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BALANCING INTERESTS UNDER WASHINGTON'S STATUTE GOVERNING THE ADMISSIBILITY OF EXTRANEOUS SEX-OFFENSE EVIDENCE

Blythe Chandler

Abstract: American courts traditionally exclude evidence that a defendant has committed crimes other than the crime with which the defendant is charged. This rule, with exceptions, is codified as Federal Rule of Evidence 404(b) and Washington Evidence Rule 404(b). However, courts and legislatures have increasingly adopted the view that evidence of other sex offenses should be admissible in sex-offense prosecutions. The Washington State Legislature recently adopted a statute, RCW 10.58.090, which governs the admissibility of evidence of other sex offenses. This Comment argues that Washington courts should use precedent applying Rule 404(b) as a guide in applying robust Rule 403 balancing under the new statute. This interpretation of the statute is consistent with its legislative history, preserves the traditional gate-keeping role of trial courts in evidence-admissibility determinations, and avoids a potential separation-of-powers question about which branch of government has ultimate authority over evidentiary rules in Washington.

INTRODUCTION

Seventy-nine-year-old Roger Scherner was tried and convicted in King County Superior Court for molesting a relative when she was seven years old.¹ Trial testimony revealed that Scherner had also molested other young girls, all of them either family members or daughters of family friends, over a period of several decades.² In addition to the victim's testimony, jurors heard four previous victims recount the abuse they had suffered as young girls.³ Their testimony was admitted under a new Washington evidence statute, section 10.58.090 of the Revised Code of Washington (RCW), which makes it easier for prosecutors to submit evidence of other sex offenses in sex-offense cases.⁴

1. Jennifer Sullivan, *Abuse Sentence Took into Account Past Accusations*, SEATTLE TIMES, Oct. 4, 2008, at B1. *State v. Scherner*, No. 07-1-00355-6 (King County Superior Court, Aug. 21, 2008) (not reported), perfection of appeal No. 62507-1 (Nov. 3, 2008).

2. Natalie Singer, *Rape Trial Lets Family Share Decades of Pain, Secrets*, SEATTLE TIMES, Aug. 19, 2008, at A1.

3. Sullivan, *supra* note 1.

4. WASH. REV. CODE § 10.58.090 (2008); *see also* Natalie Singer, *Past Abuse Acknowledged*, SEATTLE TIMES, Aug. 21, 2008, at B1.

When a defendant is charged with a sex offense, the new law allows evidence of other sex offenses to be admitted, notwithstanding the traditional bar on extraneous offense evidence. Defense attorneys who observed Scherner's trial said they expect the law will soon face challenges in Washington appellate courts.⁵ These challenges will likely question not only the applicability of the statute in cases where the evidence of other sex offenses is not as factually similar as it was in *State v. Scherner*, but also the Washington State Legislature's authority to enact rules of evidence that conflict with judicial rules.⁶

This Comment argues that Washington courts should interpret the new statute in a way that preserves the trial court's traditional gate-keeping role in evidence admissibility determinations. The statute requires trial courts to determine whether the probative value of evidence of other sex offenses is outweighed by the danger of unfair prejudice under Rule 403.⁷ Washington courts should use the Washington State Supreme Court's well-developed body of case law governing the admission of evidence of other sex offenses under Rule 404(b) to guide Rule 403 balancing under the new statute. This interpretation respects the legislature's judgment that evidence of other sex offenses is different than other types of propensity evidence. It is also consistent with the text and legislative history of the statute, and avoids difficult separation-of-powers questions about the authority of the legislature and judiciary to promulgate evidentiary rules.

Part I of this Comment reviews the general bar on evidence of other offenses in American law and exceptions specific to sex-offense cases. Part II describes Federal Rules of Evidence 413 and 414, which deal with sex-offense evidence in the federal courts, and analyzes the cases construing these rules. Part II also discusses similar evidentiary provisions enacted by states. Part III summarizes Washington law that addresses the respective powers of the Legislature and Judiciary to promulgate evidence rules. Part IV describes RCW 10.58.090 and summarizes its legislative history, while Part V describes the approach Washington courts have taken with regards to evidence of other sex

5. Singer, *supra* note 4.

6. Scholar Karl B. Tegland, anticipating a challenge to the validity of RCW 10.58.090 wrote, "[t]he issue will come down to whether the legislature has the authority to mandate the admissibility of evidence that might otherwise be barred by a rule of evidence. Further litigation on this issue seems inevitable." 5D KARL B. TEGLAND, COURTROOM HANDBOOK ON WASHINGTON EVIDENCE 246 (2008).

7. WASH. REV. CODE § 10.58.090 (2008).

offenses under Rule 404(b). Finally, Part VI argues that Washington courts should use principles from their Rule 404(b) cases to guide their analysis under the new law, which ensures meaningful Rule 403 balancing and avoids direct conflict with a court-promulgated rule.

I. COURTS HAVE MADE EXCEPTIONS TO THE
TRADITIONAL PROHIBITION ON EVIDENCE OF OTHER
BAD ACTS IN SEX-OFFENSE CASES

The prohibition on evidence of other offenses committed by a criminal defendant is deeply rooted in Anglo-American jurisprudence.⁸ This rule has created a presumption that such evidence is inadmissible despite the logical relevance of such evidence.⁹ The United States Supreme Court applied this rule in its 1892 decision in *Boyd v. United States*.¹⁰ The Court reversed the defendants' convictions because the trial court admitted evidence that the defendants committed three robberies before the murder for which they were charged.¹¹ The Court said, "However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offence charged."¹²

Courts have excluded evidence of a defendant's other offenses because they have long recognized that such evidence threatens the accuracy of trials. Jurors may give too much weight to such evidence and convict a defendant because they are convinced the defendant has a criminal character. Alternatively, jurors may convict a defendant as punishment for prior conduct, even if they are not convinced beyond a reasonable doubt that the defendant committed the crime charged.¹³ As Justice Jackson wrote for the U.S. Supreme Court in *Michelson v. United States*:

The inquiry [into the defendant's prior trouble with the law,

8. See 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 58.2 (Tiller rev., 1983).

9. The presumption against admitting evidence of other crimes distinguishes Anglo-American evidence law from that of civil-law nations. *Id.*

10. 142 U.S. 450 (1892).

11. *Id.* at 458.

12. *Id.*

13. Edward J. Imwinkelried, *A Small Contribution to the Debate Over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions*, 44 SYRACUSE L. REV. 1125, 1137-38 (1993).

specific criminal acts, or ill name among his neighbors] is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.¹⁴

Federal Rule of Evidence 404(b) codifies the ban on evidence of other wrongdoing, providing in part: “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”¹⁵ Rule 404(b) includes several exceptions to that general rule, providing that such evidence “may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”¹⁶

Accusations of sexual misconduct are particularly likely to inspire strong negative reactions in jurors.¹⁷ Despite the prejudicial nature of evidence of other sex offenses, courts have not erected absolute bars to such evidence in sex-offense prosecutions. For example, state courts developed common-law “lustful disposition” exceptions for evidence of sexual misconduct with the same victim.¹⁸ The Washington State Supreme Court adopted such an exception in 1903 in *State v. Wood*.¹⁹ *Wood* was an incest case; the trial judge had admitted testimony by the victim, the defendant’s daughter, about other acts of incest that occurred before the act for which he was charged.²⁰ The state supreme court said, “[the] general rule undoubtedly is that evidence of a distinct and different offense from that for which the defendant is on trial is inadmissible.”²¹ However, the court held that this rule did not apply in

14. 335 U.S. 469, 475–76 (1948) (internal citations omitted).

15. FED. R. EVID. 404(b).

16. *Id.* Washington Evidence Rule 404(b) contains identical provisions. WASH. R. EVID. 404(b). The majority of states have a rule that is similar or identical to Federal Evidence Rule 404(b). *See* 6 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE, T-34–T-40 (Joseph M. McLaughlin, ed., 2d ed. 2008) (Table of State and Military Adaptations of Federal Rules of Evidence).

17. *See, e.g.*, *State v. Saltarelli*, 98 Wash. 2d 358, 363, 655 P.2d 697, 699 (1982) (“[W]eighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest.”) (citing M. C. Slough & J. William Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 333–34 (1956)).

18. DAVID P. LEONARD, THE NEW WIGMORE: EVIDENCE OF OTHER MISCONDUCT AND SIMILAR EVENTS § 3.3.6 (2009).

19. 33 Wash. 290, 74 P. 380 (1903).

20. *Id.* at 291–92, 74 P. at 381.

21. *Id.* at 291, 74 P. at 381.

