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BRANDING THE SEXUAL PREDATOR: CONSTITUTIONAL RAMIFICATIONS OF FEDERAL RULES OF EVIDENCE 413 THROUGH 415

MARGARET C. LIVNAH[1]

I. INTRODUCTION

On July 9, 1995, Federal Rules of Evidence 413 through 415 became law.[2] These new rules were designed to provide a more liberal framework for the

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[1]J.D. expected 1997, University of California Hastings College of the Law; B.A. Philosophy, Yale University. Clerk to the Honorable Stephen S. Trott of the United States Court of Appeals for the Ninth Circuit 1997-98. Dedicated to my mother who showed me that curiosity is always rewarding.

[2]Federal Rule 413 reads, in pertinent part:
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.
(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the

admission of evidence of a defendant's prior act or acts of sexual violence or child molestation.[3] The rules create an evidentiary presumption that evidence of prior sexual assault or child molestation is admissible in sexual assault or molestation cases.[4]

The new amendments to the evidentiary rules were first proposed in 1991 during the Bush administration and were flatly rejected.[5] These revisions, however, were again proposed[6] as part of the Violent Crime Control and Enforcement Act, enacted on September 13, 1994.[7] Proponents of the revisions claim that they satisfy profound needs in the American system of criminal justice.[8] Those who have written in protest of the passage of the new amendments argue that the revisions potentially jeopardize fundamental liberties and directly conflict with the philosophy from which the rest of the Federal Rules of Evidence derive their legitimacy.[9]

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evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule. FED. R. EVID. 413 (West 1995).

Federal Rule 414 extends the same provisions for the admission of evidence in cases in which child molestation has been charged. *See* FED. R. EVID. 414 (West 1995).

Federal Rule 415 covers civil cases "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." *See* FED. R. EVID. 415 (West 1995). (Although passed at the same time, Rule 415 is beyond the scope of this Note.)

[3]137 CONG. REC. S3191-02, at S3239 (daily ed. Mar. 13, 1991).

[4]137 CONG. REC. S3191-02, at S3240 (daily ed. Mar. 13, 1991).

[5]*Perspectives on Proposed Federal Rules of Evidence 413-415: Introduction*, 22 FORDHAM URB. L.J. 265, 266 (1995) [hereinafter *Perspectives*].

[6]Myrna S. Raeder, *Perspectives on Proposed Federal Rules of Evidence 413-415 American Bar Association Criminal Justice Section Report to the House of Delegates*, 22 FORDHAM URB. L.J. 343, 344 (1995).

[7]Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, Title XXXII, 320935, September 13, 1994, 108 Stat. 1796, 2135; *Perspectives*, *supra* note 5, at 265.

[8]*See* David J. Karp, *Symposium on the Admission of Prior Offense Evidence in Sexual Assault Cases: Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15 (1994). Karp was senior counsel for the Office of Policy Development, United States Department of Justice. The ideas for new rules originated in the Department of Justice and Karp was one of the drafters of the original text.

[9]*See* David P. Leonard, *Perspectives on the Proposed Federal Rules of Evidence 413-415: The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305, 305 (1995) (Leonard argues that although the political process has always informed the rules, these new amendments are so politically motivated as to have "radically changed the shape of the rules" and to have created an exception to the principle that different types of cases and different types of litigants should be treated similarly); *see also* James Joseph Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly*

When the revisions were first proposed in March 1991, the proposal in the Senate stated that "[t]he willingness of the courts to admit similar evidence in prosecutions for serious sex crimes is of great importance to effective prosecution in this area, and hence to the public's security against dangerous sex offenders."[10] In August 1994, then Senate minority leader Robert Dole reiterated this position and claimed that the "tragic result" of sexual assault cases predating these amendments was the inability of prosecutors to secure convictions.[11]

Dole invoked the disturbing case of Charles R. Getz, who was convicted of raping his 11-year-old daughter.[12] In 1988, the Supreme Court of Delaware overturned the conviction on the basis that evidence of prior assaults against the child was improperly admitted at the trial level.[13] Senator Dole claimed that the "tragic result" of the prohibition against introduction of character evidence was that "the defendant walked."[14]

Dole's account misconstrues the effect of the Delaware court's decision. In his political diatribe, Dole neglected to mention that Getz was immediately retried and convicted without the introduction of evidence about his past misconduct. Getz was found guilty of first-degree rape and sentenced to life in prison, and his conviction was affirmed on appeal.[15] Thus, Getz's situation -- chosen by a politician to reveal the dangers of not admitting character evidence against defendants accused of sexual assault and child molestation -- actually demonstrates that convictions may be attained without resorting to the admission of what has traditionally been considered improper propensity evidence.

In its initial proposal of March 1991, the Senate Committee explained the need to admit evidence of similar crimes in "serious" acts of sexual violence towards women and children. The sponsors claimed that the revisions governing the admissibility of evidence in criminal cases in which the accused is charged with sexual assault or child molestation were designed to respond to a growing need in American society. This exigency is not only the result of increased violence towards women and children,[16] but a reaction to the public

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Drafted Version of a Very Bad Idea, 157 F.R.D. 95, 125 (1994).

[10]137 CONG. REC. S3191-02, at S3238 (daily ed. Mar. 13, 1991).

[11]140 CONG. REC. S10273-03, at S10276 (daily ed. Aug. 2, 1994).

[12]Getz v. State, 538 A.2d 726 (Del. 1988).

[13]*Id.*

[14]140 CONG. REC. S10273-03, at S10276 (daily ed. Aug. 2, 1994).

[15]*See* Getz v. State, 582 A.2d 935 (Del. 1990).

[16]According to a 1989 Bureau of Justice Statistics study, 31.9% of released burglars were rearrested for burglary, 24.8% of drug offenders were rearrested for a drug offense, 19.6% of violent robbers were rearrested for robbery, while only 7.7% of rapists were rearrested for rape. Of all the offenses in the study, only homicide had a lower recidivism rate, at 2.8%. David P. Bryden & Roger C. Park, *Other Crimes Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 572 (1994) (citing Allen J. Beck, *Bureau of Justice Statistics*, U.S.

perception that the American legal system does not adequately respond to that growing violence.

The passage of the revisions to the Federal Rules of Evidence was part of the response to this public outrage. This Note seeks to address both the potential constitutional consequences of the newly passed Federal Rules of Evidence 413 and 414 and the problems that these revisions were designed to remedy. The first section will introduce the history of the passage of these controversial revisions as primarily a political process and one which bypassed the standard rules of practice.[17] The second section will address the procedural violations and the troubling inconsistency of the new rules with the federal courts' interpretation of the other Federal Rules of Evidence. The third portion of this Note will address the substantive constitutional issues presented by these amendments, including: violation of due process,[18] violation of double jeopardy protection,[19] Eighth Amendment violation for punishment on the basis of status[20] and violation of the Equal Protection Clause.[21] The fourth section will address the countervailing needs for the new rules, including the increasing rate of violence towards women and children and the inadequacy of the criminal justice system to confront these challenges, and will conclude with a proposal for revisions to the new rules which seek to avoid any constitutional infirmity.[22]

II. BACKGROUND

In July 1991, a beauty pagent contestant accused superstar athlete Mike Tyson of forcibly raping her in an Indianapolis hotel room.[23] At trial, the prosecution introduced evidence of prior similar violent behavior towards women.[24] Tyson was convicted of rape and served three years in prison.[25]

Department of Justice, Recidivism of Prisoners Released in 1983 6 (1989)). It is fair to assume that, due to the low percentage of rapes actually reported, this statistic does not accurately reflect the number of rapes committed by repeat offenders. Davies, 27 CRIM L. BULL. 504, 520 (1991) (only an estimated 10% of rapes are actually reported); *see also e.g.*, A. Nicholas Groth et al., *Undetected Recidivism Among Rapists and Child Molesters*, 28 CRIME & DELINQ. 450, 453-54 (1982) (a study of an anonymous questionnaire given to convicted rapists and child molesters indicates that, on average, they committed two to five times as many sex crimes for which they were not apprehended).

