion *infra* Part II.D for sex crime exceptions in other states.

64. See *supra* note 26.

65. In addition to Dr. Wack, veteran Maryland child protection advocate Ellen Mugmon and Lisae C. Jordan, legislative counsel for the Maryland Coalition Against Sexual Assault, were among those who testified during the 2004 legislative session about the evidentiary holes in 5-404(b) that allow repeat sex offenders to escape punishment. (Notes on file with author.)

66. MD. R. EVID. 5-404(b); see also discussion *infra* Part II.B.

adopted in 1989, the long-standing common law exception admits evidence to show the accused's propensity for illicit sexual relations, but only of the same type and with the same victim.⁶⁷ In *Acuna v. State*,⁶⁸ for example, the Court of Appeals of Maryland upheld the admission of testimony of a four-year-old girl that a neighbor—who the girl's mother caught about to perform cunnilingus on the child—had performed oral sex on the girl at least ten other times.⁶⁹

Had the defendant in *Acuna* performed similar acts on other neighborhood girls, that evidence would not have been admissible in Maryland.⁷⁰ Such was the result in *State v. Werner*,⁷¹ for example, where the Maryland court of appeals affirmed the court of special appeals' reversal of a conviction of a Baltimore man who was indicted for molesting all three of his stepdaughters on the ground that the trial court had wrongly admitted the oldest victim's testimony about the sexual abuse of her younger sister.⁷² The trial court had originally allowed the girl's testimony about the abuse of her younger sister because it explained what propelled her to finally come forward and expose her stepfather,⁷³ but the Court of Appeals of Maryland held that witness rehabilitation was not appropriate in this case,⁷⁴ and there was no 5-404(b) exception under which the girl's testimony was otherwise admissible.⁷⁵

The *Werner* result would be an aberration elsewhere; most of the other states that have carved out a common law exception for other sex crimes allow evidence of a sex offender's other victims, especially in child molestation cases.⁷⁶ In fact, admission of such evidence was, historically, more the rule than the exception.⁷⁷ In the early 1920s about half the states had "lustful disposition" or "depraved instinct" exceptions to admit propensity evidence of statutory rape, sodomy, or child molestation.⁷⁸ Common law "lustful disposition" or other sex

67. *Vogel v. State*, 315 Md. 458, 466, 554 A.2d 1231, 1234 (1989) (stating: "Our acceptance of the exception is not to be taken as meaning that we adopt a broad 'sexual propensity' exception to the general rule It is strictly limited").

68. 332 Md. 65, 629 A.2d 1233 (1993).

69. *Id.* at 75-76, 629 A.2d at 1238.

70. *See id.* at 75, 629 A.2d at 1238.

71. 302 Md. 550, 489 A.2d 1119 (1985).

72. *Id.* at 565, 489 A.2d at 1127.

73. *Id.* at 554, 489 A.2d at 1121.

74. *Id.* at 562-63, 489 A.2d at 1125.

75. *Id.* at 557, 489 A.2d at 1122-23.

76. Kansas, Mississippi and Virginia, like Maryland, are among the few states to limit their sex crime exceptions to the same victim. *See State v. Crossman*, 624 P.2d 461, 462 (Kan. 1981); *Mitchell v. State*, 539 So. 2d 1366, 1372 (Miss. 1989); *Moore v. Commonwealth*, 278 S.E.2d 822, 825 (Va. 1981).

77. *See United States v. Castillo*, 140 F.3d 874, 881 (10th Cir. 1998).

78. *Id.* *See also* Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127, 171-81 (1993).

crime exceptions remain in at least nine other jurisdictions—Arkansas, Washington, D.C., Georgia, Indiana, Nebraska, North Carolina, Oregon, West Virginia, and Wisconsin—whose legislatures have not otherwise codified the exception.⁷⁹

2. Maryland's Propensity Rule, 5-404(b) Is Inconsistently Applied

The second principal reason that Maryland's propensity rule excludes an enormous amount of sex crimes evidence is that the rule is confusing, inconsistently applied, and often misunderstood.⁸⁰ "Maryland judges exclude a lot of 5-404(b) evidence in sex offense cases," said one former Maryland sex crimes prosecutor, "either because they don't really understand the rule or because they're afraid of being overturned on appeal."⁸¹ Given the murkiness of the rule's application, it is not surprising that the trial judge in *Behrel* admitted that he did not know under which 5-404(b) exception Mitchell's evidence fit, stating instead that he was admitting the evidence because "there

79. See, e.g., *Mosley v. State*, 929 S.W.2d 693, 695 (Ark. 1996) (upholding admissibility in trial of a man accused of raping his nineteen-year-old daughter of evidence that he had been convicted of raping his six-year-old stepdaughter years before); *Johnson v. United States*, 610 A.2d 729, 730 (D.C. 1992) (upholding admissibility, in trial against defendant's sex crimes against three teenaged girls, of evidence of defendant's prior sexual abuse of two other teenaged girls to show his "unusual sexual preference"); *Goins v. State*, 571 S.E.2d 195 (Ga. Ct. App. 2002) (affirming admission of facts underlying a prior conviction for rape, sodomy and sexual abuse, as relevant to lustful disposition); *Kuchel v. State*, 501 N.E.2d 1032, 1033 (Ind. 1986) ("[E]vidence of former similar offenses is admissible in sex crimes involving a 'depraved sexual instinct' [such as child molestation] whereas it is not *per se* admissible in a rape case. . . ."); *State v. Stephens*, 466 N.W.2d 781, 785-86 (Neb. 1991) (upholding trial court's admission, in the trial of a man convicted of raping his one-month old granddaughter, of evidence that he had also repeatedly molested his stepdaughter from age four to fourteen); *State v. Reeder*, 413 S.E.2d 580, 583 (N.C. Ct. App. 1992) (allowing 'other crimes' evidence to show defendant's "unnatural lust, intent or state of mind"); *State v. Fears*, 688 P.2d 88, 90 (Or. Ct. App. 1984) (allowing *modus operandi* evidence to rebut a defense of consent in sex crimes cases); *State v. Parsons*, 589 S.E.2d 226, 234 (W. Va. 2003) ("Collateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition towards children generally, or a lustful disposition to specific other children"); *State v. Fishnick*, 378 N.W.2d 272, 277-78 (Wis. 1985) (upholding admissibility against man convicted of raping three-year-old girl of evidence that man had, one week prior to incident, molested a thirteen year old and exposed himself to a twelve-year-old girl).

80. See generally McLain, *supra* note 37. See, e.g., *infra* note 84, discussing how two Maryland appellate courts differ in defining the *modus operandi* exception.

