

1996

"Are You Going to Arraign His Whole Life?": How Sexual Propensity Evidence Violates the Due Process Clause

Louis M. Natali Jr.

Prof. of Law, Temple University School of Law

R. Stephen Stigall

Follow this and additional works at: <http://lawcommons.luc.edu/lucj>

 Part of the [Sexuality and the Law Commons](#)

Recommended Citation

Louis M. Natali Jr., & R. S. 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 (1996).

Available at: <http://lawcommons.luc.edu/lucj/vol28/iss1/2>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

“Are You Going To Arraign His Whole Life?”: How Sexual Propensity Evidence Violates the Due Process Clause

*Louis M. Natali, Jr.** & R. Stephen Stigall****

I. INTRODUCTION

Congress promulgated Rules 413,¹ 414,² and 415³ of the Federal Rules of Evidence pursuant to the Violent Crime Control and Law Enforcement Act of 1994.⁴ The new rules, which became effective on July 9, 1995,⁵ require a district court to admit “propensity evidence”⁶

* Harrison’s Trial, 12 How. St. Tr. 834, 864 (Old Bailey 1692).

** Professor of Law, Temple University School of Law. B.A. 1963, La Salle College; L.L.B. 1966, Georgetown University.

*** B.A. 1991, Connecticut College; J.D. 1996, Temple University School of Law. The authors wish to thank Professors JoAnne A. Epps, Edward D. Ohlbaum, and David A. Sonenshein for their valuable comments on earlier drafts of this article. The authors also thank Temple University School of Law for financial support.

1. The relevant portion of Rule 413 provides:

(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.

FED. R. EVID. 413(a).

2. The relevant portion of Rule 414 provides:

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

FED. R. EVID. 414(a).

3. The relevant portion of Rule 415 provides:

(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 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.

FED. R. EVID. 415(a).

4. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935(c), 108 Stat. 1796, 2135-37 (codified as amended at 28 U.S.C. app. art. IV, Rules of Evidence 413–415 (1994) (effective July 9, 1995)).

5. See *infra* notes 26-60 and accompanying text for a discussion of the new rules enactment procedure.

6. Propensity evidence is evidence that an accused or civil defendant committed an

whenever a federal prosecutor or plaintiff offers such evidence in sexual assault and child molestation cases.⁷ The rules are mandatory in that they state without qualification that propensity evidence *is admissible*. Thus, the rules require admission of propensity evidence without regard to other rules of evidence, particularly the prejudice/probativeness balancing test set forth in Rule 403.

Recent scholarship suggests that many judges, law professors, and lawyers strongly oppose the new rules.⁸ These scholars have articulated several reasons why Rules 413–415 are invalid. For example, opponents argue that the new rules undermine the integrity and rationality of the Federal Rules of Evidence;⁹ the new rules are unnecessary¹⁰ and suffer from significant drafting problems;¹¹ the

offense in the past similar to the one with which he is currently charged. The inference the jury draws from such evidence is that the accused or civil defendant is the type of person who would commit the offense with which he has been charged. The jury, therefore, will likely conclude that the accused or defendant did in fact commit the offense with which he is charged. See David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 *FORDHAM URB. L.J.* 305, 336-37 (1995) (outlining jurors' reasoning in consideration of propensity evidence); James S. Liebman, *Proposed Evidence Rules 413 to 415--Some Problems and Recommendations*, 20 *U. DAYTON L. REV.* 753, 754-55 (1995) (discussing policy reasons which favor excluding propensity evidence).

7. See *supra* notes 1-3 for applicable text of the Rules; see also *infra* notes 161-62 and accompanying text for further discussion.

8. See, e.g., Dale A. Nance, *Foreword: Do We Really Want to Know the Defendant?*, 70 *CHI.-KENT L. REV.* 3, 11 (1994) (summarizing arguments against Rules 413–415).

9. Liebman, *supra* note 6, at 755-57. Professor Liebman asserts that the new rules, by permitting admission of propensity evidence in sexual assault and child molestation cases, directly contravene Rule 404, which generally proscribes using evidence of character traits to prove action in conformity therewith. *Id.* See also James Joseph Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 *F.R.D.* 95, 111-13 (1994) (arguing that Rules 413–415 will make Federal Rules of Evidence inconsistent and inexplicable); Leonard, *supra* note 6, at 341 (asserting that new rules make evidence law more complex and serve to detract from its truth-finding purpose).

10. See, e.g., Duane, *supra* note 9, at 97-106 (emphasizing that evidence law prior to enactment of new rules adequately addressed Congress's justifications for new rules); Liebman, *supra* note 6, at 758-59 (asserting Rule 404(b) adequately treats propensity evidence).

11. See, e.g., Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases (submitted to the Congress in accordance with section 320935 of the Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103-322), reprinted in 159 *F.R.D.* 51, 52 (1995) [hereinafter *Judicial Conference Report*] (noting that an overwhelming majority of judges, lawyers, law professors, and legal organizations objected to the new rules because of numerous drafting problems and because the new rules would allow the admittance of prejudicial evidence); Duane, *supra* note 9, at 115-22 (asserting that the new rules are ambiguous in scope and improperly override a number of other Federal Rules of Evidence); Liebman, *supra* note 6, at 759-60 (suggesting that the drafters did not intend for the awkward

process by which Congress enacted the rules was improper;¹² and, the new rules may violate the Equal Protection Clause of the United States Constitution.¹³

Although opponents have offered many reasons for opposing Rules 413–415, one argument against the rules' validity that has not been specifically articulated in recent literature is that the rules directly contravene the Due Process Clause¹⁴ of the United States Constitution.¹⁵ This Article contends that Rules 413–415 of the Federal Rules of Evidence violate due process: "those 'fundamental conceptions of justice which lie at the base of our civil and political institutions' and which define 'the community's sense of fair play and decency.'"¹⁶

In determining that Rules 413–415 violate the Due Process Clause, this Article first traces the legislative history of Rules 413, 414, and 415.¹⁷ This Article then discusses the historic prohibition of admitting propensity evidence, focusing first on the legal justifications for the prohibition, and second on propensity evidence's violation of due process.¹⁸ This Article next determines that Rules 413–415 violate the Due Process Clause because they contravene the prohibition of propensity evidence so deeply embedded in the United States

procedure which results from the language used in the new rules).

