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FEDERAL RULES OF EVIDENCE 413, 414, AND 415: FIFTEEN YEARS OF HINDSIGHT AND WHERE THE LAW SHOULD GO FROM HERE

Bryan C. Hathorn[1]

> *Courts that follow the common-law tradition have almost unanimously come to disallow . . . evidence of a defendant's evil character to establish a probability of his guilt. . . . The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and so overpersuade them as to prejudge one with a bad general record . . .*

Michelson v. United States, 335 U.S. 469, 475-76 (1948).

In our system of jurisprudence, we try cases, rather than persons.

People v. Allen, 420 N.W.2d 499, 504 (Mich. 1988).

In 1995, Congress added three rules, which governed the admissibility of "prior sexual misconduct" in federal trials, to the Federal Rules of Evidence.[2] The procedure by which Congress added the rules was outside of the normal procedure for the creation of federal rules, it was highly controversial, and it was done over the

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[2] *See* FED. R. EVID. 413, 414, 415.

objections of the judicial conference.[3] The controversy surrounding the rules produced a flurry of scholarship on the rules, which continued for about five years. After this initial period, the storm quieted with a reduced amount of scholarship on the subject. It is now fifteen years since the new rules went into effect and it is possible to look back at the effect of the rules with perspective and examine the impact they had on trends and changes in the law of evidence in the United States.

Section I discusses the history of the Federal Rules of Evidence and the admission of "other acts" character evidence under the rules. Section II highlights the development of law forbidding character evidence and the limited exceptions to the rule. Section III discusses the rationalizations behind the character evidence rules and the rationalization for Rules 413, 414, and 415. Section IV discusses recidivism of sexual offenders that underlies many of the rationalizations for the rules. Section V outlines the impact of Rules 413, 414, and 415 on evidence law. Section VI concludes with a discussion of what should be done with character evidence rules for sexual offenders in the future.

I. "Other Acts" Character Evidence under the Federal Rules of Evidence

The Federal Rules of Evidence govern the admissibility of evidence in federal courts. In 1965 Chief Justice Earl Warren formed an advisory committee to draft the rules, which were intended as a codification of the

[3] *See* Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (1975). *See also Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases*, 159 F.R.D. 51 (1995) [hereinafter *Report of the Judicial Conference*].

common law tradition of evidence.[4] The codification of the Rules of Evidence originally took place pursuant to the Rules Enabling Act, and ultimately the rules were passed by Congress and signed by the President as the Act to Establish Rules of Evidence for Certain Courts and Proceedings.[5]

At the most fundamental level, the Federal Rules of Evidence assume that judges and juries act rationally. For instance, Rule 105 permits a judge to ask a jury to limit its consideration of evidence for a particular purpose.[6] That juries can segregate evidence into discrete packages and apply the evidence for limited purposes assumes that juries behave rationally. That assumption has been criticized as unrealistic.[7]

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[4] *See* Glen Wissenberger, *The Proper Interpretation of the Federal Rules of Evidence: Insights from Article VI*, 30 CARDOZO L. REV. 1615 (2009).

[5] Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (1975).

[6] "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." FED. R. EVID. 105.

[7] Courts recognize that limiting instructions do not cure the impact of prejudicial evidence. *See, e.g.*, Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (calling the idea that prejudicial effects can be overcome by a jury instruction "unmitigated fiction"); Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932) (describing limiting instructions as "a mental gymnastic which is beyond, not only [the jury's] power, but anybody else's."). *See also* Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions*, 6 PSYCHOL. PUB. POL'Y & L. 677 (2000). Interestingly, it may be that judges are able to go through the mental gymnastic of excluding inadmissible evidence in bench trials better than has been supposed. The conviction rate in federal bench trials—where the judges have seen inadmissible evidence—is lower than that in federal jury trials. Daniel Givelber, *Lost Innocence: Speculation and Data about the Acquitted*, 42 AM. CRIM. L. REV. 1167, 1185-86 (2005). However, some of this effect is probably due to self selection by defendants with a weak case trying to roll the dice with the jury. *Id.*

At the same time, however, the Federal Rules of Evidence recognize that sometimes evidence, while relevant,[8] is so prejudicial that a jury cannot be exposed to it, even with a limiting instruction.[9] The commentary surrounding Rule 403—which excludes evidence where the "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury"[10]—suggests that "[u]nfair prejudice within [this] context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[11] As such, the Rules of Evidence recognize that jurors, who are presumed to be rational, suffer from inherent, non-rational tendencies.[12] The Rules of Evidence explicitly recognize that the presumption that jurors are rational must be balanced against their irrational decision making, and the rules provide for this balance through the "balancing test" of Federal Rule of Evidence 403. This balance provides a fundamental protection to the

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[8] The basis of the Federal Rules of Evidence is that only relevant evidence should be admitted. *See* FED. R. EVID. 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"); FED. R. EVID. 402 ("All relevant evidence is admissible, except as otherwise provided . . . by these rules . . . ").

[9] "Although relevant, evidence may be excluded if its probative value is *substantially outweighed by the danger of unfair prejudice* . . . ." FED. R. EVID. 403 (emphasis added).

[10] FED. R. EVID. 403. In addition to protecting against non-rational jury decisions, Rule 403 is also intended to protect against inefficiencies of trial by excluding evidence which will cause "undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

[11] FED. R. EVID. 403 advisory committee's note.

[12] It is well known that jurors are subject to make decisions based on emotion. *See, e.g.,* Todd E. Pettys, *The Emotional Juror*, 76 FORDHAM L. REV. 1609 (2000). The American Bar Association entreats prosecutors not to "use arguments calculated to inflame the passions . . . of the jury." ABA Project on Standards for Criminal Justice, Standards Relating to the Administration of Criminal Justice 98 (1974).

defendant, limiting admission of evidence likely to be misused by the jury.

The fundamental protections of Rule 403 are found again in Rule 404, which regulates the admissibility of "character evidence."[13] The Rules of Evidence recognize that evidence of "other crimes, wrongs, or acts" is perhaps the most prejudicial evidence that could be admitted at trial[14] and explicitly excludes it from consideration by the jury: "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."[15] The basis for this rule is not to exclude evidence that is irrelevant; it is to exclude relevant evidence that is likely to be misused by

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[13] Federal Rule of Evidence 404(a) states the general rule that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ." Character evidence comes in many forms, but the focus in this article is on "other acts" character evidence. This type of evidence is known by many names, including "preponderance evidence" or "prior bad acts" evidence.

[14] The caution against use of other acts character evidence is not only for criminal cases discussed in the present article. The Advisory Committee cautioned against the use of such character evidence in civil cases, stating:

> [c]haracter evidence *is of slight probative value and may be very prejudicial.* It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters, despite what the evidence in the case shows actually happened.

FED. R. EVID. 404 advisory committee's note (citing Cal. Law. Revision Comm'n, Rep. Rec. & Studies, 657-58 (1964)) (emphasis added).

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

the jury.[16] However, there are exceptions that allow the evidence to be admitted for the limited purpose[17] of showing "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[18] Even when such character evidence is admitted for a limited purpose, the rule does not *require* that it be admitted; admission is still subject to the safeguard of Rule 403, preventing admission of unfairly prejudicial evidence.[19] The safeguard against prejudicial use of "other acts" evidence follows the tradition in American courts that "a defendant must be tried for what he did, not who he is."[20]

In 1994, the landscape for character evidence in federal court changed. The United States Congress—over

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[16] Michelson v. United States, 335 U.S. 469 (1948). Justice Jackson summarized the reason for excluding character law evidence in his opinion:

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

Id. at 475-76 (citations and footnote omitted).

[17] *See* FED. R. EVID. 105.

[18] *See* FED. R. EVID. 404(b). Character evidence may also be admitted if it is an "essential element" of the action.

[19] *See* FED. R. EVID. 404 advisory committee's note on 2000 amendments.

[20] United States v. Foskey, 636 F.2d 517, 523 (D.C. Cir. 1980) (quoting United States v. Meyers, 550 F.2d 1036, 1044 (5th Cir. 1977)).

the objections of the Judicial Conference[21]—enacted Federal Rules of Evidence 413, 414, and 415.[22] Federal

[21] The Judicial Conference noted that the rules were opposed by "the overwhelming majority of judges, lawyers, law professors, and legal organizations." *Report of the Judicial Conference*, *supra* note 3, at 52. That an "overwhelming majority" of legal scholars objected to the rules is probably an understatement. When the Judicial Conference Committee on Rules of Practice and Procedure voted, there was a single vote in favor of the rules—from the representative of the Department of Justice. *Id.* This result was not surprising, as the senior counsel of the Department of Justice, David Karp, authored the rules. *See* 140 CONG. REC. H8991-92 (daily ed. Aug. 21, 1994) [hereinafter, *Floor Statement of Rep. Molinari*] (statement of Rep. Molinari). A minority of commentators have suggested that the change in the rules was positive. *See, e.g.*, Mary Katherine Danna, Note, *The New Federal Rules of Evidence 413-415: The Prejudice of Politics or Just Plain Common Sense?*, 41 ST. LOUIS U. L.J. 277, 309 (1996) (arguing that character evidence of prior bad acts is relevant and that the rules don't go far enough in relaxing the restrictions on its use).

[22] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994). The procedure by which the rules were put into place was different than the rest of the Federal Rules of Evidence, which were developed with the advice of the Judicial Conference. In the case of Rules 413, 414, and 415, the rules were forcibly added by a political process. The procedure by which they were added is in section 320935 of Public Law 103-322:

> (b) Implementation. The amendments [enacting the rules] shall become effective pursuant to subsection (d).
> (c) Recommendations by Judicial Conference. Not later than 150 days after the date of enactment of this Act, the Judicial Conference of the United States shall transmit to Congress a report containing recommendations for amending the Federal Rules of Evidence as they affect the admission of evidence of a defendant's prior sexual assault or child molestation crimes in cases involving sexual assault and child molestation. The Rules Enabling Act shall not apply to the recommendations made by the Judicial Conference pursuant to this section.
> (d) Congressional Action

Rules of Evidence 413, 414, and 415 explicitly make evidence of prior sexual offenses admissible in both civil and criminal trials.[23] Essentially, the change in the rules

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(1) It the recommendations described in subsection (c) are the same as the amendment made by subsection (a) [enacting the rules], then the amendments made by subsection (a) shall become effective 30 days after the transmittal of the recommendations.
(2) If the recommendations described in subsection (c) are different than the amendments made in subsection (a), the amendments made by subsection (a) shall become effective 150 days after the transmittal of the recommendations . . .

Id. Thus, the change to the rules took place over any thoughtful objections of the Judicial Conference, which submitted a report to Congress objecting to from the proposed rules.

[23] The text of the Federal Rules of Evidence follows, in pertinent part:

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant. . . .

Rule 414. Evidence of Similar Crimes in Child Molestation Cases

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter which it is relevant. . . .

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's

"supersede[s] in sex offense cases the restrictive aspects of Federal Rule of Evidence 404(b)."[24] In one action, Congress overruled the fundamental protections for the accused, which had been developed through centuries of case law and codified into the Federal Rules of Evidence. The "new rules, which [were] not supported by empirical evidence, could diminish . . . protections that have safeguarded persons accused in criminal cases and parties in civil cases."[25]

The addition of Federal Rules of Evidence 413, 414, and 415 added complexity to the usual scheme for admission of "other acts" character evidence. Ordinarily, under Rule 404, evidence of other wrongs to prove conformity therewith is excluded.[26] There are a number of limited exceptions where the evidence may be admitted to prove some other issue,[27] but even under one of these limited exceptions, the admissibility was subject to the protections of Rule 403. The Judicial Conference suggested that if Congress insisted on the new rules, in order to protect the accused and maintain the balance of the Federal Rules of Evidence, an explicit reference to Rule 403 should be added.[28] Ultimately Congress declined to modify the new rules before they went into effect.

Federal Rules of Evidence 413, 414, and 415 reverse the normal procedure. Under these rules, evidence of another act "is admissible, and may be considered for its

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> commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these Rules. . . .

[24] *Floor Statement of Rep. Molinari, supra* note 21.
[25] *Report of the Judicial Conference, supra* note 3, at 53.
[26] FED. R. EVID. 404(b).
[27] *See* FED. R. EVID. 404(b).
[28] *Report of the Judicial Conference, supra* note 3, at 54.

bearing on any matter to which it is relevant."[29] The floor debate and the comments from the author of the rule[30] indicated that the rule was intended to be subject to the overall protections of the balancing test of Rule 403; however, the actual language of the rule is unambiguous—"evidence . . . *is admissible.*"[31] The usual method of statutory construction[32] is to investigate the legislative intent only when the language of the statute is ambiguous. In this case, however, the plain meaning of the statute allows broad admissibility. Despite the lack of ambiguity, courts have generally applied the protections of Rule 403 to consideration of evidence under Rules 413, 415, and 415.[33]

A second issue with the application of the rules is the standard of proof necessary for the admission of evidence of "other acts." The rules only refer to "commission" of the other act,[34] and contain no statement as to the burden of proof or the reliability of the evidence. They do not specify whether the evidence of the other act requires that the defendant was convicted for the prior offense, that the defendant was charged for the crime, or

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[29] This language appears in section (a) of each of the three rules. FED. R. EVID. 413, 414, 415.