“prosecutions for adultery, fornication, rape upon one under the age of consent, and incest,”²² where “acts of sexual intercourse occurring between the parties prior to the act charged in the information may be proved.”²³

Washington courts have also broadly construed the common-scheme or plan exception to Washington Evidence Rule 404(b) to allow evidence of other sex offenses in sex-offense prosecutions. The common-scheme or plan exception traditionally allowed evidence of offenses that were constituent parts of a larger criminal plan.²⁴ For example, the theft of a getaway car would be admissible in a prosecution for a subsequent bank robbery. In *State v. Lough*,²⁵ the Washington State Supreme Court stated that this exception also applies when the defendant “devises a plan and uses it to perpetrate separate but very similar crimes.”²⁶ The *Lough* court, approving the trial court’s admission of evidence that Lough had committed similar assaults before, affirmed his rape conviction.²⁷ In recent years, Congress and a minority of state legislatures have codified rules permitting extraneous offense evidence in sex-offense cases.

II. IN 1994, CONGRESS CREATED NEW FEDERAL EVIDENCE RULES SPECIFIC TO SEX-OFFENSE EVIDENCE AND SOME STATES HAVE ADOPTED SIMILAR RULES

In 1994, the U.S. Congress enacted new Federal Rules of Evidence that deal exclusively with sex-offense evidence—over the objection of the federal judiciary.²⁸ Rule 413 applies to evidence of other acts of

22. *Id.* at 292, 74 P. at 381.

23. *Id.*

24. *See* *State v. Lough*, 125 Wash. 2d 847, 854–55, 889 P.2d 487, 491 (1995); *see also* ROBERT H. ARONSON, *THE LAW OF EVIDENCE IN WASHINGTON* § 404.05[2][d][iv] (2008).

25. 125 Wash. 2d 847, 889 P.2d 487 (1995).

26. *Id.* at 855, 889 P.2d at 491.

27. *Id.* at 852–53, 889 P.2d at 490.

28. The Judicial Conference of the United States objected to the rules on a number of grounds, including the concerns about “the danger of convicting a criminal defendant for past, as opposed to charged, behavior or for being a bad person.” Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases, 159 F.R.D. 51, 53 (1995). Congress enacted the original Federal Rules of Evidence in 1975. Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926 (1975). However, “Congress bypassed the ordinary rulemaking procedures” and developed Rules 413 and 414 with limited input from the judiciary. *Johnson v. Elk Lake Sch. Dist.*, 283 F.3d 138, 151 (3d Cir. 2002).

sexual assault in prosecutions for sexual assault,²⁹ and Rule 414 governs evidence of other acts of child molestation in prosecutions for child molestation.³⁰ Rules 413 and 414 provide that “evidence of the defendant’s commission of another offense or offenses of sexual assault [or child molestation] is admissible, and may be considered for its bearing on any matter to which it is relevant.”³¹ Federal circuit courts have upheld the rules against both equal-protection and due-process challenges.³²

Before admitting evidence of other offenses, federal courts evaluate the strength of that evidence. Under *Huddleston v. United States*,³³ federal courts consider extraneous offense evidence under Rule 104(b), which requires only that a reasonable fact-finder could find that the extraneous act occurred.³⁴ Circuit courts have applied this rule to preliminary admissibility determinations under Rules 413 and 414.³⁵

Federal courts have held that Rule 403 applies to evidence offered under Rules 413 and 414, but with less force than to evidence offered under other rules. Neither Rule 413 nor Rule 414 mentions Rule 403 balancing.³⁶ Yet, in *United States v. LeCompte*,³⁷ where the defendant was charged with molesting his niece, the district court applied Rule 403

29. FED. R. EVID. 413.

30. *Id.* 414. Congress also adopted Rule 415, which governs the admissibility of other sex-offense evidence in civil cases. *Id.* 415.

31. *Id.* 413(a); *id.* 414(a).

32. *See, e.g.*, *United States v. Julian*, 427 F.3d 471, 487 (7th Cir. 2005); *United States v. LeMay*, 260 F.3d 1018, 1024–31 (9th Cir. 2001); *United States v. Mound*, 149 F.3d 799, 801 (8th Cir. 1998); *United States v. Enjady*, 134 F.3d 1427, 1430–34 (10th Cir. 1998); *United States v. Castillo*, 140 F.3d 874, 883 (10th Cir. 1998). The Supreme Court has denied certiorari in cases involving admission of evidence under Rules 413 and 414. This Comment assumes that Washington’s new evidence statute would also survive federal-constitutional review. Analogous potential state-constitutional challenges are also outside the scope of this Comment.

33. 485 U.S. 681 (1988).

34. *Id.* at 689–90. Washington courts take a stronger view of the judiciary’s gate-keeping function and evaluate such evidence under Rule 104(a), which requires that a prosecutor establish by a preponderance of the evidence that the alleged other act occurred. *See infra* note 147 and accompanying text.

35. *Enjady*, 134 F.3d at 1433. For a more complete discussion of this issue see *Johnson v. Elk Lake School District*, 283 F.3d 138, 155 (3d Cir. 2002).

36. FED. R. EVID. 413; *id.* 414. There was initially doubt among commentators and courts about whether Rule 403 balancing applied to Rules 413 and 414. *See, e.g.*, *United States v. Sumner*, 119 F.3d 658, 661 (8th Cir. 1997) (reversing district court ruling against admission of evidence under Rule 414 based on conclusion that the Rule is unconstitutional in part because it did not allow “for the application of the Rule 403 balancing test”).

37. 131 F.3d 767 (1997).

to exclude testimony by a second niece that he had molested her as well.³⁸ The Eighth Circuit Court of Appeals reversed. The circuit court acknowledged that Rule 403 applies, but held that the district court abused its discretion by excluding the evidence, based on “the strong legislative judgment that the evidence of prior sexual offenses should ordinarily be admissible.”³⁹ The Tenth Circuit agreed, asserting that “exclusion of relevant evidence [of other sex offenses] under Rule 403 should be used infrequently, reflecting Congress’ legislative judgment that the evidence ‘normally’ should be admitted.”⁴⁰

Commentators have criticized the way that federal courts have applied Rules 413 and 414. Professor Aviva Orenstein characterizes the Rule 403 balancing test that federal courts have applied to evidence offered under Rules 413 and 414 as “toothless and ineffectual.”⁴¹ Professor Rosanna Cavallaro describes the federal courts as applying a “diluted” version of Rule 403.⁴² She argues that admission of evidence under Rules 413 and 414 should be “constrained by a robust application of Rule 403.”⁴³

A handful of states have adopted rules similar to Rules 413 and 414. Alaska,⁴⁴ Arizona,⁴⁵ California,⁴⁶ Florida,⁴⁷ Illinois,⁴⁸ Iowa,⁴⁹ Louisiana,⁵⁰ and Missouri⁵¹ have rules specifically permitting the admission of some evidence of other sex offenses in sex-offense

38. *Id.* at 768–69.

39. *Id.* at 769.

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

41. Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rules of Evidence 403*, 90 CORNELL L. REV. 1487, 1491 (2005).

42. Rosanna Cavallaro, *Federal Rules of Evidence 413–415 and the Struggle for Rulemaking Preeminence*, 98 J. CRIM. L. & CRIMINOLOGY 31, 69 (2007).

43. *Id.* at 70.

44. ALASKA R. EVID. 404(b)(2)–(3).

45. ARIZ. R. EVID. 404(c).

46. CAL. EVID. CODE § 1108 (West Supp. 2009).

47. FLA. STAT. ANN. § 90.404(2) (West Supp. 2009) (allowing for admission of evidence of prior acts of child molestation when a defendant is charged with child molestation).

48. 725 ILL. COMP. STAT. ANN. 5/115-7.3 (West 2008).

49. IOWA CODE ANN. § 701.11 (West Supp. 2008).

50. LA. CODE EVID. ANN. art. 412.2 (2006) (only applies to prosecutions for sexual misconduct with a victim under the age of seventeen).

51. MO. ANN. STAT. § 566.025 (West 1999 & Supp. 2009). This statute was held unconstitutional in *State v. Ellison*, 239 S.W.3d 603 (Mo. 2007).

prosecutions.⁵² State high courts have generally upheld these rules against constitutional challenge, although Missouri⁵³ has struck down its rule and Florida⁵⁴ has limited the scope of its rule. In 2008, Washington joined the states that have codified a rule specific to sex-offense evidence in sex-offense prosecutions, with the enactment of RCW 10.58.090.

III. BOTH THE WASHINGTON STATE LEGISLATURE AND SUPREME COURT HAVE ASSERTED THE POWER TO CREATE RULES OF EVIDENCE

The Washington State Legislature's enactment of RCW 10.58.090 was unusual because the Washington State Supreme Court has promulgated most Washington evidence rules. Whether the legislature or the judiciary has ultimate authority over evidence rules, and which rule governs if the two bodies promulgate conflicting rules, are unresolved questions in Washington.