[17]Raeder, *supra* note 6, at 345.

[18]U.S. CONST. amend. V and XIV.

[19]U.S. CONST. amend. V.

[20]U.S. CONST. amend. VIII.

[21]U.S. CONST. amend. XIV.

[22]138 CONG. REC. S15160 (Sept. 25, 1992) (remarks by Sen. Dole).

[23]Sonja Steptoe, *A Damnable Defense*, SPORTS ILLUSTRATED, Feb. 24, 1992, at 92. Tyson v. State of Indiana, 593 N.E.2d 175, 176 (1992).

[24]*Id.*

In the same year, William Kennedy Smith, nephew of the former president, was arrested and charged with forcible rape.[26] Three other women came forward and claimed they had been sexually assaulted by Smith in the 1980s.[27] At his trial, Smith's defense argued that introduction of his history of prior sexual assaults would be improper use of character evidence.[28] The trial judge excluded this evidence on the basis that the testimony would be devastating to the defense, and that there was insufficient proof of similarity between the alleged offense and the prior accusations.[29] Testimony from the accusers was withheld from the jury.[30] Smith was acquitted.[31]

The public perception surrounding these two controversial and highly publicized cases was the legal system was fundamentally flawed. The cases suggested that someone accused with atrocious crimes could be set free by operation of a technical legal formality.[32] Not only was the public shocked by the information that it received from the press, but public confidence in the criminal justice system was undermined by the general perception that society's most deplorable criminals could be set free as a result of legal technicalities.[33]

The revisions to the Federal Rules of Evidence 413 through 415 were introduced primarily as a response to the public perception of inadequacy in the prosecution of sexual predators.[34] Although the amendments were first introduced in March 1991, they were rejected by Democrats in Congress who believed the rules would be found unconstitutional.[35] In April 1994, New York Republican Representative Susan Molinari joined a substantial number of the members of Congress who voted to block the passage of the Crime Bill.[36]

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[25] Don Pierson, *Sports Digest*, THE CINCINNATI ENQUIRER, Jan. 9, 1996, at D2.

[26] State v. Smith, Fifteenth Judicial Circuit of Florida, # 91-005482 CF A.

[27] David A. Kaplan, *Palm Beach Lessons*, NEWSWEEK, Dec. 23, 1991, at 30.

[28] *Id.*

[29] Cathy Booth, *The Case That Was Not Heard*, TIME, Dec. 23, 1991, at 38.

[30] *Id.*

[31] *Smith*, # 91-005482 CF A. *See* Kaplan, *Palm Beach Lessons*, at 30.

[32] Booth, *The Case That Was Not Heard*, at 38.

[33] *Id.*

[34] 140 CONG. REC. H2415, at H2433 (daily ed. Apr. 19, 1994); 138 CONG. REC. S15160 (Sept. 25, 1992); Duane, *supra* note 9, at 3; *see generally* Karp, *supra* note 8, at 15.

[35] Duane, *supra* note 9, at 95; Kenneth Cooper, *House Nears Crime Bill Agreement; Negotiators Scramble to Solve Policy Riffs on $30 Billion Plan*, WASHINGTON POST, Aug. 21, 1994, A1, at A21.

[36] 140 CONG. REC. H2415, at H2433 (daily ed. Apr. 19, 1994) (remarks by Rep. Molinari).

Molinari announced her intention to block the bill unless it included the amended rules of evidence for sex offense cases.[37]

After the election of a majority of Republican representatives to Congress, President Clinton and the remaining Democrats in Congress were under considerable pressure to pass some form of the Crime Bill.[38] Desperate for votes from Republicans, Congress finally acquiesced to Representative Molinari's proposal.[39] Many Democrats, wary of the new provisions but weary from the deliberations, conceded that it was time to pass some form of satisfactory crime legislation.[40]

III. PROCEDURAL VIOLATIONS AND GENERAL INCONSISTENCIES WITH FEDERAL RULES OF EVIDENCE

Congress bypassed the usual rule-making procedure by enacting the amended rules in the form of legislation.[41] The customary method of passing amendments to federal procedural rules is through the Rules Enabling Act.[42] This process calls for an Advisory Committee made up of scholars in the relevant field, lawyers and judges, to draft a proposal for any amendment or addition to the existing rules.[43] The proposal is then subjected to a period of public comment, reviewed by a subcommittee of the United States Judicial Conference whose members are chosen by the Chief Justice of the Supreme Court, and finally subjected to Congressional review.[44]

On September 13, 1994, President Clinton signed the Violent Crime Control and Enforcement Act of 1994, consisting of crime legislation which included the new evidence rules.[45] The act created a mechanism granting the Judicial Conference 150 days from the date of enactment to review the proposed rules and submit recommendations or revisions to Congress.[46] Although some supported the new rules, many law professors, scholars and the American Bar

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[37]William Douglas, *Right, Left Oppose Crime Bill*, NEWSDAY, Aug. 10, 1994, at 19; *see also*, 140 CONG. REC. H8968, at H8991 (daily ed. Aug. 21, 1994) (remarks by Rep. Molinari).

[38]Katherine Q. Seelye, *House Approves Crime Bill After Days of Bargaining, Giving Victory to Clinton*, THE NEW YORK TIMES, Aug. 22, 1994, at A1.

[39]Duane, *supra* note 9, at 96-97.

[40]Seelye, *House Approves Crime Bill*, at A1. Democratic Representative William J. Hughes claimed that "some of the provisions are absolutely awful, [but it's] time to stop fiddling and pass a crime bill." *Id.*

[41]*Perspectives*, *supra* note 5, at 266.

[42]Rules Enabling Act, 28 U.S.C. 2071-2077 (1944).

[43]*Id.*

[44]*Perspectives*, *supra* note 5, at 266.

[45]*See* Pub. L. No. 103-322, Title XXXII, 320935.

[46]*Perspectives*, *supra* note 5, at 266; *see also* Raeder, *supra* note 6, at 344.

Association wrote in objection to their passage.[47] The Judicial Conference remained silent.[48] The new rules officially became law on July 9, 1995.[49]

Several problems arise as a result of the subversion of the Rules Enabling Process.[50] Congress usurped the traditional role of scholars in the law and drafted these evidence revisions without reference to the potential constitutional issues involved or to the value of maintaining consistency throughout the Federal Rules.[51]

In general, politicizing the passage of procedural rules increases the likelihood that the rules will be politically remedial, but functionally inadequate.[52] The political motivation of enacting procedural rules is safeguarded by the Rules Enabling Act practice which requires that any new revisions are scrutinized by legal scholars. Although procedural rules always have a political component and their operation evinces underlying substantive policies of the law,[53] the traditional process for passage has relegated those policy determinations to authors who have little to gain politically.

The original drafting of the Federal Rules of Evidence in 1975 was intended to adopt common law rules that had developed by the late 1960s.[54] The Rules were the result of an effort to achieve uniformity and consistency in the application of codified practices.[55]

Rules 413 and 414, however, were passed by Congress in a very contentious political environment in which concessions were made in order to ensure passage of comprehensive crime legislation.[56] These amendments are distinctive because they address a specific kind of case and treat litigants differently according to the type of charge involved.[57] The Federal Rules of Evidence generally apply consistently to various types of cases and treat litigants similarly.[58]

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[47] Raeder, *supra* note 6, at 344, and Pub. L. No. 103-322, Title XXXII, 320935 6(d)(2).

