

# BDSM AND SEXUAL ASSAULT IN THE RULES OF EVIDENCE: A PROPOSAL

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## ABSTRACT

Propensity evidence has long been generally inadmissible, but in 1994, Rule 413 was enacted to admit evidence of prior “sexual assaults” committed by a defendant in a current sexual assault case for any purpose. Rule 413(d) contains several different definitions of “sexual assault,” or certain “crime[s] under federal or state law,” including (4): “deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person.” Unlike other enumerated definitions, the definition in subsection (4) is the only one that does not contain a “non-consent” qualifier, meaning that even consensual sexual activities can be “crimes” under the Rule. Despite the lack of scholarly attention to this issue, the constraints on judicial discretion to preclude such evidence, combined with the particularly prejudicial nature of sexual act evidence, can have devastating and unintended effects on civil and criminal defendants.

Here, I propose a simple amendment to Rule 413 that makes clear that a “sexual assault” is only an act performed without consent, and provides an appropriate definition of “consent” in a newly-added subsection (e). I also critique the underlying proposition—that prior BDSM acts are relevant or probative of propensity to commit sexual assault—thereby undercutting any rational justification for the rule as presently written.

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## I. INTRODUCTION

James is on trial in federal court for sexual assault.<sup>1</sup> The prosecution notifies James<sup>2</sup> that when James takes the stand, the prosecution intends to cross-examine him about his sadomasochistic sexual proclivities.<sup>3</sup> James's lawyer moves *in limine* to preclude on three grounds: 1) this is inadmissible prior act evidence under Federal Rule of Evidence 404(b); 2) it is irrelevant under Rules 401 and 402; and 3) any possible probative value is vastly outweighed by the possibility of unfair prejudice to the defendant, demanding exclusion under Rule 403. Is the evidence admissible?

The answer, like all lawyerly answers, is “it depends.” Evidence of a person's character or prior bad acts has long been inadmissible to prove propensity or disposition,<sup>4</sup> but in 1994, Congress enacted several amendments to the Federal Rules of Evidence applicable in sexual assault cases.<sup>5</sup> For example, Rule 413 created an exception to Rule 404(b), to admit evidence of prior “sexual assaults” committed by a defendant in a current sexual assault case for any purpose.<sup>6</sup> Rule 413(d) then defines sexual assault by reference to certain “crime[s] under federal or state law,”<sup>7</sup> including (4): “deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person.”<sup>8</sup>

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<sup>1</sup> Typically, sexual assault cases are governed by state law, but there are numerous situations in which federal courts will hear cases on sexual assaults. Federal courts may exercise civil diversity jurisdiction (28 U.S.C. § 1332 (2012)) or supplemental jurisdiction (28 U.S.C. § 1367 (2012)), in which cases the law of the relevant state would apply under 28 U.S.C. § 1652 (2012). The federal courts may also exercise admiralty or maritime jurisdiction (28 U.S.C. §§ 1333(1) (2012)) or tribal jurisdiction (18 U.S.C. §§ 1152, 1153 (2012)), in which cases courts would apply federal law. This paper will also discuss state law as applicable.

<sup>2</sup> “On request by a defendant in a criminal case, the prosecutor must: (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and (B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.” FED. R. EVID. 404(b)(2).

<sup>3</sup> This paper will use the term “BDSM,” which stands for bondage and discipline; dominance and submission; and sadism and masochism. The term encompasses a number of distinct practices and subcultures, and these distinctions are generally not relevant here, but for purposes of this paper, I will focus primarily on sadism and masochism, *i.e.*, respectively, the infliction or receipt of physical pain for sexual pleasure. It should be noted that with respect to BDSM sexual practices, pain is not an end in itself—as one commentator puts it, “[t]he essential component is not the pain or bondage itself, but rather the knowledge that one person has complete control over the other . . . .” See Marianne Apostolides, *The Pleasure of the Pain: Why Some People Need S&M*, PSYCHOL. TODAY, Sept./Oct. 1999, at 61.

<sup>4</sup> See FED. R. EVID. 404(a)(1) (prohibiting evidence of a person's character to prove action in conformity therewith); see also FED. R. EVID. 404(b)(1) (prohibiting the introduction of a person's “crime, wrong, or other act” to prove character and conformity therewith).

<sup>5</sup> Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, Title XXXII, § 320935(a), 108 Stat. 2136 (1994).

<sup>6</sup> FED. R. EVID. 413 admits such evidence only in criminal cases, and FED. R. EVID. 415(a) incorporates the rule into civil cases.

<sup>7</sup> FED. R. EVID. 413(d).

<sup>8</sup> *Id.* 413(d)(4).

There is no shortage of criticism of Rule 413.<sup>9</sup> The Rule was enacted in 1994 over near-universal objection by commentators, as well as by academics and practitioners on the Advisory Committee.<sup>10</sup> However, no sustained scholarly attention has been paid to the unique problems posed by subsection (d)(4).<sup>11</sup> First, unlike other enumerated definitions of “sexual assault” in Rule 413(d), the definition in subsection (4) is the only one that doesn’t contain a “non-consent” qualifier,<sup>12</sup> meaning that even consensual sexual activities can be “crimes” under the Rule.<sup>13</sup> Second, the conduct need not have been *charged* as a crime; mere allegations of offenses suffice so long as they make out the elements of a crime.<sup>14</sup> However, one of the strangest parts of Rule 413 is that, as applied, the trial judge’s discretion to preclude evidence of prior sexual assaults is much more constrained than the judge’s discretion to admit other non-sexual past crimes, which furthers a presumption in favor of admissibility in such cases.<sup>15</sup>

Here, I propose a simple amendment to Rule 413, which makes clear that a “sexual assault” is *only* an act performed without consent. First, I outline the contentious and unique history of the enactment of this series of rules. Second, I conduct a brief survey of American jurisdictions that either criminalize BDSM conduct or decline to recognize consent as a defense to assault or battery, and I identify the jurisdictions in which these provisions overlap with unexpected and unfortunate effect. Third, I critique the underlying proposition that prior BDSM acts are relevant or probative of propensity to commit sexual assault, which

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<sup>9</sup> See Report of the Judicial Conference of the United States on the Admission of Character Evidence in Certain Sexual Misconduct Cases, 159 F.R.D. 51 (1995) [hereinafter “Judicial Conference Report”]; see also 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, 125 (1994) (“The new Rules 413–415 are among the very worst proposed amendments ever given serious consideration for the Rules of Evidence.”).

<sup>10</sup> For a helpful, though not comprehensive, survey of such objections, see generally Duane, *supra*, note 9.

<sup>11</sup> FED. R. EVID. 413(d)(4) has never been interpreted by the federal courts, and the only academic literature on this provision seems to be a couple of paragraphs in KENNETH W. GRAHAM, JR., 23 FED. PRAC. & PROC.—EVID. § 5414 (1st ed. 2017) [hereinafter “GRAHAM”].

<sup>12</sup> FED. R. EVID. 413(d)(1) also lacks a non-consent qualifier, but the underlying crimes to which that provision refers—those in 18 U.S.C. §§ 2241–2244 (2012)—all either contain non-consent qualifiers or are limited to particular situations in which consent is impossible as a matter of law (such as child victims and the rape of incarcerated persons by prison guards).

<sup>13</sup> Cf., e.g., FED. R. EVID. 413(d)(2) (“contact, *without consent*, between any part of the defendant’s body—or an object—and another person’s genitals or anus”) (emphasis added).

<sup>14</sup> *United States v. Foley*, 740 F.3d 1079, 1086–87 (7th Cir. 2014); see also Duane, 157 F.R.D. at 109.

<sup>15</sup> As originally enacted, FED. R. EVID. 413 provided that “evidence of the defendant’s commission of another offense or offenses of sexual assault *is admissible*” (emphasis added). In 2011, the Advisory Committee restyled the federal rules, including FED. R. EVID. 413, and in the guise of a procedural change, modified the Rule to its current wording: “the court *may admit* evidence that the defendant committed any other sexual assault.” The restyling has not appeared to effect any change in case law, since it was undertaken as a non-substantive change. *But cf.*, Elizabeth L. DeCoux, *Are the 2011 Changes to Federal Rules of Evidence 413–415 Invalid? The Rules Enabling Act and the Drafters’ Definition of ‘Stylistic,’* 34 N.C. CENT. L. REV. 136 (2012); see also GRAHAM § 5416.

undercuts any rational justification for the rule. Finally, I demonstrate how simple and common-sense amendments to Rule 413 can alleviate some of these concerns.

## II. THE ENACTMENT AND DEVELOPMENT OF RULE 413

Rule 413 didn't result from any groundswell of opposition to the normal operation of the character evidence rules. Rather, Rule 413 was rolled up into the hotly-contested Violent Crime Control and Law Enforcement Act signed into law by President Clinton in 1994.<sup>16</sup> Rule 413 was developed by Department of Justice Senior Counsel David Karp and introduced in the House by Representative Susan Molinari.<sup>17</sup> The rule was intended to “authorize admission and consideration of evidence of an uncharged offense for its bearing ‘on any matter to which it is relevant’ . . . includ[ing] the defendant’s propensity to commit sexual assault.”<sup>18</sup> While Representative Molinari did briefly address Rule 413 during the floor debate, she focused her remarks on Rule 414 (the provisions relating to sexual offenses against children), and she specifically referred to “an unusual disposition . . . a sexual or sado-sexual interest in children—that simply does not exist in ordinary people.”<sup>19</sup> The same provisions at issue during the floor debate were inserted into Rule 413 without explanation.<sup>20</sup>

The proposal certainly had its detractors, and the rule’s procedural history was particularly controversial. Ordinarily, changes to procedural and evidentiary rules are recommended by the Advisory Committee as per the Rules Enabling Act<sup>21</sup> due to the “exacting and meticulous care” required in drafting amendments.<sup>22</sup> Rule 413 was an anomaly; the rule changes were “based on a Senate amendment that . . . had maybe 20 minutes of debate.”<sup>23</sup> The substance of the rule also drew ire. One vocal critic on the floor, a former prosecutor, noted in a rare moment of Congressional self-awareness: “I know . . . we all . . . try to be ‘tough on crime,’ but this is ridiculous.”<sup>24</sup>

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<sup>16</sup> For a helpful outline of the provisions of the Violent Crime Control and Law Enforcement Act—and a map of the political battle lines—see generally *Symposium: Violent Crime Control and Law Enforcement Act of 1994: Introduction*, 20 U. DAYTON L. REV. 557 (1994).