81. Telephone Interview with Adam Rosenberg, former Assistant State's Attorney for Baltimore City, Sex Offense Division (July 7, 2004) (notes on file with author).

seems to be a niche within the rules that creates an exception for testimony such as this."⁸²

There is no such niche in Maryland law. Although, as in *Behrel*, the State may try to admit evidence of an accused's other molestation victims under the "common scheme" exception of 5-404(b), the rule does not consistently permit it.⁸³ Maryland appellate courts generally hold "common scheme" to mean either: (1) *modus operandi*, or distinctive pattern of doing things that suggests the handiwork or signature of the accused, which is usually only used when the defendant's identity is in doubt;⁸⁴ or (2) a plan to commit an offense as part of a grand scheme to commit others, such as a theft of nitroglycerine for use in blowing open a safe.⁸⁵

Thus, in Maryland, evidence of a defendant's pattern of sexual contact with one child, such as Father Behrel's abuse of Miller, is not admissible under "common scheme" to prove evidence of very similar conduct with a different victim, such as Curtis.⁸⁶ The Court of Special Appeals of Maryland reached a similar result in *McKinney v. State*, where it reversed the conviction of an adult male camp counselor for sexually touching three prepubescent girls in a three-day period on the ground that the sex crime evidence did not fit under any 5-404(b) exceptions—including the "common scheme" exception—and thus the trials of the three girls had been improperly joined.⁸⁷

Similarly, in *Reidnauer v. State*,⁸⁸ the court reversed the conviction of a man for raping two prostitutes on two separate occasions after both women testified that the defendant had driven them to his place of employment, penetrated them vaginally and anally with Vaseline, and

82. *Behrel v. State*, 151 Md. App. 64, 122, 823 A.2d 696, 729 (2003).

[The Court found that the evidence] does fit within a niche, and I'm not sure what it should be called, whether it's identity, opportunity, preparation, identical method earmarking of the handy work [sic] of the accused, whatever you may want to call it, there seems to be a niche within the Rules that creates an exception for testimony such as this, once again, to allow the State to show the identical method of the grooming of young men, fifteen years of age, under the circumstances presented here for the abuses alleged in this case.

Id.

83. *See id.* at 128-29, 823 A.2d at 733-34 (discussing "common scheme" rule in the instant case and others).

84. *See Oesby v. State*, 142 Md. App. 144, 161-62, 788 A.2d 662, 672 (2002) (stating that *modus operandi* evidence is generally only used when the identity of the accused is in doubt, although Maryland courts have not been consistent on this issue); *but see Ross v. State*, 276 Md. 664, 670, 350 A.2d 680, 684 (1976) (listing *modus operandi* as a propensity rule exception in its own right, independent of its use to prove identity).

85. *McKinney v. State*, 82 Md. App. 111, 124, 570 A.2d 360, 366 (1990).

86. *See Behrel*, 151 Md. App. at 130, 823 A.2d at 734.

87. *See McKinney*, 82 Md. App. at 128, 570 A.2d at 368.

88. 133 Md. App. 311, 755 A.2d 553 (2000).

told them he had AIDS.⁸⁹ The court reversed on the ground that the crimes were not admissible together under the “common scheme” exception, and thus the cases had been improperly joined.⁹⁰

Such results, however, seem to lack logic, because the crimes in those cases seem similar enough that the evidence *should*, as the trial judge in *Behrel* noted, fit under some 5-404(b) exception.⁹¹ Indeed, courts in other jurisdictions have historically admitted such similar pattern evidence under the “common scheme” or other 5-404(b) exception, although not always predictably or consistently.⁹² Such legal manipulation is still commonplace in those jurisdictions, like Maryland, that have not yet clarified their sex crimes exceptions.⁹³ Maryland’s current law on admission of sex crime evidence resembles the uneven, ad hoc state of admissibility of sex crimes evidence that was present among the states and federal courts a decade ago; it excludes a great deal of highly relevant sex crimes evidence, or results in appellate litigation when the trial courts admit that evidence.

C. Recognizing the Limits of Federal Rule of Evidence 404(b) to Admit Sex Crimes Evidence, Congress Enacted Federal Rules 413, 414, and 415

Fueled in part by frustration over similar inconsistencies inherent in Federal Rule of Evidence 404(b), U.S. Senator Robert Dole and Representative Susan Molinari proposed rules in 1994 that would allow in evidence of a serial molester or rapist’s prior victims.⁹⁴ As Senator Dole stated: “[W]hen someone is out there committing sex crime after sex crime . . . it is this Senator’s view that this evidence should be admitted at trial without a protracted struggle over whether the evi-

89. *Id.* at 315-16, 755 A.2d at 555.

90. *See id.* at 315, 755 A.2d at 555.

91. *See Behrel*, 151 Md. App. at 122, 823 A.2d at 729.

92. *See, e.g.*, David P. Bryden & Roger C. Park, “Other Crimes” Evidence in Sex Offense Cases, 78 MINN. L. REV. 529, 560-61 (1994) (citing decades-old history of legal manipulation to admit “other crimes” evidence in sex offense cases, and stating that, in general, the unpredictable and ad hoc admission of sex crime evidence is still a common basis for reversal of trial court decisions).

93. *See, e.g.*, Bowden v. State, 538 So. 2d 1226, 1233 (Ala. 1988) (emphasizing that Alabama courts recognize no formal sex crime exception, but also approving the courts’ practice of liberalizing admission of prior sexual abuse evidence under the “other purposes” exceptions of ALA. R. EVID. 404(b)); State v. Bros., 564 S.E.2d 603, 607 (N.C. Ct. App. 2002) (noting that North Carolina’s appellate courts are “markedly liberal” in admitting evidence of similar sex offenses under N.C. R. EVID. 404(b)); State v. Cramer, Nos. 76663, 76664, 2000 WL 1144975, at *2-3 (Ohio Ct. App. Aug. 10, 2000) (allowing, in trial of stepfather accused of sexually abusing his stepdaughter, evidence of defendant’s prior abuse of his niece under opportunity, identity, preparation and plan exceptions to OHIO R. EVID. 404(b)).

94. 140 CONG. REC. H5437-03 (daily ed. June 29, 1994) (statement of Rep. Molinari, who traced a brief history of the proposed rules).

dence has been properly admitted under Rule 404(b) or some other exception."⁹⁵

July 9, 1995 was the effective date of Federal Rules of Evidence 413, 414, and 415, which liberalize the admission of evidence of an accused person's other sexual misconduct or sex offenses.⁹⁶ The rules cover a broad range of cases: Federal Rule of Evidence 413 applies in criminal cases of sexual assault;⁹⁷ Rule 414 applies to child sex abuse cases;⁹⁸ and Rule 415 applies to civil cases.⁹⁹

The federal rules, in effect, codify a ninth exception to Rule 404(b) by allowing evidence of an accused's other sex offenses to be admitted to show his propensity to commit that type of crime.¹⁰⁰ Such evidence is not automatically admitted, however. The rules do not allow such evidence in dissimilar or unrelated crimes, such as kidnappings or burglaries.¹⁰¹ Although not specifically stated in the rules, the courts must subject Rules 413, 414 and 415 to the probative value versus unfair prejudice balancing test of Federal Rule of Evidence 403.¹⁰²

The overall goal of the new rules, according to Representative Molinari, is to protect the public from repeat rapists and child molesters.¹⁰³ Congress passed the rules in response to the growing public perception that recidivist child molesters and rapists were going un-

95. 139 CONG. REC. S15,137-38 (daily ed. Nov. 5, 1993).

96. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935(d), 108 Stat. 1796.

97. FED. R. EVID. 413(a). Rule 413 reads in relevant part: "In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant." *Id.*

98. FED. R. EVID. 414(a). Rule 414 reads in relevant part: "In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant." *Id.*

99. FED. R. EVID. 415(a). Rule 415 reads in relevant part:

In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

Id.

100. *See* United States v. Guardia, 135 F.3d 1326, 1329 (10th Cir. 1998) (stating that Federal Rule 413 supersedes Rule 404(b)'s general restriction on propensity evidence, and allows the government to offer evidence of defendant's prior sexual misconduct for the purpose of demonstrating his propensity to commit the charged offense).

101. LYNN MCLAIN, 5 MARYLAND EVIDENCE: MARYLAND EVIDENCE, STATE & FEDERAL § 413.2 at 874-76 (2001).

102. United States v. Enjady, 134 F.3d 1427, 1431 (10th Cir. 1998) (stating, "The legislative history . . . indicates that the district court must apply Rule 403 balancing and may exclude such evidence in an appropriate case.").

103. *See supra* note 94 and accompanying text.

punished because juries do not hear of relevant past offenses.¹⁰⁴ This perception was formed by several highly-publicized events in the 1990s, such as the rape trials of William Kennedy Smith and boxer Mike Tyson, and the rape/murder of nine-year-old Megan Kanka by a repeat sex offender.¹⁰⁵

The Kennedy Smith case illustrates the utility of Federal Rule 413, which addresses the past behavior of adult “date rape” defendants, who are often viewed with more sympathy than their victims.¹⁰⁶ Smith, a nephew of U.S. Senator Ted Kennedy, was acquitted in December, 1991¹⁰⁷ of allegedly tackling and raping a young woman who had given him a ride back to his family’s Palm Beach compound after meeting at a nearby nightclub.¹⁰⁸ Absent from the jury’s deliberations were the sworn statements of three other women who alleged sexual attacks by Smith that were similar to that alleged by the Palm Beach victim.¹⁰⁹ The trial judge excluded this evidence without comment,¹¹⁰ ostensibly because the attacks did not fit under Florida’s then-existing exceptions to the propensity rule, which mirror those currently in ef-

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104. See, e.g., David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI-KENT L. REV. 15, 15-16 (1994) (discussing impetus for Federal Rules 413-15); Sherry L. Scott, *Fairness to the Victim: Federal Rules of Evidence 413 and 414 Admit Propensity Evidence in Sexual Offender Trials*, 35 HOUS. L. REV. 1729, 1731-32 (1999) (discussing impetus for Federal Rules 413-15).
 105. See Jeffrey Waller, *Federal Rules of Evidence 413-15: “Laws Are Like Medicine; They Generally Cure an Evil by a Lesser . . . Evil,”* 30 TEX. TECH. L. REV. 1503, 1505-07 (1999) (summarizing several high-profile sex-offense cases that predated the adoption of Federal Rules 413-15).
 106. Studies show that—absent corroborating evidence—both female and male jurors are often unfairly prone to disbelieve adult rape victims. See, e.g., Scott, *supra* note 104, at 1743.
 107. Florida v. Smith, No. 91-5482CFA02 (Fla. Palm Beach County Ct. Dec. 11, 1991) at http://oris.co.palm-beach.fl.us/or_web1/details.asp?doc_id=5751689&file_num.
 108. See Mary Jordan, *Jury Finds Smith Not Guilty of Rape; Quick Verdict Ends Emotional Legal Battle*, WASH. POST, Dec. 11, 1991, at A1; Mary Jordan, *Smith’s Tearful Accuser Tells of Yelling ‘Stop!’; Alleged Victim Testifies at Rape Trial*, WASH. POST, Dec. 4, 1991, at A1. The victim, the stepdaughter of a wealthy Florida businessman, testified that after she gave Smith a ride home she accompanied him into the house, where she saw Senator Edward Kennedy and his son. She then went for an amorous walk along the beach with the seemingly gentlemanly Smith, who suddenly attacked her, knocked her to the ground and raped her, saying “no one is going to believe you.” *Id.* Too distraught to drive after the attack, she called a friend for a ride home. *Id.*
 109. Mary Jordan, *3 Women in Affidavits Accuse Smith of Sex Attacks; Statements Describe Alleged Assaults in Graphic Detail: ‘Ferocious . . . Almost Animal-Like,’* WASH. POST, July 23, 1991, at A5 (all three women described Smith inviting them to one of the Kennedy’s impressive homes under some pretext, then physically tackling and raping, or trying to rape, them); see also Rick Hampson, *Experts Say Judge Had to Exclude Other Women*, ORLANDO SENTINEL, Dec. 13, 1991, at D6.
 110. See Hampson, *supra* note 109, at D6.

fect in Maryland.¹¹¹ Without that additional evidence, the trial became a credibility contest between a well-spoken doctor from a prominent family and a single mother portrayed by the defense as a histrionic nut who was angry after a night of love gone bad.¹¹² The jury quickly decided in favor of Mr. Kennedy Smith.¹¹³

D. Adoption of the Rules in Other States

Minus the celebrity and media attention, of course, the essential elements of the Kennedy Smith rape trial are found in every jurisdiction: accuser, accused, possibly forced sex, no witnesses, scant physical evidence. In response, the legislatures of ten states have, as of June, 2004, adopted their own versions of Federal Rules of Evidence 413, 414, and 415.¹¹⁴ Five of these states—Alaska, Arizona, California, Colorado, and Illinois—have embraced all three of the rules' provisions, enacting comprehensive laws that allow in evidence of a defendant's other sex crimes in child molestation, criminal sexual offense, and civil sexual offense cases.¹¹⁵ Five other states—Florida, Indiana, Louisiana, Missouri, and Texas—have enacted rules (somewhat like those proposed in the 2004 session of the Maryland General Assembly) that allow in such evidence only for sexual offenses against minors.¹¹⁶ Including the nine states that have carved out common law exceptions to their propensity rules for sex crimes,¹¹⁷ a total of 19 states plus all the federal courts overtly recognize an exception for sex crimes evidence.¹¹⁸

111. Compare FLA. STAT. ch. 90.404(2)(a) (1991):

Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

with MD. R. EVID. 5-404(b).