[48] Raeder, *supra* note 6, at 345.

[49] *Id.* at 346.

[50] 140 CONG. REC. H5437-03, at H5437 (daily ed. June 29, 1994) (remarks by Rep. Hughes included objections to the procedure bypassing the Rules Enabling Act "which has served us well for a long time.").

[51] Raeder, *supra* note 6, at 345.

[52] Leonard, *supra* note 9, at 305-06.

[53] *Id.* at 306.

[54] *Id.* at 312.

[55] *Id.*, and notes cited therein. *See also* 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE 5006 (1977) (general history of the drafting of the Federal Rule of Evidence).

[56] *See supra* notes 32-40 and accompanying text.

[57] Leonard, *supra* note 9, at 306.

[58] *Id.* It should be noted that recently amended Rule 412, concerning the limitation of

Advocates of the new rules argued that the treatment of character evidence or evidence of prior bad acts relating to character inferences had been inconsistent among jurisdictions.[59] Sponsors specifically argued that evidence relating to the particular crimes of sexual assault and child molestation required special attention in the Federal Rules because of the inconsistency in application among jurisdictions: "the law in this area has never been a model of clarity and consistency."[60]

One of the justifications offered by political sponsors of the amendments was that the adoption of the new rules would create clarity and consistency in the regulation of character evidence in cases involving sexual crimes and child molestation.[61] Scholars writing in opposition to the new rules have argued that despite Congress' attempt to create consistency in the specific area of law concerning sex crimes, the result is further inconsistency in the application of the Federal Rules of Evidence in their entirety.[62]

Under the new amendments, sexual offenses, unlike other crimes, are treated with the further presumption that evidence of prior acts or accusations is admissible to show the probability of acting in conformity with a bad character as to similar offenses.[63] This added burden for the defense of sexual assault and child molestation cases, even if applied consistently within that class of crimes, arguably creates inequity in the treatment of other serious crimes with similar, if not higher, rates of recidivism.[64] According to many studies, the rate of recidivism among sexual offenders is lower than that among repeat offenders of other serious crimes:

> [t]here appears to have been a widespread Congressional assumption that a special rule of evidence is justified by some unusually high rate of recidivism among sexual offenders, which would make evidence of such criminal histories of unusually great probative value. But the legislative history contains no empirical evidence to support that crucial assumption, and there is good reason to question it.[65]

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disclosure of an alleged victim's sexual history in sexual assault and harassment cases, is also case-specific. *See* FED. R. EVID. 412.

[59] Duane, *supra* note 9, at 111-12.

[60] 137 CONG. REC. S3191-02, at S3240 (daily ed. Mar. 13, 1991).

[61] *Id.*; Duane, *supra* note 9, at 103.

[62] Duane, *supra* note 9, at 103-104.

[63] FED. R. EVID. 404(a). As opposed to general character evidence prohibition in Federal Rule of Evidence 404(a) which reads: "[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." *Id.*

[64] *See also supra* note 16 (in order to create true consistency, this type of prohibited character evidence arguably should be admissible in cases of crimes with higher recidivism rates such as theft or murder).

[65] Duane, *supra* note 9, at 113; *see also supra* note 16.

Additionally, the new amendments have serious drafting deficiencies.[66] There remains the troubling ambiguity regarding whether the amendments permit the application of Federal Rule of Evidence 403, which permits trial judges to use their discretion to weigh the potential prejudice against the probative value of the evidence before making a decision whether to admit or exclude propensity evidence from the trier of fact.[67] Rule 413 states that "evidence of the defendant's commission of another offense or offenses of sexual assault *is* admissible . . . for its bearing on any matter to which it is relevant."[68] From the plain reading of the rule, it is not clear whether judicial discretion or the application of Rule 403 would be appropriate.

The original proposal in Congress, however, indicates that Rules 413 and 414 were not intended to preclude the application of all the other relevant evidentiary rules.[69] Drafters of the rules indicated in the legislative history that the rule does not ensure admissibility in all cases. Rather, the new rules create a presumption of a high degree of probativeness.[70] The original proposal in March 1991 maintained that "[i]n general, the probative value of such evidence is strong, and is not outweighed by any overriding risk of prejudice."[71] The impact of Rule 403 (and its conspicuous omission in the body of the new amendments) is thereby minimized because the original drafters believed that, in general, prejudice was not a real concern.[72] The new rules create a presumption that the probative value is not substantially outweighed by the risk of unfair prejudice in cases of sexual crimes and child molestation. Only by reference to the legislative history can a defendant argue that Rule 403 should operate to rebut this strong presumption.[73]

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[66]Norman M. Garland, *Perspectives on the Proposed Federal Rules of Evidence 413-415: Some Thoughts on the Sexual Misconduct Amendments to the Federal Rules of Evidence*, 22 FORDHAM URB. L.J. 355, 357 (1995).

[67]FED. R. EVID. 403. Rule 403 reads:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Id. See also Garland, *supra* note 66, at 357; Duane, *supra* note 9, at 118-19.

[68]FED. R. EVID. 413 (emphasis added).

[69]137 CONG. REC. S3191-02, at S3239 (daily ed. Mar. 13, 1991) ("admission and consideration of [evidence of other crimes by the defendant in sexual assault prosecutions] under other rules will not be limited or impaired.").

[70]Karp, *supra* note 8, at 18.

[71]137 CONG REC. S3191-02, at S3239 (daily ed. Mar. 13, 1991).

[72]*Id.* at S3239 (daily ed. Mar. 13, 1991). The issue of prejudice forms a substantial part of my argument that the new rules are a violation of the defendant's due process rights. *See infra* section IV. A. (1) Risk of Misdecision from Prejudice.

[73]The operation of Rule 403 in connection with the new rules is still highly suspect. Accurate drafting of the amendments, rather than expository explanation in the

Lastly, the rules as drafted do not specify the form that the prior bad acts may take.[74] Rule 413 only specifies that evidence of "the defendant's *commission* of another offense or offenses of sexual assault is admissible."[75] It is not clear from the drafting of the rules whether the prior bad act would have to include a conviction. The rule appears to cover acquittals or even accusations. The drafting leaves unresolved the nature of the standard of proof required in order to admit the prior act evidence, even for the limited purpose of establishing propensity.[76] The current drafting of the amendments does not make clear what degree of proof is necessary in order to qualify prior bad acts as admissible. Although the defense may counter the introduction of unsubstantiated evidence, the nature of sexual crimes and crimes committed against children is potentially so inflammatory as to unduly influence a jury. Thus, the mere mention of potential prior bad acts may be sufficient to cause substantial prejudice.

The strictly procedural complications of sloppy draftsmanship have substantive repercussions. The withdrawal of the judicial oversight function, the creation of intrinsic inconsistencies within the Federal Rules caused by politicization of the rule-making process and the failure to specify the standard of proof required in order to make prior bad acts admissible potentially create substantive constitutional crises.

IV. SUBSTANTIVE CONSTITUTIONAL ISSUES AND THE AMENDED FEDERAL RULES OF EVIDENCE

A. Procedural Due Process Violation

In the debate over state incorporation of the Fourteenth Amendment right to due process of law, the Supreme Court took the position that due process

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legislative history, would have resolved this troubling ambiguity. Eileen A. Scallen, *The Federal Rules of Evidence in Retrospect: Observations from the 1995 AALS Evidence Section: Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes*, 28 LOY. L.A. L. REV. 1283, 1290-91 (1995). Scallen argues that the plain reading of rules discounts the legislative intention of the drafters of rules. Although the essay stresses the importance of published notes which give "great weight in interpreting the Rules," they are still always secondary to the text of the rule itself. *Id. Accord* Williamson v. United States, 114 S.Ct. 2431, 2436 (1994) (if the policy is clearly expressed in the statutory text, it outweighs whatever force the legislative notes may have).