<sup>17</sup> See generally David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15 (1994).

<sup>18</sup> 140 CONG. REC. H8968, 8991 (daily ed. Aug. 21, 1994) (statement of Representative Molinari).

<sup>19</sup> *Id.*

<sup>20</sup> See Aviva A. Orenstein, *No Bad Men! A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 695 (1998) (“One hint that Rule 413 may be more paternalistic than feminist is the fact that its wording is nearly identical to Rule 414, which deals with children.”).

<sup>21</sup> See 28 U.S.C. § 2072 (2012).

<sup>22</sup> 140 CONG. REC. H8968, 8989 (daily ed. Aug. 21, 1994) (statement of Representative Hughes).

<sup>23</sup> *Id.*; but cf., 140 CONG. REC. S12250, 12263 (daily ed. Aug. 21, 1994) (statement of Senator Hatch) (“By the way, we do change evidentiary rules. Senator Biden was concerned about changing evidentiary rules with regard to prior acts of violence by rapists and child molesters, like that was something we do not do now. We do it in the violence against women bill [FED. R. EVID. 412]. Why should we not do it against child molesters and rapists?”).

<sup>24</sup> 140 CONG. REC. at 8989. Representative Hughes’s remarks were likely in response to many of the “tough on crime”-type justifications for the rule advanced by his colleagues on the floor. See, e.g., 140 CONG. REC. S12487, 12494 (daily ed. Aug. 25, 1004) (statement of Senator Lautenberg) (“[The

But Representative Molinari had unique leverage—she was a “no” vote on the first version of the bill, which had not incorporated her proposal, and which had failed by a margin of only several votes.<sup>25</sup> In the second draft, Representative Molinari’s proposal was included as a way to court her vote, but with a caveat: Rules 413–415 would be submitted to the Judicial Conference of the United States for recommendations. If the Judicial Conference objected, Congress represented that it would take 150 days to reconsider before the laws become effective.<sup>26</sup>

The Judicial Conference’s response was unambiguous. In its report, the Conference criticized the “underlying policy,” “drafting ambiguities,” and “possible constitutional infirmities” of the new rules and urged their rejection.<sup>27</sup> Members and commentators were almost unanimous in their opposition—which the Judicial Conference itself noted as “highly unusual.”<sup>28</sup> As an alternative, the Judicial Conference suggested incorporating simplified versions of the rules into Rule 404(a).<sup>29</sup> But neither scholars nor practitioners have a vote in Congress. After 150 days of Congressional inaction, the rules took effect as enacted.<sup>30</sup>

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Rule] will allow evidence of a defendant’s prior sex offenses to be admitted in federal trials so that repeat offenders will be punished with the stiff sentences they deserve.”); *but cf.*, 140 CONG. REC. S12250, 12261–62 (daily ed. Aug. 22, 1994) (statement of Senator Biden) (“Now I cite this [Rule] . . . to not kid anybody who said, ‘Gee, Biden wrote this crime bill and, man, he is tough on crime. I like him for being tough on crime.’ I want to have truth in lending here. Do not give me credit for this last tough provision. I do not like it. I think it is wrong. I think it is unfair. I think it violates innocent people’s civil liberties.”).

<sup>25</sup> Katharine Q. Seelye, *The Crime Bill: Overview; House Approves Crime Bill After Days of Bargaining, Giving Victory to Clinton*, N.Y. TIMES (Aug. 22, 1994), <https://goo.gl/5wKVGe>.

<sup>26</sup> Violent Crime Control and Law Enforcement Act, Pub. L. No. 103–322, Title XXXII, § 320935(d)(2), 108 Stat. 2136 (1994).

<sup>27</sup> Judicial Conference Report, 159 F.R.D. at 52.

<sup>28</sup> The Judicial Conference’s Advisory Committee on Evidence Rules solicited comments from “all federal judges, about 900 evidence law professors, 40 women’s rights organizations, and 1,000 other individuals and interested organizations.” *Id.* All agreed except for one lone dissenter: the DOJ, whose senior counsel, David Karp, wrote the rules. *Id.*; *see also id.* at 53 (“It is important to note the highly unusual unanimity of the members . . . in taking the view that Rules 413–415 are undesirable.”).

<sup>29</sup> The Judicial Conference did this to eliminate “drafting ambiguities,” but interestingly, did not address the one at issue in this article. The Conference proposal maintained the exact same language at issue, defining “sexual assault” as “conduct that involved deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain of another person . . .” *Id.* at 55.

<sup>30</sup> This was precisely the result foreseen by Senator Biden, who commented during floor debate:

I am expecting that more enlightened minds, more enlightened perspectives—that is, the Supreme Court and the federal judges—will, when they look at this proposed law, say, ‘This is crazy.’ I do not know; I am hoping they will. If I am wrong on that, then I am totally wrong, and I yield. I am beaten. But, if they come back and say, ‘No, this is a bad idea. Here is how we should change the law,’ then, after they do that, I have 150 days in which to get out here and affirmatively get 51 Senators to vote for that.

140 CONG. REC. S12261 (daily ed. Aug. 22, 1994) (statement of Senator Biden). After the Judicial Conference Report, Senator Biden introduced the Conference’s backstop proposal as S. 104–1094, though with the caveat that he did “not much like” it and “would prefer a complete repeal” (much

Thus far, only a small minority of states have adopted an analogue to Rule 413 (“413 jurisdictions”).<sup>31</sup> In non-413 jurisdictions, broader rules on the admissibility of character evidence govern instead. In some of those jurisdictions, either statute or judicial precedent provides that evidence of prior sexual acts on the part of the defendant is inadmissible to prove the defendant’s propensity to commit similar acts,<sup>32</sup> while in other jurisdictions, at least in some circumstances, admission of prior sexual acts *is* permitted to prove propensity.<sup>33</sup>

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like the Judicial Conference itself). 141 CONG. REC. S10966–67 (daily ed. Jul. 31, 1995) (statement of Senator Biden). The bill died in committee.

<sup>31</sup> See Appendix 2. See also ALASKA R. EVID. 404(b)(3); ARIZ. R. EVID. 404(c); CAL. EVID. CODE § 1108; CONN. EVID. CODE § 4-5; FLA. STAT. § 90.404(c); GA. CODE ANN. § 24-4-413; 725 ILL. COMP. STAT. 5/115-7.3; IOWA CODE § 701.11(1), *held unconstitutional*, *State v. Cox*, 781 N.W.2d 757, 759 (Iowa 2010); KAN. STAT. ANN. § 60-455(d); LA. CODE EVID. ANN. § 412.2(A); NEV. REV. STAT. § 48.045(3); OKLA. STAT. tit. 12, § 2413; WASH. REV. CODE § 10.58.090, *held unconstitutional*, *State v. Gresham*, 269 P.3d 207, 219-20 (Wash. 2012) (en banc); WIS. STAT. § 904.04(2)(b).

<sup>32</sup> See Appendix 2. See also ALA. R. EVID. 404, *as interpreted by* *Marks v. State*, 170 So.3d 712 (Ala. Crim. App. 2014); COLO. REV. STAT. § 16-10-301; DEL. R. EVID. 413 (omitted), *cmt.*; HAW. REV. STAT. § 626-1, RULE 404, *as interpreted by* *State v. Iaukea*, 537 P.2d 724 (Haw. 1975); IDAHO R. EVID. 404(b), *as interpreted by* *State v. Johnson*, 227 P.3d 918 (Idaho 2010); IND. R. EVID. 404, *as interpreted by* *Utley v. State*, 699 N.E.2d 723 (Ind. Ct. App. 1998); *McCullum v. Commonwealth*, No. 03-1009, 2006 WL 436107 (Ky. Feb. 23, 2006); MASS. R. EVID. 404(b), *as interpreted by* *Commonwealth v. Pierre*, 79 Mass. App. Ct. 1129 (2011); *Steadman v. Pagels*, 125 A.3d 713 (Me. 2015); *Hurst v. State*, 929 A.2d 157 (Md. 2007); MINN. R. EVID. 404(b); MONT. CODE ANN. § 26-10, Rule 404, *as interpreted by* *State v. Sweeney*, 999 P.2d 296 (Mont. 2000); *State v. Freeman*, 571 N.W.2d 276 (Neb. 1997); N.H. R. EVID. 404, *as interpreted by* *State v. Cook*, 158 N.H. 708 (2009); N.J. R. EVID. 404, *as interpreted by* *State v. Willis*, 137 A.3d 452 (N.J. 2016); N.M. RULE 11-404, *as interpreted by* *State v. Jones*, 899 P.2d 1139 (N.M. Ct. App. 1995); *People v. Hudy*, 535 N.E.2d 250 (N.Y. 1988), *abrogated on other grounds*, 529 U.S. 513 (2000); N.C. GEN. STAT. § 8c-1, Rule 404, *as interpreted by* *State v. Khouri*, 716 S.E.2d 1 (N.C. Ct. App. 2011); N.D. R. EVID. 404, *as interpreted by* *State v. Ferguson*, 391 N.W.2d 172 (N.D. 1986); OHIO REV. CODE ANN. § 2907.02(D); OR. REV. STAT. § 40.170, Rule 404, *as interpreted by* *State v. Leistiko*, 282 P.3d 857 (Or. 2012) (en banc); *Commonwealth v. Shively*, 424 A.2d 1257 (Pa. 1981); S.C. R. EVID. 404, *as interpreted by* *State v. Cope*, 684 S.E.2d 177 (S.C. Ct. App. 2009); S.D. CODIFIED LAWS § 19-19-404, *as interpreted by* *State v. Red Star*, 625 N.W.2d 573 (S.D. 2001); TENN. R. EVID. 404, *as interpreted by* *State v. Denton*, 149 S.W.3d 1 (Tenn. 2004); TEX. R. EVID. 404, *as interpreted by* *Casey v. State*, 215 S.W.3d 870 (Tex. Crim. App. 2007); UTAH R. EVID. 404, *as interpreted by* *State v. Verde*, 296 P.3d 673 (Utah 2012), *abrogated on other grounds*, *State v. Thornton*, 391 P.3d 1016 (Utah 2017); VT. R. EVID. 404, *as interpreted by* *State v. Shippee*, 839 A.2d 566 (Vt. 2003); W.VA. R. EVID. 404; WYO. R. EVID. 404, *as interpreted by* *Wilson v. State*, 14 P.3d 912 (Wyo. 2000).