[30] *See* David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15 (1994).

[31] FED. R. EVID. 413 (emphasis added). *See also* FED. R. EVID. 414, 415. Given the comments of the author of the rules, this may be a drafting error. *See* Karp, *supra* note 30. The rules appear to be poorly drafted in other ways. The drafting errors in the statute could probably be revised, but given the difficulty in passing the law, and the almost unanimous objection to the rules by scholars and jurists, it is unlikely that Congress will revisit the debate.

[32] Rules of evidence are constructed in the same manner as any other statute. Daubert v. Merrell Dow Pharm., 509 U.S. 579, 587 (1993).

[33] *See, e.g.*, Erik D. Ojala, Note, *Propensity Evidence under Rule 413: The Need for Balance*, 77 WASH. U. L.Q. 947, 968 (1999) (reviewing Eighth and Tenth Circuit cases).

[34] "[E]vidence of the defendant's commission of another offense" of sexual misconduct is all that is required under the rules. FED. R. EVID. 413.

that there was merely an allegation against the defendant. Presumably a juror who hears evidence based on a mere allegation of prior misconduct would discount the charge, but given the inflammatory nature of the evidence, a mere allegation could be extremely prejudicial.

A third issue is with the "similar" nature of the crimes. The title of each of the rules refers to "evidence of similar crimes," but nowhere in the body of the rule is the evidence restricted to "similar" crimes.[35] Under a literal reading of the rules, a sexual assault against a male child would be admissible as evidence in a case of a sexual assault against an adult female, despite the fact that the crimes are not "similar."[36] While such a case may be extreme, it demonstrates the all encompassing language of the rules.

Finally is the issue of the relevance of other acts that occurred far in the past. The usual application of the rules suggests that offenses that are decades old are not relevant.[37] Rules 413, 414, and 415 provide that the evidence is admissible with no limitations on time.[38] Admission of evidence of a prior bad act which is decades old may be of limited relevance, but would still be highly inflammatory.[39]

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[35] This may be another drafting error, but as described *supra* note 31, it is unlikely that after the controversy when the rules were enacted Congress will want to revisit the issue.

[36] *See* FED. R. EVID. 413(d) (defining "sexual assault").

[37] *See, e.g.*, FED. R. EVID. 609 (indicating that a criminal conviction over ten years old is not relevant for the issue of impeachment of witnesses).

[38] FED. R. EVID. 413, 414, 415.

[39] In Department of Justice statistics, 5.4 percent of sexual offenders released in 1994 were rearrested for another sexual crime within three years after their release. However, of this number, 40 percent were rearrested within the first year. PATRICK A. LANGAN ET AL., RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 (Nov. 2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/

II. The Prohibition of Trial by Character

a. Common Law History

Since the inception of the American judicial system, courts have generally prohibited the use of character evidence as evidence that a person's other acts conform to an alleged crime.[40] The origins of the rule certainly trace back to English law, where the earliest cases are mixed.[41] The most famous case citing the proposition may be *People v. Molineux*, 61 N.E. 286 (1901), which cites numerous cases dating to the middle of the nineteenth century for the proposition that character evidence to "show action in conformity therewith," should be excluded.[42] *Molineux* famously states the rule and gives the basis for it:

> The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs

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pdf/rsorp94.pdf. This indicates that it is likely that the older the offense is—or at least the longer since the offender was released from prison and has had the opportunity to reoffend—the less relevant the evidence of a prior sexual offense is. This corresponds to the recognition that "stale" convictions are of little probative value in matters such as the truthfulness of a witness. *See, e.g.*, FED. R. EVID. 609(b).

[40] David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1162 (1998) [hereinafter *Foundations*].

[41] Leonard cites the case of Duke of Norfolk v. Germaine, 12 How. St. Tr. 927 (K.B. 1692) for the proposition that evidence of prior bad acts was admissible, at least in a case for adultery. *Foundations*, *supra* note 40 at 1168. However, Leonard cites *Rex v. Cole*, Mich. Term (1810), an unpublished case, for the proposition that, by 1810, the rule excluding character evidence was firmly in place in American jurisprudence. *Id.* at 1170.

[42] FED. R. EVID. 404(b).

> that he is guilty of the crime charged. This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Charta. It is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt.[43]

The general common law prohibition against character evidence is now firmly seated in American jurisprudence.[44]

The prohibition is limited in scope, however, in that the evidence is permitted to the extent that it is offered to prove that a person has a trait that would make it more likely that he or she would commit the act in question.[45] Even though "other acts" character evidence is generally excluded, the *Molineux* court recognized the existence of a narrower list of exceptions than the list found in the present

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[43] People v. Molineux , 61 N.E. 286, 293-94 (1901) (citations omitted).

[44] *See generally* 1 GEORGE E. DIX et al., MCCORMICK ON EVIDENCE § 186 (6th ed. 2006).

[45] *Foundations*, *supra* note 40, at 1165-66. Other acts evidence is admissible for legitimate non-character purposes, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FED. R. EVID. 404(b). Evidence is generally admissible when it has a bearing on the truthfulness of the accused as a witness, or where the prior act is an essential element of the charge. An example of the latter, relevant to the present discussion of sex crimes, is found in Utah Code Ann. § 76-5-404.1(3)(g) (making prior offenses an element of aggravated sexual abuse of a child as an enhancement factor).

Federal Rule of Evidence 404(b).[46] However, by the time the Federal Rules of Evidence were enacted, the rule of excluding "other acts" evidence to prove "action in conformity therewith"[47] was the law in almost every jurisdiction.[48]

As previously noted, the common law did provide exceptions. One of those exceptions was the "lustful disposition" doctrine, which allowed admission of prior

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[46] *Molineux*, 61 N.E. at 294. ("This rule, and the reasons upon which it rests, are so familiar to every student of our law that they need be referred to for no other purpose than to point out the exceptions thereto.") A curiosity in the *Molineux* case is that the evidence which was excluded there of the commission of a prior murder would likely be admissible under modern rules of evidence. The method of the murder in *Molineux* was to mail a bottle of mercuric cyanide disguised as medicine to the victim. *Id.* It is arguable that the distinctive method of the crime is evidence of "preparation, plan, knowledge, [and] identity," which could render it admissible under an exception to the character evidence exclusion. FED. R. EVID. 404(b). However, those exceptions to the rule did not exist at the time of the *Molineux* court, which only recognized exceptions for motive, intent, absence of mistake or accident, or a common plan or scheme. *See Molineux*, 61 N.E. at 294-300.

[47] FED. R. EVID. 404(b).

[48] Preliminary Draft of the Proposed Rules of Evidence, 46 F.R.D. 161, 229 (1969) ("In most jurisdictions today, the circumstantial use of character is rejected.") In the middle part of the twentieth century, there was a movement toward uniform laws. In the Preliminary Draft of the Proposed Rules of Evidence:

> [t]he Committee acknowledge[d] its indebtedness to its predecessors in the field of drafting rules of evidence. The American Law Institute Model Code of Evidence, Uniform Rules of Evidence, New Jersey Rules of Evidence, and California Evidence Code, with their supporting studies and commentaries, were invaluable in suggesting general approaches and organization as well as particular solutions.

Id. at 190.

criminal acts of sexual offenders.[49] The lustful disposition doctrine is still recognized in a number of states to admit prior sexual misconduct evidence.[50] The doctrine is similar to the motive, identity, intent, or absence of mistake or accident exceptions to the rule against admissibility of character evidence.[51] A "lustful disposition" is certainly relevant to intent and motive to commit a sexual offense. The means by which the prior offense was committed, if the *modus operendi* is sufficiently similar to the presently accused offense, is certainly probative to identity of the offender. For example, if a defendant charged with statutory rape contends that the victim "looked like an adult," prior charges on the same offense would certainly be relevant to the absence of mistake.[52] Since "other acts" evidence could be admitted under these ordinary exceptions in Rule 404(b), there is no need for a special "lustful disposition" rule admitting prior sexual misconduct.

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[49] *See* Jeffrey Waller, Comment, *Federal Rules of Evidence 413-415: "Laws are like Medicine; They Generally Cure an Evil by a Lesser . . . Evil"*, 30 TEX. TECH L. REV. 1503, 1527-30 (1999) (reviewing the lustful disposition doctrine).

[50] *See, e.g.,* Danna, *supra* note 21, at 283-84 (describing the "lustful disposition" doctrine and collecting cases). *But see* Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547, 1584 (arguing that in states that have adopted "rules of evidence patterned after Federal Rule of Evidence 404(b), the 'lustful disposition' exception has arguably been abandoned").

[51] Evidence "may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . . " FED. R. EVID. 404(b).

[52] A critical difference is that the evidence which would be admitted against the defendant who raises the "mistake" defense is that the evidence would be admitted to rebut a defense that the defendant put at issue. If the defendant opens the door by raising the defense, in fairness the prosecution should be allowed to rebut it. Thus, the defendant would have an opportunity to exclude the evidence by not taking the stand. The issue here is that the defendant, in effect, chooses to admit the evidence by raising the mistake defense.

b. Reasons for the Prohibition

The *Molineux* court stated the philosophical reasons behind forbidding character evidence in terms of the jurisprudence of a presumption of innocence. However, there are several other grounds, both legal and practical, which suggest that character evidence should be excluded.

1. Legal Rationales

a) Due Process

Courts have found in the past that admission of character evidence violates the Due Process rights of the accused.[53] In considering Federal Rules of Evidence 413, 414, and 415, which are targeted toward a specific group of offenders, there is an immediate concern over possible infringement on constitutionally protected Due Process rights.[54]

Courts and commentators have applied several tests to determine what constitutes Due Process, among them are the concepts of a historical basis, rational basis, and a fundamental fairness basis for Due Process.[55] First,

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[53] *See, e.g.*, McKinney v. Rees, 993 F.2d 1378 (9th Cir. 1993) (finding admission of character evidence in murder case violates Due Process and is not harmless error). *But see* Huddleston v. United States, 485 U.S. 681, 686-87 (1988) (refusing to hold Federal Rule of Evidence 404(b) unconstitutional despite the fact that the jury could misuse other acts character evidence).

[54] The Fifth Amendment of the United States Constitution guarantees Due Process rights. However, as described below, one of the major effects of the changes to the Federal Rules of Evidence is the parallel modification of the state rules of evidence that has happened over the past fifteen years. *See infra* Section V.b. Application of the Bill of Rights to the States occurs by incorporation thru the Fourteenth Amendment. *See* 16A AM. JUR. 2D *Constitutional Law* § 405 (1962).

[55] *See* Louis M. Natali, Jr. & R. Stephen Stigall, *"Are You Going to Arraign His Whole Life?": How Sexual Propensity Evidence Violates the Due Process Clause*, 28 LOY. U. CHI. L.J. 1, 23-34 (1996); Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57, 77-82 (1995).

commentators have contended that Rules 413, 414, and 415 violate the "traditional notions of fair play and substantial justice,"[56] because American jurisprudence has a long history of excluding character evidence that is "firmly embedded in the Constitution."[57] Second, jurors can draw inferences from the evidence that does not logically lead to the result,[58] and admitting evidence permits the jury to make irrational and arbitrary inferences.[59] Due Process requires that the rules of evidence in a criminal case prohibit admission of evidence which does not pass the "more likely than not" test.[60] Finally, the admission of the evidence violates the fundamental right to a fair trial, because trial by character denies the defendant the "fair opportunity to defend against a particular charge."[61] In addition, there is the issue that Due Process may be violated by an ex post facto law which changes the burden of proof for crimes that have already happened.[62] Despite

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[56] *See, e.g.,* Burnham v. Superior Court, 495 U.S. 604, 619 (1990) (finding that "the continuing traditions of our legal system [] define the Due Process standard of traditional notions of fair play and substantial justice.") (internal quotation marks omitted).

[57] *See* Natali & Stigall, *supra* note 55, at 23-24.

[58] For a discussion of the failure of prior bad acts to demonstrate recidivism for sexual offenses, *see infra* Section IV.

[59] *See* Natali & Stigall, *supra* note 55, at 24-28.

[60] Leary v. United States, 395 U.S. 6, 36 (1969) ("[A] criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.") (citations omitted).

[61] Michelson v. United States, 335 U.S. 469, 476 (1948); Natali & Stigall, *supra* note 55, at 24 (citing *Michelson*, 335 U.S. at 475-76). *See also* Jason L. McCandless, Note, *Prior Bad Acts and Two Bad Rules: The Fundamental Unfairness of Federal Rules of Evidence 413 and 414*, 5 WM. & MARY BILL RTS. J. 689 (1997).