[74]Garland, *supra* note 66, at 357.

[75]FED. R. EVID. 413 (emphasis added).

[76]Garland, *supra* note 66, at 357.

> [C]ritics state that the ambiguity in failing to specify any standard of proof is problematic. Some of the detractors assert that only evidence of a conviction should be permitted for such uncharged acts to be admissible. Other detractors suggest that if not limited to evidence of convictions, the uncharged acts evidence must pass the test of "clear and convincing.")

Id. (citations omitted).

was designed to protect the criminal defendant from the exercise of government power that would deprive the individual of his "fundamental" rights.[77] By example, in *Hurtado v. California*, the Court sustained a California law which permitted criminal proceedings to be initiated by information instead of by grand jury indictment.[78] The opinion stated that: "any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these *principles of liberty and justice*, must be held to be due process of law."[79] The difficulty in evaluating whether a particular right is protected by Fourteenth Amendment due process, to use the terminology of *Hurtado*, is the determination that a certain right is "fundamental" or is constitutive of our shared "principles of liberty."

The admission of evidence under Rules 413 and 414 of the commission of prior sexual assaults or child molestation creates a large chasm in the already weakening prohibition against character evidence. Under Federal Rule of Evidence 404(b), evidence that would otherwise be inadmissible because of the likelihood that jurors would use the evidence improperly to make associations about the character of the accused, already may be admitted for other purposes.[80] There now is a possibility that, under Rules 413 and 414, evidence of prior commissions of sexual assault or child molestation will be used improperly by the jury and will profoundly prejudice defendants.[81]

According to the common law tradition, propensity evidence was deemed to be too prejudicial: "[c]ourts . . . have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt."[82] The theory excluding character evidence to prove guilt of the present charge is not that the evidence of the prior act lacked proba-

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[77] GERALD GUNTHER, CONSTITUTIONAL LAW 411 (1991).

[78] 110 U.S. 516, 538 (1884).

[79] *Id.* at 537 (emphasis added).

[80] FED. R. EVID. 404(b). Rule 404(b) reads in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Id.

[81] Some scholars have rejected the notion, however, that jurors cannot be trusted with potentially prejudicial information. In discussing the role of evidentiary rules, David J. Karp wrote "[w]hen I make my own assessment of evidentiary rules, I start by asking myself what information a reasonable person would want to have in deciding an important matter." Karp, *supra* note 8, at 26.

[82] Michelson v. United States, 335 U.S. 469, 475 (1948).

probative value, but that it is overpersuasive and unduly prejudicial.[83] As stated by Justice Jackson in *Michelson v. United States*:

> [t]he state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crimes. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.[84]

Evidence of prior bad acts tends to affect adversely the decision of the jury. Evidence of prior sexual assault and child molestation would arguably have a greater effect on the jury than evidence of prior nonviolent or nonsexual crimes.[85]

Due process requires that a criminal defendant be judged according to the relevant evidence pertinent to the present charge. The new amendments to the Federal Rules of Evidence state that evidence of prior acts *is* admissible for any purpose for which it is relevant.[86] Sponsors of the amendments argued that the jury should be allowed to calculate the improbability that the same person would be mistakenly accused of the same act twice.[87] The common law concept of fundamental rights and ordered liberty may well be threatened by the presumption that similar act evidence should automatically be admitted.

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[83] *Id.* at 476.

[84] *Id.* at 475-76.

[85] *See infra* notes 88-91 and accompanying text (prior act evidence relating to sexual assault is perhaps more damaging to the defense because it is more provocative than other act evidence relating to crimes which are not perceived by society with such abhorrence).

[86] FED. R. EVID. 413 and 414; 137 CONG. REC. S3191-02, at S3239-240 (daily ed. Mar. 13, 1991). Sponsors argued that the prior act evidence is simply too probative to exclude from the purview of the jury. The limitation on the evidence was that the prior act evidence would not go to character generally but would only be admissible if it related to other crimes by the defendant that were of the same type for which he is formally charged. Ironically, as the level of probativeness rises, the potential for a constitutional violation proportionately increases. *See infra* notes 88-91 and accompanying text.

[87] 137 CONG. REC. S3191-02, at S3240 (daily ed. Mar. 13, 1991). This inference creates an equal protection challenge to the new federal rules because juries determining a case of sexual assault or child molestation (as opposed to theft or murder or any number of other violent crimes) will be permitted, if not encouraged, to gauge the likelihood of guilt from a probabilistic calculus. The concern is that the prosecution will have increased impetus to investigate suspects with a prior record. Because the new amendments are so recently enacted, there have been no reported cases challenging the apprehension of a known repeat offender on this basis. Still, the likelihood of false prosecutions based on this probabilistic evaluation endangers the principle of the equal protection of the law.

1. Risk of Misdecision from Prejudice

The risk of due process violation is increased by the potential that a jury will be prejudiced by explicit reference to prior bad sexual acts. There is a substantial risk that jurors will be emotionally overwhelmed by graphic accounts of prior sexual assaults or child molestation by witnesses who never formally charged the defendant with these crimes.[88]

> The risk of misdecision is greatest when the jury is likely to find the character of the accused's uncharged misconduct repugnant or revolting. The admission of testimony about that type of misconduct can poison the jurors' minds and generate an overmastering hostility against the accused.
>
> Evidence of sexual misconduct or child molestation by an accused has an extraordinary tendency to create such hostility.[89]

The common law prohibition of character evidence was premised upon the likelihood of an emotional repugnancy toward a defendant who has a record of similar acts.[90] In the case of sexual assault and child molestation, that likelihood is arguably greater. Thus, Wigmore offers the following assessment in his treatise:

> [i]t may almost be said that it is *because* of the indubitable relevancy of specific bad acts showing the character of the accused that such evidence is excluded. It is objectionable not because it has no appreciable probative value but because it has too much. The natural and inevitable tendency of the tribunal . . . is to give excessive weight to the vicious record of crime.[91]

2. Jury Immunity and Diminished Regret

Jurors who are overwhelmed by evidence of past criminal behavior could feel less responsibility for their decision to convict even absent sufficient evidence to make a determination of guilt beyond a reasonable doubt.[92] Jurors who convict without sufficient proof will not regret their decision if they truly

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[88] *Michelson*, 335 U.S. at 476; Leonard, *supra* note 9, at 310; Edward J. Imwinkelreid, *Perspectives on Proposed Federal Rules of Evidence 413-415: 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, 296 (1995) [hereinafter *Undertaking the Task*]. *See also supra* notes 74-76 and accompanying text: the standard of proof required to establish prior act evidence is troubling in this context because of the danger that the jury may be overpersuaded by the mere mention of a totally unproven act.

[89] *Undertaking the Task*, *supra* note 88, at 296 (citations omitted).

[90] *See supra* notes 81-83 and accompanying text.

[91] JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 62.2 at 1212-13 (Tillers, rev. ed. 1983) (emphasis added).

[92] Duane, *supra* note 9, at 103.

believe that someone with a bad record is deserving of punishment, regardless of the level of proof for the charged crime.[93]

> One of the dangers inherent in the admission of extrinsic evidence is that the jury may convict the defendant not for the offense charged but for the extrinsic offense . . . the jury may feel that the defendant should be punished for that [prior] activity even if he is not guilty of the offense charged.[94]

The jury's feeling of immunity for decisions which may be legally insufficient insulates an improper decision and may make such decisions more likely.