<sup>33</sup> See, e.g., *State v. DaBaere*, 356 N.W.2d 301 (Minn. 1984); *State v. Morey*, 722 A.2d 1185 (R.I. 1999). Some jurisdictions have adopted 413 analogues only insofar as they address cases with child victims (and therefore perhaps more aptly called “414 analogues”), which are not relevant here. See, e.g., MICH. COMP. LAWS § 768.27a(1); MO. CONST. art. I, § 18(c); VA. SUP. CT. RULE 2:413. Other jurisdictions have developed common law “pedophile exceptions” which achieve substantially the same result. See, e.g., *Fields v. State*, 2012 Ark. 353 (2012); *Gore v. State*, 37 So.3d 1178 (Miss. 2010); *State v. Parsons*, 589 S.E.2d 226 (W.Va. 2003).



This survey<sup>34</sup> comes with several caveats. First, even in jurisdictions that *prohibit* admission of prior sexual acts to prove propensity, such evidence may be introduced for any number of other purposes, including to prove identity,<sup>35</sup> motive;<sup>36</sup> intent;<sup>37</sup> plan, preparation, or *modus operandi*;<sup>38</sup> opportunity;<sup>39</sup> or lack of consent, use of force, or absence of mistake,<sup>40</sup> among others. In short, prior sexual acts frequently find themselves in evidence despite the many safeguards designed to limit their evidentiary uses.<sup>41</sup>

Second, some jurisdictions' evidence codes permit even non-criminal sexual acts to be admitted to prove propensity.<sup>42</sup> For example, a Connecticut court

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<sup>34</sup> This list is derived in part from Michael L. Smith, *Prior Sexual Misconduct Evidence in State Courts: Constitutional and Common-Law Challenges*, 52 AM. CRIM. L. REV. 321 (2015).

<sup>35</sup> *State v. Gaines*, 260 Kan. 752, 768 (1996) (“[T]he state asserts that the inference can be made that the defendant, who engaged in toe sucking in the past, was the same person who attacked the victim and engaged in toe sucking when he attacked her. . . We agree.”).

<sup>36</sup> *McDowell v. State*, 318 P.3d 352, 361 (Wyo. 2014) (“[S]exual behavior with . . . children . . . is unusual sexual behavior permitting admission of uncharged misconduct evidence to prove motive when the accused denies that the charged conduct ever occurred.”) (internal citation omitted).

<sup>37</sup> *State v. Sexton*, 256 Kan. 344 (1994); see also Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575 (1990).

<sup>38</sup> *State v. Martin*, 796 P.2d 1007, 1012 (Idaho 1990) (“It is . . . our opinion that the evidence in question showed that the prior rape and the rape of B.E. were sufficiently similar and unusual in their common pattern to constitute a *modus operandi* . . .”) (citing *Coleman v. State*, 621 P.2d 869 (Alaska 1980)).

<sup>39</sup> *State v. Behrendt*, 237 P.3d 1156, 1170 (Haw. 2010) (“The prior sexual contacts between SI and Behrendt in South Dakota were relevant to establish Behrendt's opportunity to engage in the sexual contacts in Hawaii without being detected.”).

<sup>40</sup> *United States v. Willis*, 826 F.3d 1265, 1273 (10th Cir. 2016) (“[T]he evidence tended to show that, in each prior incident, Mr. Willis engaged in sexual activity where the other party either did not or could not consent. Thus, the prior-acts evidence demonstrated a propensity that was directly relevant to the only issue for the jury to decide.”); cf. Roger C. Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right About Consent Defense Cases*, 22 FORDHAM URB. L.J. 271 (1994) (arguing that evidence of the defendant's propensity to commit sexual assault without the victim's consent should be admissible in cases where the accused raises the defense of consent).

<sup>41</sup> *People v. Jones*, 311 P.3d 274 (Colo. 2013); see also Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181 (arguing that many enumerated permissible prior-act purposes—like identity, intent, and *modus operandi*—are inherently disguised propensity inferences). For example, the Colorado statute, COLO. REV. STAT. § 16-10-301(3) (emphasis added), declines to admit for propensity purposes, but permits admission for a laundry list of other reasons, including:

Refuting defenses, such as consent or recent fabrication; showing a common plan, scheme, design, or *modus operandi*, regardless of whether identity is at issue and *regardless of whether the charged offense has a close nexus as part of a unified transaction to the other act*; showing motive, opportunity, preparation, including grooming of a victim, knowledge, identity, or absence of mistake or accident; *or for any other matter for which it is relevant.*

<sup>42</sup> At common law, many jurisdictions recognized a prior act exception which permitted a party to introduce prior sexual acts to prove “lustful disposition” toward a sexual act that was either illegal or somehow deviant in a way that bears on character. See Lisa M. Segal, Note, *The Admissibility of*

ruled that the introduction of the defendant's possession of a pornographic magazine depicting "young-looking women"—*adult* women—was admissible in a child sexual assault trial.<sup>43</sup> In Louisiana, the legislature amended its evidence code to permit the introduction of "acts involving sexually assaultive behavior" and legislators *expressly* acknowledged that this amendment was written to encompass even legal sexual activity.<sup>44</sup> During consideration, scholarly testimony squarely expressed concern "over the admissibility of hypothetical evidence [that] the accused has a preference for 'rough sex.'"<sup>45</sup> And in a recent Georgia rape case, the court permitted the prosecution to play a part of a pornographic DVD depicting bondage owned by the defendant. The video was admitted because the rape victim's hands had been bound during the assault, and the defendant's ownership of commercial bondage porn evinced a "lustful disposition" toward bondage.<sup>46</sup>

Thirdly, Rule 413 and its state counterparts regulate the admission of evidence in "sexual assault" cases only. Courts may admit evidence of a defendant's engagement in BDSM-related activities in other cases according to general principles of character evidence.<sup>47</sup> As for other non-BDSM prior sexual act evidence, courts are generally permissive but more reluctant.<sup>48</sup>

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*Uncharged Misconduct Evidence in Sex Offense Cases: New Federal Rules of Evidence Codify the Lustful Disposition Exception*, 29 SUFFOLK U. L. REV. 515, 526 (1995).

<sup>43</sup> *State v. Michael D.*, 101 A.3d 298 (Conn. 2014) (holding that evidence of possession of magazines depicting young-looking adult women was admissible over the defendant's objection that such evidence constituted improper character or propensity evidence). It should be noted that the Supreme Court has held the First Amendment protects the dissemination of both "virtual child pornography" and pornography featuring adults, even if marketed as child pornography. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

<sup>44</sup> *State v. Layton*, 168 So.3d 358, 360–61 (La. 2015) (summarizing relevant legislative history).

<sup>45</sup> *Layton*, 168 So.3d at 361 (internal citation omitted).

<sup>46</sup> *Womack v. State*, 731 S.E.2d 387, 391 (Ga. Ct. App. 2012). It is difficult to discern the actual content of the DVD from the language used in the decision. In describing the content, the court uses "bondage" and "rape" interchangeably, and often just gives up and describes it as containing "rape and/or bondage." *Cf. United States v. Friedlander*, 395 Fed. Appx. 577, 581 (11th Cir. 2010) (admitting similar evidence in a child sexual assault trial under FED. R. EVID. 404, but only because "the photographs depicted bondage-related imagery nearly identical to acts which [the defendant] said he would perform on the children" and therefore not admitted for propensity purposes).

<sup>47</sup> *See, e.g., Commonwealth v. Tassinari*, 466 Mass. 340 (2013) (affirming the admission of unredacted portions of electronic communications between the defendant and victim describing BDSM sexual practices in murder trial); *State v. Sexton*, 256 Kan. 344 (1994) (admitting evidence that the defendant had engaged in sexual bondage with former wife as tending to show that defendant's strangulation of the victim was deliberate in a murder trial); *In re Civil Commitment of Rigenhagen*, No. A12–1086, 2012 WL 6734466 (Minn. Ct. App. Dec. 31, 2012) (affirming the admission of evidence at civil commitment proceeding of defendant's engagement in, and consumption of pornography depicting, bondage, dominance, and sadomasochism—BDSM—which helped establish him as a sexually dangerous person (SDP)).

<sup>48</sup> *See, e.g., Commonwealth v. Christie*, 53 N.E.3d 1268 (Mass. App. Ct. 2016) (refusing to admit evidence in a child sexual assault case of the defendant's interest in pornography depicting the use of sex toys); *State v. Thomassie*, 206 So.3d 311 (La. Ct. App. 2016) (refusing to admit evidence in a child sexual assault case of the defendant's preference for women with no pubic hair); *see also Simpson v. State*, 523 S.E.2d 320 (Ga. 1999).



Federal courts have uniformly held Rule 413 constitutional, so long as Rule 403<sup>49</sup> safeguards, including the trial court's ability to exclude based on a disproportionate possibility of undue prejudice, remain in place to ensure due process.<sup>50</sup> But often, Rule 403 safeguards are either illusory or overstated.<sup>51</sup> For example, the Third Circuit has instructed lower courts that "the exclusion of relevant [Rule 413] evidence under Rule 403 should be used infrequently, reflecting Congress' legislative judgment that the evidence 'normally' should be admitted."<sup>52</sup> The 403 balancing is colored from the beginning by this prior legislative judgment, and "Rule 403 must be applied to allow [the] Rule . . . its intended effect"—*i.e.*, admission of the evidence.<sup>53</sup> Such understandings don't write Rule 403 out of the picture entirely, but they can come close.

This does not bode well for defendants. Consider the following facts:<sup>54</sup> A defendant is on trial for a rape in which the victim's hands are bound. The prosecution calls a former sexual partner of the defendant, who intends to testify that the defendant once bound his or her hands during sex, or enjoyed aggressive or rough sex. Since this could constitute a crime under Georgia law,<sup>55</sup> there would be little standing in the way of admission—after all, the legislative judgment is that "sexual assaults" lend themselves to propensity, and under the law of the state, he has committed a "sexual assault."