12. See, e.g., Duane, *supra* note 9, at 95-97 (discussing manner in which Congress enacted Rules 413–415); Liebman, *supra* note 6, at 757 (noting that Congress did not subject rules to needed study, Congressional hearings, or consideration by Supreme Court or its Advisory Committee on Federal Rules); Myrna S. Raeder, *American Bar Association Criminal Justice Section Report to the House of Delegates*, 22 *FORDHAM URB. L.J.* 343, 343-44 (1995) (recommending that ABA oppose Rules 413–415, in part because of Congress's bypassing Rules Enabling Act procedures).

13. Duane, *supra* note 9, at 113-15. Professor Duane argues that Rules 413–415 will have a disproportionate impact on Native Americans because commission of sexual assault or child molestation is a federal offense only if the act occurs on Native American land or federal property. *Id.* at 114. Professor Duane comments that although racially disparate impact of rules does not, by itself, amount to a violation of the Equal Protection Clause, *United States v. Antelope*, 430 U.S. 641, 647-50 (1977), Rules 413–415 disproportionately target Native Americans and therefore have significant racial implications. Duane, *supra* note 9, at 113-15 (commenting on the new rules' shameful unequal treatment of Native Americans).

14. U.S. CONST. amend. V.

15. See Liebman, *supra* note 6, at 757-58 (asserting that the new rules may be unconstitutional but declining to undertake a comprehensive study of the constitutional status of the prohibition of propensity evidence).

16. *Dowling v. United States*, 493 U.S. 342, 353 (1990) (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) and *Rochin v. California*, 342 U.S. 165, 173 (1952)).

17. See *infra* Part II.

18. See *infra* Part III.

Constitution.¹⁹ In addition, this Article argues that the rules are unconstitutional because they require irrational and arbitrary inferences,²⁰ and because they completely eviscerate Rules 403²¹ and 404²² of the Federal Rules of Evidence, thus preventing a fundamentally fair trial.²³ This Article also includes a discussion of lower court opinions holding that admission of propensity evidence in trials involving sexual assault and child molestation violates due process.²⁴ Finally, this Article concludes that Rules 413–415 represent popular political fads which Congress enacted in order to satisfy the fears of constituents, without regard to protections afforded to defendants by the Constitution.²⁵

II. THE ENACTMENT OF RULES 413, 414, AND 415 OF THE FEDERAL RULES OF EVIDENCE

On September 13, 1994, Congress enacted Rules 413, 414, and 415 of the Federal Rules of Evidence as part of the Violent Crime Control and Law Enforcement Act of 1994 (“Crime Bill”).²⁶ Although Congress established the rules by enactment of the Crime Bill, unsuccessful attempts had previously been made in proposing Rules 413–415.²⁷ The rules, originally drafted as part of the Bush

19. See *infra* Part IV.

20. See *infra* Part IV.B.

21. See *infra* note 211 for the text of Rule 403 of the Federal Rules of Evidence. See *infra* notes 212–13 and accompanying text for a discussion of the impact of Rules 413–415 on Rule 403.

22. See *infra* notes 66–67 for the pertinent portions of the text of Rule 404 of the Federal Rules of Evidence. See *infra* notes 194–99 and 203–07 and accompanying text for a discussion of the impact of Rules 413–415 on Rule 404.

23. See *infra* Part IV.C.

24. See *infra* Part IV.D.

25. See *infra* Part V.

26. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935(a), 108 Stat. 1796, 2135–37 (codified as amended at 28 U.S.C. app. art. IV. Rules of Evidence 413, 414, 415 (1994)) (effective July 9, 1995).

27. H.R. 4848, 103d Cong. § 611 (1994); H.R. 4197, 103d Cong. § 211 (1994); H.R. 4055, 103d Cong. § 307 (1994); H.R. 2872, 103d Cong. § 211 (1993); S. 8, 103d Cong. § 821 (1993); S. 6, 103d Cong. § 121 (1993); H.R. 688, 103d Cong. § 121 (1993); H.R. 2847, 103d Cong. § 821 (1993); S. 3271, 102d Cong. § 121 (1992); H.R. 5960, 102d Cong. § 121 (1992); H.R. 5218, 102d Cong. § 711 (1992); S. 635, 102d Cong. § 801 (1991); S. 1151, 102d Cong. § 801 (1991); S. 1335, 102d Cong. § 301 (1991); H.R. 1400, 102d Cong. § 801 (1991); H.R. 3463, 102d Cong. § 1 (1991); S. 472, 102d Cong. § 231 (1991); H.R. 1149, 102d Cong. § 231 (1991).