> Evidence of prior bad acts has been widely presumed to carry the risk of unfair prejudice because of the grave possibility that jurors, even if they do not conclude that the defendant is guilty of the crime charged beyond a reasonable doubt, will be inclined to convict him (at least in part) on the basis of their disapproval of his prior crimes, or their hunch that he has committed other crimes for which he was never caught.[95]

Thus, the jury may convict without making a finding of guilt beyond a reasonable doubt on the basis of facts regarding the present charge. In that case, the defendant is deprived of due process rights because the jury might convict on the basis of prejudice, meanwhile protected by a feeling of immunity.

Another problem with admitting evidence of uncharged (and therefore unpunished) prior acts is the possibility that juries will convict for the current charge without sufficient evidence of guilt in order to vindicate the unpunished prior crimes. If a juror is persuaded by the other act evidence that the defendant deserves punishment, that juror may choose to disregard the paucity of evidence to sustain the current charge and convict nevertheless.[96]

Unlike the jury who must base its conviction upon substantial evidence of the charged crime, the jury who is informed of the defendant's prior record

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[93] *See* D. Craig Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 WASH. L. REV. 289, 294 (1989). Lewis describes how scholars believe that the fact finder will experience "diminished regret about possible error in a determination of guilt when the fact finder learns that the accused is an 'evil person.'" *Id.*

[94] United States v. Beechum, 582 F.2d 898, 914 (5th Cir. 1978).

[95] Duane, *supra* note 9, at 110.

[96] As yet, there has been no reported case in which this principle has been demonstrated. The potential that the application of the amended evidentiary rules will lead to the suspension of the Government's constitutional burden may be sufficient to determine that the new rules are unconstitutional. It is not suprising that there are no reported cases: the rules are fairly new and not yet adopted by any states and the possibility that a jury will confirm the suspicion that it has decided a case improperly is at best negligible.

(even a record of accusations without charges or convictions) may feel insulated in its decision to convict without adequate proof.[97]

3. Rules Do Not Require Prosecution to Sustain Its Burden of Proof

Admission of evidence of prior sexual offenses may have such a persuasive influence over the jury that the level of proof required for a conviction is diminished. The Fifth and Fourteenth Amendment due process guarantees protect the expectation that, in criminal cases, the government must establish the guilt of the accused beyond a reasonable doubt.[98]

The Court in *In Re Winship* held that: "'[d]ue process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the fact finder of his guilt.'"[99] The Court explicitly held that due process required the prosecution to prove "beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged."[100]

The new amendments to the Federal Rules create the presumption to admit evidence of prior 'commissions' of acts of sexual violence or child molestation.[101] Commissions may include convictions, acquittals and accusations.[102] Thus, the defendant *may* be convicted on the basis of rumor, coincidence or the convincing testimony of an accuser who has never pressed charges.[103]

This difficulty would arise in a case in which a sympathetic plaintiff cannot muster sufficient evidence of the charged crime to compel a conviction. In that case, evidence by accusers of prior uncharged misconduct might cause a jury to convict for the past crimes on the belief either that the defendant should not be allowed to get away with repeated assaults or on the belief in the statistical unlikelihood that the same defendant would be accused of similar crimes more than once without actually having committed them. This scenario represents

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[97] *Lewis, supra* note 93, at 326.

[98] *Id.*, at 294; U.S. CONST. amend V and XIV.

[99] *In Re Winship*, 397 U.S. 358, 364 (1970) (quoting Speiser v. Randall, 357 U.S 513, 525-26 (1958)).

[100] *Id.*

[101] FED. R. EVID. 413 and 414.

[102] *See supra* notes 74-76 and accompanying text.

[103] A response to this argument is that the defense has the opportunity to counter the testimony of uncharged misconduct with evidence tending to prove that the defendant was innocent of the conduct alleged by the accusations. Still, presentation of this rebuttal evidence is arguably time-consuming and expensive for the defense and the admission of accusations may be so prejudicial as to jeopardize severely the defendant's chances of successful rebuttal.

Sponsors countered these arguments by claiming that the prior commissions are so relevant, in balance, their admission is not *unduly* prejudicial. *See supra* note 70 and accompanying text. This argument, however, fails to address the standard of proof requirement.

an occasion in which the prosecutor would be relieved of its constitutional duty to prove all the facts of the present charge beyond a reasonable doubt.[104]

B. Violation of the Protection Against Double Jeopardy

The Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb."[105] This provision ensures that no defendant can be made to stand trial for the same offense more than once. This provision is potentially violated in instances in which the prosecution seeks to introduce evidence of a prior act for which the defendant was acquitted.

New rules 413 and 414 permit the admission of evidence of prior acquittals in order to show that defendant acted in similar fashion in the current case.[106] The purpose of the introduction of this evidence is to convince a jury of the defendant's guilt by reintroducing evidence used in past trials, including acquittals. The defendant may in effect be made to stand suit to the prior offense twice. The constitutional protection against double jeopardy is thereby potentially violated.

In a Sixth Circuit case, *Oliphant v. Koehler*, defendant Oliphant appealed his conviction for forcible rape of a Michigan State University freshman.[107] At the jury trial, the prosecution presented two witnesses who testified to similar experiences with the defendant which resulted in acquittals. Although the majority found that the evidence was admissible to show a course of conduct or plan under Federal Rule 404(b),[108] Chief Judge Edwards, in a dissenting opinion, stated that introduction of their testimony violated the Fifth Amendment protection from double jeopardy:

> [t]he constitutional problem is posed by the fact that in both of these instances that identical charge had been filed by each of these two witnesses, appellant had been subjected to a jury trial, and the jury had

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[104]*In Re Winship*, at 364; *see supra* notes 94 and 95. I would argue, however, that the admission of prior act evidence, even if or perhaps by virtue of being admitted without proof beyond a reasonable doubt, creates a permissive and not a mandatory presumption. In other words, the jury is free to use the information to inform them, but are under no legal obligation to convict the defendant for his past crimes. According to Justice O'Connor: "mandatory presumptions violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of the offense. By contrast, a permissive inference is not a violation of due process because the State still has the burden of persuading the jury that the suggested conclusion should be inferred based on the predicate facts proved." Estelle v. McGuire, 502 U.S. 62, 78-79 (1991) (O'Connor, J., dissenting).

[105]U.S. CONST. amend. V.

[106]FED. R. EVID. 413, 414.

[107]Oliphant v. Koehler, 594 F.2d 547, 547 (6th Cir. 1979), *cert. denied*, 444 U.S. 877 (1979).

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

> found him "not guilty." To allow these same complainants to testify to these same events to buttress another complainant's charge of the same offense committed against her appears to me to allow appellant to be put in jeopardy twice in each such instance.[109]

Supreme Court Justice Brennan agreed in *Dowling v. United States*.[110] In his vigorous dissent, Brennan asserted that the introduction of evidence used to attain a prior acquittal, when introduced under Rule 404(b) for purposes other than character, was still an impermissible violation of the Double Jeopardy Clause: "[b]ecause the introduction of this testimony effectively forced petitioner to defend against charges for which he had already been acquitted, the doctrine of criminal collateral estoppel grounded in the Double Jeopardy Clause should have prohibited the Government from introducing the testimony."[111] Justice Brennan reiterated the constitutional function of the Double Jeopardy Clause: "an acquittal reflects both an institutional interest in preserving the finality of judgments and a strong public interest in protecting individuals against governmental overreaching."[112] The purpose of the protection against double jeopardy is to prevent the government, with its vastly superior resources, from wearing down the defendant and also protects a defendant against living in a continuous state of anxiety about whether or not he will be retried.[113]

In addition, although not of constitutional relevance, the introduction of this evidence would require the defendant to respond with rebuttal evidence presumably already introduced as evidence in the former trial resulting in an acquittal. This would lead to a 'trial within a trial' in order to include the presentation of rebuttal evidence.[114] The introduction of redundant evidence would arguably be a violation of Federal Rule of Evidence 403 and might unnecessarily prolong the presentation of evidence or risk confusing and distracting the jury.[115]

In *Oliphant v. Koehler*, the majority held that:

> [d]efendant is not on trial for the offense charged against him in the prior case. The question presently at issue is whether, as charged by the prosecution, he [committed the elements of the present crime]. Testimony tending *legitimately* to establish such offense, or some element thereof, may not be excluded solely on the ground that it was

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109*Oliphant*, 594 F.2d at 556.