A. *The Washington State Supreme Court Initially Adopted the Washington Rules of Evidence*

The Washington State Supreme Court adopted the Washington Evidence Rules by court order in 1978,⁵⁵ after Chief Justice Stafford

52. Oregon Evidence Rule 404(4) makes evidence of "other crimes, wrongs or acts" committed by the defendant admissible if relevant, except as otherwise provided by other evidence rules, or required by the Oregon or United States Constitution. OR. REV. STAT. § 40.170 (2001). Oregon courts of appeals have interpreted this rule as prohibiting Rule 403 balancing of evidence of other offenses that is offered for a non-propensity purpose unless such balancing is required by due process. *See, e.g., State v. Wyant*, 175 P.3d 988, 991 (Or. Ct. App. 2007). This statute does not create a special rule for sex-offense evidence. Texas has a rule that allows evidence of other "crimes, wrongs or acts committed by the defendant" against the same child who is the victim of the charged offense. TEX. CODE CRIM. PROC. ANN. art. 38.37 (Vernon 2005 & Supp. 2008).

53. Missouri is a notable exception. The state supreme court in *State v. Ellison*, 239 S.W.3d 603, 608 (Mo. 2007), struck down Missouri's statute as unconstitutional on the grounds that evidence of the defendant's prior criminal acts admitted purely to show propensity "violates one of the constitutional protections vital to the integrity of our criminal justice system."

54. *See McLean v. State*, 934 So. 2d 1248, 1262 (Fla. 2006) (extending precedent to Florida's rule governing evidence of other sex offenses and requiring: (1) the trial court to find the other offenses have been proved by clear and convincing evidence, (2) the trial court to use factors including "the similarity of the prior acts to the act charged regarding the location of where the acts occurred, the age and gender of the victims, and the manner in which the acts were committed," and (3) the trial court to guard against allowing testimony regarding other offenses becoming a "feature of the trial").

55. Adoption of Rules of Evidence, 91 Wash. 2d 1117 (1978).

appointed a Judicial Council Task Force to study whether or not Washington should adopt written evidence rules.⁵⁶ The members of the Task Force discussed whether the rules should be created by statute or court rule,⁵⁷ and ultimately opted for court rule, grounding their decision in the judiciary's inherent constitutional powers.⁵⁸ The Task Force recommended that Washington adopt a set of rules based on (but not identical to) the Federal Rules.⁵⁹ The judiciary has generally overseen amendments to the Washington Rules of Evidence since then.⁶⁰

B. Washington Case Law Provides No Clear Answers as to Which Branch of the Government Has Ultimate Authority over Evidence Rules

The Washington State Supreme Court has determined that article IV, section 1 of the state constitution⁶¹ gives it the inherent authority to create rules of court procedure.⁶² The court's authority to create rules is also recognized in the Revised Code of Washington:

The supreme court shall have the power to prescribe, from time to time, . . . the mode and manner . . . of taking and obtaining evidence, . . . and generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits . . . by the supreme court, superior courts, and district courts of the state . . . to

56. Karl B. Tegland, *The Proposed Rules of Evidence: An Opportunity for Codification*, WASH. STATE BAR NEWS, Jan. 1979, at 28, 28. Mr. Tegland served as the reporter for Judicial Council Task Force. *Id.*

57. *Id.* at 30–31.

58. See WASH. CONST. art. IV, § 1; Tegland, *supra* note 56, at 30–31.

59. Tegland, *supra* note 56, at 28.

60. The Washington State Supreme Court adopts new court rules under a process described in General Rule 9. General Rule 9 states that any person or group may propose an amendment to the court rules or a new court rule and describes the form such submissions should take. WASH. CT. R. 9(c) & (d). General Rule 9 also describes the court's process for reviewing such rules, which includes a public comment period for any rules making "significant" (meaning non-technical) changes. *Id.* 9(f) & (g). It also provides a schedule for proposal, consideration, and adoption of new rules.

61. Article IV, § 1 provides, "[t]he judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide." WASH. CONST. art. IV, § 1.

62. *State v. Fields*, 85 Wash. 2d 126, 129, 530 P.2d 284, 285–86 (1975) (holding that art. IV, § 1 gave the court such inherent power "quite apart" from statutory authority and that this power included the ability to enact criminal rules authorizing the issuance of a search warrant because issuance of a search warrant is part of criminal process).

promote the speedy determination of litigation on the merits.⁶³

Nonetheless, the court has acknowledged the legislature's authority to create rules of evidence. In *State v. Sears*,⁶⁴ the court said in dictum that the legislature has the power to enact rules of evidence.⁶⁵ The trial court had entered judgment against Sears for five violations of the Unfair Practices Act.⁶⁶ Sears argued on appeal that the Act violated provisions of both the state and federal constitutions, and that various terms used in the Act, including the term "cost survey," were too vague and uncertain to be sustained.⁶⁷ The Act provided that a "cost survey," established by the defendant's trade or industry "shall be deemed competent evidence to be used in proving" a violation.⁶⁸ The court rejected Sears' argument: "It may be admitted that the term 'cost survey' is not as definite as it might be *It is also apparent that all the statute does, or was intended to do, is to create a rule of evidence, which of course the legislature may do.*"⁶⁹

The court has also said that the legislature has authority over "substantive law,"⁷⁰ and has made a qualified statement that rules of evidence are substantive law.⁷¹ In *State v. Pavelich*,⁷² the defendants had been convicted of operating a speakeasy.⁷³ Pavelich appealed on the grounds that the trial court had erred by failing to give an instruction that no inference of guilt could be drawn from the defendants' decision not to testify in the case.⁷⁴ Pavelich had not requested the instruction.⁷⁵ A

63. WASH. REV. CODE § 2.04.190 (2008).

64. 4 Wash. 2d 200, 103 P.2d 337 (1940).

65. *Id.* at 215, 103 P.2d at 344.

66. *Id.* at 203, 103 P.2d at 339. The trial court had entered a judgment on the pleadings in favor of the plaintiff after the defendant demurred to the complaint, arguing that it failed to state a cause of action. When the trial court overruled the demurrer, the defendant opted to stand on his demurrer. See also Unfair Practices Act, 1939 Wash. Sess. Laws 923 (regulating unfair business practices).

67. *Sears*, 4 Wash. 2d at 208–10, 103 P.2d at 341–42.

68. *Id.* at 214, 103 P.2d at 344; 1939 Wash. Sess. Laws at 927–28.

69. *Sears*, 4 Wash. 2d at 214–15, 103 P.2d at 344 (emphasis added). For a similar statement that the state may create a cause of action and include in the law provisions regarding evidence, see *Folden v. Robinson*, 58 Wash. 2d 760, 766, 364 P.2d 924, 928 (1961).

70. The court has said that the legislature has authority over "substantive law" and the court has authority over "procedural law." *Emright v. King County*, 96 Wash. 2d 538, 540, 637 P.2d 656, 658 (1981).

71. *State v. Pavelich*, 153 Wash. 379, 380, 279 P. 1102, 1102 (1929).

72. *Id.* at 379, 279 P. at 1102.

73. *Id.* at 380, 279 P. at 1102.

74. *Id.*

75. *Id.*

statute made it “the duty of the court to instruct the jury that no inference of guilt shall arise” against a defendant who does not testify,⁷⁶ which courts had interpreted to require such an instruction even if the defendant did not ask for it.⁷⁷ A court rule abrogated the requirement that courts give the instruction without a request by the defendant.⁷⁸ While holding that Pavelich’s failure to request an instruction defeated his claim, the court said, “*Rules of evidence are substantive law*, found in the common law chiefly, and growing out of the reasoning, experience, and common sense of lawyers and courts.”⁷⁹

The court described itself as the final arbiter of evidentiary rules in a case dealing with an evidence rule created by the legislature. In *State v. Ryan*,⁸⁰ the defendant appealed his conviction for committing indecent liberties with two children, objecting to hearsay statements by both victims that were admitted under a child-hearsay statute.⁸¹ The defendant argued that the legislature had violated the separation-of-powers doctrine by invading the judicial province.⁸² The court’s discussion of the separation-of-powers issue contains assertions of judicial authority over evidence rules:

Where a rule of court is inconsistent with a procedural statute, the court’s rulemaking power is supreme. Nonetheless, apparent conflicts between a court rule and a statutory provision should be harmonized, and both given effect if possible.

Legislative enactment of hearsay exceptions is specifically contemplated by the Rules of Evidence. [Rule] 802 states: “Hearsay is not admissible except as provided by these rules, by other court rules, or *by statute*.” Nevertheless, statutory enactments of evidentiary rules are subject to judicial review, this court being the final arbiter of evidentiary rules.⁸³

76. Wash. Rem. & Bal. Code § 2148 (1915).

77. *Pavelich*, 153 Wash. at 385–86, 279 P. at 1104 (citing *Linbeck v. State*, 1 Wash. 336, 25 P. 452 (1890), *reaff’d*, *State v. Meyers*, 8 Wash. 177, 35 P. 580 (1894)).