Administration's push for violent crime legislation,²⁸ remained virtually unchanged in what resulted in the Crime Bill.²⁹

The legislative history reveals several reasons that prompted Congress to enact Rules 413–415.³⁰ First, sponsors of the House and Senate bills believed that prosecutors desired similar-offense type evidence in sexual assault and child molestation cases.³¹ Second, the sponsors expressed a desire to protect the public from rapists and child molesters,³² whom the sponsors asserted were typically recidivists, by obtaining more convictions³³ through admitting propensity evidence without a “protracted legal battle” of whether such evidence is admissible.³⁴ Third, the sponsors commented that the rules would bolster the credibility of sexual assault victims in the face of defenses of consent and false accusation, and bolster the credibility of child molestation victims whose credibility is often weak in the absence of

28. Edward J. Imwinkelried, *Some Comments About Mr. David Karp's Remarks on Propensity Evidence*, 70 CHI.-KENT L. REV. 37, 37 (1994) [hereinafter Imwinkelried, *Some Comments*] (responding to David J. Karp, Senior Counsel to the Office of Policy Development, United States Department of Justice, who was a primary author of Rules 413–415).

29. See *supra* note 27 for the various legislative bills proposing Rules 413–415. Compare 137 CONG. REC. S3212 (daily ed. Mar. 13, 1991) (setting forth Rules 413–415 in text of § 801 of S. 635, 102 Cong. (1991)) with Act of Sept. 13, 1994, Pub. L. No. 103-322, § 320935(a), 1994 U.S.C.A.N. (108 Stat.) 1796, 2135-37 (providing text of FED. R. EVID. 413, 414, and 415).

30. The legislative history for Rules 413–415 and the views expressed by individual members of Congress are set forth in a prepared text of an address presented to the Evidence Section of the Association of American Law Schools [the “AALS”] on January 9, 1993. See generally David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15 (1994) (reprinting address to Evidence Section of AALS); see also 140 CONG. REC. S12,990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole, principal sponsor of rules in Senate) (stating that the address provides a “detailed account of the views of the legislative sponsors and the administration concerning the . . . reform, and should . . . be considered an authoritative part of its legislative history”); 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari, principle sponsor of rules in House) (same).

31. See 140 CONG. REC. S10,276 (daily ed. Aug. 2, 1994) (statement of Sen. Dole) (“Ask any prosecutor, and he or she will tell you how important similar-offense evidence can be.”).

32. See 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) (noting critical nature of rules in protecting public from rapists and child molesters).

33. See 140 CONG. REC. H5439 (daily ed. June 29, 1994) (statement of Rep. Kyl) (indicating new rules will result in more convictions).

34. See 140 CONG. REC. S10,276 (daily ed. Aug. 2, 1994) (statement of Sen. Dole) (“[W]hen someone is out there committing sex crime after sex crime, committing child molestation after child molestation, it is this Senator's view that this [propensity] evidence should be admitted . . . without a protracted legal battle over what is admissible and what is not.”).

corroborating evidence.³⁵ Moreover, the supporters of the rules suggested that propensity evidence in sexual assault and child molestation cases is typically relevant, probative, and not outweighed by any prejudice or adverse effects the evidence may cause.³⁶ Finally, because sexual assault and child molestation offenses are typically state crimes, the sponsors desired to cause the states to change their evidence codes to reflect the federal rules.³⁷

Congress did not enact Rules 413–415 without vigorous dissent. Several members of Congress voiced strong opposition to the new rules.³⁸ Arguments against the rules included, among others, that the rules were highly prejudicial and unconstitutional.³⁹ For example, in a scathing criticism of the rules, Representative Hughes remarked:

[T]he proposed rules are not only seriously suspect on constitutional grounds, but they are extremely bad public policy. If the primary evidence in a prosecution's case in chief is evidence of prior acts . . . we would be sinking into the star chamber procedures that have long been rejected by civilized societies everywhere. . . . This is a question of protecting our system of justice and fair trials.⁴⁰

Also in the House, New York Representative Schumer explicitly objected to Rules 413–415 on grounds that they violate due process.⁴¹ Senator Biden, a tough-on-crime drafter of the Crime Bill, adamantly

35. See 140 CONG. REC. H8991-92 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) (discussing consent and false accusation defenses in sexual assault cases); 140 CONG. REC. S10,276 (daily ed. Aug. 2, 1994) (statement of Sen. Dole) (noting defense of attacking credibility of child-victim in child molestation cases); see also Karp, *supra* note 30, at 21 (asserting need to bolster victims' credibility in sexual assault and child molestation cases).

36. See 140 CONG. REC. H8991-92 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari); see also Karp, *supra* note 30, at 20-22, 24 (discussing probative value of propensity evidence in sexual assault and child molestation cases).

37. See 140 CONG. REC. S10,276 (daily ed. Aug. 2, 1994) (statement of Sen. Dole) (“[T]he Federal Government has a leadership role to play in this area. Once the Federal rules are amended, it's possible—perhaps even likely—that the States may follow suit and amend their own rules of evidence as well.”)

38. See *infra* notes 40-44 and accompanying text.

39. See, e.g., 140 CONG. REC. H8990 (daily ed. Aug. 21, 1994) (statement inserted into the record by Rep. Hughes) (noting that rules would raise “very serious constitutional questions”); 140 CONG. REC. H5439 (daily ed. June 29, 1994) (statement of Rep. Schumer) (objecting to Rules 413–415 on grounds that they violate due process).