Once the evidence is admitted, its potential impact is broad. In some circuits, trial judges are expressly advised against giving limiting instructions on evidence admitted through Rule 413,<sup>56</sup> since the Rule itself permits consideration

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<sup>49</sup> "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice . . ." FED. R. EVID. 403.

<sup>50</sup> *See, e.g.*, *United States v. Stamper*, 106 Fed. Appx. 833 (4th Cir. 2004); *United States v. Julian*, 427 F.3d 471 (7th Cir. 2005); *United States v. Mound*, 149 F.3d 799 (8th Cir. 1998); *United States v. Gatewood*, No. 11-8074, 2012 WL 12538558 (D. Ariz. June 18, 2012); *United States v. Wright*, 53 M.J. 476 (C.A.A.F. 2000) (holding the analogous Military Rule of Evidence constitutional); *cf.*, *Schroeder v. Tilton*, 493 F.3d 1083 (9th Cir. 2007) (holding that the equivalent California Evidence Code provision does not violate the U.S. Constitution's Ex Post Facto Clause). In *United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998), the Court did not mince words: "[W]ithout the safeguards embodied in Rule 403 we would hold the rule unconstitutional."

<sup>51</sup> *See generally*, Fang Bu, Note, *Searching for a Better Constitutional Guarantor for FRE 413–415: The Conflict Among Circuits in Applying the FRE 403 Balancing Test and a New Solution*, 2016 U. ILL. L. REV. 1905 (2016).

<sup>52</sup> *Enjady*, 134 F.3d at 1433; *see also* 140 CONG. REC. H8968, 8992 (daily ed. Aug. 21, 1994) (remarks of Representative Susan Molinari (R-NY)) ("[T]he practical efficacy of these rules will depend on faithful execution by judges of the will of Congress in adopting this critical reform. To implement the legislative intent, the courts must liberally construe these rules to provide the basis for a fully informed decision of sexual assault and child molestation cases, including assessment of the defendant's propensities and questions of probability in light of the defendant's past conduct.").

<sup>53</sup> *United States v. LeCompte*, 131 F.3d 767, 769 (8th Cir. 1997) (using a substantially similar analysis in a case involving Rule 414, the parallel Rule relating to evidence in cases of sexual offenses against children).

<sup>54</sup> These hypothetical facts are based on *Womack v. State*, cited *supra*, note 46.

<sup>55</sup> *See Ogletree v. State*, 440 S.E.2d 732 (Ga. Ct. App. 1994).

<sup>56</sup> *See, e.g.*, MOD. CRIM. JURY INSTR. § 4.29, *cmt.* (3d Cir. 2012, revised 2014); PATTERN CRIM. JURY INSTR. § 3.11, *cmt.* at 28 (7th Cir. 2012); MODEL CRIM. JURY INSTR. § 2.08, *cmt.* at 40 (8th Cir. 2014).

on “any matter to which it is relevant.”<sup>57</sup> And, even in jurisdictions where limiting instructions are allowed, there is much reason to doubt their effectiveness.<sup>58</sup> No less a jurist than Learned Hand considered limiting instructions a mere “placebo,”<sup>59</sup> requiring jurors to perform a “mental gymnastic . . . beyond, not only their powers, but anybody’s else.”<sup>60</sup> When it comes to sexual taboos, which run particularly deep in the human psyche,<sup>61</sup> limiting instructions seem especially superficial.

### III. SUBSECTION (d)(4)—THE PROBLEM

Rule 413(d)(4) has never been interpreted by the federal courts, so we begin with a blank slate.<sup>62</sup> As mentioned above, little relevant guidance appears in any of the legislative history. This can cut both ways, of course. On one hand, one could infer that the omission of the phrase “without consent” was a mere scrivener’s error that does not correctly convey the legislature’s intent, and therefore the reader should simply ignore the omission.<sup>63</sup> On the other hand, one could also infer that the drafting legislators implicitly assumed that *no person* would consent to “bodily injury” or “physical pain,” and this assumption is embodied in the Rule as a substantive policy judgment. As broadly as Rule 413

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<sup>57</sup> FED. R. EVID. 413(a) (“The evidence may be considered on any matter to which it is relevant.”).

<sup>58</sup> See Lisa Eichhorn, *Social Science Findings and the Jury’s Ability to Disregard Evidence Under the Federal Rules of Evidence*, 52 LAW & CONTEMP. PROBS. 341, 351–52 (1989); see also Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL’Y & L. 589 (1997); Madelyn Chortek, *The Psychology of Unknowing: Inadmissible Evidence in Jury and Bench Trials*, 32 REV. LITIG. 117, 122–26 (2013).

<sup>59</sup> *United States v. Delli Paoli*, 229 F.2d 319, 321 (2d Cir. 1956) (Learned Hand, J.).

<sup>60</sup> *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932).

<sup>61</sup> Consider what Gayle Rubin calls the “fallacy of misplaced scale”—whereby sexual acts are “burdened with an excess of significance,” and “[s]mall differences in value or behaviour are often experienced as cosmic threats.” Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, reprinted in NORTON ANTHOLOGY OF THEORY & CRITICISM 2388 (Vincent B. Leitch ed., 2010).

<sup>62</sup> The Federal Rules of Evidence—generally—are interpreted much the same as statutes: interpreters are instructed to “examine the language of the rule,” “determine the scope of the rule,” “look to the history of the rule,” and “consider the ‘purpose’ or ‘policy’ of the rule.” GRAHAM § 5027. But Glen Weissenberger vigorously opposes the notion that the Federal Rules of Evidence should be construed as a statutory scheme. See, e.g., *id.*; *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307 (1992); *Are the Federal Rules of Evidence a Statute?* 55 OHIO ST. L.J. 393 (1994); *Evidence Myopia: The Failure to See the Federal Rules of Evidence as a Codification of the Common Law*, 40 WM. & MARY L. REV. 1539 (1999). Judges have not embraced this view, and in either event, there is little justification for treating Rule 413—a Federal Rule enacted by Congress, not the *Advisory Committee*—as anything other than a statute. Therefore, this paper proceeds by using methodology familiar to the interpretation of statutes.

<sup>63</sup> In statutory interpretation cases, courts sometimes consider legislative silence on a particularly strange ambiguity as if it were a “dog that did not bark,” where the failure to “bark” implies that Congress did not intend the provision to be particularly controversial or effect a major change in policy. See, e.g., *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) (citing Sir Arthur Conan Doyle, *Silver Blaze*, in THE COMPLETE SHERLOCK HOLMES 335 (1927)).

sweeps, it does not appear to have been Congress’s intent to include consensual sex in the definition of “sexual assault.” However, this is how Rule 413 operates.

The phrase “without consent” appears only in subsections (2) and (3), but not (1), (4), and (5).

**(d) Definition of “Sexual Assault.”** In this rule and Rule 415, “sexual assault” means a crime under federal law or under state law (as “state” is defined in 18 U.S.C. § 513) involving:

- (1)** any conduct prohibited by 18 U.S.C. chapter 109A;
- (2)** contact, *without consent*, between any part of the defendant’s body—or an object—and another person’s genitals or anus;
- (3)** contact, *without consent*, between the defendant’s genitals or anus and any part of another person’s body;
- (4)** deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or
- (5)** an attempt or conspiracy to engage in conduct described in subparagraphs (1)–(4).<sup>64</sup>

The governing principles of statutory interpretation in such situations are clear:

When the legislature uses a term or phrase in one statute or provision but excludes it from another, courts do not imply an intent to include the missing term in that statute or provision where the term or phrase is excluded. Instead, omission of the same provision from a similar section is significant to show different legislative intent for the two sections.<sup>65</sup>

Therefore, without meaningful extrinsic guidance, the most appropriate inference is that the omission in subsection (4) is intentional.

Another key term is the verb “inflict,” by which the statute refers to inflicting “death, bodily injury, or physical pain.”<sup>66</sup> As defined by Oxford Dictionary, to “inflict” is to “[c]ause (something unpleasant or painful) to be suffered by someone or something” or to “[i]mpose something unwelcome on.”<sup>67</sup> It could be the case that by using the term “inflict,” by definition the rule does not

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<sup>64</sup> FED. R. EVID. 413(d) (emphasis added).

<sup>65</sup> SHAMBIE SINGER, *EACH WORD GIVEN EFFECT*, 2A SUTHERLAND STATUTORY CONSTRUCTION § 46.6 (7th ed. 2016); *see also* Keene Corp. v. United States, 508 U.S. 200, 208 (1993) [hereinafter “SUTHERLAND”] (“Where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”); *cf.* Field v. Mans, 516 U.S. 59, 67 (1995) (“The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory sections enacted simultaneously in relevant respects.”).

<sup>66</sup> FED. R. EVID. 413(d)(4).

<sup>67</sup> *Inflict*, OXFORD ENGLISH DICTIONARY, <https://goo.gl/r7d8LP>.

reach consensual acts, since it is impossible to “[i]mpose something unwelcome on” someone who consents to the imposition.<sup>68</sup> On this interpretation, non-consent is already baked into the concept of “inflict[ion].”

This is plausible, but not natural. On this interpretation, whether or not something is an “infliction” is context-dependent—the context, of course, being whether or not the “infliction” is consented to. Or, to use the phraseology of the Oxford Dictionary, the “unwelcome” thing is one to which I do not consent *right now*. But a more natural interpretation would be that a thing may be “inflict[ed]” upon somebody not if that person does not consent, but rather, if the “inflict[ion]” has generally negative characteristics. It is not possible to “inflict” upon me a slice of pie, even if I am full. However, it is possible to “inflict” pain upon me, even if I consent to and enjoy it. Consider one person (let’s call him Albert) pleading of the other (let’s call him Armand): “Go ahead—hit me. Go on.”<sup>69</sup> If Armand then hit Albert, Albert would feel pain, even if he consented to it, and it would still be correct to say that “Armand inflicted pain on Albert.” Therefore, we find no recourse in a creative interpretation of the term “inflict.”

The last hope of avoiding the interpretive problem is the canon of constitutional avoidance, which provides that given two possible interpretations of a statute—one that implicates constitutional concerns and one that does not—the latter interpretation must prevail.<sup>70</sup> But this interpretive principle steps in only when a constitutional right is endangered. Litigators have tried to bring BDSM within the principle of *Lawrence v. Texas*, which enshrined substantive due process protection against prosecution for “sodomy.”<sup>71</sup> But *Lawrence* itself contains a limiting principle: in an especially opaque passage, Justice Kennedy writes that the government generally may not “define the meaning of the [sexual] relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.”<sup>72</sup> Thus far, every court to confront the issue has

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<sup>68</sup> I am grateful to Dinora Smith for this insight.