[62] *See, e.g.*, Carmell v. Texas, 529 U.S. 513, 552-53 (2000) (finding that a Texas sexual offender law changed the evidentiary burden of proof for the crimes, and thus application to crimes which occurred

the concerns of commentators shortly after the new rules were passed,[63] fifteen years later no courts have yet determined that the additions to the Federal Rules of Evidence violate the Due Process Clause.[64]

b) Equal Protection for Sexual Offenders[65]

The intent of Rules 413, 414, and 415 is to treat sexual offenders differently than other types of criminals. When legislation seeks to treat different classes of persons differently, it immediately triggers Equal Protection concerns.[66] Even proponents of Rules 413, 414, and 415 concede that they may violate the Equal Protection Clause of the Constitution.[67] When a statute distinguishes between different classes of individuals, the issue is whether strict scrutiny,[68] intermediate scrutiny,[69] or ordinary rational

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before the law was passed violated the ex post facto law provision of the United States Constitution).

[63] Natali & Stigall, *supra* note 55; McCandless, *supra* note 61.

[64] *See, e.g.,* United States v. Castillo, 140 F.3d 874 (10th Cir. 1998); United States v. Sandoval, 410 F. Supp. 2d 1071 (D. N.M. 2005).

[65] Nobody likes a sexual offender, and the author does not suggest that sexual offenders deserve any kind of special treatment. But "special treatment" refers both to treatment with positive and negative consequences. The reasons for prohibition against character evidence in this section refer explicitly to prohibition of character evidence targeted toward a specific group. Federal Rules of Evidence 413, 414, and 415 specifically target sex offenders.

[66] *See* Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot*, 22 FORDHAM URB. L.J. 285, 303 (1995) [hereinafter *Reforming*]; Sheft, *supra* note 55, at 82-86.

[67] Danna, *supra* note 21, at 309.

[68] The Court has typically limited strict scrutiny to racial classifications or fundamental constitutional rights. *See, e.g.,* Loving v. Virginia, 388 U.S. 1 (1967). The Court has been reticent to add new classifications where strict scrutiny applies.

[69] *See, e.g.,* Craig v. Boren, 429 U.S. 190 (1976). The rules would survive heightened scrutiny if there is an important state interest and the rule is substantially related to the state interest.

basis scrutiny[70] should apply. Although the rules pass rational basis scrutiny,[71] because the state interest of keeping sexual offenders from repeating their offenses, the rules could fail under intermediate scrutiny. In particular, in *Craig*,[72] the Court found that use of statistical evidence to establish that a group had a higher probability to offend was not substantially related to the rule and violated the Equal Protection Clause.[73] Presumably, Federal Rules of Evidence 413, 414, and 415 could be attacked on the same basis, although it appears that no successful attack on the rules using Equal Protection grounds has yet been made.[74]

2. Juror Prejudice

Ultimately, trials depend on the jurors making rational decisions to come to a proper outcome.[75] At the

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[70] *See, e.g.*, Railway Express Agency v. New York, 336 U.S. 106 (1949). The rules would survive rational basis scrutiny if there is a legitimate state interest that was rationally related to the rule.

[71] *See* United States v. Enjady, 134 F.3d 1427, 1432-33 (10th Cir. 1998) (applying rational basis scrutiny to Rules 413, 414, and 415). *See also* United States v. Castillo, 140 F.3d 874, 883 (10th Cir. 1998) (finding that rational basis test satisfied because of the government's "need for corroborating evidence in cases of sexual abuse of a child because of the highly secretive nature of these sex crimes and because often the only available proof is the child's testimony.").

[72] *Craig*, 429 U.S. at 190. In *Craig*, the Supreme Court declined to allow the state of Oklahoma to treat boys differently than girls for the purchase of alcohol when the state argued that statistically boys were more likely than girls to drink and drive. *Id.* at 200-04.

[73] Using this reasoning, arguments based on recidivism would fall into intermediate scrutiny. Because the majority of the arguments for the rules depend on statistical recidivism of criminals, theoretically they should face an uphill battle on this front.

[74] *See* United States v. LeMay, 260 F.3d 1018, 1019 (9th Cir. 2001) (finding no Equal Protection violation); United States v. Castillo, 140 F.3d 874, 874-75 (10th Cir. 1998) (same); United States v. Enjady, 134 F.3d 1427, 1432-33 (4th Cir. 1998) (same); United States v. Sandoval, 410 F. Supp. 2d 1071, 1075 (D. N.M. 2005) (same).

[75] If jurors behaved perfectly rationally, the rules of evidence, save, perhaps Federal Rule of Evidence 105, which provides for "limiting

same time, it is well known that jurors do not always act rationally.[76] The law has adopted protections to overcome this problem. For example, to prevent juror misuse of evidence, the Federal Rules of Evidence require that evidence be excluded if the "probative value is substantially outweighed" by, among other things, "the danger of unfair prejudice."[77]

In the context of balancing prejudice against probativeness, it is necessary to consider the susceptibility of jurors to common cognitive biases[78] that can cause erroneous decisions. If the admitted evidence is susceptible to misuse, it should be excluded.

Jurors are human and are susceptible cognitive biases. Before discussing the types of bounded rationality[79] to which jurors are susceptible, it is useful to consider when people are most susceptible to decisions that show aspects

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instructions," would be unnecessary. All evidence would be given to the jury, and the judge could tell the jury which evidence should be excluded or given little weight *ex post*. *See generally* Charles L. Barzun, *Rules of Weight*, 83 NOTRE DAME L. REV. 1957 (2008) (arguing that rules of weight may be a better system of evidence than rules based on admissibility). Such a model would be similar to appellate courts reviewing decisions of bench trials. For appellate cases, the presumption is that, after hearing the evidence, the judge gave no weight to evidence to which an objection was made.

[76] *See, e.g.*, Donald C. Langvoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998).

[77] FED. R. EVID. 403. For examples of cases with excluded propensity evidence, *see generally* 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE, EVIDENCE § 5239 (3d ed.) (collecting cases).

[78] Arguably, cognitive biases give rise to irrational choices. For a list of common cognitive biases and their application to economic choices, *see* Matthew Rabin, *Psychology & Economics*, 36 J. ECON. LIT. 11-46 (1998).

[79] *See, e.g.*, Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1075-1102 (2000).

of cognitive biases. People tend to use simplifying heuristics when the decision involves choices between complex options.[80] Trials with two sides presenting alternate theories are inherently complex, and jurors are typically not familiar with the issues involved. Frequently, the jury instructions are confusing to legal scholars—suggesting that jurors will have great difficulty arriving at a proper conclusion.[81] One would expect that, given their difficult task, jurors would employ heuristic shortcuts to help in their decision making.

In addition, people make irrational choices when they are subject to highly emotional decisions.[82] While litigators should try not to inflame the passions of the jury, in some situations it is unavoidable. Evidence that is simply so inflammatory that it will inspire a jury to convict based on unfair prejudice should be excluded.

There are two ways that jurors may misuse prior acts character evidence. Juror prejudices have been termed "inferential prejudice,"[83] where the trier of fact overestimates the value of the evidence and comes to the wrong conclusion, and "nullification prejudice,"[84] where the trier of fact convicts a person simply for being a bad

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[80] *Id.* at 1076-84.

[81] *See generally* Peter Tiersma, *Asking Jurors to do the Impossible*, 5:2 TENN. J. L. & POL'Y 105 (2009) (symposium issue) (discussing the difficult tasks asked of the jury during trial and deliberation).

[82] Criminal trials are inherently highly emotional, and trials involving sexual misconduct are even more so. In a survey that asked which crimes were the most serious, rape and child abuse trailed only murder in "seriousness." Joseph A. Aluise, Note, *Evidence of Prior Sexual Misconduct in Sexual Assault and Child Molestation Proceedings: Did Congress Err in Passing Federal Rules of Evidence 413, 414, and 415?*, 14 J. L. & POL. 153, 190-91 (1998). As such, one might expect that jurors will fall prey to emotional decision making, particularly in sexual offender trials.

[83] Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 720 (1998). *See also Reforming, supra* note 66, at 296-98.

[84] Park, *supra* note 83, at 720.

individual. While the mechanism by which the trier of fact reaches an improper conclusion is different, when jurors misuse evidence the outcome is the same—an incorrect verdict based on misuse of prejudicial evidence.

a) Attribution Error and Base Rate Fallacy

"[A]ttribution error causes human decision-makers to attribute too much importance to dispositions, and to overlook situational influences."[85] Essentially, attribution error means that people naturally gravitate toward a "trait theory" rather than a "situational" approach when predicting people's behavior.[86] However, experiments have shown that a perceived natural trait toward altruism can be overcome by simple situational pressures.[87]

Not only do people tend to rely more on dispositions, but they fall prey to "Base Rate Fallacy"[88] and give more weight to a trait than it merits.[89] For instance, Kahneman and Tversky showed that a sample of psychology students asked to predict what field a person

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[85] *Id.* at 738.

[86] Trait theory suggests that people have natural dispositions, or traits, which control their behavior. *See infra* Section III.d.

[87] This fallibility of "trait theory" in a "situational" setting was demonstrated in the classic "good Samaritan" study. When seminarians were confronted with a person in need of assistance, the fact that they were in a hurry dominated the trait of altruism. *See* John M. Darley & C. Daniel Batson, *From Jerusalem to Jericho: A Study of Situational and Dispositional Variables in Helping Behavior*, 27 J. PERSONALITY & SOC. PSYCHOL. 100 (1973).

[88] Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, 80 PSYCHOL. REV. 237-38 (1973).

[89] Park, *supra* note 83, at 740. Park describes this as the "interview illusion" after experiments conducted by Ross and Nisbett. When asked about the capabilities of a prospective employee, interviewers gave more weight to the personality information that they got in a short interview than other information that might be more relevant—the student's grades in school. *Id.* at 740. *See also* Korobkin & Ulen, *supra* note 79, at 1087 (applying base rate fallacy and representativeness heuristic to character evidence).

studied in graduate school based their predictions on a description of the "personality sketch" that suggested a person was studying computer science, despite the fact that such an outcome was much less probable than other outcomes, such as the person being a graduate student in education.[90] A person's intuition "violates the statistical rules of prediction."[91]

The Federal Rules of Evidence recognize the importance of correcting for these cognitive errors implicitly, if not explicitly. For instance, in the case of hearsay evidence, a liberally applied Rule 402[92] would classify as relevant almost all statements made out of court and "offered in evidence to prove the truth of the matter asserted."[93] However, the Rules of Evidence explicitly declare that hearsay is "not admissible"[94] without an exception. The exclusion of hearsay evidence follows because it is generally recognized that "juries might accord it more weight than it deserves."[95] The exceptions to the general exclusion of hearsay evidence exist because there is some other factor which gives the evidence some indicia of reliability,[96] or would give the defendant an opportunity to

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[90] Kahneman & Tversky, *supra* note 88, at 237. The total number of graduate students in education greatly exceeds the number in computer science.

[91] *Id.* at 238.

[92] "All relevant evidence is admissible, except as otherwise provided . . . by these rules." FED. R. EVID. 402.

[93] FED. R. EVID. 801.

[94] FED. R. EVID. 802.

[95] Barzun, *supra* note 75, at 1994.

[96] *See* FED. R. EVID. 803, 804. The rule "proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness." FED. R. EVID. 803 advisory committee's note. For example, the hearsay rules assume that a patient has no incentive to lie to his doctor in making statements for medical diagnosis or treatment, and thus such statements would be reliable. FED. R. EVID. 803(4).

contest the accuracy of the statements.[97]

In the context of evidence classified as "other acts," presenting a juror with a list of prior offenses plays to the juror's natural tendency to accept this evidence of a bad character "trait" as being indicative of the likelihood that the accused is a sexual predator, even though the "base rate" of sexual offenders is very low. In addition, jurors are likely to assess more weight to this highly prejudicial evidence than other, perhaps more relevant, situational evidence. In essence, cognitive error leads jurors to rely on their intuition that criminals are naturally recidivist, and jurors may accept evidence of "other acts" character evidence acts as more valuable than it really is.[98]

b) Confirmation Bias

Confirmation bias is a heuristic whereby people examine the evidence but attribute more weight to the evidence which confirms their beliefs. The tendency to believe data that supports a desired (or sought after) conclusion has been known for hundreds of years,[99] but the mechanism by which it occurs has only been more recently investigated. Sometimes confirmation bias simply results

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[97] For instance, in the case of an admissible "admission by party opponent," FED. R. EVID. 801(d)(2), the defendant has the opportunity to demonstrate that the hearsay is untruthful through the adversarial system. FED. R. EVID. 801(d)(2) advisory committee's note.

[98] Korobkin & Ulen, *supra* note 79, at 1087.

[99] In 1620, Francis Bacon wrote,

> The human understanding when it has once adopted an opinion . . . draws all things else to support and agree with it. And though there be a greater number and weight of instances to be found on the other side, yet these it either neglects or despises, or else by some distinction sets aside or rejects[.]

Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998).

from "wishful thinking."[100] In other cases, confirmation bias results from a "representativeness" or "availability" heuristic.[101] In this latter instance, individuals may subconsciously choose an option based on "known patterns without questioning whether the previous pattern has relevance in predicting future events," or by assuming facts that are readily memorable are more reliable.[102] Regardless of the source of the bias, when an individual thinks that a decision should come out with a particular outcome, evidence which supports that conclusion may be adopted and given greater weight than it merits.[103]

In the context of "other acts" character evidence, it is clear how this mechanism can prejudice the jury. The prosecution is typically the first to present its case[104] and has the opportunity to set a "goal,"[105] for which the jury can then collect and assess evidence. After establishing the goal, a prosecutor can then present "other acts" evidence which will have a greater chance to be accepted by a juror who is looking for reasons to convict a defendant. With the idea of conviction in mind, other acts will present a juror

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[100] Essentially, this means that a person believes the result that the individual wants to see. *See, e.g. id.*

[101] John E. Montgomery, *Cognitive Biases and Heuristics in Tort Litigation: A Proposal to Limit Their Effects Without Changing the World*, 85 NEB. L. REV. 15, 23 (2006).

[102] *Id.*

[103] Confirmation bias is present in all populations. Even scientists (of which the author is one), a group who on the whole are supposed to be rigorous, analytic, rational, and mathematical thinkers are susceptible to the effects of confirmation bias. *See* Monwhea Jeng, *A Selected History of Expectation Bias in Physics*, 74 AM. J. PHYSICS 578, 578 (2006).

[104] This is also an example of "primacy" where the first thing that a person hears is more likely to be remembered. *See* James Deese & Roger A. Kaufman, *Serial Effects in Recall of Unorganized and Sequentially Organized Verbal Material*, 54 J. EXPERIMENTAL PSYCHOL. 180 (1957).

[105] In the context of a criminal trial, the "goal" for the prosecution is naturally the adjudication of guilt of the defendant.

with a ready catalogue of easily remembered evidence that supports the guilt of the defendant.

III. Rationalizations for Federal Rules 413, 414 and 415

Even though there are compelling reasons why "other acts" character evidence should be excluded, there are a number of reasons why commentators have suggested it should be admitted. The fundamental premise behind these reasons is that the evidence is relevant, accurate, and most importantly, it serves the interest of justice because it prevents a guilty individual from getting away with a crime.

a. Political Expedience

It is safe to say that nobody likes a sex offender.[106] In particular, nobody likes a repeat sexual offender. Politicians, who need the approval of the voting population to keep their jobs, have a strong incentive to vote for acts that punish groups who are disliked. In the months leading up to the passage of Federal Rules of Evidence 413, 414, and 415, the news was full of stories about the acquittal of William Kennedy Smith after evidence of prior sexual offenses was excluded from his state trial.[107] In the floor debate for the passage of the rules, senators and representatives played to the public passions surrounding the inadmissibility of "other acts" character evidence.

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[106] *See* Aluise, *supra* note 82, at 190-91 (describing a poll where rape and child abuse were ranked only behind murder in "heinousness").

[107] *See* Karp, *supra* note 30, at 15-17. This article is instructive in pointing out a number of prominent cases where acquittals followed exclusion of propensity evidence. It is also instructive to note that this article was written by the author of Federal Rules 413, 414, and 415. *See also* Aluise, *supra* note 82, at 190-93 (recounting numerous examples of repeat sexual offenders).

Cases cited included *People v. Hansen*,[108] *Getz v. State*,[109] *State v. Pace*,[110] the case of Megan Kanka,[111] and Susan Harrison.[112] All of these cases involved repeat sexual offenders, and the floor debate was framed in a way that inflamed the passions of the public against the judiciary.[113]

Given the public backlash against the judiciary, it is not surprising that Congress would act to gather popular support. When the rules were passed, the Clinton Presidency was "floundering" and "the Democratic leadership in Congress desperately sought to enhance their public standing."[114] The public backlash against the judiciary gave Congress a perfect opportunity to gather

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[108] People v. Hansen, 708 P.2d 468, 471 (Colo. App. 1985) (finding admission of prior telephone calls to minor girls was reversible error in trial of defendant accused of child prostitution).

[109] Getz v. State, 538 A.2d 726, 735 (Del. 1988) (reversing conviction of defendant for rape of his eleven year old daughter because testimony about prior sexual contact with daughter was inadmissible).

[110] State v. Pace, 275 S.E.2d 254, 257 (N.C. Ct. App. 1981) (ordering new trial for Pace, who had been convicted of rape and murder, because admission of testimony by another woman who had claimed that the defendant raped her was reversible error).

[111] State v. Timmendequas, 737 A.2d 55, 172 (N.J. 1999) (defendant, a repeat child sex offender, was convicted of raping and murdering Megan Kanka). This is the case that led to passage of "Megan's Law" which requires convicted sex offenders to register. *See* Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071(d) (1994). The law required all states to pass sexual offender registration legislation at the risk of losing federal funding. Since the passage of the act, every state has complied with the federal mandate. Kimberly B. Wilkins, *Sex Offender Registration and Community Notification Laws: Will these Laws Survive?*, 37 U. RICH. L. REV. 1245 (2003).

[112] Susan Harrison was murdered by a two time convicted rapist, Jerry Walter McFadden. Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 CATH. U. L. REV. 153, 180 (2008).

[113] For discussion of the politics surrounding the passage of the rules, *see id.*

[114] *See id. at* 179.

public backing to change the rules of evidence to punish a particularly despised group. In the words of David J. Karp, who drafted the rules, "statements supporting the legislative proposal have pointed to the strength of the public interest in admitting all significant evidence of guilt in sex offense cases."[115]

The political goal was evidenced by the way the rules went into effect. Typically, rules are promulgated through a five-step process: "proposal by the Advisory Committee, a period of public debate and comment, Supreme Court adoption, and finally Congressional review and approval."[116] At the time of passage, the rules were opposed by the "overwhelming majority" of legal scholars.[117] Nonetheless, rather than following the usual procedure for deliberation and consideration, the Violent Crime Control and Law Enforcement Act of 1994 bypassed the procedure of input from the Judicial Conference.[118] In their rush[119] to gather public support, Congress instituted

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[115] Karp, *supra* note 30, at 20.

[116] Aluise, *supra* note 82, at 159-60. *See* 28 U.S.C. § 2072 (2000).

[117] *Report of the Judicial Conference*, *supra* note 3, at 52.

[118] Some might argue that there was input from the Judicial Conference because the text of the act permitted the Judicial Conference to comment on the rules. However, the rules also provided that they would go into effect regardless of what the Judicial Conference said. As a result, the ability of the Judicial Conference to comment had no teeth. *See*, *supra* note 22.

[119] The normal procedure for amendment of the rules has five levels of review. Aluise, *supra* note 82, at 159-60. However, in the case of Rules 413, 414, and 415:

> a practice that often takes three years or more and inspires serious comment and debate within the legal community was completed after twenty minutes of floor debate in the United States Senate, after one exhaustive marathon weekend in the House of Representatives, with no public hearings held on the matter, and with no serious consideration of the potential ramifications of the changes.

new rules that bypassed the basic protections put into place by Rule 404 and set up rules designed to apply exclusively to a targeted group.

It has also been suggested that Congress acted with the goal of promoting "justice" and "achieving [increased] consistency in the law."[120] While these public policy goals are laudable, the circumstances surrounding the passage of the new rules suggest that Congress was looking to something other than public policy when they passed the rules. Congress declined to take the advice of the Advisory Committee—the group that was the best equipped to interpret and modify the rules—and passed the rules to support its own political agenda. The proponents of the bill openly spoke of their agenda—to put a thumb on the scales of justice and tip the balance in favor of the prosecution: "there is a problem with the rules of evidence with regard to the ability to get the kind of background necessary to get convictions . . . "[121] The proponents of the rules were relying on the belief that convictions in sexual assault cases are more difficult to obtain than other types of crimes. However, the statistical evidence does not support this premise.[122]

Teter, *supra* note 112, at 180.

[120] *See* Karen M. Fingar, *And Justice For All: The Admissibility of Uncharged Sexual Misconduct Evidence Under the Recent Amendment to the Federal Rules of Evidence*, 5 S. CAL. REV. L. & WOMEN'S STUD. 501, 508 (1996).

[121] Representative Bill McCullum, quoted in Teter, *supra* note 112, at 186.

[122] *See infra* Figures 1-3 and Section V.c on the effect of the rules on conviction and plea rates.

b. Protection of Victims Unwilling or Unable to Testify

Commentators have suggested that victims of sexual crimes are unable or unwilling to testify.[123] Studies have shown that the majority of rapes go unreported.[124] Part of the reason for the low rate of reports of rate is an apparent "chilling effect" based on the perceived unresponsiveness of the judicial system.[125] Moreover, rape is a clandestine crime where the victims "endure greater physical and emotional trauma than do victims of most other crimes."[126] Thus, proponents argue that because of the "unique nature of sex crimes" allowing prior sexual misconduct evidence "insure[s] . . . greater justice will be done for victims of sex crimes."[127]

In addition to a providing a measure of justice for victims of sexual offenses, the drafter of the rules suggested that Federal Rule of Evidence 414 is particularly important because it deals with sex offenses against children. [128] The additional justification for this rule is that child molestation "cases regularly present the need to rely on the testimony of a child victim-witness whose credibility can readily be

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[123] *See, e.g.* Fingar, *supra* note 120. *But see Reforming*, *supra* note 66, at 299 ("[I]n prosecutions for sexual misconduct or child molestation, there is usually a victim capable of testifying at trial.").

[124] *See* Fingar, *supra* note 120, at 503-04 (citing statistics on reports of rapes).

[125] *Id.*

[126] *Id.* at 537. Of course, if it was the trauma to the victims that mattered, one might frame the rules of evidence according to the value of the crime, and the admissibility of character evidence would differ for shoplifting and car theft because of the different costs of the crimes. However, another author points out Rules 413, 414, and 415 have no applicability to murder which, judged by the fact that it can carry the death penalty, is judged the most serious of all crimes. *See Reforming, supra* note 66, at 299 (1995).

[127] Fingar, *supra* note 120, at 537.

[128] Karp, *supra* note 30, at 21.

attacked in the absence of substantial corroboration."[129] This rationale suggests that it should be unnecessary for the accuser to testify, and instead the prosecution should be able to put on more credible witnesses who can serve as proxies. Such a strategy violates the fundamental right of the accused to confront his accuser, one of the hallmarks of American jurisprudence.[130]

c. Law and Economics Rationale

The "Law and Economics" analytic method is the quintessential rational choice model. The method is founded on neoclassical economics and assumes that actors compare among the various options and rationally make the best possible choice.[131] This assumption can be applied to character evidence as either an incentive model or a cost minimization model, described below.

1. Incentive Model

Sanchiro has considered the law and economics approach for prohibition of using character evidence.[132] He argues that the result of the prohibition is that it creates a disincentive toward refraining from the undesirable behavior.[133] This objective intent is independent of the effect on the finders of fact.[134] Curiously, Sanchiro's analysis holds that even if character evidence does, in fact, have predictive value, the actual predictive value of the evidence is irrelevant when considering a disincentive for

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[129] *Id.*

[130] *See, e.g.,* Crawford v. Washington, 541 U.S. 36 (2004).

[131] *See generally* RICHARD A. POSNER, AN ECONOMIC ANALYSIS OF THE LAW (5th ed. 1998). However, citing behavioral psychology results, not all commentators agree with the approach of treating actors as perfectly rational. *See, e.g.,* Korobkin & Ulen, *supra* note 79.

[132] Chris William Sanchiro, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227 (2001).

[133] *Id.* at 1265.

[134] *Id.*

bad behavior. Under Sanchiro's disincentive model, a person who has a prior instance of bad character which would be admissible would be in a "damned if you do, damned if you don't" situation, and there is no disincentive to commit a crime.[135]

However, this analysis fails to take into account that there is an incentive for the person with prior "bad" character to stay out of any situation where they might be arrested, because the individual knows that an arrest will bring in the "other acts" character evidence and increase the chance of conviction.[136] As a result, there is an incentive to avoid situations which could lead to arrest. The Sanchiro incentive theory can equally well be applied to either deter or promote bad acts by a person with a prior record.

Under either of these approaches, the model assumes that the actor is making a rational choice. The assumption is that the actor has an understanding of the relevant rules of evidence, or at least a sufficient knowledge to make a rational and informed decision. However, it is unlikely that most offenders have a thorough understanding of the rules of evidence. Even if they did, when deciding on a course of action it is unlikely that offenders take into account the possible admissibility of their other acts.

2. Cost Minimization Model

Posner has approached the character evidence ban from the perspective of cost minimization. Posner

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[135] *Id.* at 1266.

[136] One can consider this in the context of an alleged child molester. If a person has been previously accused of child molestation, he or she may consider the costs and benefits of being alone with children in a suspicious situation. Here, the cost of a long prison term could be thought of as outweighing the benefits, assuming the purported offender has adequate self control.

calculates the benefit as probability of an error[137] as a function of the evidence admitted, $p(x)$ times the "stakes" of a trial, S, which should be independent of the evidence.[138] The overall societal benefit is then $B(x) = p(x) S + c(x)$, where c is the cost of error avoidance.[139] The object would then be to optimize the benefit, $B(x)$, as a function of the evidence admitted, x. The optimum value is then obtained[140] when $p_x S = -c_x$, where the subscripts represent the derivatives with respect to the evidence, x.[141]

Posner asserts that prior criminal conduct is probative of whether or not a person has committed a new crime, and suggests that because the stakes, S, go up for a repeat offender, if the increased cost to the offender is sufficient, "the propensity to commit a subsequent offense may be reduced to the same level as the propensity to commit a first offense."[142] This effect is essentially the same as the Sanchiro incentive theory, and again relies on the fact that the offender is fully apprised of the admissibility of the evidence.