112. See *A Day-by-Day Account of Courtroom Proceedings*, ORLANDO SENTINEL, Dec. 12, 1991, at A7; Janet Cawley, *Smith Denies Rape, Says Sex 'Completely Mutual'*, CHI. TRIB., Dec. 11, 1991, at C1; Mary Jordan, *Smith Defense Calls It an 'Act of Love'; Rape Trial Opens After Key State Evidence Is Ruled Inadmissible*, WASH. POST, Dec. 2, 1991, at A3.
113. Chris Lavin, *Smith Acquitted of Rape; Jury Out Just 77 Minutes*, ST. PETERSBURG TIMES, Dec. 12, 1991, at A1.
114. See *supra* notes 97-99 and accompanying text.
115. ALASKA R. EVID. 404(b); ARIZ. R. EVID. 404(c); ARIZ. REV. STAT. ANN. § 13-1420 (West 2001); CAL. R. EVID. §§ 1101, 1108; COLO. REV. STAT. ANN. § 16-10-301 (West 2003); 725 ILL. COMP. STAT. ANN. 5/115-7.3 (West 2002).
116. FLA. STAT. ANN. § 90.404(2)(b)(1) (West 1999 & Supp. 2004); IND. CODE ANN. § 35-37-4-15(a) (Michie Supp. 1998); LA. CODE EVID. ANN. art. 412.2 (West 2004); MO. ANN. STAT. § 566.025 (West Supp. 2004); TEX. CRIM. PROC. CODE ANN. § 38.37 (Vernon Supp. 2004).
117. See *supra* note 79 and accompanying text.
118. See *supra* notes 115-16 and accompanying text.

III. WHY MARYLAND NEEDS A HEIGHTENED PROPENSITY RULE

Why should Maryland follow the trend towards liberalizing admission of other crimes in sex offense cases? Why should such evidence be preferentially admitted over, for example, past evidence of drunk driving charges? The primary reasons, discussed below, are summarized in this portion of the preamble to Colorado's statute:

[S]exual offenses are a matter of grave statewide concern. These frequently occurring offenses are aggressive and assaultive violations of the well-being, privacy, and security of the victims . . . [and] result in serious and long-lasting harm to individuals and society. These offenses often are not reported or are reported long after the offense for many reasons . . . [and] usually occur under circumstances in which there are no witnesses except for the accused and the victim, and, because of this and the frequent delays in reporting, there is often no evidence except for the conflicting testimony. Moreover, there is frequently a reluctance on the part of others to believe that the offenses occurred.¹¹⁹

A. *Nature of Sex Offenses Means There Are Almost Never Witnesses, and, Due to Delay in Reporting, Often No Physical Evidence*

The most compelling argument for liberalizing admission of a defendant's prior sex crimes is that such crimes often take place in secret, leaving no witnesses. Fear and shame prevent victims from reporting, thus there is often no current physical evidence.¹²⁰ Since the parties often know each other, the sex is "consensual," and may leave no bruises or scars.¹²¹ The result is that, as in the Kennedy Smith and Behrel trials,¹²² sex offense cases often result in a credibility contest between two parties, between whom there is usually a great disparity of power.¹²³ In urging the adoption of the federal rules, Representative Molinari characterized many rape trials as "unresolvable swearing matches."¹²⁴ This characterization is especially true of many child sex abuse cases.¹²⁵

119. COLO. REV. STAT. ANN. § 16-10-301(1) (West 1998).

120. See Karp, *supra* note 104, at 20-21.

121. See *supra* notes 7, 14 and accompanying text.

122. See *supra* notes 107-13 and accompanying text (discussing Kennedy Smith trial); see also Behrel v. State, 151 Md. App. 64, 130-31, 823 A.2d 696, 734 (2003) (stating: "The central issue here was whether the abuse occurred at all, and the strength of the State's case rested largely on the jury's assessment of Curtis's credibility and Behrel's veracity.>").

123. See, e.g., 140 CONG. REC. H23,603 (daily ed. Aug. 21, 1994) (quoting statement of Rep. Molinari, characterizing many rape trials as "unresolvable swearing matches").

124. *Id.*

125. See, e.g., 2001 Fla. Laws ch. 2001-221(1), which provides that:

B. Damage to Victims, Especially Children, Is Unique

A second compelling reason for Maryland to treat sex crime evidence differently is that rape and incest, although crimes of violence, have a particularly psychological dimension.¹²⁶ Sex crimes confuse something private and intimate with something criminal, and often cause shame and stigma for the victim greater than that associated with any other crime.¹²⁷ Furthermore, the effects are often life-long.¹²⁸ These effects of child abuse can be devastating and also quite costly. For example, at sentencing proceedings in death penalty cases, one often hears that the defendant was abused as a child.¹²⁹ Bringing perpetrators of child sex abuse to justice can help stop the chain of abuse and thus serve strong public policy interests.¹³⁰

C. High Number of Victims for Repeat Offenders and Strong Evidence that Repeat Offenders Will Strike Again

The high number of victims, combined with the probability that many sex offenders will commit other sex offenses, is the third main justification for the new rules. Sex offenders are unique: other criminals usually do not commit sex offenses.¹³¹ In fact, the Department of Justice reported in 2003 that sex offenders are four times

[I]n cases of child sexual abuse, the credibility of the victim is frequently a focal issue of the case, and

. . . [E]vidence which shows that an accused child molester has molested children at other times may be relevant to corroborate the victim's testimony, and

. . . [E]vidence which shows that an accused child molester has molested children at other times may have a probative value which outweighs its prejudicial effect.

126. David L. Corwin et. al., *Modern History of Child Sexual Abuse Awareness: Cycles of Discovery and Suppression*, 17 CHILD ABUSE & NEGLECT 7, 9, 18 (1993).

127. *Id.* at 10.

128. See, e.g., *Behrel v. State*, 151 Md. App. 64, 106-08, 823 A.2d 696, 720-21 (2003). The court recounted a recorded telephone conversation in which the adult Curtis confronts Behrel, saying:

You know, I've spent fifteen years believing that it was my fault, and that I was dirty and nasty [M]y life has been basically over since the end of [the abuse]. You know I'm thirty-two years old, and I'm trying to move on with my life, and I can't close this chapter of my life without speaking with you about it I want my power back. You took it all away from me.

Id.

129. Memorandum in Support of H.D. 401 from Professor Lynn McLain of the University of Baltimore School of Law, to Maryland Representative Joseph P. Vallario, Chair of House Judiciary Committee (Feb. 20, 2004) (on file with author).

130. See WILLIAM E. PRENDERGAST, *SEXUAL ABUSE OF CHILDREN AND ADOLESCENTS 78-79* (Continuum Publishing 1996); see also Kevin M. Wallis, *Perspectives on Offenders*, in *FROM VICTIM TO OFFENDER* 1, 10-11 (Freda Briggs ed., 1995).