<sup>69</sup> See *THE BIRDCAGE* (United Artists 1996).

<sup>70</sup> CONSTITUTIONAL CONSIDERATIONS, 2A SUTHERLAND § 45:11 (“The fact that one among alternative constructions involves serious constitutional difficulties is reason to reject that interpretation in favor of a reasonable, constitutional alternative, if available. Courts even have found that a ‘strained construction’ is desirable if it is the only construction that will save an act’s constitutionality . . . .”); cf. *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (Marshall, J.) (“No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of a legislative act. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other points, a just respect for the legislature requires, that the obligation of its laws should not be unnecessarily and wantonly assailed.”).

<sup>71</sup> *Lawrence v. Texas*, 539 U.S. 558, 567 (2003). In *Lawrence*, the offense of “sodomy” was designated “deviate sexual intercourse” with a member of the same sex, itself defined as “any contact between any part of the genitals of one person and the mouth or anus of another person; or the penetration of the genitals or the anus of another person with an object.” TEX. PENAL CODE § 21.01(1). For more on the changing nature of the term “sodomy,” see generally William N. Eskridge, Jr., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003* (2008).

<sup>72</sup> *Lawrence*, 539 U.S. at 567.

agreed, holding that there is no due process right to engage in BDSM conduct.<sup>73</sup> Since no constitutional rights are implicated,<sup>74</sup> no constitutional problems are posed.<sup>75</sup>

The text of Rule 413 is clear: a “sexual assault” under the Rule can be consensual. On this understanding, there is no need to debate whether the omission of the phrase “without consent” was or was not intended to effect this result; Congressional intent is essentially irrelevant. The Supreme Court has repeatedly (albeit inconsistently) noted that there is no interpretive paradigm which empowers the reader to “attempt to create ambiguity where the statute’s text and structure suggest none.”<sup>76</sup> To interpret Rule 413 otherwise would be to do just that.

#### IV. THE CRIMINALIZATION OF BDSM IN THE UNITED STATES

One of the few restrictions on the admission of prior acts under Rule 413 is that the prior act must be a “crime” under federal or state law.<sup>77</sup> Therefore, a brief survey of BDSM criminalization is necessary.<sup>78</sup>

The problematic status of BDSM in American law originates from two contradictory principles inherited from Anglo-American jurisprudence.<sup>79</sup> Originally, the governing principle permitted a person to consent “practically to

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<sup>73</sup> *Commonwealth v. Appleby*, 402 N.E.2d 1051 (Mass. 1980); *State v. Van*, 688 N.W.2d 600, 615 (Neb. 2004); *Commonwealth v. Carey*, 974 N.E.2d 624, 631 (Mass. 2012); *Doe v. Rector and Visitors of George Mason Univ.*, 149 F. Supp. 3d 602, 634 (E.D. Va. 2016).

<sup>74</sup> *But cf.*, a more eager formulation of the canon of constitutional avoidance espoused by Judge Kozinski, in which an alternate interpretation is privileged if it permits the court to “avoid[] a ruling on a difficult and unexplored constitutional issue.” *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1223 (9th Cir. 2012) (Kozinski, J.).

<sup>75</sup> The existence and scope of a substantive due process right to engage in BDSM is beyond the scope of this paper; however, persuasive arguments abound that *Lawrence* compels such a conclusion. *See, e.g.*, Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89, 145–50 (2014); Kelly Egan, Comment, *Morality-Based Legislation is Alive and Well: Why the Law Permits Consent to Body Modification but not Sadoomasochistic Sex*, 70 ALB. L. REV. 1615, 1639–40 (2007); Devin Meepos, Note, *50 Shades of Consent: Re-Defining the Law’s Treatment of Sadoomasochism*, 43 SW. L. REV. 97, 104–05 (2013); Daniel Haley, Note, *Bound by Law: A Roadmap for the Practical Legalization of BDSM*, 21 CARDOZO J. L. & GENDER 631, 640–48 (2015).

It should be noted that legislative efforts to decriminalize BDSM have been as ineffective as litigation. *See* Whitney Mallett, *If S&M Is Going Mainstream, Why Are Lawmakers Banning It?* TALKING POINTS MEMO (Dec. 30, 2014), <https://goo.gl/qV34Kz>.

<sup>76</sup> *Ali v. Bureau of Prisons*, 552 U.S. 214, 227 (2008) (“According to most expressions of the literalism doctrine, courts must give effect to a literal meaning without consulting other indicia of intent or meaning when the statutory text itself is ‘plain,’ or ‘clear and unambiguous.’”); *see also* 2A SUTHERLAND § 46:4.

<sup>77</sup> However, as noted above, *supra* n. 43–46, certain state law analogues—like those in Louisiana, Georgia, and Connecticut—do not require the prior act at issue to be a “crime.”

<sup>78</sup> For similar—and far more extensive—overviews and surveys, *see* Monica Pa, *Beyond the Pleasure Principle: The Criminalization of Sadoomasochistic Sex*, 11 TEX. J. WOMEN & L. 51, 64–76 (2001); Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165, 166–200 (2007); *see also* Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CAL. L. REV. 881 (2016) (reviewing federal regulation of sexual conduct and its impact upon sexual norms).

<sup>79</sup> *See generally* Vera Bergelson, *Consent to Harm*, 28 PACE L. REV. 683 (2008).

anything.”<sup>80</sup> But as a result of the growing penal power of the state, the victim became increasingly excluded from the penological process, and “an individual lost the power to consent to what the state regarded as harm to itself.”<sup>81</sup> More recently, issues of consent to battery and assault have arisen with respect to sports<sup>82</sup> and body modification,<sup>83</sup> and even some statutes governing conduct in a duel remain on the books.<sup>84</sup>

Following the principle from the seminal British case *Regina v. Brown*,<sup>85</sup> many jurisdictions hold, either by statute<sup>86</sup> or precedent,<sup>87</sup> that consent is no defense to an assault and battery charge (collectively, “anti-BDSM jurisdictions”). But the Model Penal Code expressly recognizes consent as a defense to criminal assault or battery if “the bodily injury consented to or threatened by the conduct consented to is not serious.”<sup>88</sup> In the spirit of the MPC, several jurisdictions

<sup>80</sup> *Id.* at 686 (*volenti non fit injuria*—lit., “a person is not wronged by that to which he consents.”).

<sup>81</sup> *Id.* at 684. It is worth noting that recent countervailing victims’ rights movements have aggressively reasserted the role of the victim in the criminal justice system, and substantial victimological research over the last several decades has been dedicated to identifying and implementing victims’ preferences. For a discussion of the role of the victim in a restorative justice paradigm, see generally Heather Strang, *Repair or Revenge?: Victims and Restorative Justice*, reprinted in *A RESTORATIVE JUSTICE READER*, 340–56 (Gerry Johnstone, ed., 2d ed. 2013).

<sup>82</sup> See generally Charles Harary, *Aggressive Play or Criminal Assault? An In Depth Look at Sports Violence and Criminal Liability*, 25 COLUM. J.L. & ARTS 197 (2002); see also Cheryl Hanna, *Sex Is Not a Sport: Consent and Violence in Criminal Law*, 42 B.C. L. REV. 239 (2000).

<sup>83</sup> See generally Egan, cited *supra*, note 75.

<sup>84</sup> See, e.g., UTAH CODE ANN. § 76-5-104.

<sup>85</sup> *Regina v. Brown* [1994] 1 AC (HL) 212. The *Brown* decision (a.k.a. the *Spanner* case) was a particularly high-profile event, and its decision is often cited for the proposition that consent is not a defense to assault or battery in a “sado-masochistic encounter.”

<sup>86</sup> See, e.g., HAW. REV. STAT. § 702.234 (providing a defense only in a “lawful athletic event or competitive sport”).

<sup>87</sup> See, e.g., *People v. Samuels*, 250 Cal. Rptr 438, 447 (Cal. Ct. App. 1967); *Woods v. United States*, 65 A.3d 667, 672 (D.C. 2013); *Lyons v. State*, 437 So.2d 711, 712 (Fl. Dist. Ct. App. 1983); *Ogletree v. State*, 440 S.E.2d 732, 733 (Ga. Ct. App. 1994); *State v. Collier*, 372 N.W.2d 303, 307 (Iowa Ct. App. 1985); *Commonwealth v. Appleby*, 402 N.E.2d 1051, 1060–61 (Mass. 1980), approved of by *Commonwealth v. Carey*, 974 N.E.2d 624, 627 (Mass. 2012); *Durr v. State*, 722 So.2d 134, 134–35 (Miss. 1998) (gang initiation); *State v. Van*, 688 N.W.2d 600, 614–15 (Neb. 2004); *State v. Brown*, 630 N.E.2d 397, 403–04 (Ohio Ct. App. 1993) (hazing); *State v. Roby*, 74 A. 638, 641 (Vt. 1909); but see *Helton v. State*, 624 N.E.2d 499, 514 (Ind. Ct. App. 1993).

<sup>88</sup> MODEL PENAL CODE § 2.11(2)(a). MODEL PENAL CODE § 210.0(3) defines “serious bodily injury” as “bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.” The National Coalition for Sexual Freedom (NCSF) hypothesizes that, under this definition, a person can consent to most forms of BDSM conduct, but one might be unable to consent to “breath control and certain other play” as well as “scarification and some other forms of ‘extreme’ or ‘heavy’ scenes.” See *Consent and BDSM: The State of the Law*, NATIONAL COALITION FOR SEXUAL FREEDOM, at 3, <https://goo.gl/ZcVGVR>.