40. 140 CONG. REC. H8990 (daily ed. Aug. 21, 1994) (statement inserted into the record by Rep. Hughes). Rep. Hughes also stated that the use of propensity evidence resembled the tactics used in the Star Chamber. *Id.*

41. 140 CONG. REC. H5439-40 (daily ed. June 29, 1994) (statement of Rep. Schumer).

opposed the new rules as well, asserting that the new rules violate "every basic tenet of our system."⁴²

Despite considerable opposition on grounds that the new rules were unconstitutional, the opponents acquiesced after lengthy negotiations⁴³ with the rules' supporters and enacted the Crime Bill, thereby enacting Rules 413–415.⁴⁴ The rules, however, did not become effective immediately. Rather, the Crime Bill required the Judicial Conference of the United States, within 150 days of the rules' enactment, to prepare and transmit a report to Congress setting forth recommendations for amending the Federal Rules of Evidence to admit evidence of a defendant's prior sexual assault or child molestation offenses in sexual assault and child molestation cases.⁴⁵ The Act further provided that if the Judicial Conference recommended amendments to the Federal Rules of Evidence different from those Congress enacted, Rules 413–415 nevertheless would become effective within 150 days after the Judicial Conference transmitted its recommendations, unless Congress provided otherwise.⁴⁶

The Judicial Conference submitted its report to Congress on February 9, 1995.⁴⁷ Based on opposition to the rules by the Judicial Conference's Advisory Committee on Evidence Rules, Advisory Committee on Criminal Rules, and Advisory Committee on Civil Rules, the Judicial Conference urged Congress to reconsider Rules 413–415.⁴⁸ For example, the Advisory Committee on Evidence Rules met in October, 1994, to consider the public's response to the new rules.⁴⁹ The Advisory Committee reported that the majority of judges, law professors, lawyers, and legal organizations overwhelmingly opposed Rules 413–415.⁵⁰ Second Circuit Judge Ralph K. Winter's

42. 140 CONG. REC. S10,277 (daily ed. Aug. 2, 1994) (statement of Sen. Biden).

43. Jill Zuckman, *Negotiators in House Outline Deal on Crime Bill*, BOSTON GLOBE, Aug. 21, 1994, at 1 (outline of anticrime bill reached after a "night of closed negotiations that lasted until 6 a.m.").

44. See Duane, *supra* note 9, at 95-97 (discussing procedure by which opponents acquiesced to supporters of rules).

45. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935(c), 108 Stat. 1796, 2137 (codified as amended at 28 U.S.C. app. art. IV, Rules of Evidence 413–415 (1994) (effective Jul. 9, 1995)).

46. *Id.* § 320935(d) (2), 108 Stat. at 2137.

47. *Judicial Conference Report*, *supra* note 11, at 51.

48. *Id.* at 52-53.

49. *Id.* at 52.

50. *Id.* See also Richard C. Reuben, *Some Judges Oppose Evidence Amendment*, A.B.A. J., Jan. 1995, at 20-21 (1995) (reporting that judges' concerns over constitutionality, administrative inconvenience, and fundamental fairness of the proposed rules led the judges to oppose them).

remarks in opposition to the new rules were typical: "You can't convict someone based on their propensity to commit a crime."⁵¹

With the exception of the Department of Justice's dissenting vote in each committee, the advisory committees unanimously opposed the new rules.⁵² The committees concluded that the new rules would improperly (1) permit admission of highly prejudicial and unreliable evidence, (2) cause significant trial delay because the admission of such evidence would require defendants to contest other alleged wrongs, and (3) diminish the fundamental and time-honored protections against admission of propensity evidence developed under rules and case law.⁵³ Although the Judicial Conference urged Congress to reconsider Rules 413–415, the Judicial Conference alternatively recommended that Congress incorporate Rules 413–415 as amendments to Rules 404 and 405 of the Federal Rules of Evidence.⁵⁴

In addition to the Judicial Conference, the American Bar Association voiced strong opposition to the new rules.⁵⁵ In the Criminal Justice Section's Report to the House of Delegates on Rules 413–415, the ABA noted that, among others in the legal profession, eleven lawyers, fifty-six evidence professors, nineteen judges, and twelve

51. Junda Woo, *Judges Attack Law Easing Rape Evidence*, WALL ST. J., Sept. 22, 1994, at B8.

52. *Judicial Conference Report*, *supra* note 11, at 53. The Judicial Conference report emphasized to Congress the highly unusual unanimity of members' opposition to Rules 413–415. *Id.* The report noted that of the 40 judges, practicing attorneys, and academics comprising the Standing Committee and Advisory Committees on Evidence, Criminal, and Civil Rules, all but the representatives of the Department of Justice opposed Rules 413–415. *Id.*

53. *Id.* at 52-53.

54. *Id.* at 53-57. The Judicial Conference's proposed amendments to Rules 404 and 405, *inter alia*, would have (1) expressly applied the other rules of evidence to propensity evidence offered in sexual assault and child molestation cases under the new rules, (2) allowed the opponent of such propensity evidence to use similar evidence in rebuttal, (3) expressly subjected propensity evidence to the Rule 403 unfair prejudice versus probative balance, (4) ensured that the notice provisions of existing Rule 404 are consistent, (5) removed the special notice provisions of Rules 413–415 in civil cases to require notice as provided in the Federal Rules of Civil Procedure, and (6) permitted the accused or defendant to offer reputation or opinion evidence after the admission of the propensity evidence. *Id.* at 54. See *id.* at 54-57 for the text of the Judicial Conference's recommended amendments to Rules 404 and 405 of the Federal Rules of Evidence accompanied by the Advisory Committee on Evidence Rules' Notes explaining the amendments in detail.