110Dowling v. United States, 493 U.S. 342, 354 (1990).

111*Id.*

112*Id.* at 355.

113*Id.*

114Duane, *supra* note 9, at 124.

115*Id.* at 124-25.

> offered and received in the prior case as bearing on defendant's guilt of the offense there charged.[116]

The conclusion, that such use is legitimate, essentially begs the question of whether the introduction of the same evidence used in the previous trials resulting in acquittals constitutes a violation of the Double Jeopardy Clause. The real issue is whether or not this introduction is itself legitimate.

In *Dowling v. United States*, the majority decision written by Justice White held that:

> we decline to extend . . . the collateral-estoppel component of the Double Jeopardy Clause to exclude in all circumstances, . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted.[117]

Justice White refused to extend the Double Jeopardy Clause, which is meant to protect the defendant from relitigation of "an issue of ultimate fact," to the introduction of evidence that merely "relates to alleged criminal conduct for which a defendant has been acquitted."[118] According to the majority holding in *Dowling*, the prosecution may introduce evidence in a subsequent trial although the issue underlying the evidence has already been litigated, so long as the prosecution does not intend to have the jury make a finding as to ultimate guilt or innocence on the prior evidence.[119]

Therefore, according to *Dowling*, the concerns noted above are of little importance and the Double Jeopardy Clause is not violated when the evidence sought to be introduced does not bear on the ultimate issue of guilt or innocence.[120] Furthermore, although the new amendments permit the admission of evidence from a prior trial which resulted in an acquittal, they do not attest to the veracity of that evidence. The Federal Rules of Evidence bear upon the admissibility, not the credibility of the evidence sought to be introduced.[121] *Dowling* suggests that defendants are still capable of mounting a formidable defense by introducing the same evidence that established their innocence in the first trial. Thus, if the same defendant was able to convince a jury to acquit based on the evidence previously presented, then arguably that same evidence should be sufficient to counteract the prosecution's ability to introduce contrary evidence.[122]The sponsors of the new amendments, in the

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[116]*Oliphant*, 594 F.2d at 554 (emphasis added) (quoting People v. Johnson, 43 N.W.2d 334, 340 (1950)).

[117]*Dowling*, 493 U.S. at 348.

[118]*Id.* at 342.

[119]*Id.*

[120]*Id.*

[121]FED. R. EVID. 413, 414.

[122]Garland, *supra* note 66, at 359.

legislative history if not in the plain reading of the rules themselves, admit the exercise of the judge's discretion and the use of Rule 403 balancing.[123]

Under the revised rules, the prosecution may only *introduce* evidence used in prior trials leading to acquittals; it cannot attest to its veracity. In other words, as is the case with all evidence introduced at trial, the prior act evidence must be weighed by the jury and, because in another proceeding the evidence formerly led to an acquittal, it may well be regarded with less deference. The new rules only permit the evidence to be admitted, they do not prescribe the significance to be attributed to that evidence.

Thus, under *Dowling*, the Fifth Amendment protection from double jeopardy is not violated if the prior act evidence introduced does not bear on the ultimate question of guilt or innocence of the accused as to the prior acquittals. The facts of prior acquittals may not be introduced for the purpose of relitigating the decisions to acquit rendered in an earlier proceeding. Under the new amendments, however, evidence giving rise to a prior acquittal may be introduced to bear on the ultimate question of guilt or innocence for the present similar charge. The impetus to reintroduce this evidence is to bear on the present charge and to demonstrate, by allusion to propensity, the likelihood that the accused is guilty.

The *Dowling* approach insists that merely relitigating facts of prior bad acts is substantially different from introducing those previous acts to demonstrate the likelihood that defendant is guilty of the present charge. This delicate distinction may well be lost on a jury. Although this does not represent a technical violation of the Constitution, a practical result is that jurors will balance the prior act evidence which resulted in an acquittal in their ultimate evaluation of guilt or innocence for the current charge.

C. Violation of the Eighth Amendment Protection of Punishment for Status

Criminalization of a person's status offends the constitutional protection from cruel and unusual punishment. The Supreme Court in *Robinson v. California* held a California statute making an addiction to narcotics a criminal offense inflicts a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[124] The California statute considered in *Robinson* did

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> If that jury stopped to consider seriously the questions presented by evidence of multiple acts of the accused, I think that in most instances they can be trusted to decide whether they believe the accused did those acts or not. In fact, if the jury comes to the conclusion that the prosecution has attempted to convict the accused of acts he did not commit (because the evidence is weak), then the jury might be inclined to hold that against the prosecution, not the accused.

Id.

[123] *See supra* notes 67-73 and accompanying text.

[124] Robinson v. California, 370 U.S. 660, 660 (1962); U.S. CONST. amend. XIII and XIV.

not punish conduct related to the use, sale, purchase or possession of drugs.[125] Rather, the law "[made] the 'status' of narcotic addiction a criminal offense, for which the offender may be prosecuted 'at any time before he reforms.'"[126] The Court held that punishment for being affected by disease "would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[127] Justice Stewart, writing for the majority, concluded that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[128]

Although the criminalization of status offends the Eighth Amendment protection from cruel and unusual punishment, the Court in *Robinson* conceded that "a person's character or status can be a legitimate consideration during the later sentencing phase of the trial after there has been a determination that the accused perpetrated a crime."[129] In *Rummel v. Estelle*, the Supreme Court upheld a Texas recidivist statute and maintained that the mandatory life sentence for repeat offenders does not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments.[130] The Court held:

> the primary goals [of a recidivist statute] are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the *propensities he has demonstrated over a period of time.*[131]

According to the *Rummel* decision, therefore, the trier at the sentencing stage may fairly be informed by the accused's propensity to repeat his offenses.[132]

The issue raised by the new Federal Rules of Evidence 413 and 414 is whether or not they are, in essence, punishment for status or whether they merely inform the level of punishment. The issue is whether or not the propensity to commit crimes of sexual assault or child molestation is truly a character disposition, or status. The sponsors of the new rules argued that in order for the evidence to be admissible under the new rules:

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[125]*Robinson*, 370 U.S. at 666.

[126]*Id.*

[127]*Id.*

[128]*Id.* at 667.

[129]Edward J. Imwinkelreid, *A Small Contribution to the Debate Over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions*, 44 SYRACUSE L. REV. 1125, 1145 (1993) [hereinafter *A Small Contribution*].

[130]Rummel v. Estelle, 445 U.S. 263, 284 (1980).

[131]*Id.* (emphasis added).