However, the NCSF believes that courts consistently misclassify injuries as “serious” in practice, and the position has much support. In BDSM scenarios, courts have proved extremely willing to stretch the definition of “serious injury” further than it can logically bear. For example, in *Appleby*, the mere use of a riding crop during sex was in itself sufficient to make any resulting injury “serious,” even though the only resulting injury to speak of was “redness.” See *Appleby*, 402 N.E.2d at 1056–58.

provide—either by statute<sup>89</sup> or precedent<sup>90</sup>—that consent is a permissible defense. Other jurisdictions hold that consent *may* be a defense, but place limits upon that principle that range from practical to arbitrary.<sup>91</sup> In a significant number of jurisdictions, neither statute nor precedent address the issue with any clarity.<sup>92</sup>

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<sup>89</sup> ALA. CODE § 13A-2-7(b); COLO. REV. STAT. § 18-1-505(2); DEL. CODE ANN. tit. 11, § 452; 720 ILL. COMP. STAT. § 5/11-1.70; ME. REV. STAT. tit. 17-A, § 109(2)(A); MO. REV. STAT. § 565.010(1)(1); N.H. REV. STAT. ANN. § 626:6(II); N.J. REV. STAT. § 2C:2-10(b)(1); N.D. CENT. CODE § 12.1-17-08(1)(a); PA. CONS. STAT., tit. 18 § 311; TENN. CODE ANN. § 39-13-104(1); TEX. PENAL CODE § 22.06(a)(1).

<sup>90</sup> See *State v. Magee*, 116 So.3d 948, 959–60 (La. Ct. App. 2013); *Pryor v. State*, 6 A.3d 343, 359 (Md. Ct. Spec. App. 2010) (mentioning in passing consent as a general defense); *State v. Jensen*, 118 P.3d 762, 769 (N.M. Ct. App. 2005) (agreeing that “a person can consent to having rough, violent, or forcible sex,” but that evidence in the case at hand did not support a jury instruction on consent); *People v. Jovanovic*, 700 N.Y.S.2d 156, 168–69, 175 n.5 (N.Y. App. Div. 1999) (paradoxically refusing to hold consent as a defense to assault in a BDSM encounter, but reversing a conviction for sexual assault in which evidence of consent was not admitted); *State v. Beck*, 19 S.C.L. 363, 364 (S.C. App. L. & Eq. 1833); *State v. Archer*, 115 N.W. 1075, 1076 (S.D. 1908) (affirming dismissal of an indictment alleging that adultery was an “assault,” noting that “[o]ne who assaults or whips another at his request, or with his consent does any other act which under ordinary circumstances would amount to an indictable battery, commits no crime.”); *Perkins v. Commonwealth*, 523 S.E.2d 512, 513 (Va. Ct. App. 2000).

<sup>91</sup> See *Govan v. State*, 913 N.E.2d 237, 242–43 (Ind. Ct. App. 2009) (holding that the presence of a weapon like a knife during sex renders consent *per se* impossible); *State v. Mackrill*, 191 P.3d 451, 459 (Mont. 2008) (refusing to extend the statutory consent defense to assault and battery charges on public policy grounds); *State v. Brown*, 381 A.2d 1231, 1231 (N.J. Super. Ct. App. Div. 1977) (holding that a person cannot consent to atrocious assault and battery, but reserving decision on simple assault and battery); UTAH CODE ANN. § 76-5-104 (dueling statute which provides that “In any prosecution for . . . assault, it is no defense . . . that the defendant was a party to any . . . consensual altercation if . . . any dangerous weapon . . . was used”).

<sup>92</sup> See ALASKA STAT. §§ 11.41.220(a)(1), 11.41.230; ARIZ. REV. STAT. ANN. § 13-1203; ARK. CODE ANN. § 5-13-206; CONN. GEN. STAT. ANN. § 53a-61; IDAHO CODE ANN. § 18-903(c); KAN. STAT. ANN. § 21-5413(a)(1), *but see* *State v. Sexton*, 886 P.2d 811, 815 (Kan. 1994) (noting “sexual bondage between consenting adults is [not] a crime”); KY. REV. STAT. ANN. § 508.030; MICH. COMP. LAWS § 750.81a; MINN. STAT. § 609.224(1); NEV. REV. STAT. § 200.471(1)(a); N.C. GEN. STAT. § 14-33(c); OKLA. STAT. tit. 21, § 641; OR. REV. STAT. § 163.160(1); R.I. GEN. LAWS § 11-5-3(a); S.C. CODE ANN. § 16-3-600(E)(1); *State v. Hiott*, 987 P.2d 135, 136-137 (Wash. Ct. App. 1999); W. VA. CODE § 61-2-9(b)-(c); *State v. Davison*, 666 N.W.2d 1 (Wisc. 2003); WYO. STAT. ANN. § 6-2-501.



BDSM is rarely, if ever, criminalized by way of a targeted penal law. Rather, the prohibition's origin lies in a statute of general applicability, prohibiting assault, battery, or strangulation, to which courts refuse to recognize a defense of consent, which achieves substantially the same result: criminalization. Because of this framework, the fact that the defendant did or did not "deriv[e] sexual pleasure" from the encounter is wholly irrelevant to the *mens rea* inquiry with respect to the crime or act at issue.

Rule 413(d) requires the crime to "involv[e] . . . deriving sexual pleasure or gratification . . ."<sup>93</sup> At first glance, one plausible interpretation could be that, for the proponent to admit evidence of prior charges, the Rule requires the original criminal act to be *defined* as one in which the defendant derived sexual pleasure. This interpretation would be a favorable one for BDSM practitioners, since the crimes of assault or battery do not contain as an element any requirement that the defendant derive sexual pleasure. But this interpretation seems unlikely. In *United States v. Foley*,<sup>94</sup> the defendant made a similar claim, and argued that in applying Rule 413 to prior conduct, courts must take a "categorical approach" inquiry: all prior crimes must definitionally correspond to the text of Rule 413 (*i.e.*, as outlined in the relevant *penal law*, not as committed in fact).<sup>95</sup> However, the Seventh Circuit rejected this argument, holding instead that courts must analyze the underlying facts of the prior act to determine whether it falls within the ambit of the Rule.<sup>96</sup> The Seventh Circuit's conclusion is unfortunate, but there is no reason to believe that it is incorrect, as it seems congruous with Congressional policy of liberal admission.

## V. BDSM AND PROPENSITY

Why admit evidence of acts of prior sexual assault at all? The justification, broadly speaking, is spelled out in two propositions: (1) a person who commits one sexual assault is more likely to commit another than someone who has never before committed a sexual assault; and (2) that likelihood is stronger than in other propensity connections, in a way that justifies a special rule recognizing the connection.<sup>97</sup> For purposes of this article, I reserve decision on whether this justification is a sound one. But even if we assume as much, the logic of Rule 413 remains internally incoherent. Since Rule 413(d)(4) includes BDSM in the definition of "sexual assault," to survive scrutiny, it must follow that a person who

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<sup>93</sup> FED. R. EVID. 413(d)(4).

<sup>94</sup> *United States v. Foley*, 740 F.3d 1079 (7th Cir. 2014).

<sup>95</sup> *See id.* at 1087.

<sup>96</sup> *Id.* ("Foley points to no authority requiring courts to apply the categorical approach to Rule 413, nor does he offer any persuasive authority or policy reason why the rule should be interpreted that way. The focus of the Federal Rules of Evidence is on facts, and the policy rationale for Rule 413 is that a person who has engaged in the covered conduct is likely to engage in it again. Rule 413 uses statutory definitions to designate the covered conduct, but the focus is on the conduct itself rather than how the charges have been drafted.")

<sup>97</sup> *See United States v. Cunningham*, 103 F.3d 553, 556–57 (7th Cir. 1996) (Posner, J.); *Foley*, 740 F.3d at 1086–87.

engages in BDSM activity is more likely to commit a sexual assault than someone who does not (hereinafter “the BDSM propensity proposition”). Otherwise, evidence of prior BDSM acts would be irrelevant,<sup>98</sup> and certainly more prejudicial than probative.<sup>99</sup>

But the BDSM propensity proposition is theoretically and empirically flawed. Social theory, almost universally, has long resisted the impulse to draw a straight line from a person’s non-traditional sexual desires to the content of their character. Following Freud’s assertion that “sadism and masochism cannot be attributed merely to the element of aggressiveness,”<sup>100</sup> Jacques Lacan flatly refused to consider sadism “a register of a kind of immanent aggression.”<sup>101</sup> Michel Foucault considered sadomasochism a “massive cultural fact”—less violence, more theatre—constituting “one of the great conversions in the Western imagination—unreason transformed into the delirium of the heart, the madness of desire, and an insane dialogue between love and death in the limitless presumption of appetite.”<sup>102</sup>

Empirically, no evidence exists that BDSM practice or interest predicts future violence.<sup>103</sup> At the very least, no supporting evidence exists in the Congressional Record. Further, there appears to be no evidence to suggest that dominant partners are more likely than submissive partners to commit a sexual assault—*i.e.*, a nonconsensual sexual act.<sup>104</sup> But Rule 413 makes such an assumption—and that assumption only makes sense if we understand dominant partners as aggressive people at the core of their psyche.<sup>105</sup> After all, subsection (d)(4) only reaches the “*deriving* [of] sexual pleasure or gratification *from*

<sup>98</sup> “Evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” FED. R. EVID. 401. “Irrelevant evidence is not admissible.” FED. R. EVID. 402.

<sup>99</sup> “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice . . . .” FED. R. EVID. 403.

<sup>100</sup> SIGMUND FREUD, THREE ESSAYS ON THE THEORY OF SEXUALITY (1905), *reprinted in* THE FREUD READER 253 (Peter Gay ed., 1989) (“[T]he existence of the pair of opposites formed by sadism and masochism cannot be attributed merely to the element of aggressiveness.”).

<sup>101</sup> JACQUES LACAN, SEMINAR X: ANXIETY (Jacques Alain-Miller ed., A.R. Price trans.) 103 (2014) (“I’m going to . . . shake up the ruts in which you are accustomed to leaving the function[] known as sadism . . . as if what were involved were merely a register of a kind of immanent aggression.”).

<sup>102</sup> MICHEL FOUCAULT, HISTORY OF MADNESS 361–62 (Jean Khalfa ed., Jonathan Murphy & Jean Khalfa trans., 2006) (1961).

<sup>103</sup> And, as Tamara Lave and Aviva A. Orenstein note, it is likely also the case that “sex offenders are not necessarily the compulsive offenders that politicians and the general public believe them to be.” See Tamara Lave and Aviva A. Orenstein, *Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes*, 81 U. CIN. L. REV. 795, 796 (2013).