55. See American Bar Association Criminal Justice Section Report to the House of Delegates, *reprinted in* 22 FORDHAM URB. L.J. 343, 343-53 (1995-) [hereinafter A.B.A. Criminal Justice Section Report](resolving to oppose Rules 413–415 of the Federal Rules of Evidence).

organizations had expressed objection to the new rules to Congress.⁵⁶ The ABA concluded that the rules were defective because, *inter alia*, they raised due process issues by permitting evidence solely to show propensity.⁵⁷

Notwithstanding the strong opposition to the new rules, Congress took no action with respect to the Judicial Conference's recommendation that Congress reconsider Rules 413–415.⁵⁸ Moreover, Congress took no action regarding the Judicial Conference's alternate proposal of incorporating Rules 413–415 into Rules 404 and 405 of the Federal Rules of Evidence.⁵⁹ Accordingly, Rules 413–415 became effective on July 9, 1995.⁶⁰

III. THE PROHIBITION AGAINST ADMITTING PROPENSITY EVIDENCE AS EMBEDDED IN THE CONCEPT OF DUE PROCESS

A. *The Traditional Reasons Against the Use of Propensity Evidence*

The proscription against admitting propensity evidence arose out of the common law.⁶¹ This is evidenced by the old Uniform Rules of Evidence, which were drafted in 1948 by the National Conference of the Commission on Uniform State Laws. Uniform Rule 55 prohibited admission of prior crimes evidence to prove disposition to commit the crime charged.⁶² As set forth in its comment, Rule 55 expresses, the generally accepted rule rejecting evidence of another crime

56. *Id.* at 345. Of the 100 individuals who opposed the rules, 19 cited constitutional concerns and 58 thought that the rules were unfair. *Id.* at 346.

57. *Id.* at 347 (citing *McKinney v. Rees*, 993 F.2d 1378, 1385 (9th Cir. 1993)).

58. *Effective Date of Evidence Rules 413, 414, and 415*, 1995 United States Order 95-24, July 9, 1995, available in WESTLAW, US-Orders database.

59. *Id.*

60. *Id.*

61. *See, e.g.*, *Michelson v. United States*, 335 U.S. 469, 475 (1948) (noting common law tradition of disallowing admission of propensity evidence to prove action in conformity therewith).

62. *See, e.g.*, TRIAL EVIDENCE IN CIVIL CASES, RE-30 (Sol Schreiber et al. eds., rev. ed. 1969) (reprinting the Uniform Rules of Evidence). Rule 55 provided in relevant part:

[E]vidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed another crime or civil wrong on another specified occasion but . . . such evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge, or identity.

Id. at Appendix A.

or civil wrong as proof that a person committed a crime or civil wrong on a specified occasion. The limitation is directed against the idea that when it is shown that a person committed a crime on a former occasion there arises an inference that he has a disposition to commit crime and therefore committed the crime with which he is now charged.⁶³

The California Evidence Code, a precursor to the Federal Rules, which went into effect in 1967, similarly reflects a proscription against using propensity evidence.⁶⁴

The Federal Rules of Evidence codified the propensity evidence prohibition in Rule 404.⁶⁵ Rule 404 provides that evidence of a person's character or character trait is not admissible to prove that the person acted in conformity with the person's character or character trait, except in certain limited circumstances.⁶⁶ Rule 404 also proscribes admitting evidence of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith.⁶⁷ However, evidence of other crimes, wrongs, and acts is

63. *Id.*

64. The California Evidence Code provides in pertinent part:

(a) Except as provided in this section and in Sections 1102, 1103, and 1108, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

CAL. EVID. CODE § 1101 (West Supp. 1996). Significantly, however, the California Evidence Code, in a sexual offense criminal action, permits admission of an accused's other sexual offenses if the trial judge does not find that the prejudice of such evidence outweighs its probative value. CAL. EVID. CODE § 1108 (West Supp. 1996).

65. FED. R. EVID. 404.

66. FED. R. EVID. 404(a). Rule 404(a) of the Federal Rules of Evidence provides in pertinent part:

(a) Character evidence generally.

Evidence of a person's character or a trait of his character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused.

Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same; . . .

Id.

67. FED. R. EVID. 404(b). Rule 404(b) of the Federal Rules of Evidence provides in relevant part: "Evidence of other crimes, wrongs, or acts is not admissible to prove the

admissible, if probative of a material issue in a case other than character, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.⁶⁸

Courts and commentators have offered numerous justifications for the propensity rule, generally noting the highly prejudicial nature of propensity evidence.⁶⁹ For example, courts, reasoning that jurors may convict an accused because the accused is a “bad person,”⁷⁰ have typically excluded propensity evidence on grounds that such evidence jeopardizes the constitutionally mandated presumption of innocence until proven guilty.⁷¹ The jury, repulsed by evidence of prior “bad acts,” may overlook weaknesses in the prosecution’s case in order to punish the accused for the prior offense.⁷² Moreover, as scholars have