At the same time, Posner recognizes that even without the effect on the actor, there is a problem with a jury misusing the "other acts" character evidence to arrive

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[137] An "erroneous rather than a correct outcome." Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1484 (1999).

[138] *Id.* at 1481.

[139] *Id.* at 1484.

[140] There are several mathematical assumptions on which the model depends. The most important is that the second derivative of B with respect to x is negative, and Posner assumes that it remains so over the full range of the evidence admitted, x. Otherwise, $B(x)$ would not have a maximum.

[141] *Id.* at 1484-85. In actuality, the optimization would normally take place with respect to all of the other variables in the system, so the derivatives are best considered as partial derivatives holding all other variables constant. However, in a model system such as the Posner model, a true multivariate analysis is unnecessary.

[142] Posner, *supra* note 137, at 1525.

at an incorrect outcome. Posner suggests that one must minimize the cost of a trial error.[143] If the cost of a new trial is T, and the probability that the evidence will lead to a wrongful conviction with admission of evidence x is $p(x)$, the expected benefit, the reduced cost, is $C= p(x)\ T + c(x)$, where $c(x)$ is the error avoidance cost. The object of the cost minimization model is to minimize the total cost, which occurs where $T\,p_x = -c_x$. Such a calculation amounts to minimizing the cost associated to admission of evidence which causes the jury to make a poor decision.[144] Posner's analysis suggests[145] that evidence should be admitted up to the point where the cost of error avoidance for the admission exceeds the trial costs times the probability of an error.

Posner rationalizes Federal Rules of Evidence 413, 414, and 415 because using the "other acts" character evidence in sexual offender cases is more reliable than not using it,[146] whereas for a thief, he contends that the evidence is not reliable:[147]

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[143] Posner focuses on the procedural costs. There are, of course, other costs unrelated to the trial. The cost to the wrongfully convicted individual stands out. There are other costs, as well, such as compensation paid to the wrongfully convicted individual. Twenty five states have statutes which compensate people who have been wrongly convicted. *See* Adele Bernhard, *A Short Overview of the Statutory Remedies for the Wrongly Convicted: What Works, What Doesn't, and Why*, 18 B.U. PUB. INT. L.J. 403, 409 (2009).

[144] Again, there are certain assumptions in the model, such as that the second derivative of the total cost with respect to the admission of the evidence is positive.

[145] Posner makes an assumption here that increasing evidence, x, results in a decreasing probability of error, $p(x)$, and that the cost of error avoidance is not decreasing.

[146] Essentially, this means that the probability of error, $p(x)$, decreases with the admission of the evidence.

[147] Or, in the context of the probability of error, $p(x)$ does not decrease—or at least does not increase.

> Unlike a molester, a thief, unless he is a kleptomaniac, does not have an overwhelming desire to steal. Theft is merely instrumental to his desire for money, and there are many substitute instruments. Committing a prior theft does not show that a defendant "likes" theft and so does not furnish a motive for his committing the current theft with which he is charged.[148]

The premise of Posner's analysis can be extended beyond the realm of sexual crimes. The logical conclusion is that if reliability and predictive value was the premise for the special prior sexual conduct rules, we should allow propensity evidence for *any* crime influenced by a person's needs, likes, or desires. Thus, we would presumably allow evidence of prior drug abuse in a case involving heroin possession, or perhaps evidence of prior public intoxication in the case of a person charged with driving under the influence.[149] Posner's argument for Federal Rules of Evidence 413, 414, and 415 implicitly relies on the accuracy of the past conduct of predicting future conduct. Or, simply put, persons who have committed sexual misconduct are more likely to be recidivists than those who

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[148] Posner, *supra* note 137, at 1525-26. It is interesting that Posner falls back to the language of "motive." If motive was the reason for the admission of the forbidden evidence, the evidence permitted by Federal Rules of Evidence 413, 414, and 415 would be permitted as motive evidence under Rule 404(b).

[149] Here, the analogy may be a bit strained, because it is necessary to compare evidence of prior public intoxication with driving under the influence. In an actual DUI case, many states have laws which make a later DUI conviction a different, and more serious, offense than a first. As a result, the conviction of a prior DUI offense would be admissible as an element of the crime, and would not necessarily be admitted to prove "action in conformity therewith." FED. R. EVID. 404.

have committed other crimes. In the following sections, we will see how this fundamental assumption is flawed.[150]

Using the Posner cost minimization model, one could also posit that the reason the evidence should be admitted is that the cost of allowing a sexual predator go free is extraordinary high. In this case, even a small probability, p, would be multiplied by a very large T (where T includes the societal burden) and thus the shift would be to admitting evidence with a very small probability of error, because the product could overcome the error avoidance cost. However, if this were the case, one would expect similar exceptional rules allowing "other acts" character evidence for other "high cost" crimes, such as murder. Given that the drafters of the rules chose only to weigh the reliability of the evidence, and not the societal cost, it is unlikely that the drafters considered this rationalization *ex ante*.

d. Prior Conduct is Predictive of Future Behavior

Perhaps the most widely used reason that prior sexual misconduct character evidence should be admitted is that it is relevant to predict conduct. Courts have accepted that propensity evidence is relevant.[151] For example, one of the indicators of whether a person is likely to commit a crime in the future is whether that individual has committed a crime in the past: "he did it once, therefore he did it again."[152] The question is not whether the evidence sought is relevant, the question is whether it is too relevant.[153]

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[150] *See infra* Section IV.

[151] *See, e.g.,* Michelson v. United States, 335 U.S. 469, 475-76 (1948); United States v. Guardia, 135 F.3d 1326, 1328 (10th Cir. 1998); United States v. Beechum, 582 F.2d 898, 910 (5th Cir. 1978); 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, 1129 (1993).

[152] Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character*

Of course, this premise is nonspecific and does not indicate a probability to commit a *specific* act or type of act, but more likely a general disregard for societal norms. Additionally, a person's general bad character in the past has not been shown to predict future lawlessness on a specific occasion.[154] For instance, if a person has been accused of adultery in the past, is it predictive of a desire for immoral conduct in general, a desire to commit adultery, or is it perhaps simply a desire for a relationship with another person—who just happens to be married to someone else? While a past offense may be a reliable predictor of commission of future offenses, it may have little probative value for a specific offense and is not probative of the result.

The reasoning behind the predictive accuracy in the case of sexual misconduct, as stated by Posner and those who subscribe to the "lustful disposition" theory,[155] is that the nature of a sexual offender is such that they are bound to repeatedly commit sexual offenses. This reasoning is the basis by which evidence of prior acts is considered more reliable in the case of a sex offense than in the case of some other type of offense.

The idea that sex offenders are incurable predators has found its way into the popular media,[156] and has been

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Theory of Logical Relevance, The Doctrine of Chances, 40 U. RICH. L. REV. 419, 426 (2006) [hereinafter *Doctrine of Chances*].

[153] *Michelson*, 335 U.S. at 475-76.

[154] *See* 1 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:19, at 2-118 n.28 (Thompson West 2006) (collecting studies showing that there is little correlation between a person's general character and his behavior on a specific occasion).

[155] *See supra* notes 49-52 and accompanying text.

[156] For instance, one of the highest rated television dramas on the National Broadcasting Company ("NBC") network for the last ten years has been *Law & Order, SVU*, which relates the workings of the sex crimes unit of a fictional New York police precinct. Many of the episodes are based on real life cases which have been in the news, reinforcing the idea that sex crimes have a high base rate and that the

widely cited—particularly in the civil commitments of "sexual predators."[157] This reasoning has been justified on the basis of psychological studies. Those who subscribe to the psychological "trait theory" approach suggest that persons have "stable internal elements" which influence their behavior over a wide range of situations.[158] However, research shows that trait theory is incapable of predicting behavior. For example, the theory could not be used to correctly predict when school children would cheat.[159] Trait theory, treated in the most basic sense, is essentially a probabilistic theory—it does not speak to whether a person actually committed the specific act in question, but rather shows the likelihood that a person committed the act.

Other researchers have suggested that "situationalism" dominates behavior.[160] This approach suggests that behavior is highly situation dependent, and small changes in the situation can result in dramatic changes in behavior.[161] Thus, past behavior is a poor

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world is full of sexual predators. *See* LAW & ORDER: SPECIAL VICTIMS UNIT, WIKIPEDIA, http://en.wikipedia.org/wiki/Law_%26_Order:_Special_Victims_Unit.

[157] *See generally* Aman Ahluwalia, *Civil Commitment of Sexually Violent Predators: The Search for a Limiting Principle*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 489 (2006).

[158] *See* Edward J. Imwinkelried, *Reshaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U. L. REV. 741, 747-50 (2008) [hereinafter *Grotesque*]. *See also* Waller, *supra* note 49, at 1511-13 (discussing application of trait theory to reliability of evidence).

[159] *See Grotesque, supra* note 158, at 748 (2008). In the context of the current discussion, situationalism would suggest that sexual misconduct in the past is not suggestive of sexual misconduct in the future. *See also* Waller, *supra* note 49, at 1511-13. Note that Rules 413, 414, and 415 do not explicitly require that the prior act be "similar." Evidence of an adult rape could be used in a child rape case, and vice versa.

[160] *Grotesque, supra* note 158, at 749-51. *See also* Waller, *supra* note 49, at 1513-15.

[161] *See Grotesque, supra* note 158, at 749-51.

predictor of future behavior when the situation surrounding the events is different. For instance, a college student may be arrested for driving home drunk from a fraternity party. However, drunk driving after attending a fraternity party is hardly predictive of drunk driving after taking an exam in philosophy. The facts and circumstances surrounding the situation matter.[162] The situationalism approach appears to be what the drafters of the original Federal Rules of Evidence subscribed to when they excluded "other acts" character evidence in Rule 404, before the addition of Rules 413, 414, and 415.[163]

The current psychological literature suggests that "interactionism," a blend between the two extremes, is probably the best theory. Interactionism suggests that people have a "psychic structure" that interacts with the situation to produce results.[164] Nonetheless, even using this more modern approach, behavior is far from "predictable," because the theory depends on a "learned" response to a stimuli or situation.[165] If the learned stimulus is absent, the individual would not be expected to perform in the predicted fashion.

e. Doctrine of Chances

With the failure of psychological theories to predict behavior, commentators have begun to rely on alternative

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[162] Which is not, of course, to excuse the behavior of the drunk driver. The offender should be punished according to the law. The point here is that an act committed under one set of circumstances may have little probative value in a future case.

[163] Of course, "situationalism" could also be spun in favor of the new rules. For instance, situationalism hinges on people performing similarly in similar situations. Under this theory, a child molester left alone with a victim might be expected to take the opportunity to molest the child, if he had done so in a similar situation in the past.

[164] *See Grotesque, supra* note 158, at 747-52. *See also* Waller, *supra* note 49, at 1515-17.

[165] *See* Waller, *supra* note 49, at 1515-17.

methods to justify admission of past conduct character evidence based on the traditional exceptions to the prior acts character evidence ban. The "doctrine of chances"[166] argues that it is implausible that a person would accidentally commit a sexual offense on several occasions, or be so unlucky to be falsely accused of the same sexual offense on a later occasion.[167] However, this same treatment could just as easily be applied to other crimes, so it does not necessarily justify a distinction in the admission of "other acts" evidence for sexual crimes as compared to other types of crimes.

Moreover, the doctrine of chances is not properly considered as admission of prior acts to show character in conformity therewith, but rather as an absence of mistake or accident,[168] a longstanding exception to the prohibition against "other acts" character evidence. For instance, when a person is accused of statutory rape, a common defense is that the offender did not know that the victim was underage.[169] Such a scenario is a classic example of the "mistake" defense. The Federal Rules of Evidence permit the admission of evidence to prove an "absence of mistake."[170] An offender who claims "I didn't know how old she was" on repeat occasions will find no solace in the rule excluding character evidence to prove conformity, as the evidence will be admitted to prove absence of mistake. There is no need for a special rule to admit evidence of the

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[166] *See, e.g., Doctrine of Chances*, *supra* note 152. The concept of the "doctrine of chances" appears in the "absence of mistake or accident" language of Federal Rule of Evidence 404(b).

[167] *See* Fingar, *supra* note 120, at 531. Of course, this is a probabilistic argument that flies in the face of the protections of Federal Rule of Evidence 404, which limits the possibility of any probabilistic determination of guilt by a finder of fact.

[168] *See* FED. R. EVID. 404(b).

[169] In many states, mistake is not a defense to statutory rape because statutory rape is a strict liability offense requiring no sceinter.

[170] FED R. EVID. 404(b).

prior accusations of sexual offenders in "doctrine of chances" cases, because the Federal Rules of Evidence already provide an exception to provide for admission of relevant evidence in this case.