78. *Pavelich*, 153 Wash. at 386, 279 P. at 1104–05. The court rule at issue was Rule 9. 140 Wash. xli (1926).

79. *Pavelich*, 153 Wash. at 382, 279 P. at 1103 (emphasis added).

80. 103 Wash. 2d 165, 691 P.2d 197 (1984). *Ryan* was decided after the court codified the Washington Rules of Evidence. *See supra* note 55 and accompanying text.

81. *Id.* at 167, 691 P.2d 197. The child hearsay statute at issue in *Ryan* was WASH. REV. CODE § 9A.44.120 (1983).

82. *Ryan*, 103 Wash. 2d at 169, 691 P.2d at 201.

83. *Id.* at 178, 691 P.2d at 206 (emphasis in original) (citations omitted).

However, the court interpreted the statute to include the constitutional requirements under the Confrontation Clause of “unavailability”⁸⁴ of the declarant and “reliability” of the statement.⁸⁵ The court held that the admission of the hearsay testimony was improper because neither requirement was met.⁸⁶

The court’s interpretation of the child-hearsay statute allowed it to avoid the issue of whether the legislature has the power to enact an evidentiary rule that is inconsistent with one created by the judiciary. The court reversed Ryan’s conviction because, other than his confession, the hearsay statements were the only evidence that a crime had occurred. Without the hearsay statements there was insufficient evidence to sustain a conviction under the corpus delicti rule.⁸⁷

IV. THE LEGISLATIVE HISTORY OF RCW 10.58.090 EMPHASIZES RULE 403 AND RETREATS FROM THE FEDERAL RULES AND ASSERTIONS OF LEGISLATIVE POWER

RCW 10.58.090, which the Washington State Legislature adopted with near unanimity,⁸⁸ provides: “In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant’s commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.”⁸⁹ “Sex offense” is defined by other provisions of the Washington Code,⁹⁰ and expressly includes

84. *Id.* at 170, 691 P.2d at 202.

85. *Id.* at 170, 691 P.2d at 202.

86. *Id.* at 170–77, 691 P.2d 202–06 (applying the constitutional rule of *Ohio v. Roberts*, 448 U.S. 56 (1980)).

87. *Id.* at 178, 691 P.2d at 206. Under Washington’s corpus delicti rule, a conviction cannot be sustained on the basis of the defendant’s confession alone; some additional corroborative evidence is required. *Id.* at 177–78, 691 P.2d at 206.

88. Substitute Senate Bill 6933 passed the Senate by a vote of 47-0 and passed the House by a vote of 91-5. Certification of Enrollment, Sub. S. 6933, 60th Leg., 2008 Reg. Sess. (Wash. 2008), available at <http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bills/Senate%20Passed%20Legislature/6933-S.PL.pdf>, permanent copy available at <http://www.law.washington.edu/wlr/notes/84washrev259n88.pdf>.

89. Sex Offenses—Admissibility of Evidence, ch. 90, 2008 Wash. Sess. Laws 412.

90. Section 4 of the statute provides: “For purposes of this section, ‘sex offense’ means: Any offense defined as a sex offense under RCW 9.94A.030; Any violation under RCW 9A.44.096 (sexual misconduct with a minor in the second degree; and Any violation under RCW 9.68A.090

uncharged conduct.⁹¹ The definition encompasses many different offenses, including rape in the first, second, or third degree;⁹² rape of a child in the first, second, or third degree;⁹³ child molestation in the first, second, or third degree;⁹⁴ sexual misconduct with a minor in the first or second degree;⁹⁵ indecent liberties;⁹⁶ sexually violating human remains;⁹⁷ voyeurism;⁹⁸ custodial sexual misconduct in the first degree;⁹⁹ criminal trespass against children;¹⁰⁰ incest in the first or second degree;¹⁰¹ sexual exploitation of a minor;¹⁰² dealing in depictions of a minor engaged in sexually explicit conduct;¹⁰³ sending or bringing into state depictions of a minor engaged in sexually explicit conduct;¹⁰⁴ possession of depictions of a minor engaged in sexually explicit conduct;¹⁰⁵ communication with a minor for immoral purposes;¹⁰⁶ commercial sexual abuse of a minor;¹⁰⁷ and criminal attempt, criminal solicitation, or criminal conspiracy to commit any of the included crimes.¹⁰⁸

The statute instructs courts to weigh a variety of factors when deciding whether evidence that a defendant has committed another sex offense is admissible under Rule 403:

(communication with a minor for immoral purposes).” *Id.* § 10.58.090(4). A conviction under another state’s law, or under federal law, for conduct that would constitute a Washington “sex offense” is included within the definition. *Id.* § 9.94A.030(46)(d) (including in the definition of sex offense “[a]ny federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection”).

91. *Id.* § 10.58.090(5).

92. *Id.* §§ 9A.44.040, 9A.44.050, 9A.44.060.

93. *Id.* §§ 9A.44.073–079.

94. *Id.* §§ 9A.44.083–089.

95. *Id.* §§ 9A.44.093–096.

96. *Id.* § 9A.44.100.

97. *Id.* § 9A.44.105.

98. *Id.* § 9A.44.115.

99. *Id.* § 9A.44.160.

100. *Id.* § 9A.44.196.

101. *Id.* § 9A.64.020.

102. *Id.* § 9.68A.040.

103. *Id.* § 9.68A.050.

104. *Id.* § 9.68A.060.

105. *Id.* § 9.68A.070.

106. *Id.* § 9.68A.090.

107. *Id.* § 9.68A.100.

108. *Id.* § 9A.28.

- (a) The similarity of the prior acts to the acts charged;¹⁰⁹
- (b) The closeness in time of the prior acts to the acts charged;
- (c) The frequency of the prior acts;
- (d) The presence or lack of intervening circumstances;
- (e) The necessity of the evidence beyond the testimonies already offered at trial;¹¹⁰
- (f) Whether the prior act was a criminal conviction;¹¹¹
- (g) Whether the 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; and
- (h) Other facts and circumstances.¹¹²

Factor (g) contains language identical to the language of Rule 403.¹¹³ The statute does not provide any guidance as to how courts should weigh the eight factors, and does not address what courts should do when some factors point toward admission while others point toward exclusion.¹¹⁴

109. This reference to “prior” acts may be inconsistent with the statute’s provision that evidence of the defendant’s commission of “another sex offense or sex offenses” is admissible under the statute. *Id.* § 10.58.090(1) (emphasis added). The difference between “another sex offense” and “prior acts” is significant: in *United States v. Sioux*, the Ninth Circuit upheld the admission of evidence of the defendant’s acts committed *after* the charged crime, in part because Federal Evidence Rules 413 and 414 both refer to evidence of “another offense or offenses.” 362 F.3d 1241, 1245 (9th Cir. 2004).

110. Factors (a)–(e) mirror the language of the factors that the Ninth Circuit instructed trial courts to consider when determining the admissibility of evidence under Federal Evidence Rules 413–15. *See United States v. LeMay*, 260 F.3d 1018, 1028 (9th Cir. 2001); *Doe by Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1268 (9th Cir. 2000). Some of these factors are also similar to factors that the Judicial Conference of the United States included in a proposed alternative to Rules 413–15. Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases, 159 F.R.D. 51, 54–55 (1995).

111. Although the statute specifically includes “uncharged” conduct in the definition of sex offense, it is unclear whether conduct for which the defendant has been acquitted may be admitted. The U.S. Supreme Court has held that evidence of acts for which a defendant has been acquitted is not necessarily barred in a subsequent prosecution because of double jeopardy. *United States v. Dowling*, 493 U.S. 342, 348 (1990). Washington cases are in accord. *See, e.g., State v. Eggleston*, 164 Wash. 2d 61, 187 P.3d 233 (2008).

112. WASH. REV. CODE § 10.58.090(6) (2008).

113. Rule 403 reads: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” WASH. R. EVID. 403.

114. *See* WASH. REV. CODE § 10.58.090.

However, three patterns in the legislative history of the statute are useful in interpreting the statute. Specifically, the legislature removed references to Federal Evidence Rules 413 and 414, emphasized the importance of Rule 403 balancing, and moderated assertions of legislative power over the evidence rules.