character of a person in order to show action in conformity therewith.” *Id.*

68. *Id.*

69. See, e.g., *Huddleston v. United States*, 485 U.S. 681, 686 (1988) (commenting that propensity evidence may carry risk of unfair prejudice to defendant); *Spencer v. Texas*, 385 U.S. 554, 570 (1967) (Warren, C.J., dissenting) (noting that use of prior convictions evidence to show action in conformity “needlessly prejudices” accused); *Boyd v. United States*, 142 U.S. 450, 458 (1892) (discussing prejudice accruing to defendant when court admits propensity evidence); *United States v. Hines*, 955 F.2d 1449, 1454 (11th Cir. 1992) (commenting that character evidence has strong potential for unfair prejudice); *United States v. Peden*, 961 F.2d 517, 520 (5th Cir. 1992) (asserting that propensity evidence is likely to prejudice jury and blind it to real issue of whether accused is guilty of crime charged); *People v. Zackowitz*, 172 N.E. 466, 467 (N.Y. 1930) (Cardozo, C.J.) (noting that propensity evidence carries appeal to prejudice and passion); *Rex v. Smith*, 11 Crim. App. 229, 237 (Crim. App. 1915) (explaining why propensity evidence is inadmissible); *Regina v. Oddy*, 169 Eng. Rep. 499, 502 (Cr. Cas. Res. 1851) (Lord Campbell, C.J.) (rejecting propensity evidence because it prejudiced accused as “bad man”); Duane, *supra* note 9, at 107-11 (discussing prejudice to accused as justification for propensity rule).

70. *Michelson v. United States*, 335 U.S. 469, 476 (1948); see also *Peden*, 961 F.2d at 520 (noting risk that jury will characterize accused as “evil person”); *United States v. Foskey*, 636 F.2d 517, 523 (D.C. Cir. 1980) (“It is fundamental to American jurisprudence that ‘a defendant must be tried for what he did, not for who he is.’”) (quoting *United States v. Meyers*, 550 F.2d 1036, 1044 (5th Cir. 1974)); David P. Bryden & Roger C. Park, “*Other Crimes*” *Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 565 (1994) (discussing danger that jury will convict defendant because it concludes defendant is “bad man”); Liebman, *supra* note 6, at 754 (same).

71. See *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977) (discussing bar on propensity evidence as concomitant to presumption of innocence); *People v. Molineux*, 61 N.E. 286, 293-94 (N.Y. 1901) (noting interrelationship between propensity rule and presumption of innocence). See also *Spencer v. Texas*, 385 U.S. 554, 575 (1967) (Warren, C.J. dissenting) (commenting that propensity evidence jeopardizes presumption of innocence); Reuben, *supra* note 50, at 21 (reporting that many judges believe proscription against using propensity evidence is part of the presumption of innocence).

72. 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, 288 (1995) [hereinafter Imwinkelried,

suggested, jurors may not regret wrongfully convicting the accused if they believe the accused committed prior offenses.⁷³ Courts have also barred admission of propensity evidence on grounds that jurors will credit propensity evidence with more weight than such evidence deserves.⁷⁴ Researchers have shown that character traits are not sufficiently stable temporally to permit reliable inferences that one acted in conformity with a character trait.⁷⁵ Furthermore, courts have excluded propensity evidence because such evidence blurs the issues in the case, redirecting the jury's attention away from the determination of guilt for the crime charged.⁷⁶

B. Propensity Evidence As a Violation of Due Process

The many justifications against the use of propensity evidence reflect the common theme in American jurisprudence that the admission of propensity evidence prevents a fair trial and thus violates the Due Process Clauses of the Constitution.⁷⁷ In *Murray's Lessee v.*

Undertaking the Task]; see also *Peden*, 961 F.2d at 520 (noting that while a jury may feel unsure about the government's case, a jury will nevertheless convict on the belief that the accused is evil).

73. RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, *A MODERN APPROACH TO EVIDENCE* 165 (2d ed. 1982); 1 CHARLES T. MCCORMICK, *MCCORMICK ON EVIDENCE* § 185, at 780 (4th ed. 1992).

74. *Michelson*, 335 U.S. at 476 (explaining that propensity evidence weighs too much and over-persuades the jury so as to prejudice the accused as one with bad record); *People v. Zackowitz*, 172 N.E. 466, 468 (N.Y. 1930) (Cardozo, C.J.) (noting jury's or judge's tendency to accord excessive weight to propensity evidence); 1A JOHN HENRY WIGMORE, *WIGMORE ON EVIDENCE*, § 58.2, at 1212 (Tillers rev. 1983) (discussing overvaluation of propensity evidence by jury); Imwinkelried, *Some Comments, supra* note 28, at 43 (noting that juries tend to overestimate the value of propensity evidence); Liebman, *supra* note 6, at 755 (citing cases).

75. See David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 25-31 (1987) (concluding that individual personality traits do not permit reliable inferences of action in conformity with personality traits); Miguel Angel Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1041-60 (1984) (same); but see Susan M. Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 518 (1991) (concluding that individual personality traits do permit reliable inferences of action in conformity with personality traits); Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1,32-34, 64-86 (1993) (same).

76. *Zackowitz*, 172 N.E. 467; Liebman, *supra* note 6, at 755.

77. U.S. CONST. amends. V & XIV, § 1. The failure to observe fundamental fairness, which is essential to the concept of justice, results in a denial of due process. See, e.g., *Lisenba v. California*, 314 U.S. 219, 236 (1941); accord *Kealohapauole v. Shimoda*, 800 F.2d 1463, 1465 (9th Cir. 1986) (same). The Supreme Court has acknowledged that the very integrity of the judicial system depends on a fair trial. See *Powers v. Ohio*, 499 U.S. 400, 413 (1991) (noting integrity of judicial system depends on convictions or

Hoboken Land & Improvement Co.,⁷⁸ the United States Supreme Court advanced a historical test for ascertaining what constitutes due process.⁷⁹ The Court held that if the process is not in conflict with any express constitutional provisions, courts must,

look to those settled usages and modes of proceeding existing in the common and statute [sic] law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.⁸⁰