IV. Recidivism of Sexual Offenders

The common themes running between the various rationalizations for allowing prior sexual misconduct evidence is that victims of sex crimes need special protection and that sexual offenders are natural born recidivists. The assumption is that, in the case of sexual offenders, past behavior is predictive of future behavior.

As described above, jurors are subject to cognitive biases, and they attribute greater reliability to recidivism than it actually deserves.[171] In particular, because Federal Rules of Evidence 413, 414, and 415 are special rules of admissibility of evidence against sexual offenders and do not apply to other types of criminal offenses, the rules have a built-in assumption that sexual offenders are more likely to be repeat offenders than people who commit other types of crimes. This assumption merits additional investigation.[172]

Before considering the data on recidivism, which is in itself controversial,[173] it is necessary to point out some of the flaws pertaining to statistics on repeat offenders. To begin, there are concerns with the accuracy of the data.[174] Different studies measure different statistics. For instance,

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[171] *See supra* Section II.b.2

[172] The idea that sexual offenders are "predators" appears to be a relatively new invention. As late as the mid 1980s, the consensus was that sexual offenders were not more likely to reoffend than other criminals. *See* Aluise, *supra* note 82, at 173-74.

[173] *See* 1 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:19, at 2-118 n.28 (Thompson West 2006).

[174] *See* Park, *supra* note 83, at 768.

some studies examine re-arrest rates,[175] whereas others may only look at convictions.[176] Another problem is the number of offenses which go undetected.[177] As one commentator has noted, "the true recidivism rate may be practically unknowable."[178]

Even when data is available, the statistics may be irrelevant to evaluate whether "other acts" character evidence has any bearing on a trial for a new offense. For instance, in order to properly use recidivism data to demonstrate a likelihood for future misconduct, the person would have to have an opportunity to commit additional crimes,[179] and the new crime would need to be similar to the prior crime.[180] A widely reported statistic on recidivism

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[175] In addition to the problem that a person who is arrested for a new crime may actually be innocent of it, using rearrest rates causes problems in interpreting the data because the police frequently "round[s] up the usual suspects" when a crime is committed. The arrest of a suspect for a crime may be more likely because he was convicted of a prior similar crime. Park, *supra* note 83, at 772.

[176] *Id.* at 770.

[177] *Id.* at 769.

[178] *Id.* at 770.

[179] It is frequently said that the recidivism rate for murder is among the lowest of all crimes because murderers serving long prison sentences do not have an opportunity to commit another crime. This may be partly true, but a more accurate measure is to look at the recidivism rate for those who have been released from prison. For murderers, this rate is also extremely low. Of course, there may be other reasons for this, such as the advanced age of a person released from prison following a long prison sentence. As one commentator put it, "[i]t is not surprising to find the recidivism rate for convicted murderers to be low, if only because their productivity as murderers is likely to be impaired by age by the time they are released." *Id.* at 771.

[180] If one is examining the admissibility of prior similar acts, it only makes sense to examine whether a prior act is likely to cause a person to commit the same act in the future. In some jurisdictions, a traffic offense is a criminal matter. But traffic violations are likely poor indicators of a crime such as an assault. They might, however, be relevant to a crime such as vehicular homicide, which contains a traffic component.

for sexual offenders is that it approaches 50 percent. However, this rate is lower than almost all other types of crimes, and the reported recidivism rate is nonspecific in that it is the rate that the offender was rearrested for *any* crime.[181] Thus, the result does not indicate the validity of assumptions behind Rules 413, 414, and 415, that a sexual offender is likely to commit a future sexual offense.

Numerous authors[182] have argued that past behavior is predictive of future behavior. One of the predictors of criminal activity is whether the person has committed a crime—any crime—in the past. However, the question is: how should one define a "crime" for the purpose of determining if it is predictive? Certainly a student who has accumulated a hundred parking tickets during his four years of college has demonstrated that he or she is a scofflaw, but would a demonstrated low threshold for breaking the law be predictive of a later charge of armed robbery? Clearly, some discretion must be demonstrated when considering how a past crime relates to the probability of a future crime. Recognizing this fact, the original authors of the Federal Rules of Evidence, who subscribed to the situational approach, rather than the trait theory approach, excluded this type of evidence.[183]

Even with the large uncertainties in the recidivism statistics, there are some results that are probative to the admission of evidence of similar prior acts. In a 1989 study, researchers looked at 100,000 prisoners for three

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[181] J. Comparet-Cassani, *A Primer on the Civil Trial of a Sexually Violent Predator*, 37 SAN DIEGO L. REV. 1057, 1072 n.80 (2000).

[182] *See supra* Section II.d.

[183] *See* FED. R. EVID. 404(b). The titles of Federal Rules of Evidence 413, 414, and 415 seem to require that the prior bad act be "similar," but the text of the rules does not require factual similarity between the cases. In cases with significant factual similarity, the evidence allowed by these rules would likely be admissible under the exception for evidence of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FED. R. EVID. 404(b).

years after release and measured the re-arrest rate for the *same type of crime.* From lowest to highest recidivism rate for the same type of crime, the researchers found murderers (2.8 percent), rapists (7.7 percent), violent robbers (19.6 percent), drug offenders (24.8 percent), and burglars (31.9 percent).[184] Thus, even with a substantial amount of underreporting of new offenses for rapists, the statistics "suggest precisely the opposite of what the rules assume"—that prior sexual offenses are less useful in predicting future similar offenses than other crimes, such as drug offenses and burglaries.[185]

Politicians and the public media have convinced the American public that "sex offenders are a class of offenders with unusually high rates of recidivism."[186] However, this assumption is unfounded and has "little empirical substantiation."[187] Even proponents of adopting state rules similar to the federal rules concede that "that no conclusive data proves that most sex offenders are exceptional recidivists, i.e. that they are more likely to commit another

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[184] *See* David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305, 339 (1995) [hereinafter *Political Process*] at note 157 (citing Bryden & Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529 (1994)). In 1992 another study was conducted, which showed a three year re-arrest rate for rapists of only 2.9 percent. Waller, *supra* note 49, at 1517. In more recent Department of Justice statistics, the three year re-arrest rate of sex offenders released in 1994 was 5.3 percent, 40 percent of which committed the new crime within a year of release. In addition, the Department of Justice study showed that, when looking at the rate of recidivism for any crime, the recidivism rate for sexual offenders (43 percent) was lower than that of the convict rate as a whole (68 percent). PATRICK A. LANGAN ET AL., RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 (Nov. 2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/rsorp94.pdf. Unfortunately, it appears that the Department of Justice discontinued the recidivism study shortly after Rules 413, 414, and 415 were passed.

[185] *Political Process, supra* note 184, at 339.

[186] Ahluwalia, *supra* note 157, at 494.

[187] *Id.*

sex offense than a murderer is to commit another murder."[188] The public bias against sex offenders and assumption that sexual offenders represent a class of incurable deviants plays directly to the misuse of "other acts" character evidence by jurors.

V. Impact of Federal Rules of Evidence 413, 414, and 415

a. Burden Shifting

One of the curious aspects of Rules 413, 414, and 415 is that some of their rationalizations are actually encompassed as exceptions in Federal Rule of Evidence 404(b). Commentators have argued that the "defendant's desire for . . . sexual gratification is essentially akin to proof of motive."[189] Proof of motive is an exception to the exclusion of character evidence of Federal Rule of Evidence 404(b). Similarly, the evidence could be admitted to contest lack of consent, but "absence of mistake" [190] is already included as an exception to the rule.[191] It is at least arguable that very little has changed by the admission of the rules, because they only allow evidence which was already admissible under exceptions,[192] and the rules are unnecessary.

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[188] Joyce R. Lombardi, Comment, *Because Sex Crimes Are Different: Why Maryland Should (Carefully) Adopt the Contested Federal Rules of Evidence 413 and 414 That Permit Propensity Evidence of a Criminal Defendant's Other Sex Offenses*, 34 U. BALT. L. REV. 103, 119 (2004).

[189] Melilli, *supra* note 50, at 1585.

[190] FED. R. EVID. 404(b).

[191] Melilli, *supra* note 50, at 1586.

[192] *See generally* David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529 (1994) (reviewing pre Federal Rule of Evidence 413, 414, and 415 admission of prior sex offenses under exceptions for motive, identity, plan, intent, absence of mistake, and for impeachment).

However, even if the rules are unnecessary for the purpose of determining admissibility of the evidence, the rules shift the burden to a presumption of admissibility, because Federal Rules of Evidence declare that "other acts" character evidence "*is admissible.*"[193] Even with the subsequent application of Federal Rule of Evidence 403, the burden is now on the defense to keep the evidence out, rather than the burden being on the prosecution (or plaintiff in a civil trial) to convince the judge that the evidence should be allowed in under a Rule 404(b) exception.

b. Adoption of similar rules by the states

Given the numerous reasons why "other acts" character evidence should be excluded, one should consider why Congress forced the rules on the judiciary.[194] For instance, the majority of sex crimes are tried in state, rather than federal court.[195] Because the vast majority of sex crimes are charged in state courts, one might ask if a change of the Federal Rules of Evidence really matters.

Because the majority of sex crimes are prosecuted in state courts,[196] one might question if there was any real impact of the law of evidence when Federal Rules of Evidence 413, 414, and 415 were adopted. Arguably, these

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[193] FED. R. EVID. 413, 414, 415 (emphasis added).

[194] *See supra* Section III.a, notes 21-28 and accompanying text.

[195] For example, in 2007, there were 428 cases brought with federal criminal charges of sexual assaults. Judicial Business of the United States Courts, *Judicial Business 2007, Table D-4*, *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2007.aspx. In the same year, there were 23,207 arrests in state courts for charges of forcible rape. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, *available at* http://www.albany.edu/sourcebook/.

[196] Edward J. Imwinkelried, *Perspectives on Proposed Federal Rules of Evidence 413-415*, 22 FORDHAM URB. L.J. 285, 288 (1995). *See also* Fingar, *supra* note 120, at 504-05; *Political Process, supra* note 184, at 340; Sheft, *supra* note 55, at 58.

rules impact a small minority of sexual assault cases[197] and thus their impact should be quite small.

However, the effect of the new rules is not solely on the federal evidence law. When they were originally passed in 1975,[198] the Federal Rules of Evidence had a profound impact on state evidence law. The Federal Rules of Evidence are taught at most law schools in the country. At the time of the passage of the Federal Rules of Evidence 413, 414, and 415, the majority of states had adopted rules of evidence which were similar to the existing Federal Rules of Evidence.[199] At the time of the passage of the new rules, there had already been a movement in states to have laws consistent, for the most part, with the federal rules, and one might have expected that states would move to adopt rules similar to Federal Rules of Evidence 413, 414, and 415.[200]

In essence, the new Federal Rules 413, 414, and 415 were frontrunners in a new movement in evidence law.[201]

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[197] The federal rules come into play in less than 2 percent of all sex assault cases. *See supra* note 195 and accompanying text.

[198] Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926 (1975).

[199] In 1995, thirty eight states had adopted rules similar to the Federal Rules of Evidence. *Political Process, supra* note 184, at 340. In the following decade, four more states adopted versions of the Federal Rules of Evidence. 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE, EVIDENCE § 5009 (3d ed.).

[200] The actual procedure by which rules of evidence are adopted in the states is beyond the scope of this article. In some states the rules of evidence are codified in statutes, in others, they are judicially adopted rules of evidence. In others, the legislature and the judiciary share the authority. For the purposes of this article, the author has conducted a survey of the codified statutes and rules of evidence for the states.

[201] Shortly after the passage of the rules, some authors suggested this revolution in state codes of evidence. *See, e.g.*, Fingar, *supra* note 120, at 510 ("every state in the United States should incorporate the recent legislation into its evidence code in order to achieve increased

Time has shown that the change in the Federal Rules had the predicted effect on state rules. At the time of the passage Federal Rules 413, 414, and 415, only two states had statutes governing admissibility of "other acts" character evidence in sex crimes.[202] Fifteen years later, the list has grown to a substantial minority of states[203] with one state with a new law soon to go into effect[204] and proposed legislation in another.[205]

The histories of these laws and rules show that many states were using the same justification for passing the laws as the Federal Government. The advisory committee for the Alaska Rules of Evidence noted that the equivalent rule in Alaska was "adopted for the sole reason

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consistency and intellectual honesty in the law regarding the admissibility of uncharged sexual misconduct evidence").

[202] IND. CODE § 35-37-4-15 (1993); MO. REV. STAT. § 566.025 (1995). Both of these laws have now been overturned by state courts. *See infra* notes 213-16 and accompanying text.