131. See Lucy Berliner, *Sex Offenders: Policy and Practice*, 92 NW. U. L. REV. 1203, 1208, n.41 (1998).

more likely than any other released prisoner to commit a sex crime.¹³² Common sense indicates that a strong compulsion to rape strangers or molest children is not something that disappears on its own, without extensive treatment. As Representative Molinari stated, "a history of [child molestation in a defendant] tends to be exceptionally probative because it shows an unusual disposition of the defendant—a sexual or sado-sexual interest in children—that simply does not exist in ordinary people."¹³³ As Chief Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit noted as *dicta* in one case, propensity evidence and motive evidence overlap in sex crime cases because "[m]ost people do not have a taste for sexually molesting children . . . [and] as between two suspected molesters, then, only one of whom has a history of such molestation, the history establishes a motive that enables the two suspects to be distinguished."¹³⁴ The principle is simple: several prior instances of violent behavior are often an important indicator of future violent tendencies.¹³⁵

It should be noted, however, that no conclusive data proves that most sex offenders are exceptional recidivists, i.e. that they are more likely to commit another sex offense than a murderer is to commit another murder.¹³⁶ Because sex crimes are vastly underreported,¹³⁷ and sex crime recidivism samples vary widely,¹³⁸ recidivism rates range from an improbably low 2.5% for rapists to as high as 77% for a subgroup of core pedophiles.¹³⁹ Most studies place the baseline range from about 20% to 45% for both rapists and child molesters.¹⁴⁰

132. PATRICK A. LANGAN ET AL., U.S. DEP'T OF JUST., RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, at 12 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf>.

133. See 140 CONG. REC. H23,603 (daily ed. Aug. 21, 1994).

134. United States v. Cunningham, 103 F.3d 553, 556 (7th Cir. 1996).

135. See, e.g., Kansas v. Hendricks, 521 U.S. 346, 357-58 (1997) (upholding the Kansas Sexually Violent Predator Act and stating that "previous instances of violent behavior are an important indicator of future violent tendencies").

136. See *infra* notes 137-39 and accompanying text.

137. CENTER FOR SEX OFFENDER MANAGEMENT, U.S. DEP'T OF JUST., RECIDIVISM OF SEX OFFENDERS 3 (2001), available at <http://www.csom.org/pubs/recid-sexof.pdf>.

138. *Id.* at 2 (noting that sex offender subgroups, definition of recidivism, and length of study all yield very different results).

139. See *supra* note 132, at 8 (showing that 2.5% of released rapists out of 272,111 former inmates from fifteen states, including Maryland, were arrested for another rape within three months of release), available at <http://www.ojp.usdoj.gov/bjs/pub/rpr94.pdf>; see also Eric S. Janus & Paul E. Meehl, *Assessing the Legal Standard for Predictions of Dangerousness in Sex Offender Commitment Proceedings*, 3 PSYCHOL. PUB. POL'Y & L. 33, 54, 57, nn. 125, 134 (1997) (citing R. KARL HANSON ET AL., OTTAWA: CORRECTIONS BRANCH, MINISTRY OF THE SOLICITOR GENERAL OF CANADA, LONG-TERM FOLLOW-UP OF CHILD MOLESTERS: RISK PREDICTORS AND TREATMENT OUTCOME 22 (1992) (noting a 77% recidivism rate among a subgroup of incarcerated child molesters)).

140. See Janus, *supra* note 139, at 51.

Nonetheless, the fact that “all fifty states, the District of Columbia, and the federal government have adopted some form of sex offender registration or community notification programs”¹⁴¹ is further evidence that a link between sex offenders and recidivism is widely recognized. Finally, even more compelling is the fact that studies consistently show that many convicted child molesters each have committed numerous, even hundreds, of sex offenses that are never reported or punished.¹⁴²

D. The Federal Rules Are Consistent with the Trend of Focusing on the Actions of Sex Crime Defendants, Not the Alleged Consent of Sex Crime Victims

The 1995 federal rules continue the evidentiary trend of focusing on the perpetrators, rather than the victims, of sexual violence.¹⁴³ The United States Court of Appeals for the Tenth Circuit noted that this trend is reflected in the state and federal rape shield statutes,¹⁴⁴ which, like Federal Rule of Evidence 413, encourage “rape reporting and increased conviction rates by directing the jury’s attention to the defendant.”¹⁴⁵

Federal Rule of Evidence 413 also “limits the prejudice to the victim that often results from jurors’ tendencies to blame victims” in sex offense cases.¹⁴⁶ Even victims in sex crimes involving children are placed under far more scrutiny than defendants because, among other things, “there is a general notion that kids lie to get out of being punished, and also the fact that people simply don’t want to believe these things happen.”¹⁴⁷

E. Why the Worst Fears of Critics Are Unfounded: Congressional and State Responses

Despite these arguments, many believe that the federal rules and its spin-offs are ill-conceived and dangerous to defendants’ civil liberties.¹⁴⁸ Yet these fears are largely unfounded for several reasons: 1)

141. *Young v. State*, 370 Md. 686, 692 n.3, 806 A.2d 233, 236 n.3 (2002).

142. See Scott, *supra* note 104, at 1740; see also LANGAN, *supra* note 132, at 1-2.

143. See *United States v. Enjady*, 134 F.3d 1427, 1432 (10th Cir. 1998).

144. Rape shield statutes generally prohibit a sexual assault victim’s prior sexual history from being a subject of inquiry in a trial against the accused. See, e.g., FED. R. EVID. 412.

145. *Enjady*, 134 F.3d at 1432.

146. *Id.*

147. Telephone Interview with Adam Rosenberg, former Assistant State’s Attorney for Baltimore City, Sex Offense Division (July 7, 2004) (notes on file with author).

148. Scott, *supra* note 104, at 1735; Waller, *supra* note 105, at 1521-23. Even several co-sponsors of Maryland’s proposed House Bill attacked those who had come to testify on the bill’s behalf at a House Judiciary Committee Hearing on February 19, 2004. Personal observation of the hearing on

the rules are not as new as they sound¹⁴⁹; some evidence that critics so fear, such as allegations of uncharged prior sex offenses, is already allowed in under current Maryland law,¹⁵⁰ albeit inconsistently; 2) the rules contain time-tested procedural safeguards that successfully balance the rights of the accused with those of the accuser;¹⁵¹ and 3) some of the fears rest on nothing more than deep anxiety about sex in general, and an unwarranted fear of false rape allegations in particular.¹⁵²

1. The Federal Rules Are Constitutional

The main criticism against the rules is that, by creating an exception to the propensity rule, they violate the due process clause of the Fifth Amendment, which guarantees defendants a fair trial.¹⁵³ Critics charge that the jury will be so prejudiced by the other offenses—especially in the case of a child molester—that they will convict based on their outrage, not on the facts related to the current charge, thus violating the defendant's right to a fair trial.¹⁵⁴ The constitutionality of the federal rules, however, has been upheld. The first court to do so was the United States Court of Appeals for the Tenth Circuit in *United States v. Enjady*.¹⁵⁵ In *Enjady*, a rape defendant, who resided on a Native American reservation, appealed his conviction on the ground that Federal Rule of Evidence 413 violated the Fifth Amendment by allowing the trial court to admit testimony of another woman who said he had raped her two years earlier.¹⁵⁶

The court upheld the constitutionality of the rules for five reasons. First, although the ban on propensity evidence is a long-standing principle, it is not embedded in the Constitution.¹⁵⁷ Second, Rules 413-415 allow other victims to corroborate the complainant's account, which is important in crimes that often leave no witnesses.¹⁵⁸ As the court stated, "[b]roader admissibility of prior rapes places before the jury evidence that the defendant 'lacks [the] moral inhibitions that would prevent him from committing rapes' and implies that the

H.D. 401 before the House Judiciary Committee during the 418th session of the 2004 General Assembly. (Notes on file with author.)