The Supreme Court elaborated on this historical test in *Hurtado v. California*.⁸¹ In *Hurtado*, the Court explained that a process, not otherwise forbidden, “must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country;”⁸² The Supreme Court recently re-articulated the definition of due process in *Dowling v. United States*.⁸³ The Court defined due process as “those ‘fundamental conceptions of justice which lie at the base of our civil and political institutions,’ and which define the community’s sense of fair play and decency.”⁸⁴

Applying the foregoing historical test, it is clear that the exclusion of propensity evidence at trial constitutes due process. The settled mode of proceeding in Anglo-American jurisprudence is prohibition of propensity evidence to prove action in conformity with a particular character trait.⁸⁵ This ban on propensity evidence has been firmly and

acquittals given by persons who are fair). See *infra* Part III.C for a discussion of how Rules 413–415 of the Federal Rules of Evidence prevent a fundamentally fair trial.

78. 59 U.S. (18 How.) 272 (1856).

79. *Id.* at 276-77.

80. *Id.* at 277.

81. 110 U.S. 516 (1884).

82. *Id.* at 528 (emphasis added).

83. 493 U.S. 342 (1990).

84. *Id.* at 353 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

85. In *Lovely v. United States*, 169 F.2d 386 (4th Cir. 1948), the United States Court of Appeals for the Fourth Circuit remarked:

The rule which thus forbids the introduction of evidence of other offenses having no reasonable tendency to prove the crime charged, except in so far as they may establish a criminal tendency on the part of the accused . . . arises out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence. If such evidence were allowed . . . persons accused of crime would be greatly prejudiced. . . .

Id. at 389 (emphasis added).

The rule against propensity evidence has been firmly established in England. For example, in *Makin v. Attorney-General for New South Wales*, 17 COX. CR. L. 704 (Cr. Cas. Res. 1893), Lord Chancellor Herschell stated:

It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those

historically established since at least the seventeenth century in England and, as evidenced in case law and state and federal codes of evidence, has had continuing validity to the present.⁸⁶ This centuries-old rule has therefore become firmly embedded in the principles underlying the Due Process Clauses.⁸⁷ It is a fundamental conception of how defendants should be tried in American courtrooms.

Courts' rejection of propensity evidence proffered to prove action in conformity with a particular character trait can be traced to at least 1684, in *Hampden's Trial*.⁸⁸ In that case, Justice Withins, of the King's Bench, noted that in a prior case the King's Bench had excluded evidence of prior forgeries committed by the accused who was on trial for forgery.⁸⁹ Justice Withins explained that the court had excluded the evidence because the evidence would "rak[e] into men's course of life, to pick up evidence that they cannot be prepared to answer to."⁹⁰ Similarly, in 1692, the Lord Chief Justice Holt at Old Bailey excluded propensity evidence in a murder prosecution in

covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried.

Id. at 708; *accord* *Rex v. Smith*, 11 Crim. App. 229, 237 (Crim. App. 1915) (noting propensity rule); *Regina v. Oddy*, 169 Eng. Rep. 499, 502 (Cr. Cas. Res. 1851) (Lord Campbell, C.J.) (rejecting propensity evidence because it prejudiced accused as "bad man").

86. *See* WIGMORE, *supra* note 74, § 58.2, at 1213 (noting ban on propensity had received judicial sanction for three centuries); 2 JACK B. WEINSTEIN ET AL., WEINSTEIN'S EVIDENCE ¶ 404[08], at 404-44 (Joseph M. McLaughlin 1996) ("Although all American jurisdictions agree that no evidence may be introduced which seeks solely to prove that the accused has a criminal disposition. . . ."); Leonard, *supra* note 6, at 305 (commenting that proscription against using propensity evidence has historically been important tenet of American evidence law).

87. *Cf.* *Burnham v. Superior Court*, 495 U.S. 604, 610-19 (1990) (Scalia, J.) (defining jurisdictional "presence" as procedural due process by relying on historical, continuing traditions in Anglo-American jurisprudence). *See also infra* note 121 (for detailed explanation of *Burnham* definition of jurisdictional presence).

In *People v. Molineux*, 61 N.E. 286, 293-94 (N.Y. 1901), the New York Court of Appeals noted that:

[S]o universally recognized and so firmly established in all English-speaking lands, [the propensity rule] 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 the Magna Charta. It is the product of that same humane and enlightened public spirit which . . . 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.

Id.

88. 9 Cob. St. Tr. 1053 (K.B. 1684).

89. *Id.* at 1103.

90. *Id.*

Harrison's Trial.⁹¹ Upon the evidence's proffer, Justice Holt remarked: "Hold, what are you doing now? Are you going to arraign his whole life? Away, away, that ought not to be; that is nothing to the matter."⁹²

Pre-Revolutionary war colonial courts adopted the proscription against using propensity evidence as well. In *Rex v. Doaks*,⁹³ the accused had been indicted for keeping a bawdy house.⁹⁴ The prosecution sought to introduce the accused's prior acts of lasciviousness.⁹⁵ The highest court in Massachusetts, the Superior Court of Judicature, held that the propensity evidence was inadmissible.⁹⁶

In addition to the seventeenth and eighteenth century cases, the United States Supreme Court has continuously ruled against the use of propensity evidence. One of the earliest Supreme Court decisions addressing the ban on prior crimes evidence was *Boyd v. United States*.⁹⁷ In *Boyd*, the prosecution charged the defendants with murder following a robbery attempt.⁹⁸ The trial court permitted the prosecution to introduce evidence of prior robberies committed by the defendants.⁹⁹ The Court held that the prior crimes evidence was inadmissible.¹⁰⁰ The Court reasoned that the prior crimes evidence unduly prejudiced the defendants by impressing upon the jurors the notion that the defendants were "wretches" who were undeserving of certain prescribed trial protections.¹⁰¹

In *Brinegar v. United States*,¹⁰² the Supreme Court implied that the prohibition of admitting propensity evidence was embedded in the concept of due process.¹⁰³ In that case, the Court concluded that in a

91. 12 How. St. Tr. 834, 864 (Old Bailey 1692).