[203] The following list includes both statutes and rules of evidence, by the date they went into effect. The laws and rules cover sexual assault cases, but some are restricted to crimes against minors, while others are broader in scope. California: CAL.EVID.CODE § 1108 (West) (passed in 1995); Texas: TEX. CODE CRIM. PROC. ANN. ART. § 38.37 (Vernon) (effective 1995); Colorado: COLO. REV. STAT. § 16-10-301 (effective 1996); Arizona: ARIZ. R. EVID. 404(c)) (effective 1997); Alaska: ALASKA R. EVID. 404(b)(2)-(3) (effective 1998); Illinois: 725 ILL. COMP. STAT. 5/115-7.3 (effective 1998); Florida: FLA. STAT. § 90.404 (effective 2001); Louisiana: LA. CODE EVID. ANN. 412.2 (passed 2001); Iowa: IOWA CODE § 701.11 (passed in 2003); Michigan: MICH. COMP. LAWS. § 768.27a (effective 2006); Tennessee: TENN. CODE ANN. § 40-17-124 (effective 2006) (admitting evidence of prior sex crimes in cases of sex crimes against children under the age of 13); Oklahoma: 12 OKLA. STAT. § 2413 and 2414 (passed 2007); Utah: UTAH R. EVID. 404(c) (effective 2008); Washington: WASH. REV. CODE § 10.58.090 (effective 2008).

[204] Nebraska: NEB. REV. STAT. §§ 27-413 to -415 (effective January 1, 2010).

[205] Kansas: KAN. STAT. ANN. § 60-455 (prior acts evidence not admissible). *But see* 2009 Kan. Laws Ch. 103 (S.B. 44) (proposed amendments to allow for admission of evidence of prior sexual crimes).

that the legislature has mandated the amendment."[206] The legislative record of the California statute admitting "other acts" character evidence in sex offense cases[207] justified the statute on the basis of the comments in the congressional record for the passage of Federal Rules of Evidence and an article[208] written by the author of the Federal Rules.[209] The Colorado legislature wrote its justification—based on the notions of underreported crimes, lack of credible witness testimony, and sexual offender recidivism—directly into the statute.[210] The Florida legislature passed a statute

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[206] ALASKA R. EVID. 403 advisory committee's note.
[207] CAL. EVID. CODE § 1108 (West 2008).
[208] Karp, *supra* note 30.
[209] *See* The Assembly Journal for the 1995-96 Regular Session, 3277.
[210] COLO. REV. STAT. § 16-10-301. The text of the statute includes a preamble outlining the reasons for the passage of the law:

> The general assembly hereby finds and declares that sexual offenses are a matter of grave statewide concern. These frequently occurring offenses are aggressive and assaultive violations of the well-being, privacy, and security of the victims, are severely contrary to common notions of proper behavior between people, and result in serious and long-lasting harm to individuals and society. These offenses often are not reported or are reported long after the offense for many reasons, including: The frequency with which the victims are vulnerable, such as young children who may be related to the perpetrator; the personal indignity, humiliation, and embarrassment involved in the offenses themselves; and the fear of further personal indignity, humiliation, and embarrassment in connection with investigation and prosecution. These offenses usually occur under circumstances in which there are no witnesses except for the accused and the victim, and, because of this and the frequent delays in reporting, there is often no evidence except for the conflicting testimony. Moreover, there is frequently a reluctance on the part of others to believe that the offenses occurred because of the inequality between the victim

instituting the admission of prior acts evidence, and it was adopted by the Florida Supreme Court over the recommendation of the advisory committee.[211] In Washington, where the state legislature has co-extensive authority with the judiciary to pass rules of evidence, the legislature adopted the exception "to ensure that juries receive the necessary evidence to reach a just and fair verdict."[212] None of the authors of these rules and statutes presented anything beyond the conclusory statements and justifications offered in the passage of the Federal Rules.

> and the perpetrator, such as between the child victim and the adult accused, or because of the deviant and distasteful nature of the charges. In addition, it is recognized that some sex offenders cannot or will not respond to treatment or otherwise resist the impulses which motivate such conduct and that sex offenders are extremely habituated. As a result, such offenders often commit numerous offenses involving sexual deviance over many years, with the same or different victims, and often, but not necessarily, through similar methods or by common design. The general assembly reaffirms and reemphasizes that, in the prosecution of sexual offenses, including in proving the corpus delicti of such offenses, there is a greater need and propriety for consideration by the fact finder of evidence of other relevant acts of the accused, including any actions, crimes, wrongs, or transactions, whether isolated acts or ongoing actions and whether occurring prior to or after the charged offense. The general assembly finds that such evidence of other sexual acts is typically relevant and highly probative, and it is expected that normally the probative value of such evidence will outweigh any danger of unfair prejudice, even when incidents are remote from one another in time.

Id.

[211] In re Amendments to the Florida Evidence Code, 825 So.2d 339 (Fla. 2002).

[212] 2008 Wash. Legis. Serv. Ch. 90 (S.S.B. 6933) (West).

Remarkably, in the two states that had statutes admitting "other acts" evidence before the adoption of Federal Rules of Evidence 413, 414, and 415, the statutes have been overturned by the courts. In Missouri, the state supreme court found that the law violated the state constitution.[213] In Indiana, the statute was passed in May 1993, to go into effect the following year.[214] The Indiana statute was declared a nullity before it went into effect, because it conflicted with the common law rules of evidence.[215] It is ironic that the frontrunner states have reversed course through judicial decisions and ruled that prior sexual misconduct evidence is not admissible.[216]

c. Conviction and Plea Bargain Rates

One of the premises in support of passage of the rules was that prosecution of sex offenders was difficult because of lack of credible testimony of the victims or underreporting of crimes.[217] The changes in the rules were supposed to tip the scales toward the prosecution by

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[213] State v. Ellison, 239 S.W.3d 603, 607-08 (2007) (finding MO. REV. STAT. § 566.025 violates the state constitution). *See also* William E. Marcantel, Note, *Protecting the Predator or the Prey? The Missouri Supreme Court's Refusal to Allow Past Sexual Misconduct as Propensity Evidence*, 74 MO. L. REV. 211, 229 (2009).

[214] 1993 Ind. Legis. Serv. P.L. 232-1993 (H.E.A. 1342) (West).

[215] Brim v. State, 624 N.E.2d 27, 33 n.2 (Ind. Ct. App. 1993). This case was decided on November 23, 1993. The statement by the *Brim* court was dicta, but was later reinforced in Day v. State, 643 N.E. 2d 1 (Ind. Ct. App. 1994). The statement by the *Day* court is also dicta, because the crime in that case happened before the law went into effect, but the statements in the two cases suggest that the courts will not permit admission of "other acts" character evidence based on the statute.

[216] The legislative mandate for the rules of evidence may violate at least one other state constitution. The Tennessee Supreme Court has ruled in another context that the judiciary is not bound by rules of procedure adopted by the legislature. *See* State v. Mallard, 40 S.W.3d 473 (2001).

[217] *See supra* Section III.b.

shifting the burden to the defense to keep evidence out. This burden shifting was a sea change in the evidence landscape surrounding trials of sexual offenders.

The trial landscape for sexual misconduct could change in a number of ways. For instance, one might expect that with the evidence being presumptively admissible, defendants might seek a plea bargain rather than the risk of a trial. Defendants might prefer a bench trial rather than a jury trial, because the judge would, presumably, be willing to give character evidence less weight. Defendants might try to take the stand in their own defense. Whereas a defendant may previously have refrained from taking the stand under the old rules because the evidence may have been admissible for impeachment evidence if they claimed "mistake,"[218] under the new rules, with a flood of "other acts" character evidence coming in, a defendant may be left with no choice but to testify on his own behalf to try to "remove the sting."[219]

It is difficult to assess whether all of these results have come to pass. However, from the statistical evidence,[220] it appears that at least some of these outcomes have occurred.[221] Both the total number of federal sexual assault charges and the conviction rate for federal sexual assault cases have gone up substantially in the past thirty years. Figure 1 shows that the number of federal sex assault cases has gone from fewer than 100 in 1980 to over

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[218] *See* FED. R. EVID. 404(b).

[219] Ohler v. United States, 529 U.S. 753, 758 (2000).

[220] Statistical evidence in this section from 1980-1996 is found in *The Reports of the Judicial Conference.* Data from 1997-2008 is found in the Judicial Business of the United States Courts, *Annual Report of the Director, 1997-2008, available at* http://www.uscourts.gov/Statistics/JudicialBusiness.aspx.

[221] Here, we only investigate the change in conviction rates and plea bargain rates. Because of the low number of trials and the even smaller number of bench trials, the small sample size makes statistical analysis for other outcomes difficult.

400 in the last three decades. Examination of the statistics shows that the defendants in the overwhelming majority of these cases plead guilty, and most of the increase in cases resulted in guilty pleas.

The conviction rate for federal sexual assault cases has risen dramatically over the last thirty years. In an eleven year period from 1980-1990, before the sexual offender rules were passed, the average conviction rate of sexual assaults in federal court was about 72 percent.[222] In the most recent eleven-year period, from 1998-2008, after the rules were passed, the conviction rate was 87 percent. The change in conviction rates for sexual assaults may not entirely be a result of the new rules of evidence during that period, as the conviction rate for all crimes in federal court also rose from about 81 percent to 90 percent.

[222] This number is calculated by dividing the total number of pleas, *nolo contendre*, and convictions by the total number of sexual assault cases filed. In order to examine the effect of Rules 413 and 414, the cases have been limited to sexual assault cases which would qualify under those rules. Cases for other sex crimes, such as sex trafficking and distribution, sex offender registry violations, and sexually explicit material have not been included. Naturally, the statistics for the total number of cases filed does not include cases where accusations were made but no charge was brought against the defendant.

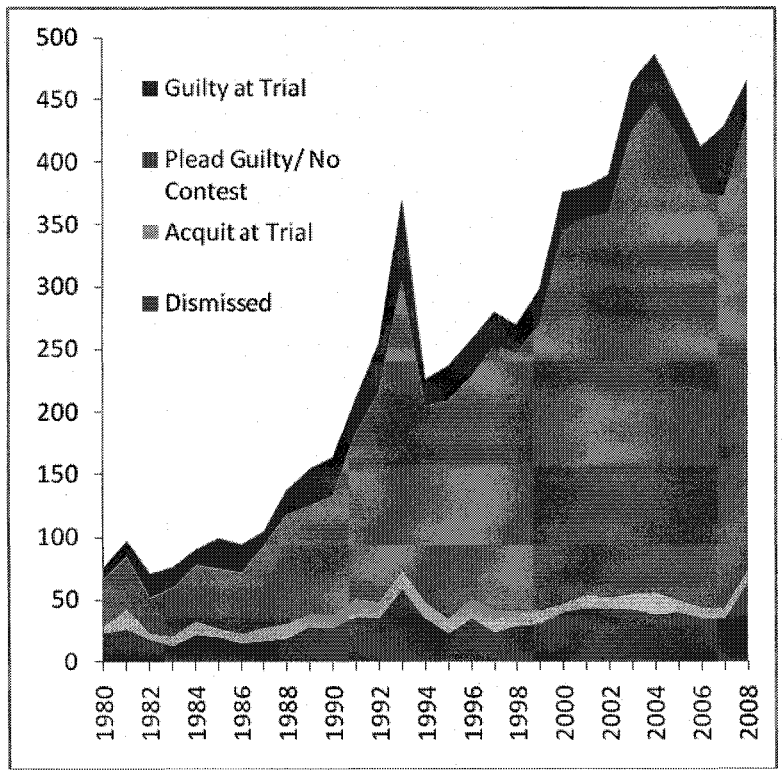

Figure 1.
Total Federal Sexual Assault Cases by Disposition.[223]

The data for conviction rates appear in Figure 2, and it is immediately apparent that in the 1980s the conviction rate for sexual assaults was lower than the overall conviction rate for federal crimes. After the turn of the century, the conviction rate for sexual assaults was nearly the same as the conviction rate for federal crimes. In 1995,

[223] Statistics for guilty pleas includes no contest pleas, because statistics for no contest and guilty pleas are not available for all years. However, the total number of *nolo contendre* pleas for sex abuse cases is generally quite small. Between 2001 and 2004, there were a total of 1370 cases where the defendant was found guilty. Of this total number, only two were *nolo contendre* pleas, or less than 0.2 percent of the total.

the year in which the new rules went into effect, the rate of convictions for sexual assaults was actually higher than the rate for conviction on all federal crimes. This statistic immediately calls into question one of the premises behind Federal Rules of Evidence 413, 414, and 415—that convictions were difficult to obtain in sexual assault cases.