<sup>104</sup> It may be reasonable to assume that a dominant partner is more likely to make a *mistake of fact* as to the consent of a submissive partner; however, it would not necessarily follow from such a claim that the dominant partner has a *propensity* to commit sexual assault.

<sup>105</sup> For a theoretical counterpoint, see, e.g., FREUD, *supra* note 100 at 252–53 (citing, *inter alia*, Richard von Krafft-Ebing, PSYCHOPATHIA SEXUALIS: EINE KLINISCH-FORENSISCHE STUDIE (1886); Albert von Schrenk-Notzing, *Literaturzusammenstellung über die Psychologie und Psychopathologie der Vita Sexualis*, 9 ZEITSCHRIFT FÜR HYPNOTISMUS 98 (1899)) (“It can often be shown that masochism is nothing more than an extension of sadism turned round upon the subject’s own self . . . . A sadist is always at the same time a masochist . . . .”).

*inflicting* . . . death, bodily injury, or physical pain . . .”<sup>106</sup> Since Rule 413 places the defendant in the active subject role in the sentence, the Rule would only apply if the defendant is doing both the “deriving” of pleasure and the “inflicting” of pain. In theory, the Rule would not apply to a submissive or masochistic defendant, who derives pleasure from *receiving* pain.

Over the last decade, there has been a steady movement toward de-pathologizing BDSM conduct.<sup>107</sup> While the Diagnostic and Statistical Manual of Mental Disorders identifies both “sexual sadism disorder” and “sexual masochism disorder” as paraphilic disorders,<sup>108</sup> the new diagnostic preferences—in response to medical and psychological scholarship on the issue<sup>109</sup>—recommend diagnosis only if “the behaviors cause clinically significant distress or impairment in social, occupational, or other important areas of functioning,” or “if the person has acted on these sexual urges with a *nonconsenting person*.”<sup>110</sup> Implicit in these changes is a *rejection* of the BDSM propensity proposition—by de-pathologizing consensual sexual acts and inclinations, the American Psychiatric Association affirms that sadomasochism *in itself* poses no risk to health or safety.

This is not to say there is complete consensus. Judges and scholars in numerous disciplines cite hesitations as to both the normative permissibility of BDSM and the appropriateness of decriminalization.<sup>111</sup> Concerns range widely,<sup>112</sup> but they can be placed into one of several categories. First, critics raising *normative objections* disagree that no harm is done: some argue that BDSM is a “breach of the peace” and inflicts harm on the public as a whole,<sup>113</sup> while others argue that BDSM constitutes a dignitary harm to the submissive partner.<sup>114</sup> Second, critics raising *social objections* worry that BDSM legalization (and the accompanying social acceptance) could lead to the glorification and

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<sup>106</sup> FED. R. EVID. 413(d)(4) (emphasis added).

<sup>107</sup> For a brief survey of the de-pathologization of BDSM, see Merissa Nathan Gerson, *BDSM versus the DSM: A History of the Fight that Got Kink De-classified as Mental Illness*, THE ATLANTIC (Jan. 13, 2015), <https://goo.gl/7CWYxh>; see also Apostolides, cited *supra* note 3, at 60.

<sup>108</sup> AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 685 (2013) [hereinafter “DSM-5”]. The DSM-5 identifies both sexual masochism and sexual sadism disorders as *algolagnic disorders*, a subgrouping of *anomalous activity practices*, itself a subgroup of *paraphilic disorders*. For sexual masochism disorder, see *ibid.*, no. 302.83 (F65.51), 694; for sexual sadism disorder, see *ibid.*, no. 302.84 (F65.62), 695.

<sup>109</sup> See, e.g., Andreas A.J. Wismeijer & Marcel A.L.M. van Assen, *Psychological Characteristics of BDSM Practitioners*, 10 J. SEX. MED. 1943 (2013); Ummni Khan, *Sadomasochism in Sickness and in Health: Competing Claims from Science, Social Science, and Culture*, 7 CURRENT SEX. HEALTH REP. 49 (2015).

<sup>110</sup> DSM-5 at 694, 695 (emphasis added); see also Devin Meepos, Note, *50 Shades of Consent: Re-defining the Law’s Treatment of Sadomasochism*, 43 SW. U. L. REV. 97, 104–05 (2013).

<sup>111</sup> The stigma is also strong in many segments of non-legal society as well. See, e.g., Michaelangelo Conte, *Former Dominatrix Fights to Keep Job as Sheriff’s Officer*, JERSEY JOURNAL (June 16, 2017), <https://goo.gl/dvbkQS>.

<sup>112</sup> Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89, 119–39 (2014) (noting several different objections to the morality or decriminalization of BDSM practices).

<sup>113</sup> State v. Collier, 372 N.W.2d 303, 305 (Iowa Ct. App. 1985).

<sup>114</sup> Dennis J. Baker, *The Moral Limits of Consent as a Defense in the Criminal Law*, 12 NEW CRIM. L. REV. 93 (2009).

encouragement of sexual violence or objectification.<sup>115</sup> Third, critics raising *pragmatic objections* argue that BDSM poses risks of non-consent and mistake of fact as to the consent of the submissive partner, which sets it apart from other sexual activities<sup>116</sup> and makes domestic violence and sexual assault more difficult to prove.<sup>117</sup>

The intricacies of such arguments and the responses to them are beyond the scope of this article. Many of these arguments are identified and sufficiently refuted by Margo Kaplan, who notes in her article that many, if not all, of these arguments rest on a normative devaluation of the importance of sexual pleasure and autonomy in the overall well-being and security of personhood.<sup>118</sup>

The gist is this: Popular culture has seen a general liberalization of sexual attitudes toward BDSM and kink over the last couple decades,<sup>119</sup> and there has been a parallel process of BDSM de-pathologization by the medical community. It is time the law followed suit.

#### VI. SUBSECTION (d)(4)—THE SOLUTION

Rule 413 should be repealed in full. However, the problems identified in this article can be solved in a less radical way. Rule 413 should define sexual assault as “non-consensual,” a qualifier already present in subsections (d)(2) and (d)(3). The effect of such a change would distribute the qualifier to all subsections. As amended, the rule would read:

**(d) Definition of “Sexual Assault.”** In this rule and Rule 415, “sexual assault” means a crime under federal law or under state law (as “state” is defined in 18 U.S.C. § 513), **committed without consent**, involving:

- (1)** any conduct prohibited by 18 U.S.C. chapter 109A;
- (2)** contact, ~~without consent~~, between any part of the defendant’s body—or an object—and another person’s genitals or anus;

<sup>115</sup> See Kaplan, *supra* note 112, at 133–34.

<sup>116</sup> *Id.* at 131–33. As Kaplan notes, here, scholars, courts, and commentators routinely ignore that common—almost universal—practice to negotiate these boundaries at length before the encounter and to employ mechanisms like safe words that ensure their enforcement. For an example, see William Saletan, *The Trouble with Bondage: Why S&M Will Never Be Fully Accepted*, SLATE (Mar. 4, 2013), <https://goo.gl/PBDhsc>. For an empirical exposition on cultural representation of BDSM practices, see generally Margot Weiss, *Mainstreaming Kink: The Politics of BDSM Representation in U.S. Popular Media*, 50 J. HOMOSEXUALITY 103 (2006).

<sup>117</sup> Cheryl Hanna, *Sex Is not a Sport: Consent and Violence in Criminal Law*, 42 B.C. L. REV. 239 (2000). This concern has even been featured in primetime television. See *Law & Order: Special Victims Unit, Twenty-Five Acts* (NBC television broadcast Oct. 10, 2012).

<sup>118</sup> Kaplan, *supra* note 112 at 115–39.

<sup>119</sup> See, e.g., E.L. James, *FIFTY SHADES OF GREY* (2011); see also t Markowitz, *Kink Is More Popular than You Think*, OK CUPID BLOG (Apr. 18, 2017) (webpage no longer available) (on file with N.Y.U. Review of Law & Social Change).

- (3) contact, ~~without consent~~, between the defendant's genitals or anus and any part of another person's body;
- (4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or
- (5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)–(4).

This revision will make clear to the courts that *no* sexual act should be considered for propensity purposes unless the act itself was nonconsensual. This rule excludes state crimes that do not definitionally require the act to be “committed without consent”—*no matter how* the state defines it. The effect is to refocus the evidentiary rule on its appropriate object—nonconsensual sexual acts—which more closely aligns with the Rule's original legislative intent.

This change poses an interpretive problem of its own: in anti-BDSM jurisdictions, courts hold (or statutes provide) that a person cannot consent to an assaultive act. Since the Rule permits the state law to define the underlying crime, one plausible interpretation could be that this amendment intends, in much the same way, to defer to state law on the issue of what constitutes legally valid consent. This would, of course, defeat the point. An independent definition of consent would eliminate this possibility. I therefore propose the following:

**(e) Definition of “Consent.”** In this rule, “consent” means a voluntary and revocable agreement to participate in a sexual act with the defendant.

Lastly, I address one additional, albeit strange, interpretive problem.<sup>120</sup> As worded, these amendments provide that a prior sexual act is inadmissible if it results in a person's death, just because the other person may “consent” to death. This seems an undesirable conclusion.<sup>121</sup> Therefore, a proviso is necessary:

**(e) Definition of “Consent.”** In this rule, “consent” means a voluntary and revocable agreement (except an agreement concerning death) to participate in a sexual act with the defendant.

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<sup>120</sup> GRAHAM § 5414, makes the claim that under the Rule, the conduct at issue need not even constitute an *actus reus*, since the Rule seems to speak to only the *derivation* of “sexual pleasure or gratification.”

However, I find this interpretation unavailing for two reasons. First, the act itself is named—“inflicting”—which would exclude, for example, the consumption of pornography, and reach only “inflict[ions].” Second, the requirement in subsection (d) that the prior conduct be a “crime” necessarily includes due process restrictions which circumscribe that crime, and due process mandates that any crime contain as a component an act, so as to avoid the criminalization of mere status. *See Robinson v. California*, 370 U.S. 660 (1962); *see also United States v. Smith*, 331 U.S. 469, 474–75 (1947) (using the interpretive canon of constitutional avoidance to construe an ambiguous federal procedural rule in a manner which does not pose constitutional problems).

<sup>121</sup> Whether it is or is not in fact an undesirable conclusion is a much more complicated topic beyond the scope of this paper.