A. *The Legislative History of RCW 10.58.090 Shows the Legislature’s Movement Away from Federal Rules 413 and 414 and Toward Rule 403 Balancing*

The Washington State Legislature considered and abandoned a pair of draft bills governing sex-offense evidence, then introduced a new bill,¹¹⁵ which was further amended before adoption in 2008.¹¹⁶ The textual differences between these subsequent drafts of the bill that eventually became RCW 10.58.090 provide insight into the legislature’s intent in adopting the statute.¹¹⁷

The two draft bills contained a section expressly stating that the new law was “based upon Federal Rules of Evidence 413 and 414, and federal appellate court cases construing those rules.”¹¹⁸ As passed, the statute does not contain a single reference to the Federal Rules of Evidence, or the cases interpreting them.¹¹⁹ In fact, the legislative history

115. S. 6933, 60th Leg., 2008 Reg. Sess. (First Reading, Feb. 7, 2008) (Wash. 2008).

116. Senate Bill 6933 was replaced with Substitute Senate Bill 6933, 60th Leg., 2008 Reg. Sess. (First Reading Feb. 8, 2008), which was amended twice. 6933-S AMH JUDI ZARO 021 (adopted Mar. 5, 2008), *available at* <http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Amendments/House/6933-S%20AMH%20JUDI%20ZARO%20021.pdf>, *permanent copy available at* <http://www.law.washington.edu/wlr/notes/84washrev259n116a.pdf>; 6933-S AMH JUDI ZARO 019 (adopted Mar. 5, 2008), *available at* <http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Amendments/House/6933-S%20AMH%20JUDI%20ZARO%20019.pdf>, *permanent copy available at* <http://www.law.washington.edu/wlr/notes/84washrev259n116b.pdf>.

117. The Washington State Supreme Court has used subsequent drafts of legislation to determine legislative intent. *See, e.g., In re the Marriage of Kovacs*, 121 Wash. 2d 795, 804–08, 854 P.2d 629, 634–36 (1993).

118. S. 6363 § 3(1), 60th Leg., 2008 Reg. Sess. (Wash. 2008); H.R. 2622 § 3(1), 60th Leg., 2008 Reg. Sess. (Wash. 2008).

119. *Compare* S. 6363, 60th Leg., 2008 Reg. Sess. (First Reading, Feb. 7, 2008) (Wash. 2008), H.R. 2622 § 2(8) (Wash. 2008) *with* Sex Offenses—Admissibility of Evidence, ch. 90, 2008 Wash. Sess. Laws 412. *See also*, 6933-S AMH JUDI ZARO 021 (adopted Mar. 5, 2008), *available at* <http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Amendments/House/6933-S%20AMH%20JUDI%20ZARO%20021.pdf>, *permanent copy available at* <http://www.law.washington.edu/wlr/notes/84washrev259n119.pdf> (amending the Substitute S. 6933 to remove references to the Federal Rules of Evidence and cases construing them). The Final Bill Report does retain a minor reference to Federal Rules 413 and 414 and states that there are

of the statute suggests that legislators preferred to leave its interpretation to Washington courts. House Judiciary Committee Chairwoman Pat Lantz said references to the Federal Rules and cases construing them were not needed because the state supreme court has its own way of deciding when federal rules and decisions are “germane.”¹²⁰

Unlike Federal Evidence Rules 413 and 414, the draft bills required the application of Rule 403 to evidence offered under the statute.¹²¹ However, the draft bills significantly limited a trial court’s discretion under Rule 403 by providing that “[t]he inflammatory potential inherent in the sexual nature of prior sex offenses cannot be considered in evaluating the admissibility of evidence under this section.”¹²² This language never appeared in the new bill.¹²³ Legislators provided a list of factors that courts must consider when performing the Rule 403 balancing test but left trial courts free to determine the potential for prejudice associated with the introduction of evidence of other sex offenses.¹²⁴

B. The Legislature Replaced Broad Assertions of Legislative Power to Enact Evidence Rules in the Draft Bills with More Moderate Statements in the Final Statute

Textual differences between draft bills and the bill that the legislature finally adopted, as well as statements by legislators and members of the judiciary, demonstrate that the legislature was concerned about intruding on the power of the judiciary when they adopted the bill. The draft bills asserted, “It is now apparent that with respect to substantive rules of evidence related to criminal proceedings, the legislative process is better suited to address concerns raised by the general public than is the court

federal appellate court cases construing the rules. Sub. S. 6933, Final Bill Report, at 1 (2008), available at <http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bill%20Reports/Senate%20Final/6933-S.FBR.pdf>, permanent copy available at <http://www.law.washington.edu/wlr/notes/84washrev259n119.pdf>.

120. *Executive Session on S. 6933, H. Judiciary Comm.*, 60th Leg., 2008 Reg. Sess. (Feb. 28, 2008) (statement of Rep. Pat Lantz in support of amendment 6933-S AMH JUDI ZARO 021), available at <http://www.tvw.org/media/mediaplayer.cfm?evid=2008021272&TYPE=V&CFID=1185621&CFTOKEN=93536292&bhcp=1> at 1:02:00.

121. *See supra* note 36 and accompanying text; S. 6363 § 1, 60th Leg., 2008 Reg. Sess. (Wash. 2008); H.R. 2622 § 1, 60th Leg., 2008 Reg. Sess. (Wash. 2008).

122. *Id.*

123. S. 6933, 60th Leg., 2008 Reg. Sess. (First Reading, Feb. 7, 2008) (Wash. 2008).

124. *See Sex Offenses—Admissibility of Evidence*, ch. 90, 2008 Wash. Sess. Laws 412.

rule process.”¹²⁵ The draft bills cited *State v. Sears*¹²⁶ and *State v. Pavelich*¹²⁷ as legal authority for the proposition that the legislature’s authority extends to enacting rules of evidence because the Court has categorized rules of evidence as substantive law.¹²⁸ The draft bills also would have amended RCW 2.04.200, which provides that “[w]hen and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect,”¹²⁹ by adding a single clause: “unless the law in conflict expressly states an intent to supercede a rule of court.”¹³⁰ Subsequent drafts of the bill show the legislature retreating from absolute statements of legislative authority to create evidence rules.

It is likely that at least one reason for this change was the Washington legal establishment’s opposition to Senate Bill 6933. Distinguished members of the legal community argued that the legislature should defer to the court’s rule-making process to address the issue of evidence of other sex offenses.¹³¹ Chief Justice Gerry Alexander wrote a letter to the chairman of the Senate Judiciary Committee, asking that the matter be left to the courts:

While the substitute bill [SB 6933] represents an improvement over the original legislation, SB 6363, the judiciary remains very concerned with moving this legislation forward without a broader conversation. This is a very controversial issue, with strong opinions on both sides of the argument, and we strongly feel that the appropriate avenue for a discussion of this nature is

125. S. 6363 § 1, 60th Leg., 2008 Reg. Sess. (Wash. 2008); H.R. 2622 § 1, 60th Leg., 2008 Reg. Sess. (Wash. 2008).

126. 4 Wash. 2d 200, 103 P.2d 337 (1940). *See supra* Part III.

127. 153 Wash. 379, 279 P. 1102 (1929). *See supra* Part III.

128. S. 6363 § 1, 60th Leg., 2008 Reg. Sess. (Wash. 2008); H.R. 2622 § 1, 60th Leg., 2008 Reg. Sess. (Wash. 2008) (“The legislature’s authority for enacting rules of evidence arises from the Washington supreme court’s prior classification of such rules as substantive law. *See State v. Sears*, 4 [Wash.] 2d 200, 215, 103 P.2d 337 (1940) (the legislature has the power to enact laws which create rules of evidence); *State v. Pavelich*, 153 Wash. 379, 279 P. 1102 (1929) (‘rules of evidence are substantive law.’)”).

129. WASH. REV. CODE § 2.04.200 (2008).

130. S. 6363 § 4, 60th Leg., 2008 Reg. Sess. (Wash. 2008); H.R. 2622 § 4, 60th Leg., 2008 Reg. Sess. (Wash. 2008).

131. Representatives of the Board of Judicial Administration and the Washington State Bar Association testified in opposition to the bill. Substitute S. 6933 Senate Bill Report, at 3 (2008); Substitute S. 6933 House Bill Report, at 5 (2008). For a description of the court’s rulemaking process see *supra* note 60.

through the court's rulemaking process.¹³²

Chief Justice Alexander concluded, "While consideration of this issue may be appropriately before the state legislature, it is our view that the proponents of this legislation should first attempt to work through the rulemaking process pursuant to General Rule 9."¹³³

Comments by members of the House and Senate Judiciary Committees demonstrate that they were also concerned about intruding upon the power of the judiciary. House Judiciary Committee Chairwoman Pat Lantz expressed concern about "stepping on what clearly has been for the most part a court function to develop rules."¹³⁴ Senator Chris Marr, a member of the Senate Judiciary Committee and a bill sponsor,¹³⁵ told the House Judiciary Committee that the final bill reflected the intent to ensure the legislation did not "unintentionally diminish the court's rule-making authority."¹³⁶

Senator Marr was referring to differences between the draft bills and final bill. While the draft bills included broad assertions of legislative authority over "substantive rules of evidence" and amendments to RCW 2.04.200,¹³⁷ the session law contains a brief statement of legislative and judicial authority over evidence rules: "the legislature and the courts share the responsibility for enacting rules of evidence."¹³⁸

In sum, RCW 10.58.090 applies to evidence of other sex offenses

132. Letter from Chief Justice Gerry Alexander to Sen. Adam Kline, re: SB 6933—Changing rules concerning the admissibility of evidence in sex offense cases (Feb. 7, 2008) (included in Senate Bill file).