149. See Karp, *supra* note 104, at 23.

150. See *Behrel v. State*, 151 Md. App. 64, 125-26, 823 A.2d 696, 730-31 (2003); see also *Oesby v. State*, 142 Md. App. 144, 163-64, 788 A.2d 662, 673 (2002).

151. See Scott, *supra* note 104, at 1736-38.

152. See *infra* Part III.E.5.

153. See U.S. CONST. amend. V.

154. See Karp, *supra* note 104, at 222; see also Scott, *supra* note 104, at 1738-39.

155. 134 F.3d 1427.

156. *Id.* at 1429.

157. *Id.* at 1432 ("Many procedural practices—including evidentiary rules—that have long existed have been changed without being held unconstitutional. The enactment of the Federal Rules of Evidence and subsequent amendments are examples.").

158. *Id.*

threat of criminal sanctions has not deterred the defendant in the past."¹⁵⁹ Third, "[c]orroboratory information about the defendant also limits the prejudice to the victim that often results from jurors' tendencies to blame victims in acquaintance rape cases."¹⁶⁰ Fourth, "like rape shield statutes codified in the federal and state rules of evidence, Rule 413 encourages rape reporting and increased conviction rates by directing the jury's attention to the defendant."¹⁶¹ Fifth, the requirement that courts apply a Federal Rule of Evidence 403 balancing test provides adequate due process for the defendant.¹⁶²

The United States Court of Appeals for the Tenth Circuit upheld the constitutionality of Federal Rule of Evidence 414 in *United States v. Castillo*.¹⁶³ In admitting several uncharged allegations of a father's sexual abuse of his two daughters, the *Castillo* court echoed the reasons from the *Enjady* court, and also added two more.¹⁶⁴ One, that the common law "lustful disposition" exception historically applied in so many states favors the idea that Federal Rules of Evidence 413-415 stand on firm notions of fairness in trial.¹⁶⁵ Two, the rules are also subject to Federal Rule of Evidence 402, which requires relevancy.¹⁶⁶ The *Castillo* court also rejected the defendant's somewhat far-fetched arguments that the rules violated the Equal Protection Clause of the Fourteenth Amendment¹⁶⁷ and the Eighth Amendment prohibition against cruel and unusual punishment.¹⁶⁸

The *Castillo* court also addressed the commonly stated concern that, as one Maryland defense attorney complained to the Maryland General Assembly, once juries hear about a defendant's prior sex offenses, the trial is a "slam dunk" win for the prosecution.¹⁶⁹ For this argument to hold true, stated the *Castillo* court, "juries would have to ignore courts' instructions to them that they consider only the crime charged in deciding whether to convict."¹⁷⁰ The court noted: "A central assumption of our jurisprudence is that juries follow the instruc-

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 1432-33.

163. 140 F.3d 874 (10th Cir. 1998).

164. *Id.* at 881-82.

165. *Id.* at 881.

166. *Id.* at 882.

167. *Id.* at 883 (stating that the rational basis test was met by the government's "need for corroborating evidence in cases of sexual abuse of a child because of the highly secretive nature of these sex crimes and because often the only available proof is the child's testimony").

168. *Id.* at 884.

169. Personal observation of the hearing on H.D. 401 before the House Judiciary Committee during the 418th session of the 2004 General Assembly. (Notes on file with author.)

170. *Castillo*, 140 F.3d at 884. The court noted, "The rule does not impose criminal punishment at all; it is merely an evidentiary rule." *Id.*

tions they receive.”¹⁷¹ A former Maryland sex crimes prosecutor echoes the sentiment that juries generally heed such instructions: “[I]f you get prior acts in, defense counsel has a great argument lined up that you can’t convict based on just these prior bad acts, which may make it harder for a jury to convict because, in my experience, they may overcompensate and not want to convict based on that.”¹⁷²

2. Admitting Uncharged Offenses Does Not Unfairly Prejudice the Defendant Because, Not Only Are Uncharged Offenses Routinely Admitted Now, but the Sex Crime Rules Contain Special Procedural Safeguards Absent Elsewhere

Some critics are alarmed that Federal Rules of Evidence 413-415 and their state counterparts allow admission of evidence of uncharged offenses.¹⁷³ There are at least five reasons why there is no need for alarm. First, evidence of uncharged offenses is already allowed in under Maryland Rule of Evidence 5-404(b).¹⁷⁴ There is nothing new about this.

Second, in Maryland, evidence of uncharged allegations must meet a stringent clear and convincing evidentiary standard.¹⁷⁵ This is stricter than the federal rules.¹⁷⁶ Maryland’s evidentiary standard was met in *Acuna v. State*, for example, where the court held that a four-year-old girl’s descriptions of prior acts of oral sex by her stepfather were admissible since the detail provided by the girl was specific enough and so inappropriate for her age that it met the clear and convincing standard of proof of admissibility.¹⁷⁷

On the other hand, the standard also keeps out unsound allegations. Florida Statute 90.404(2)(b)(1),¹⁷⁸ which codifies that state’s version of Federal Rule of Evidence 414 but, unlike the federal rule,

171. *Id.*

172. E-mail from Adam Rosenberg, former Assistant State’s Attorney for Baltimore City, Sex Offense Division, to the author (July 7, 2004) (on file with author).

173. See, e.g., Jeffrey G. Pickett, *The Presumption of Innocence Imperiled: The New Federal Rules of Evidence 413-415 and the Use of Other Sexual-Offense Evidence in Washington*, 70 WASH. L. REV. 883, 884, 899 (1995).

174. See *supra* notes 40-45 and accompanying text (discussing uncharged offenses, bad acts, acquittals and other non-convictions currently admissible under Maryland Rule of Evidence 5-404(b)); see also MD. R. EVID. 5-404(b).

175. *Acuna v. State*, 332 Md. 65, 72, 629 A.2d 1233, 1236 (1993); *Vogel v. State*, 315 Md. 458, 467; 554 A.2d 1231, 1235 (1989).

176. See *supra* note 47 and accompanying text (discussing the *Huddleston* standard).

177. *Acuna*, 332 Md. at 76, 629 A.2d at 1238.