No rule can be drafted so perfectly as to eliminate the ever-present specter of ambiguity.<sup>122</sup> But hopefully, these amendments will leave the rest of Rule 413 intact, and effect only the desired change: removing BDSM from the definition of “sexual assault.”

## VII. CONCLUSION

In the words of Foucault, “the idea that S&M is related to a deep violence—that S&M practice is a way of liberating this violence, this aggression—is stupid.”<sup>123</sup> But the rules of evidence incorporate such a notion, presupposing not only that BDSM is “relevant” to the inherent violence of sexual assault, but that BDSM and sexual assault are close enough in fact to be the same at law. Once this proposition is captured and properly rejected, Rule 413(d)(4) loses all pretense to rationality.

Based on the text, context, and legislative history of Rule 413, my interpretation of Rule 413 is the only permissible one. That is a problem—the statutes and decisions criminalizing consensual BDSM are an immoral intrusion into the intimate lives of people and are arguably unconstitutional, and the Federal Rules of Evidence should mitigate the impact of those laws, rather than expand it. Further, an amendment will serve other purposes. Since their promulgation, the Federal Rules have served as a model for state evidence codes, in substance and in form.<sup>124</sup> This amendment will also serve as such a model, and though its effect is narrow—mitigation of the collateral consequences of BDSM criminalization—hopefully it will be the start of legislative movement toward wholesale decriminalization of consensual sexual conduct.

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<sup>122</sup> See, e.g., BRYAN A. GARNER, GUIDELINES FOR DRAFTING AND EDITING LEGISLATION, 14 (2016) (“[A]mbiguity is *always* a disease of legislative drafting.”) (emphasis in original).

<sup>123</sup> Michel Foucault, *Sex, Power, and the Politics of Identity*, interview with B. Gallagher & A. Wilson (June 1982), reprinted in MICHEL FOUCAULT—ETHICS: SUBJECTIVITY AND TRUTH 165 (Paul Rabinow, ed. 1997).

<sup>124</sup> This was a stated goal of the original proponents of the Federal Rules of Evidence—that the rules would “become a model for states wishing to reform their law of evidence.” See GRAHAM §§ 5006, 5009 (internal quotations removed).

APPENDIX 1: PROPOSED REVISION TO RULE 413

**Rule 413. Similar crimes in sexual assault cases**

(a) *Permitted Uses.* In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.

(b) *Disclosure to the Defendant.* If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) *Effect on Other Rules.* This rule does not limit the admission or consideration of evidence under any other rule.

(d) *Definition of "Sexual Assault."* In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513), **committed without consent**, involving:

- (1) any conduct prohibited by 18 U.S.C. chapter 109A;
- (2) contact, ~~without consent~~, between any part of the defendant's body—or an object—and another person's genitals or anus;
- (3) contact, ~~without consent~~, between the defendant's genitals or anus and any part of another person's body;
- (4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or
- (5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)–(4).

**(e) Definition of "Consent."** In this rule, "consent" means a voluntary and revocable agreement (except an agreement concerning death) to participate in a sexual act with the defendant.

## APPENDIX 2: COMPARISON OF BDSM LAWS AND RULE 413 ANALOGUES

<b>Jurisdiction</b>	<b>BDSM laws</b>	<b>413 analogue</b>	<b>State court admissibility</b>	<b>Federal court admissibility</b>
<i>Alabama</i>	Legal	Inadmissible for propensity	Inadmissible for propensity	Inadmissible for propensity
<i>Alaska</i>	Unsettled	Admissible for propensity	Unsettled	Unsettled
<i>Arizona</i>	Unsettled	Admissible for propensity	Unsettled	Unsettled
<i>Arkansas</i>	Unsettled	Inadmissible for propensity	Inadmissible for propensity	Unsettled
<i>California</i>	Illegal	Admissible for propensity	Admissible for propensity	Admissible for propensity
<i>Colorado</i>	Legal	Inadmissible for propensity	Inadmissible for propensity	Inadmissible for propensity
<i>Connecticut</i>	Illegal	Admissible for propensity	Admissible for propensity	Admissible for propensity
<i>Delaware</i>	Legal	Inadmissible for propensity	Inadmissible for propensity	Inadmissible for propensity
<i>District of Columbia</i>	Illegal	Inadmissible for propensity	Admissible for propensity	Admissible for propensity
<i>Florida</i>	Illegal	Admissible for propensity	Admissible for propensity	Admissible for propensity
<i>Georgia</i>	Illegal	Admissible for propensity	Admissible for propensity	Admissible for propensity
<i>Hawai'i</i>	Illegal	Inadmissible for propensity	Inadmissible for propensity	Admissible for propensity
<i>Idaho</i>	Unsettled	Inadmissible for propensity	Inadmissible for propensity	Unsettled
<i>Illinois</i>	Legal	Admissible for propensity	Inadmissible for propensity	Inadmissible for propensity
<i>Indiana</i>	Illegal	Inadmissible for	Inadmissible for	Admissible for

		propensity	propensity	propensity
<i>Iowa</i>	Illegal	Inadmissible for propensity <sup>125</sup>	Admissible for propensity	Admissible for propensity
<i>Kansas</i>	Unsettled	Admissible for propensity	Unsettled	Unsettled
<i>Kentucky</i>	Unsettled	Inadmissible for propensity	Inadmissible for propensity	Unsettled
<i>Louisiana</i>	Illegal	Admissible for propensity	Admissible for propensity	Admissible for propensity
<i>Maine</i>	Legal	Inadmissible for propensity	Inadmissible for propensity	Inadmissible for propensity
<i>Maryland</i>	Unsettled	Inadmissible for propensity	Inadmissible for propensity	Unsettled
<i>Massachusetts</i>	Illegal	Inadmissible for propensity	Inadmissible for propensity	Admissible for propensity
<i>Michigan</i>	Unsettled	Inadmissible for propensity	Inadmissible for propensity	Unsettled
<i>Minnesota</i>	Unsettled	Inadmissible for propensity	Inadmissible for propensity	Unsettled
<i>Mississippi</i>	Illegal	Admissible for propensity	Admissible for propensity	Admissible for propensity
<i>Missouri</i> <sup>126</sup>	Legal	Inadmissible for propensity	Inadmissible for propensity	Inadmissible for propensity
<i>Montana</i>	Illegal	Inadmissible for propensity	Inadmissible for propensity	Admissible for propensity

<sup>125</sup> Iowa's 413 analogue, IOWA CODE § 701.11(1) (2003), was ruled unconstitutional in 2010. *See State v. Cox*, 781 N.W.2d 757 (Iowa 2010).

<sup>126</sup> A brief detour through Missouri demonstrates the political power of propensity evidence: in 1995, the Missouri legislature enacted MO. REV. STAT. § 566.025, which admitted prior act evidence in sexual assault cases with child victims. The Missouri Supreme Court held that the law violated the provisions of the Missouri Constitution in *State v. Burns*, 978 S.W.2d 759 (Mo. 1998) (en banc). In 2000, the legislature tried again, and the judiciary once more responded by striking down the statute. *State v. Ellison*, 239 S.W.3d 603 (Mo. 2007) (en banc). Then, in 2013, the Missouri legislature amended the problematic provision of the state constitution and re-established the propensity rule for cases involving child victims. *See MO. CONST.*, art. I, § 18(c).

<i>Nebraska</i>	Illegal	Inadmissible for propensity	Inadmissible for propensity	Admissible for propensity
<i>Nevada</i>	Unsettled	Admissible for propensity	Unsettled	Unsettled
<i>New Hampshire</i>	Legal	Inadmissible for propensity	Inadmissible for propensity	Inadmissible for propensity
<i>New Jersey</i>	Unsettled	Inadmissible for propensity	Inadmissible for propensity	Unsettled
<i>New Mexico</i>	Legal	Inadmissible for propensity	Inadmissible for propensity	Inadmissible for propensity
<i>New York</i>	Unsettled	Inadmissible for propensity	Inadmissible for propensity	Unsettled
<i>North Carolina</i>	Unsettled	Inadmissible for propensity	Inadmissible for propensity	Unsettled
<i>North Dakota</i>	Legal	Inadmissible for propensity	Inadmissible for propensity	Inadmissible for propensity
<i>Ohio</i>	Illegal	Inadmissible for propensity	Inadmissible for propensity	Admissible for propensity
<i>Oklahoma</i>	Unsettled	Admissible for propensity	Unsettled	Unsettled
<i>Oregon</i>	Unsettled	Inadmissible for propensity	Inadmissible for propensity	Unsettled
<i>Pennsylvania</i>	Legal	Inadmissible for propensity	Inadmissible for propensity	Inadmissible for propensity
<i>Rhode Island</i>	Unsettled	Admissible for propensity	Admissible for propensity	Unsettled
<i>South Carolina</i>	Unsettled	Inadmissible for propensity	Inadmissible for propensity	Unsettled
<i>South Dakota</i>	Unsettled	Inadmissible for propensity	Inadmissible for propensity	Unsettled
<i>Tennessee</i>	Legal	Inadmissible for propensity	Inadmissible for propensity	Inadmissible for propensity
<i>Texas</i>	Legal	Inadmissible for	Inadmissible for	Inadmissible for

		propensity	propensity	propensity
<i>Utah</i>	Unsettled	Inadmissible for propensity	Inadmissible for propensity	Unsettled
<i>Vermont</i>	Illegal	Inadmissible for propensity	Inadmissible for propensity	Admissible for propensity
<i>Virginia</i>	Legal	Admissible for propensity	Inadmissible for propensity	Inadmissible for propensity
<i>Washington</i>	Unsettled	Inadmissible for propensity <sup>127</sup>	Inadmissible for propensity	Unsettled
<i>West Virginia</i>	Unsettled	Inadmissible for propensity	Inadmissible for propensity	Unsettled
<i>Wisconsin</i>	Unsettled	Admissible for propensity	Unsettled	Unsettled
<i>Wyoming</i>	Unsettled	Inadmissible for propensity	Inadmissible for propensity	Unsettled

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<sup>127</sup> Washington's 413 analogue, WASH. REV. CODE § 10.58.900 (2008), was ruled unconstitutional in 2012. *See State v. Gresham*, 269 P.3d 207 (Wash. 2012) (en banc).