133. *Id.*

134. *Executive Session on S. 6933, H. Judiciary Comm.*, 60th Leg., 2008 Reg. Sess. (Feb. 28, 2008) (statement of Rep. Pat Lantz in support of amendment 6933-S AMH JUDI ZARO 021), available at <http://www.tvw.org/media/mediaplayer.cfm?evid=2008021272&TYPE=V&CFID=1185621&CFTOKEN=93536292&bhcp=1> at 1:07:00.

135. Senator Marr sponsored both the Senate draft bill and the final bill. S. 6363 60th Leg., 2008 Reg. Sess. (Wash. 2008); S. 6933, 60th Leg., 2008 Reg. Sess. (Wash. 2008) (First Reading Feb. 7, 2008).

136. *Hearing on S. 6933 Before the H. Judiciary Comm.*, 60th Leg., 2008 Reg. Sess. (Feb. 27, 2008) (statement of Sen. Chris Marr in support of S. 6933), available at <http://www.tvw.org/media/mediaplayer.cfm?evid=2008021234&TYPE=V&CFID=1185621&CFTOKEN=93536292&bhcp=1> at 1:04:25.

137. *See supra* notes 125–130 and accompanying text.

138. Sex Offenses—Admissibility of Evidence, ch. 90, § 1, 2008 Wash. Sess. Laws 412 ("In Washington, the legislature and the courts share the responsibility for enacting the rules of evidence. . . . [t]he legislature's authority for enacting rules of evidence arises from the Washington supreme court's prior classification of such rules as substantive law.").

offered in a wide range of sex-offense prosecutions.¹³⁹ Under the statute, relevant evidence of other sex offenses is admissible, as long as it passes the balancing test under Rule 403.¹⁴⁰ The statute's express reference to Rule 403 differentiates RCW 10.58.090 from Federal Rules of Evidence 413 and 414.¹⁴¹ The legislative history of the statute also demonstrates the drafters' movement away from the federal rules and the cases construing them.¹⁴² Those cases provide for the introduction of evidence of other offenses upon the trial court's conclusion that a reasonable finder-of-fact could conclude that the other offenses occurred¹⁴³ and have applied a "toothless" version of Rule 403.¹⁴⁴ The legislative history of the statute also demonstrates the legislature's awareness of the separation-of-powers concerns that its enactment of the statute raises.¹⁴⁵

V. WASHINGTON COURTS HAVE DEVELOPED A NUANCED BODY OF LAW UNDER RULE 404(b) GOVERNING EVIDENCE OF OTHER SEX OFFENSES

The Washington State Supreme Court has developed a considerable body of case law dealing with extraneous sex-offense evidence in sex-offense prosecutions under Rule 404(b). The Court set out a four-part test for admission of evidence of other sex offenses in *State v. Lough*:

To admit evidence of other crimes or wrongs under Washington law, the trial court must (1) identify the purpose for which the evidence is sought to be introduced, (2) determine whether the evidence is relevant to prove an element of the crime charged and (3) weigh the probative value of the evidence against its prejudicial effect. Additionally, the party offering the evidence of prior misconduct has the burden of proving by a preponderance of the evidence that the misconduct actually occurred.¹⁴⁶

139. WASH. REV. CODE § 10.58.090 (2008); *see supra* notes 90–108 and accompanying text.

140. WASH. REV. CODE § 10.58.090 (2008); *see supra* note 89 and accompanying text.

141. FED. R. EVID. 413; *id.* 414; *see supra* notes 36 & 89 and accompanying text.

142. *See supra* notes 118–124 and accompanying text.

143. *United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998); *see supra* notes 33–35 and accompanying text.

144. Orenstein, *supra* note 41, at 1491; *see supra* notes 41–43 and accompanying text.

145. *See supra* Part III (discussing the unresolved question of whether Washington's legislature or judiciary has ultimate authority over the rules of evidence); *supra* Part IV.B (describing the legislature's move toward more moderate assertions of authority over the rules of evidence).

146. *Lough*, 125 Wash. 2d at 853, 889 P.2d at 490 (internal citations omitted).

The requirement that the prosecution demonstrate by a preponderance of the evidence that the defendant actually committed the other offense before evidence of that offense is allowed before a finder of fact is well established in Washington.¹⁴⁷ If this requirement is met, then a trial court will identify the purpose for which the evidence is being offered. If the evidence is relevant for that purpose, the trial court will conduct Rule 403 balancing on the record.¹⁴⁸ Under Rule 403, the trial court will admit relevant evidence of another offense unless its probative value is substantially outweighed by the danger of unfair prejudice.¹⁴⁹

Washington courts have admitted evidence of other sex offenses in sex-offense prosecutions for three purposes: (1) to prove that it was the defendant who attacked the victim; (2) to prove that the assault on the complaining victim actually occurred;¹⁵⁰ and (3) to refute a defense of accident or mistake. These categories are based on Rule 404(b) exceptions for identity, common scheme or plan, and absence of mistake, respectively.¹⁵¹

A. *Washington Courts Evaluate Evidence of Another Sex Offense Offered to Prove Identity Under the Modus Operandi Exception*

When evidence of other sex offenses or sexual conduct is offered to prove identity, Washington courts consider it under the modus operandi exception.¹⁵² Evidence of other sex offenses is admissible under this exception if the way the other sex offense was committed is unique and very similar to the way the crime charged was committed.¹⁵³ *State v. Coe*¹⁵⁴ illustrates both requirements. In *Coe*, the Washington State

147. See, e.g., *State v. Foxhoven*, 161 Wash. 2d 168, 175, 163 P.3d 786, 789–90 (2007); *State v. Thang*, 145 Wash. 2d 630, 642, 41 P.3d 1159, 1165 (2002); *State v. Norlin*, 134 Wash. 2d 570, 577, 951 P.2d 1131, 1134 (1998); *State v. Benn*, 120 Wash. 2d 631, 653, 845 P.2d 289, 302 (1993). This is in contrast to the federal practice, where extraneous offense evidence is evaluated under Rule 104(b). See *supra* notes 33–35 and accompanying text.

148. See, e.g., *State v. Brown*, 113 Wash. 2d 520, 526–27, 782 P.2d 1013, 1018 (1989).

149. See WASH. R. EVID. 403.

150. This purpose includes refuting a defense of consent in rape prosecutions. For example in *Lough*, 125 Wash. 2d 847, 889 P.2d 487, the defendant's defense at trial was that he had not drugged the complaining victim in this case and that they had consensual sex. The Washington State Supreme Court affirmed the admission of testimony by other women to similar conduct under the common scheme or plan exception to Rule 404.

151. See WASH. R. EVID. 404(b).

152. *State v. Coe*, 101 Wash. 2d 772, 777, 684 P.2d 668, 672 (1984).

153. *Id.* at 777–79, 684 P.2d at 672–73.

154. *Coe*, 101 Wash. 2d 772, 684 P.2d 668.

Supreme Court vacated the defendant's conviction for four forcible rapes, finding that one witness's testimony failed the uniqueness requirement, and another witness's testimony failed the similarity requirement.¹⁵⁵

Coe's former girlfriend had testified at trial about aspects of their consensual sexual relationship.¹⁵⁶ The court ruled that it was error to admit her testimony because while the behavior she described was similar to the behavior described by the rape victims, it was not unique.¹⁵⁷ The court also "question[ed] the relevancy of an individual's behavior in a consensual sexual relationship to demonstrate modus operandi with respect to a violent nonconsensual sexual act."¹⁵⁸

The court concluded that the trial court also erred by admitting the testimony of a woman who alleged that Coe had approached her on a jogging trail, "fondling what appeared to be a replica of a penis" and making sexually explicit comments.¹⁵⁹ The court said that though the jogger had described unusual behavior, the evidence was nonetheless inadmissible because the behavior was "not similar to the actions of the rapist."¹⁶⁰

B. Washington Courts Evaluate Evidence of Other Offenses Offered to Prove That the Charged Crime Occurred Under the Common Scheme or Plan Exception

Washington courts also allow evidence of other sex offenses for the purpose of proving that the charged crime occurred as the victim described it under the common scheme or plan exception. In *State v. Lough*, the trial court admitted the testimony of four women who all said that Lough, a paramedic, had drugged and raped them while they were in a relationship with him.¹⁶¹ The account of the victim of the charged crime was substantially the same.¹⁶² After a comprehensive review of the

155. *Id.* at 776–79, 684 P.2d at 671–73.

156. *Id.* at 776, 684 P.2d at 671 ("For example, she testified Coe indicated he liked to masturbate, and that he used certain vulgar terms while they were engaged in sexual activity. She also declared Coe would frequently perform cunnilingus on her and that he would fondle his penis and insert his fingers in her vagina prior to having sexual intercourse.").