[132]*Id.*

> the evidence must be of such a character as to indicate that the defendant has the unusual combination of aggressive and sexual impulses that motivates the commission of such crimes, and a lack of effective inhibitions against acting on such impulses. . . . Evidence of other acts of molestation indicates that the defendant has a type of desire or impulse -- a sexual or sado-sexual interest in children -- that simply does not exist in ordinary people.[133]

This description of the evidence sought to be introduced by these new rules indicates that at least the sponsors believed this evidence was especially relevant because of its bearing on the status of the offender.[134]

The new rules permit the prosecution to introduce evidence of character in order to show conduct in conformity with past acts on the present occasion.[135] The difficulty arises when the prosecution, lacking sufficient evidence to convince a jury beyond a reasonable doubt of the present charge, persuades a jury to use evidence of prior bad acts in order to convict.[136] In that instance, as in *Robinson*, the verdict may be based on the jury's belief that the accused fits the definition of a sexual predator or a child molester, and not on the sufficiency of the evidence of the current charge. In such a case, the State may secure a conviction based on status, in violation of the Eighth Amendment, and is relieved of its constitutional duty to prove all elements of the present charge.

In the hypothetical instance in which the jury convicts based upon the accused's status as a sexual offender, the constitutional right against cruel and unusual punishment is abrogated. However, before the passage of Rules 413 through 415, evidence of uncharged misconduct was admissible "to show lustful disposition" or "depraved sexual instinct" especially in cases involving children.[137] The exception to the character evidence prohibition (before the passage of the new federal rules) was based upon two rationales: the high rate of recidivism among child molesters and the special need to bolster the testimony of a solitary child victim-witness.[138] In at least one case, however,

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[133]137 CONG. REC. S3191-02, at S3240 (daily ed. Mar. 13, 1991).

[134]*A Small Contribution*, *supra* note 129, at 1145-46. Professor Imwinkelreid has suggested that this status problem may be remedied by the judge instructing the jury as to the permitted use of the prior act evidence. It is possible that the problem to be avoided by the use of a jury limiting instruction -- i.e., characterization of the accused as a repeat offender, as sexual predator or as a child molester -- is no longer necessary under the new revised Federal Rules.

[135]FED. R. EVID. 413, 414.

[136]The jury may have a tendency to convict a defendant without sufficient evidence of the current charge in order to punish him for prior unpunished crimes. *See* notes 92-97 and accompanying text.

[137]Bryden & Park, *supra* note 16, at 557.

[138]*Id.* at 558.

Lannan v. State,[139] the court held that sex offenses were not special enough to justify a unique exception and that although recidivism rates for sex offenders was high, it believed it to be no higher than for drug offenders.[140]

The relative probativeness of the rates of recidivism for sexual offenders and child molesters is a matter of empirical verification. The new rules may violate the Eighth Amendment protection from punishment for status because they permit a jury to convict on the basis of other act evidence instead of upon the sufficiency of the evidence pertaining to the current charge.

D. Violation of the Fourteenth Amendment Equal Protection Clause

There are two Equal Protection challenges to the new Federal Rules of Evidence 413 and 414. First of all, the new rules create a potential for the unequal treatment of similarly situated individuals.[141] According to a Bureau of Justice Statistics study documenting rates of recidivism found among prisoners who were rearrested for the same crimes, rape has a relatively low rate of recidivism.[142] Thus, the eradication of the character evidence prohibition seems to discriminate unfairly against those individuals accused of sexual offenses and child molestation.[143] This exception established by the new amendments violates the principle that different types of criminals and different types of cases should be treated similarly for the purposes of trial procedure.[144] This discrimination, if not empirically justified, may be a violation of the accused's right to equal protection of the laws under the Fourteenth Amendment.[145]

Second, the Federal Rules of Evidence apply only in suits arising in federal court. Although most cases of sexual assault or child molestation arise under state law, the new amendments, at least for a time, may apply unfairly to discriminate against Native Americans.[146] The federal rules only apply in cases or controversies arising under federal law.[147] The new amendments would

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[139]Lannan v. State, 600 N.E.2d 1334 (Ind. 1992).

[140]*Id.* at 1337; *see also supra* note 16 (discussing relative recidivism rates among violent crimes).

[141]James S. Liebman, *Proposed Evidence Rules 413 to 415 -- Some Problems and Recommendations*, 20 U. DAYTON L. REV. 753, 754 (1995) (proposed new rules create the potential for unequal treatment of similarly situated individuals, i.e., a high proportion of robberies are committed by 'career robbers' and they are treated differently from 'career rapists' under these rules).

[142]*See supra* note 16 for statistics regarding rates of recidivism and the difficulties with those statistics.

[143]*See supra* note 141.

[144]Leonard, *supra* note 9, at 305.

[145]U.S. CONST. amend. XIV.

[146]Duane, *supra* note 9, at 113-15.

[147]*Id.* Federal jurisdiction would encompass crimes which occur on Indian

likely disproportionately effect cases which occur on Indian land. Therefore, "federal sex crime prosecutions are disproportionately targeted at Native American defendants. In the year ending September 30, 1993, for example, Native Americans made up 80% of all defendants convicted of sexual abuse crimes in federal court – but less than 1% of the country's population."[148]

The Supreme Court in *United State v. Antelope* held that, although the procedural rules governing prosecution of a Native American defendant may have been different from the rules applicable to an Idaho state resident, the Equal Protection provision of the Fourteenth Amendment was not violated.[149] The Court held that: "[u]nder our federal system, the National Government does not violate equal protection when its own body of law is evenhanded, regardless of the laws of States with respect to the same subject matter."[150] Although the application of the Federal Rules, in their effect, would disproportionately affect Native Americans,[151] the rules create a regulatory scheme which is applied evenhandedly to all those accused within its jurisdiction.[152] Thus, just as the Court held in *Antelope* that application of a federal regulatory scheme does not violate the Equal Protection Clause, neither would the application of a new evidentiary scheme in the prosecution of sexual offenders.[153]

Although the racially disparate impact of the new rules "by itself, does not amount to a violation of the Equal Protection Clause, it entails a profound political price that ought not to be undertaken lightly.... This nation's shameful legacy of unequal and discriminatory treatment of Native Americans is by now common knowledge."[154] Although not necessarily a constitutional transgression, the potential for disparate impact of the new evidentiary amendments may cost a substantial social price.

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reservations and federal property including national parks, military bases, or the territorial waters of the United States.

[148] *Id.* at 114 (citing U.S. Bureau of the Census, Statistical Abstract of the United States: 1993, at 18, Table No. 18 (1993)).

[149] United States v. Antelope, 430 U.S. 641, 649 (1977).

[150] *Id.*

[151] The federal scheme is also created with the intention to serve as a model for state procedure: the "proposed new rules would apply directly in federal cases, and would have broader significance as a potential for state reforms." 137 CONG. REC. S3191-02, at S3239 (daily ed. Mar. 13, 1991).

[152] *Antelope*, 430 U.S. at 649-650. "The Federal Government treated respondents in the same manner as all other persons within federal jurisdiction, pursuant to a regulatory scheme that did not erect impermissible racial classifications." *Id.*

[153] *Id.* at 649.

[154] Duane, *supra* note 9, at 114-15.