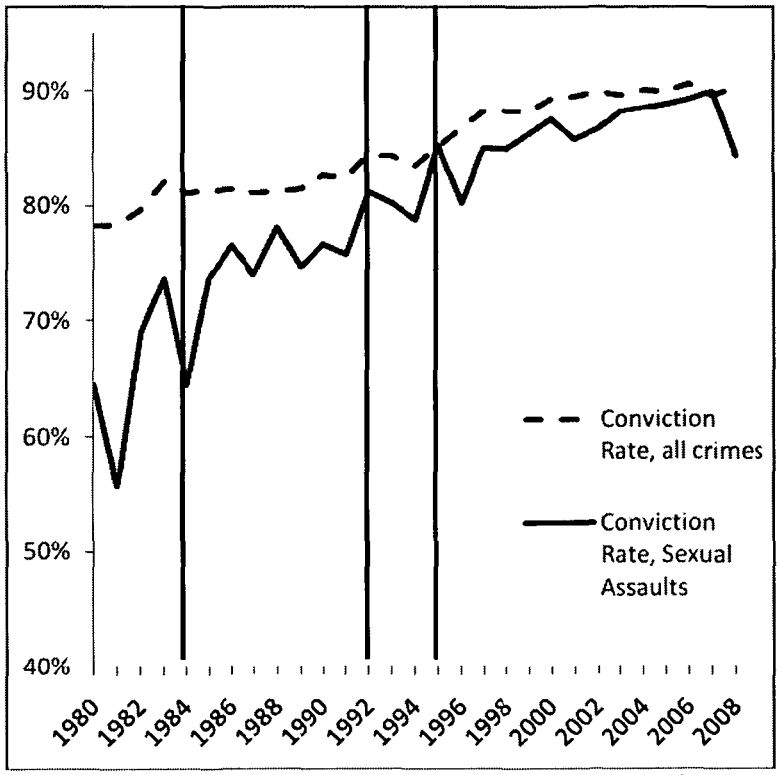

Figure 2. Conviction Rates of Federal Sexual Offenders. The vertical lines represent the passage of the Federal Sentencing Guidelines (1984), the introduction of DNA evidence in federal courts (1992), and the passage of Federal Rules of Evidence 413, 414, and 415 (1995).

The implementation of the rules in 1995 may not be the cause of the change in conviction rates. The greatest change in the rate occurred between 1980 and 1990, with a

slower trend afterwards. As a result, it is apparent that the rule changes were not effective in delivering the promised result: the changes in the rules were likely not responsible for any substantive increase in conviction rates.

A similar effect appears in the rate of plea bargains. In the 1980s, approximately 54 percent of federal sexual assault charges resulted in either a guilty plea or reached a conviction *nolo contendre*. In the most recent eleven-year period, the rate jumped to 79 percent. Figure 3 shows that the rate of plea deals in sexual assault cases rose by approximately 30 percent between 1980 and 2009, with the highest year being 1995, the year that the new rules went into effect. However, the majority of the rise does not appear to be a result of rule changes in 1995, but rather other effects in the 1980s. After the change in rules, the rate of pleas in sexual assault cases is approximately the same. Again, the proponents of the rule changes used the premise of difficulty in obtaining convictions to effect their passage, but the data shows that, at the time the rules were passed, a greater proportion of sexual assault defendants plead guilty than defendants in other federal crimes, and after the rules were passed the plea rate did not increase significantly for sexual assault cases.

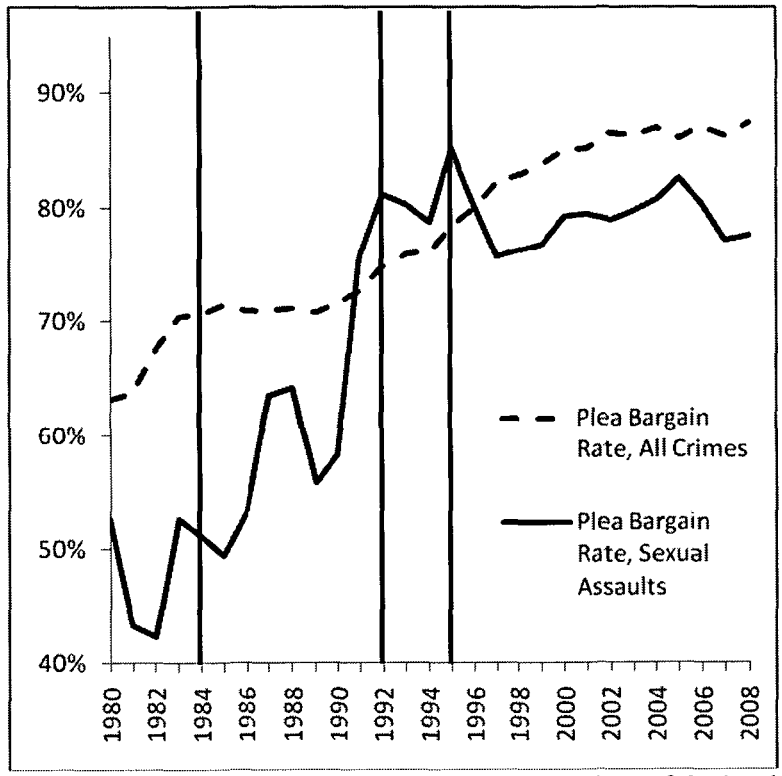

Figure 3. Plea Rates (including *nolo contendre*) of Federal Sexual Offenders. The vertical lines represent the passage of the Federal Sentencing Guidelines (1984), the introduction of DNA evidence in federal courts (1992), and the passage of Federal Rules of Evidence 413, 414, and 415 (1995).

The large increase in conviction rates and rates of plea bargains is likely due to factors other than the change in the rules of evidence in 1995. The changes could result from other factors, such as exercise of prosecutorial discretion to only bring the strongest cases (which would decrease the number of charges brought), introduction of the federal sentencing guidelines, which created an

incentive for defendants to plead charges down in 1984,[224] or improved forensic techniques. For example, in the early 1990s, DNA evidence was first allowed in federal court.[225] Since that time DNA evidence has become a valuable tool for prosecutions. DNA evidence is particularly useful in prosecutions of sex offenders, as DNA evidence left on the victim would be nearly conclusive and results in a very high conviction rate.[226] The largest jump in the plea bargain rate was shortly after the introduction of DNA evidence in federal courts.

The promise that the addition of the rules would change the landscape of federal sexual assault trials by increasing conviction rates remains unfulfilled. The statistics do not support that the new rules actually dramatically increased conviction rates or plea bargain rates over a trend that was already occurring for federal crimes as a whole. While the conviction rate for sexual assaults has gone up faster than the general conviction rate for federal crimes, most of the disparity was made up

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[224] *See* The Sentencing Reform Act of 1984 (Chapter II of the Comprehensive Crime Control Act of 1984), Pub. L. No. 98-473, 98 Stat. 1837 (creating the United States Sentencing Commission). The Sentencing Reform Act made all federal sentences determinate. *See also* PROTECT Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (restricting grounds where a federal judge could make a downward departure from sentencing guidelines in sex abuse cases). *But see* United States v. Booker, 543 U.S. 220 (2005) (finding mandatory federal sentencing guidelines violates the Sixth Amendment of the Constitution).

[225] *See* United States v. Jakobetz, 747 F. Supp. 250 (D. Vt. 1990) (finding DNA evidence admissible under the Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)).

[226] Such evidence is unlikely to be used in many other crimes where physical forensic evidence is unnecessary. DNA evidence would not be in issue in cases where the defendant claimed consent of the victim. However, reliable data on the "consent" defense is not widely available.

before the rules went into effect, and the change is likely a result of numerous other factors.

VI. Conclusion

In 1994, when Congress passed legislation implementing Federal Rules of Evidence 413, 414, and 415, they put in place a process to erode the character evidence exclusionary rule that had developed over two centuries of common law in the United States. The stated intent was to make it easier to convict sex offenders, and the unstated intent was to influence the development of evidence law in the several states. These objectives have been accomplished with mixed results.

The statistical evidence shows that the conviction rates for sex offenders have changed little since the change in the rules of evidence went into effect. While conviction rates for sex offenses have increased over the last three decades, the majority of the increase paralleled increases in the overall federal conviction rate. Additionally, the majority of increase occurred before the changes in the rules of evidence and was likely a result of other factors.

The second intent, although not express, was to influence the laws of the states. While the Federal System sets up two distinct legal systems, one in the federal government and one in the several states, there is a significant amount of "cross pollination" between the two systems. Many states have adopted rules of evidence that are either based on the Federal Rules of Evidence or are strongly influenced by them.[227] While it was never explicitly stated as a goal for the passage of the Federal Rules of Evidence 413, 414, and 415, scholars predicted the

[227] Forty-two of the fifty states now have rules of evidence that parallel the Federal Rules of Evidence. 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE, EVIDENCE § 5009 (2d ed. 2005).

trend toward similarity in state and federal evidence laws the laws would continue.[228] Despite the controversy when Congress originally passed the rules, this second goal has also been largely successful.[229]

With the success of at least some of these goals, it is also an appropriate time to assess the cost of the changes. Federal Rules of Evidence 413, 414, and 415 have come at a significant cost to fairness to criminal defendants. The rules are designed to admit evidence that will appeal to the basest emotions of jurors in a way that begs jurors to misuse it. The rules admit "other acts" character evidence, which is statistically less relevant than character evidence in many other crimes. In their rush to punish sexual offenders, Congress pushed to admit evidence that was the least probative and the most prejudicial, in contrast to the fundamental protections of Federal Rule of Evidence 403.[230] Essentially, Rules 413, 414, and 415 are designed to take advantage of juror prejudice and to include evidence that is of questionable probative value. Congress tipped the scales in favor of conviction.

Federal Rules of Evidence 413, 414, and 415 are also a cumbersome addition to the rules. The rules have started to make the 400 series of Federal Rules of Evidence look like the 800 series of Federal Rules for hearsay evidence.[231] The hearsay rule states that hearsay statements

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[228] *See, e.g.*, Fingar, *supra* note 120, at 510 ("every state in the United States should incorporate the recent legislation into its evidence code in order to achieve increased consistency and intellectual honesty in the law regarding the admissibility of sexual misconduct evidence").

[229] The list of states which have adopted similar rules are listed *supra* notes 202-205. The number is now a substantial minority of states, but in two of these states the courts have ruled the laws either unconstitutional (Missouri) or a nullity (Indiana).

[230] In a survey of 60,000 adults, the Department of Justice found that following homicide, rape and child abuse were considered the next two most serious crimes. Aluise, *supra* note 82, at 190-91.

[231] With special admissibility or exceptions to character evidence provided by Federal Rules of Evidence 406-415, there are now ten

are not admissible.[232] After declaring that hearsay is not admissible, the next two rules carve out nearly three dozen exceptions where the evidence is deemed to be sufficiently reliable to be admitted.[233] When exceptions are combined with case law defining the constitutional overlay of the rules,[234] what remains is a complex series of rules.[235] The addition of new rules for different kinds of "other acts" character evidence, that is deemed reliable,[236] could give the character evidence rules the same complexity of the hearsay rules—with the possible complication that this type of evidence is likely to be more prejudicial to the jury than all but the most damning hearsay evidence.

Justice Brandeis once described the Federal System as one where "a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social . . .

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rules that provide overlays on top of the basic rule of character evidence admission, Federal Rule of Evidence 404.

[232] FED. R. EVID. 802.

[233] FED. R. EVID. 803, 804.

[234] *See, e.g.,* Crawford v. Washington, 541 U.S. 36, 61 (2004) (finding admission of most hearsay evidence without production of the declarant violates the Confrontation Clause). *See also* Robert P. Mosteller, *Crawford's Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases, in* DUKE LAW SCHOOL FACULTY SCHOLARSHIP SERIES, 127 (Mar. 2008), *available at* http://lsr.nellco.org/duke_fs/127.

[235] The complexity of the hearsay rules has been debated for decades. *See, e.g.*, G. Michael Fenner, *Law Professor Reveals Shocking Truth About Hearsay*, 62 UMKC L. REV. 1, 100 (1992) ("[T]he hearsay rule is, in fact, overly cumbersome, unnecessarily difficult, roundly misunderstood and misapplied, gingerly avoided as the most feared of all of the rules of evidence, and not worth the trees that die in its defense and its explanation."). Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 376 (1992) (noting "no one who studies or teaches evidence doubts that the hearsay doctrine is hard to apply and administer" and calling for hearsay reform).

[236] As noted above, *supra* Section IV, the "reliability" of other acts character evidence is certainly questionable.

experiments without risk to the rest of the country."[237] This happened in the case of evidence of prior bad acts evidence in sexual assault cases, when Indiana and Missouri passed statutes which admitted character evidence in sexual offense cases.[238] Perhaps Congress, acting with political motives, was too quick to act when it responded by passing legislation which instituted Rules 413, 414, and 415.

The addition of Rules 413, 414, and 415 to the Federal Rules of Evidence was an experiment that succeeded in its goals of stigmatizing a despised group and influencing changes in laws of the several states. However, the success of the experiment came at a tremendous cost to the principles of fairness in admission of evidence that dates back to the middle of the nineteenth century. Federal Rules of Evidence 413, 414, and 415 deliberately play to the passions of the jury and deliberately put evidence in front of a jury that has prejudicial value that exceeds its probative value. Fifteen years after the experiment began, it is time for others to follow the lead of courts in Missouri and Indiana[239]—the two states that began the experiment. The time has come to restore the Federal Rules of Evidence to their form before the addition of the special "other acts" character evidence rules for alleged sexual offenders.

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[237] New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis J., dissenting).

[238] IND. CODE § 35-37-4-15 (1993); MO. REV. STAT § 566.025 (1995).

[239] State v. Ellison, 239 S.W.3d 603 (2007) (finding MO. REV. STAT § 566.025, which admitted sexual misconduct evidence, violates the state constitution); Brim v. State, 624 N.E.2d 27, 33 n.2 (Ind. Ct. App. 1993) (declaring the Indiana law admitting other acts character evidence a nullity).