157. *Id.* at 778, 684 P.2d at 672.

158. *Id.*

159. *Id.* at 778–79, 684 P.2d at 672–73.

160. *Id.* There was no testimony or other evidence that the attacker had a replica penis.

161. *State v. Lough*, 125 Wash. 2d 847, 850–51, 889 P.2d 487, 489 (1995).

162. *Id.* at 849, 889 P.2d at 488.

victim's testimony and that of the four prior victims, revealing the marked similarity between them, the court concluded, "A rational trier of fact could find that the Defendant was the mastermind of an overarching plan."¹⁶³

In *State v. DeVincentis*,¹⁶⁴ the court distinguished the common scheme or plan exception from the modus operandi exception. The court said that when the issue in the case is whether the crime occurred (as opposed to the identity of the perpetrator), factual similarity between evidence of other offenses and the charged crime is required but uniqueness is not.¹⁶⁵ The defendant, DeVincentis, paid his twelve-year-old neighbor K.S. and her friend to mow his lawn and then to clean his house.¹⁶⁶ After the girls cleaned the house together once, DeVincentis asked K.S. to clean alone.¹⁶⁷ While she worked, DeVincentis wore only g-string or bikini underwear, and said something to the effect of "I hope you don't mind."¹⁶⁸ He eventually asked her to massage his back while he wore only the g-string or bikini underwear.¹⁶⁹ He later removed his underwear and asked her to massage his buttocks and legs, then told her to lie down and massaged her back, buttocks and legs.¹⁷⁰ Finally, he laid on his back and told K.S. to massage his stomach and penis, until he ejaculated.¹⁷¹

The trial court admitted evidence that DeVincentis had been convicted fifteen years earlier in New York for having molested a ten-year-old friend of his daughter.¹⁷² V.C., the victim of the earlier abuse, testified that she frequently spent time at his home,¹⁷³ and that he often wore nothing but bikini or g-string underwear.¹⁷⁴ She testified that she

163. *Id.* at 861, 889 P.2d at 495.

164. 150 Wash. 2d 11, 74 P.3d 119 (2003).

165. *Id.* at 21, 74 P.3d at 125 ("Evidence of unique modus operandi is relevant when the focus of the inquiry is the identity of the perpetrator, not whether the charged crime occurred. As we have recently established, when identity is at issue, the degree of similarity must be at the highest level and the commonalities must be unique because the crimes must have been committed in a manner to serve as an identifiable signature.") (internal citation omitted).

166. *Id.* at 13, 74 P.3d at 121.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 14, 74 P.3d at 121.

171. *Id.*

172. *Id.* at 15, 74 P.3d at 122.

173. *Id.*

174. *Id.*

had “memory flashes” of abusive encounters that began with massages and progressed to his ejaculating on her.¹⁷⁵

The Washington State Supreme Court affirmed the trial court’s determination that V.C.’s testimony was sufficiently factually similar to the testimony of the complaining victim to be admitted for the purpose of proving that the charged crime occurred. The court quoted extensively from the trial court’s oral ruling admitting the testimony of V.C.:

The trial court explained that “the evidence involving [V.C.] is relevant to show that the defendant had devised a scheme to get to know young people through a safe channel, such as a friend of his daughter, or . . . as a friend of the next-door neighbor girl . . .” . . . This plan allowed DeVincentis to bring the children into “an apparently safe but actually unsafe and isolated environment so that he could pursue his compulsion to have sexual contact with these . . . prepubescent or pubescent girls.” . . . Other similarities that the trial court noted included walking around his house in an unusual piece of clothing—bikini or g-string underwear . . . With both girls, DeVincentis “asked for a massage or gave [a] massage, asked or directed the child to a secluded spot such as a bedroom, directed or asked that clothes be taken off . . .” Finally, in both instances, he had the girls masturbate him until climax.¹⁷⁶

The court stated that while “unique or uncommon” facts were not required, “[r]andom similarities are not enough.”¹⁷⁷ Referring to the similarities in the testimony of K.S. and V.C., the court found that DeVincentis first gained the trust of both girls, then desensitized them to his nudity, “thereby making it easier to move from nudity to physical skin-to-skin touch and sexual behavior.”¹⁷⁸ The supreme court’s emphasis on the facts of the case demonstrates the kind of factual similarity courts looked for before between the charged crime and evidence of another offense, when determining whether such evidence is admissible under Rule 404(b).

175. *Id.*

176. *Id.* at 22, 74 P.3d at 125–26 (internal citations omitted).

177. *Id.* at 18–19, 74 P.3d at 124.

178. *Id.* at 16, 74 P.3d at 122 (internal quotations omitted).

C. *Washington Courts Also Look for Factual Similarity Before Admitting Evidence of Other Offenses to Rebut a Defense of Mistake or Accident*

Evidence that the defendant has committed another offense may be admissible to refute the defendant's assertions that either the defendant's own conduct was a mistake or accident, or that the victim mistook the defendant's innocent behavior for criminal conduct.¹⁷⁹ For example, in *State v. Baker*,¹⁸⁰ the defendant was accused of touching the genitals of his girlfriend's eight-year-old daughter, N.H., while the child was asleep.¹⁸¹ He claimed that if he had touched the girl, it was an accident because he was asleep himself.¹⁸² In part to refute that defense, the prosecution offered testimony by Baker's own daughter that he had molested her during her childhood while she was sleeping.¹⁸³ The court of appeals affirmed, finding that the alleged other acts were similar enough to the crime charged to be admitted to refute Baker's defense that any touching had been an accident.¹⁸⁴

VI. UNDER RCW 10.58.090, TRIAL COURTS RETAIN A KEY GATE-KEEPING ROLE WHEN EVIDENCE OF OTHER SEX OFFENSES IS OFFERED

Washington courts should interpret RCW 10.58.090 in a manner that preserves the trial court's important gate-keeping function. When balancing the probative value and potential for unfair prejudice under the new statute, Washington courts should use the well-developed body of case law governing evidence of other sex offenses under Rule 404(b) as a guide. This approach is consistent with the legislature's judgment that evidence of other sex offenses is different from evidence that a defendant has committed other types of offenses, protects the accuracy of trials, and avoids difficult separation-of-powers questions about authority over evidence law.

179. WASH. R. EVID. 404(b).

180. 89 Wash. App. 726, 950 P.2d 486 (1997).

181. *Id.* at 729, 950 P.2d at 488.

182. *Id.* at 731, 950 P.2d at 489.

183. *Id.* at 730, 950 P.2d at 488.

184. *Id.* at 734-35, 950 P.2d at 491. The appellate court also found the testimony admissible for the purpose of establishing a common scheme or plan. *Id.*

A. *Robust Rule 403 Balancing is Consistent with the Text and Legislative History of RCW 10.58.090*

Nothing in the text or the legislative history of RCW 10.58.090 suggests that the Rule 403 balancing test should be watered down in favor of admissibility. In fact, the statute's emphasis on Rule 403, and the revisions of and amendments to the statute's text,¹⁸⁵ suggests the opposite. When the legislature passed RCW 10.58.090, Federal Rules 413 and 414 had been in effect for thirteen years and had generated substantial case law.¹⁸⁶ While many of Washington's evidence rules closely track the federal rules,¹⁸⁷ RCW 10.58.090 contains substantial textual differences. Whereas Federal Rules 413 and 414 do not mention Rule 403 balancing and say that sex-offense evidence "may be considered for its bearing on any matter for which it is relevant," the Washington statute explicitly states that courts should evaluate such evidence under Rule 403 and includes the text of Rule 403 the statute.¹⁸⁸

The Washington State Legislature declined to adopt the language of the federal rules, and removed all references to Federal Rules 413 and 414 and the cases construing them, which limits the persuasive force of those Rules and cases.¹⁸⁹ The federal appellate courts have limited the effectiveness of Rule 403 balancing when it is applied to evidence of other sex offenses under Rules 413 and 414.¹⁹⁰ Scholars have criticized the ineffective application of Rule 403 in federal courts. According to Professor Aviva Orenstein, "the [federal] courts have weakened Rule 403 by tending to admit evidence of prior sexual offenses automatically under a *pro forma* approach to Rule 403."¹⁹¹ Professor Rosanna

185. *See supra* Part IV.A.

186. *See supra* Part II.

187. Washington has adopted twenty-two evidence rules that are textually identical to the federal rules, and five that are substantively identical. It has also adopted twenty-one hearsay exceptions that are identical to those included under Federal Rule 803. WEINSTEIN, *supra* note 16, Table of State and Military Adaptations of Federal Rules of Evidence, T-1–T-182.

188. WASH. REV. CODE § 10.58.090(6) (2008) ("When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, the trial judge shall consider . . . (g) Whether the 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."); *see also supra* note 112 and accompanying text.