V. COUNTERVAILING NEEDS FOR THE NEW RULES

Although the new rules potentially encounter many constitutional impasses, the issues that they are designed to address are real and very troubling. According to the Senate Judiciary Committee in 1992, violent attacks by men is the primary health risk to American women.[155] In advocating the passage of the new rules, Senator Dole claimed that a "staggering 2.5 million violent crimes are committed against women each year."[156] Congressional Representative Tom Lewis spoke in support of the amendments: "[m]any of those who commit crimes of sexual assault and child molestation have a terrible history of sexually violent and abusive behavior, terrorizing victim after victim with circumstances making it difficult to prosecute effectively. [The new rules] will help break many of these chains of violence."[157]

The problems of sexual violence against women and abuse and molestation of children are compelling and the rising statistics of abuse are daunting.[158] Rape and molestation are among the most violent offenses that can be committed against a person short of homicide.[159]

The statistics of repeat offenders among rapists and child molestors show that other crimes, such as burglary and drug offenses, have considerably higher rates of recidivism.[160] The statistics bearing upon the issue of recidivism, however, must be seriously questioned because they do not reflect the many rapes which remain unreported.[161] The relatively low rate of recidivism for rape is arguably misleading because incidents of rape are largely unreported.[162]

In fact, a further difficulty with sexual violence and child molestation is that the repeat offenders are more likely to be psychologically predisposed to sexual violence than other crimes with higher recidivism rates. For example, a thief will probably steal in order to provide himself with money or other resources. If the circumstances were different, i.e., if that thief were suddenly wealthy, the chances of repetition might logically decline significantly. However, there is no environmental duress which causes a man to rape. There is, more reasonably, a compulsion or a predisposition to rape or molest, and changed circumstances

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[155] 138 CONG. REC. S15160 (Sept. 25, 1992) (remarks by Sen. Dole).

[156] *Id.*

[157] 140 CONG. REC. E1403 (July 1, 1994) (extensions of remarks by Florida Rep. Tom Lewis).

[158] *A Small Contribution, supra* note 129, at 1149.

[159] *Id.*

[160] *See* Bryden & Park, *supra* note 16.

[161] *Id.*

[162] Davies, *supra* note 16, at 520 (statistics showing that the reporting of rapes is as low as 10%).

would not logically have any bearing on the repetitive nature of the crime.[163] "[E]vidence showing that the defendant has committed sexual assaults on other occasions places him in a small class of depraved criminals."[164] Thus, information bearing upon the defendant's psychological predispositions are perhaps more probative in the context of sexual assault or child molestation than in the context of other crimes.[165]

The political motivation influencing the sponsors of the new rules was the need to convict more criminals and to ensure greater safety.[166] The aspiration is to deter crime and to convict those accused.[167] Whether or not the new rules are effective in achieving these goals and whether their potential violations of fundamental constitutional principles are worth the experiment is still open to question.[168]

Beside achieving their goals of higher conviction rates and increased safety, the rules respond to the public perception that the criminal justice system is radically unfair and ineffective in its prosecution of crimes against women and children.[169] Rape and child molestation present different problems to the rule-drafters: these crimes have as their victims those members of society who have a diminished political voice. Both women and children victims have, traditionally, been discounted both in the courtroom and in the public view.[170]

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[163]In determining whether prior act evidence is predictive, commentators of the new rules espoused various theories. These psychological theories (trait theory, situationism and interactionism) are described in further detail in other articles. *See, e.g.*, Leonard, *supra* note 9, at 316; Imwinkelreid, *Symposium on the Admission of Prior Offense Evidence in Sexual Assault Cases: Some Comments About Mr. David Karp's Remarks on Propensity Evidence*, 70 CHI.-KENT L. REV. 37, 44 (1994); *Undertaking the Task*, *supra* note 88, at 295; Bryden & Park, *supra* note 16, at 562.

[164]Karp, *supra* note 8, at 24.

[165]*Id.* (evidence that defendant falls within this small class of depraved criminals "is likely to be highly probative in relation to the pending charge.").

[166]137 CONG. REC. S3191-02, at S3238 (daily ed. Mar. 13, 1991) ("[t]he willingness of the courts to admit similar crimes evidence in prosecutions for serious sex crimes is of great importance to effective prosecution in this area, and hence to the public security against dangerous sex offenders.").

[167]But see data compiled by the United States District Courts for the year ending June 30, 1992, in which the prosecution for rape was able to obtain conviction in 84% of all sex offense prosecutions in federal court. This statistic was significantly higher than convictions in only 78.2% of larceny and theft cases, 5.8% of all homicide cases, and 64.7% of its assault cases. Duane, *supra* note 8, at 100. Most rape and molestation charges are brought in state court, however, so these statistics are not necessarily generally demonstrative.

[168]*A Small Contribution*, *supra* note 129, at 1150.

[169]138 CONG. REC. S15160 (Sept. 25, 1992) (remarks by Sen. Dole).

[170]At common law, the character of the victim of sexual assault was at issue: "both at common law and under the Federal Rules, a party was sometimes allowed to prove the alleged victim's character. Along similar lines, many states at common law permitted the defendant to offer evidence of an alleged rape victim's unchaste character." Leonard,

In the courtroom, although the trial is designed to adjudicate the guilt or innocence of the accused, it is often the case that women-victims are subjected to close scrutiny and a high degree of prejudice.[171]

The crime of rape, unlike other violent crimes, involves the element of consent and thus the issue of the accused's perception is at issue.[172] Certainly if the defendant uses the defense of consent, the victim should have the right to counter by arguing that the defendant should have understood the victim's lack of consent. Repeat offenses of rape and sexual molestation are indeed probative to ascertain the defendant's claimed miscomprehension of consent. In addition, crimes of sexual violence rarely have eyewitnesses. The trial, therefore, becomes a credibility contest.[173] It is difficult to make an educated assessment of the relative credibility of the victim and the defendant without admitting evidence of the accused's prior bad acts.

In her argument before the House of Representatives, Representative Molinari claimed that the law predating the new amendments resulted in the "ironic result that serial rapists and child molesters go free of the accused's prior bad acts, because current law encourages reversals."[174] There is, however, an eighty-four percent federal conviction rate for sex offense prosecutions which is considerably higher than for other crimes.[175] The primary reason for this statistic is the "extent to which evidence of prior sexual offenses is already admissible under current law in cases where such evidence is unusually probative or used to negate the defense of consent."[176] The extent to which the new rules represent a more effective response to the violence committed against women and children in American society remains largely a question of

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supra note 9, at 309-310. This tactic has been somewhat curtailed by the passage of the Federal Rule of Evidence 412.

[171]Bryden & Park, *supra* note 16, at 578. Especially "in acquaintance rape cases, the evidence of prior sexual assaults by the accused may help to combat prejudice against victims. Researchers have shown that jurors have a tendency to blame the victim in acquaintance rape cases." *Id.*

[172]*Id.* at 575-78.

[173]Karp, *supra* note 8, at 32.

> The court is presented with unequivocally different versions of the incident. The defendant claims that it was a romantic interlude. The victim says that she was raped. The evidence of other sexually assaultive behavior by the defendant is admitted because it makes the victim's version more probable and the defendant's less so.

Id.

[174]140 CONG. REC. H2415-04, at H2433 (daily ed. Apr. 19, 1994) (remarks by Rep. Molinari).

[175]Karp, *supra* note 8, at 24.

[176]*Id.* Evidence of prior misconduct is admissible for non-character related reasons under Rule 404(b). *See A Small Contribution, supra* note 129, at 1132-36 (prior act evidence may be introduced in order to show act charged was not accidental); *id.* at 1136 ("Rule 404(b) embodies the inclusionary conception.").

empirical observation. Many scholars have argued, however, that the status of the law preceding the passage of these controversial amendments was an adequate response to the growing problem of violence and still retained the delicate balance of protecting accused's constitutional rights.[177]

These special rules were designed to address a very specific area of violent crime. It may simply be too early to determine whether the rules have adequately responded to the dire problem they were intended to address. It may also be premature to determine whether their application would compromise the constitutional rights of defendants upon which the Bill of Rights is premised.

[177]Karp, *supra* note 8; *see e.g., generally* Duane, *supra* note 9; *A Small Contribution, supra* note 129, at 1125; *Undertaking the Task, supra* note 88, at 288.