178. FLA. STAT. ANN. § 90.404(2)(b)(1) (West Supp. 2004) provides: “In a criminal case in which the defendant is charged with a crime involving child molestation, evidence of the defendant’s commission of other crimes, wrongs, or acts of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.”

imposes a clear and convincing standard on uncharged allegations,¹⁷⁹ provides a good example for Maryland. The standard was not met in a case involving a 41-year-old man accused of statutory rape of a 13-year-old girl.¹⁸⁰ The trial judge ruled inadmissible testimony that defendant had fondled a 13-year-old girl who was staying at his house eight years previously, because the authorities had not found enough evidence to charge the defendant when the girls reported the incident eight years ago.¹⁸¹

Third, judicial gloss on the federal rules requires that uncharged offenses must be similar to the crime charged.¹⁸² For example, in *United States v. LeCompte*,¹⁸³ the court allowed evidence showing the defendant's abuse of his first wife's young niece closely resembled his pattern of game playing, exposure, and touching with his second wife's young niece.¹⁸⁴ The case law in most jurisdictions does not support the fear that an unrelated sexual allegation, such as the attempted rape of an adult woman, will be allowed into the trial of a defendant charged with fondling a young boy.¹⁸⁵

Fourth, uncharged offenses in Maryland (and under the federal rules) must still pass the balancing test for probative value versus unfair prejudice of Rule 5-403.¹⁸⁶ In applying its federal counterpart, Rule 403, the federal courts consider the following factors in sexual assault cases:

1) [H]ow clearly the prior act has been proved; 2) how probative the evidence is of the material fact it is admitted to prove; 3) how seriously disputed the material fact is; and 4) whether the government can avail itself of any less prejudicial evidence. When analyzing the probative dangers, a court considers: 1) how likely is it such evidence will contrib-

179. *Audano v. State*, 641 So. 2d 1356, 1358-59 (Fla. Dist. Ct. App. 1994).

180. *Id.*

181. *Id.* (stating that "[w]e agree that the collateral accusations were not established by clear and convincing evidence. The stories were inconsistent Although a conviction is not a prerequisite for admission of evidence of other crimes, no offense was charged. The authorities did not believe the girls' stories at the time.") (citations omitted).

182. *United States v. LeCompte*, 131 F.3d 767, 769 (8th Cir. 1997); *United States v. Meachem*, 115 F.3d 1488, 1495 (10th Cir. 1997).

183. 131 F.3d 767 (8th Cir. 1997).

184. *LeCompte*, 131 F.3d at 768.

185. Georgia is one of the only states that liberally (perhaps too liberally) allows evidence of unrelated sexual allegations into child molestation cases. *See, e.g., Davis v. State*, 517 S.E.2d 808, 812 (Ga. Ct. App. 1999) (evidence of prior inappropriate conversations held relevant to lustful disposition); *Barrett v. State*, 559 S.E.2d 108, 110 (Ga. Ct. App. 2002) (prior requests for anal sex with wife held relevant in prosecution involving anal sex with a minor, despite differences between the acts, including age of other party and presence or absence of consent).

186. *See United States v. Enjady*, 134 F.3d 1427, 1431 (10th Cir. 1998); *see also State v. Faulkner*, 314 Md. 630, 635, 552 A.2d 896, 898 (1989).

ute to an improperly-based jury verdict; 2) the extent to which such evidence will distract the jury from the central issues of the trial; and 3) how time consuming it will be to prove the prior conduct.¹⁸⁷

Clearly, not all uncharged allegations make it through these procedural hurdles.¹⁸⁸ When Maryland courts apply Rule 5-403, case law requires them to perform the Rule 5-403 analysis on the record explaining the reasoning underlying admission or exclusion of the uncharged offense.¹⁸⁹ This ensures that the Rule 5-403 analysis is deliberate and allows the appellate court to determine whether the rule has been properly applied.¹⁹⁰

Finally, Federal Rules 413-415 require prosecutors to give fifteen days advance notice to defendants regarding specific evidence of other sex offenses prosecutors will submit, giving defendants time to prepare a full rebuttal.¹⁹¹ This notice requirement does not exist under Maryland Rule 5-404(b).¹⁹² Therefore, the federal rules provide greater procedural protection to the defendant than if the defendant was charged with an offense that was not of a sexual nature.¹⁹³

3. Remote Claims Are Not Necessarily Unfair to the Defendant, and the Judge May Use Discretion in Admitting Such Claims

Critics of the proposed sex crime exception are also alarmed that evidence of very old convictions or allegations may be allowed into a sex offender's trial, since the new rules have no time limit.¹⁹⁴ Again, however, there is nothing new about admitting remote claims; Maryland courts have done so for decades.¹⁹⁵ Since there is no statute of limitations on murder cases or child sex abuse cases, Maryland rules of evidence have long allowed in rape or murder claims dating back decades, as long as they are relevant for other purposes.¹⁹⁶ In

187. *Enjady*, 134 F.3d at 1433.

188. *See, e.g.*, *United States v. Guardia*, 135 F.3d 1326, 1331-32 (10th Cir. 1998) (excluding testimony of other patients who alleged the doctor had inappropriately touched them, under Rule 413 in the doctor's sexual harassment trial because the testimony was deemed overly prejudicial under Rule 403).

189. *Streater v. State*, 352 Md. 800, 810, 724 A.2d 111, 116 (1999).

190. *See id.*

191. FED. R. EVID. 413(b), 414(b), 415(b); Karp, *supra* note 104, at 18.

192. *See* MD. R. EVID. 5-404(b).

193. *See* Karp, *supra* note 104, at 24-25.

194. *See, e.g.*, 140 CONG. REC. S10,277 (daily ed. Aug. 2, 1994) (statement of Sen. Biden expressing concern that allowing "unsubstantiated testimony about something that could have happened—anything—from the day before to 50 years before into a trial . . . absolutely violates every basic tenet of our system.").

195. *See* McLain, *supra* note 101, § 404.5, at 645-46.