189. *See supra* Part IV.A and notes 37–40.

190. *See supra* notes 36–43 and accompanying text.

191. Orenstein, *supra* note 41, at 1520.

Cavallaro similarly writes, “only one [federal] court has recognized the inappropriateness of acquiescing . . . to a ‘diluted’ form of Rule 403 review for similar acts evidence in sexual assault cases.”¹⁹² The plain text of Washington’s statute and its legislative history suggest that Washington courts should not follow the interpretation of the federal courts and should instead apply meaningful Rule 403 balancing to evidence of other sex offenses.

B. Washington’s Well-Developed Body of Case Law Governing Evidence of Other Sex Offenses Provides Guidelines to Ensure Meaningful Rule 403 Balancing

Washington courts should retain the requirement that trial courts find that an extraneous sex offense occurred by a preponderance of the evidence under Rule 104(a) before admitting evidence of that offense.¹⁹³ This rule is well established in Washington and has previously been applied to evidence of other sex offenses.¹⁹⁴ The text of RCW 10.58.090 does not mention the standard courts should apply to preliminary determinations as to whether the other offense occurred,¹⁹⁵ and there is no reason to change this established practice.¹⁹⁶

Rule 403 requires the trial court to weigh evidence’s probative value against the danger of unfair prejudice.¹⁹⁷ Rule 403 implicitly requires a court to find that proffered evidence is relevant under Rule 401 because evidence that is not relevant has no probative value. Under Rule 401, evidence is relevant when it has “any tendency” to make a material fact more or less probable;¹⁹⁸ therefore, a trial court must identify the specific purpose for which evidence is offered before it can meaningfully assess the evidence’s relevance or probative value.

In sex-offense prosecutions, evidence of another sex offense is often offered to prove that it was the defendant who attacked the victim, to

192. Cavallaro, *supra* note 42, at 69.

193. *See supra* notes 146–147 and accompanying text.

194. *Id.*

195. WASH. REV. CODE § 10.58.090 (2008).

196. In light of the textual differences between RCW 10.58.090 and Federal Rules 413 and 414, *see supra* Part VI.A, the fact that federal courts apply the Rule 104(b) standard, *see supra* notes 33–35 and accompanying text, is not a persuasive reason for Washington courts to adopt Rule 104(b).

197. WASH. R. EVID. 403.

198. *Id.* 401 (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

prove that the charged crime occurred, or to refute a defense of accident or mistake. These categories are based on exceptions to Rule 404(b).¹⁹⁹ While these categories are not necessarily exclusive, they capture the most common uses for evidence of other sex offenses and therefore remain useful in assessing the probative worth of such evidence, despite RCW 10.58.090's rejection of Rule 404(b) in general.

The principles that emerge from *DeVincentis*, *Baker*, and *Coe* are useful guides to trial courts performing Rule 403 balancing under the statute. Evidence that a defendant has committed another sex offense is "likely to be highly prejudicial."²⁰⁰ In light of the likelihood that evidence of other sex offenses will result in substantial unfair prejudice to the defendant, such evidence should only be admitted under Rule 403 if it also has significant probative value. The first factor that RCW 10.58.090 instructs trial courts to consider when performing Rule 403 balancing is "[t]he similarity of the prior acts to the acts charged."²⁰¹ This factor emphasizes the importance of factual similarity between the evidence of another offense and the crime charged. Existing Washington case law can be used to give this requirement meaning.

Under the principles established in *Coe*, evidence of other sex offenses that is offered to prove identity is probative when it is both factually similar to the charged crime and describes an unusual or unique way of committing the crime.²⁰² The need for other sex-offense evidence to prove identity arises when a complaining victim is unable to identify the attacker and there is also little or no physical evidence available for that purpose. In such cases, the defendant is not disputing that the victim was attacked, but rather is asserting that the defendant was not the attacker. Evidence that the defendant has committed another sex offense that is either non-distinctive or factually dissimilar from the assault the complaining victim describes, is not particularly probative of identity.²⁰³ Admitting dissimilar or non-distinctive other offense evidence for the purpose of proving identity invites the jury to convict the defendant because the defendant has done something reprehensible in the past, even if it is not the crime charged, or because the jury has determined that the defendant is a sexual predator and therefore must have

199. *See supra* note 151.

200. *State v. Lough*, 125 Wash. 2d 847, 862, 889 P.2d 487, 495 (1995). *See also supra* Part I.

201. WASH. REV. CODE § 10.58.090(6)(a) (2008).

202. *See supra* Part V.A.

203. *See State v. Coe*, 101 Wash. 2d 772, 777–79, 684 P.2d 668, 672 (1984).

committed the crime charged.

Under the principles established in *DeVincentis* and *Baker*, evidence of other offenses offered to prove that the crime charged occurred or to refute a defense of accident or mistake may have significant probative value when there is a high degree of factual similarity to the crime charged.²⁰⁴ The need for evidence of other offenses arises when the defendant asserts that the alleged victim has fabricated the assault, consented to sexual conduct, or has mistaken innocent conduct for an assault. The evidence of another sex offense is then relevant and probative because when another victim describes substantially similar conduct, the complaining victim's account becomes more credible.²⁰⁵ When evidence of another sex offense is offered for this purpose, courts should consider whether the kinds of factual similarity identified in *DeVincentis* exist; this evaluation includes the similarity in the ages of the victims and of the conduct described, including the sexual conduct and other conduct leading to it.²⁰⁶ If the evidence of another offense is linked by only "random similarities,"²⁰⁷ to the crime charged, its probative value is likely to be outweighed by the risk of undue prejudice to the defendant.

C. Preserving the Trial Court's Gate-Keeping Role Also Avoids a Potential Conflict Between the Legislature and the Court Over the Power to Enact Evidence Rules

The question of whether the legislature or the judiciary has ultimate authority over the rules of evidence in Washington is unresolved.²⁰⁸ However, precedent suggests that evidentiary rules are an area where the court will assert its power as against that of the legislature.²⁰⁹ The legislative history of RCW 10.58.090 suggests that the legislature was aware of this potential conflict and amended the statute to moderate its assertions of power over evidence rules.²¹⁰

204. See *supra* Parts V.B–C.

205. Professor Imwinkelreid describes this use of evidence that the defendant has committed another sex offense as an application of the doctrine of chances. See Imwinkelreid, *supra* note 13, at 1135.

206. See *supra* notes 168–175 and accompanying text.

207. *State v. DeVincentis*, 150 Wash. 2d 11, 18, 74 P.3d 119, 124 (2003).

208. See *supra* Part III.

209. See *supra* notes 80–86 and accompanying text.

210. See *supra* Part IV.B.

Institutional competence concerns lie behind the question of whether the legislature or the courts have ultimate authority over the rules of evidence. Analysis of admissibility of evidence generally begins with whether the proffered evidence is relevant, probative, and not unduly prejudicial. These are highly fact-specific inquiries that have traditionally been left to trial judges.²¹¹

An evidentiary statute construed as a legislative determination that entire category of evidence “is admissible[] notwithstanding”²¹² the traditional bar on other offense evidence has the potential to undermine the judiciary’s traditional gate-keeping role. The sheer number of offenses included in RCW 10.58.090 and differences between the elements of many of them²¹³ heighten this concern. This, in turn, raises questions as to whether individual defendants will be tried “upon competent evidence, and only for the offence charged.”²¹⁴ Interpreting RCW 10.58.090 to demand meaningful Rule 403 analysis of such evidence gives effect to the purpose of the statute by moving analysis of the admissibility of evidence of other offenses out of Rule 404 and into Rule 403, while preserving the judiciary’s gate-keeping role.

CONCLUSION

Washington’s new sex-offense evidence statute, RCW 10.58.090, should be interpreted by Washington courts to require standards-based Rule 403 balancing before evidence of other sex offenses is admitted. Precedent applying Rule 404(b) provides meaningful standards. Using those standards to guide admissibility under RCW 10.58.090 gives effect to the legislature’s judgment that sex-offense evidence is different from other evidence, without undermining the traditional gate-keeping role of the trial court. It also avoids a potential conflict between the legislature and judiciary over evidence rule-making authority.

211. Cavallaro, *supra* note 42, at 38 (citing Eileen A. Scallen, *Analyzing “The Politics of [Evidence] Rulemaking,”* 53 HASTINGS L.J. 843, 882–83 (2002)).

212. RCW 10.58.090(1) broadly states that “evidence of the defendant’s commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b).” WASH. REV. CODE § 10.58.090(1) (2008).

213. *See supra* notes 90–108 and accompanying text. For example, the statute would potentially make offenses such as voyeurism or possession of child pornography admissible in a prosecution for a violent sexual assault, despite significant differences in the elements of the offenses.

214. *Boyd v. United States*, 142 U.S. 450, 458 (1892).