196. *See, e.g.*, *State v. Faulkner*, 314 Md. 630, 642-43, 552 A.2d 896, 902 (1989) (finding "other crimes" evidence of two robberies that were three and four years old was probative and admissible on the limited issue of identity); *Hoes v. State*, 35 Md. App. 61, 63-65, 368 A.2d 1080, 1082-83 (1977) (evi-

Merzbacher v. State,¹⁹⁷ testimony from several adults who had allegedly been terrorized and sexually assaulted by a sadistic high school teacher twenty years prior was admitted to help explain why the adult prosecuting witness had waited so long to come forward.¹⁹⁸

Under Federal Rule 414, which deals with child molestation, the courts must liberally admit evidence of prior sex crimes, regardless of age, because the information may be especially probative.¹⁹⁹ In *United States v. Meachem*,²⁰⁰ where the defendant was charged with abusing a female relative, the Court of Appeals for the Tenth Circuit admitted testimony from two other adult relatives that their stepfather fondled them thirty years earlier.²⁰¹ The testimony was admitted to rebut the defendant's testimony that he had never sexually touched his stepdaughters when they were under the age of fourteen.²⁰² The court agreed with the prosecution that the evidence was probative because both events occurred when the defendant was a mature man, the defendant had apparently not sought treatment for his proclivities, and the patterns of abuse were sufficiently similar that the defendant was not unfairly prejudiced.²⁰³

Nonetheless, courts are free to decide if very old claims may be unfair to the defendant. In *United States v. Larson*,²⁰⁴ the Court of Appeals for the Second Circuit admitted testimony, under Federal Rule of Evidence 414, from two adult men about the defendant's alleged sexual abuse of them sixteen to twenty years earlier, but excluded testimony from another alleged victim whose abuse had occurred twenty to twenty-one years earlier.²⁰⁵ Without explaining exactly why, the court said that the latter allegations were simply too remote in time to be fair to the defendant.²⁰⁶

Ultimately, the matter of remote claims will be one of discretion, and the court may choose to exclude such a claim, if, for example, the other incidents occurred when the defendant was a minor, or the act charged was recent and the other crimes very remote.²⁰⁷ Alternatively, if remote claims are admitted, the jury will still ultimately de-

dence that the defendant shot the victim twice in the side four or five years earlier was admissible to show specific intent that the subsequent shooting of the victim was not likely to be an accident).

197. *Merzbacher v. State*, 346 Md. 391, 697 A.2d 432 (1997).

198. *Id.* at 409, 697 A.2d at 441.

199. *United States v. Meachem*, 115 F.3d 1488, 1491-92 (10th Cir. 1997).

200. 115 F.3d 1488 (10th Cir. 1997).

201. *Id.*

202. *Id.*

203. *Id.* at 1492-93.

204. *United States v. Larson*, 112 F.3d 600 (2d Cir. 1997).

205. *Id.* at 602.

206. *Id.*

207. *See, e.g., Harris v. State*, 324 Md. 490, 501, 597 A.2d 956, 962 (1991) (refusing to admit remote evidence in trial for recent drug sale).

cide how much weight it wants to accord possibly stale testimony of old claims.²⁰⁸

4. The Rules Will Not Unduly or Unfairly Dilute or Delay the Proceedings

Critics also protest that the rules will create a trial within a trial, thus causing undue delay and prejudice to the defendant.²⁰⁹ Yet, again, courts are accustomed to dealing with evidence of uncharged acts.²¹⁰ Pretrial hearings are commonly held at the request of either party to try to obtain an advance ruling against admitting certain evidence.²¹¹ Furthermore, Maryland's proposed rule specifically provides that other act evidence must be presented in a closed hearing to protect against the jury hearing evidence that the judge might find to be unfairly prejudicial.²¹² The same kind of procedure is followed now in Maryland when other crimes evidence is offered under Rule 5-404(b).²¹³

Furthermore, if the judge finds other crimes evidence to be highly relevant and helpful, taking the time to hear it will be worthwhile. Indeed, that ruling might lead to a plea bargain, and actually save the court's time.

On the other hand, the trial judge may decide that the additional testimony and witnesses may simply overburden the current proceedings. This was the case in *United States v. Guardia*,²¹⁴ where the judge excluded testimony from additional patients in a doctor's sexual misconduct trial.²¹⁵ The rationale was that the additional witnesses would "transform [a] trial of two incidents into [a] trial of six incidents, each requiring description by lay witnesses and explanation by expert witnesses," and thus slow down the trial.²¹⁶

5. The Rules Will Not Let in a Disproportionate Share of False Allegations and Mere Rumors Because of Safeguards

Whether spoken or not, many critics fear that the new rules will fuel false rape claims. One opponent of the new rule, testifying before the Maryland House Judiciary Committee on February 19, 2004, worried that the proposed bill would allow pre-teen girls, angered because they had not been selected to dance in Swan Lake, to concoct a story

208. See, e.g., *Barefoot v. Estelle*, 463 U.S. 880, 902 (1983) (noting that juries decide how much weight to give evidence).

209. See Karp, *supra* note 104, at 22.

210. See Karp, *supra* note 104, at 20-22.

211. See Karp, *supra* note 104, at 21-22.

212. See McLain, *supra* note 129.

213. See McLain, *supra* note 129.

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

215. *Id.* at 1332.

216. *Id.*

that their dance teacher had molested them, and secure a conviction based on their joint testimony.²¹⁷

Such a scenario, however, has no logical connection to the proposed rules. Police, prosecutorial, and judicial discretion, which are unaltered by the new rules, are designed to minimize bogus claims long before they ever get to trial. Such hurdles arguably make it hard enough for one false claimant to successfully litigate her fabricated story,²¹⁸ it would be even more difficult for two or three false claimants to consistently maintain their fake "Swan Lake" claims through the entire judicial process. While some false rape reports nonetheless prevail,²¹⁹ the proposed rules of evidence would not make such a result more likely.

IV. CONCLUSION

Due to the secretive and highly damaging nature of sex crimes, and the fact that these trials often come down to a swearing match between grossly unequal parties, Maryland should override its aversion to evidence of prior sex offenses to prove a defendant's propensity to commit future crimes, and adopt Federal Rules of Evidence 413 and 414, along with their procedural safeguards that ensure fairness to defendants. As Maryland Attorney General Joseph Curran stated in voicing his support for House Bill 401, the new rule would remove a "plainly unjust bar against the admission of relevant information in sexual child abuse prosecutions."²²⁰ Curran underscores the fact that "entrusting the admissibility determination to the trial court's discre-

217. Personal observation of the hearing on H.D. 401 before the House Judiciary Committee during the 418th session of the 2004 General Assembly. (Notes on file with author.)

218. See, e.g., David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1300 (1997) (suggesting that, among the many women who eventually drop rape charges, some may do so because of "a dawning realization that a false report of rape is a dangerous business"). No reliable data exists on how many women drop charges because they were false to begin with, since many police departments classify as "unfounded" those rapes that are either falsely alleged, or those with insufficient testimony, or whose victims decide to drop charges. See, e.g., Del Quentin Wilber, *Police Figures on Rape in Error*, BALT. SUN, Dec. 3, 2003, at 1B.

219. There is no consensus on the actual number of false rapes reported to the police. Bryden & Lengnick, *supra* note 218, at 1298 (citing the conventional, but not unanimous, wisdom that "the proportion of false reports [of rape] is negligible, perhaps as low as 2%, a figure said to be comparable to that for most other crimes.").

220. Letter from Attorney General Joseph Curran to Del. Joseph Vallario, Chair of House Judiciary Committee (Feb. 23, 2004) (on file with author).

tion ensures that only highly probative and reliable evidence is allowed and safeguards against any unfair prejudice.”²²¹

Joyce R. Lombardi

221. *Id.*