92. *Id.*

93. Quincy's Mass. Repts 90 (Mass. Super. Ct. 1763).

94. *Id.* at 90.

95. *Id.*

96. *Id.* at 90-91.

97. 142 U.S. 450 (1892).

98. *Id.*

99. *Id.* at 454.

100. *Id.* at 458.

101. *Id.*

102. 338 U.S. 160 (1949).

103. Notwithstanding the persuasive authority against the use of propensity evidence, the United States Supreme Court has never *expressly* held that admission of propensity evidence to show action in conformity with a particular character trait violates the Due Process Clauses. See *Estelle v. McGuire*, 502 U.S. 62, 75 n.5 (1991) (declining to reach issue of whether admitting propensity evidence violates due process); *Spencer v. Texas*, 385 U.S. 554, 572-74 (1967) (Warren, C.J., dissenting)

prosecution for illegal importation of liquor, testimony of a government agent that he had arrested the defendant several months earlier for illegal transportation of liquor was inadmissible.¹⁰⁴ The Court stated:

Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty, and property.¹⁰⁵

In *Michelson v. United States*,¹⁰⁶ the Court expressly placed its imprimatur on the common law rule barring propensity evidence.¹⁰⁷ In the compelling language of Justice Jackson, the Court reasoned:

Courts that follow the common law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish the probability of his guilt The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.¹⁰⁸

The Court recently reaffirmed the ban on propensity evidence in *Huddleston v. United States*.¹⁰⁹

(commenting that the Court has never held that use of prior convictions to show propensity violates due process, but probably would do so).

Paul F. Rothstein, Georgetown University Law Center Professor and consultant to the House and Senate on evidence rules, has noted that the Supreme Court has consistently shied away from determining that use of earlier wrongdoing as evidence presents constitutional problems. Harvey Berkman, *Crime Bill Sex Rule Stirs Evidence Debate*, NAT'L L.J., Sept. 5, 1994, at A16.

104. *Brinegar*, 338 U.S. at 173.

105. *Id.* at 174.

106. 335 U.S. 469 (1948).

107. *Id.* at 475-76.

108. *Id.*

109. 485 U.S. 681, 685-87 (1988) (discussing how Federal Rule of Evidence 404(b) prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the defendant's character, unless the evidence bears upon a relevant issue in the case, such as the defendant's motive or opportunity).

Moreover, Chief Justice Warren in *Spencer v. Texas*¹¹⁰ commented that the use of prior convictions to show propensity is fundamentally at odds with the policies underlying due process.¹¹¹ He reasoned that the use of prior convictions “needlessly prejudices the accused.”¹¹² Justice Warren also explained that evidence of prior crimes to show action in conformity with a particular character trait jeopardizes the constitutionally mandated presumption of innocence.¹¹³ In addition, Justice Warren noted that the ban on propensity is well established.¹¹⁴ He stated that previous decisions by the Supreme Court, federal courts of appeals, and state courts suggested that evidence of prior crimes in order to show criminal disposition would violate the Due Process Clause.¹¹⁵ No other justice disagreed with Justice Warren’s propositions.

More recently, in *Estelle v. McGuire*,¹¹⁶ Justice O’Connor suggested that in certain circumstances admitting evidence of prior crimes in order to show disposition to commit the crime charged may violate the Due Process Clause. Justice O’Connor commented that the fundamental fairness requirement of the Due Process Clause mandates proof of guilt beyond a reasonable doubt.¹¹⁷ She asserted that the principles underlying the Due Process Clause prohibit presumptions that have the effect of relieving the prosecution of its burden of persuasion of proof of guilt beyond a reasonable doubt on every element of a crime.¹¹⁸ Justice O’Connor’s analysis suggests that

110. 385 U.S. 554 (1967).

111. *Id.* at 573-74 (Warren, C.J., dissenting).

112. *Id.* at 570 (Warren, C.J., dissenting).

113. *Id.* at 575 (Warren, C.J., dissenting); *see also* *People v. Molineux*, 61 N.E. 286, 293-94 (N.Y. 1901) (asserting that propensity rule developed from constitutional mandate of presumption of innocence).

114. 385 U.S. at 572 (Warren, C.J., dissenting).

115. *Id.* at 573-74 & nn.4-6 (Warren, C.J., dissenting) (citing *Marshall v. United States*, 360 U.S. 310, 312-13 (1959); *Michelson v. United States*, 335 U.S. 469, 475-76 (1948); *Boyd v. United States*, 142 U.S. 450, 458 (1892); *United States v. Jacangelo*, 281 F.2d 574, 576-77 (3d Cir. 1960); *Swann v. United States*, 195 F.2d 689, 690-91 (4th Cir. 1952); *Lovely v. United States*, 169 F.2d 386, 389 (4th Cir. 1948); *Railton v. United States*, 127 F.2d 691, 693 (5th Cir. 1942); *Tedesco v. United States*, 118 F.2d 737, 739-40 (9th Cir. 1941); *State v. Myrick*, 317 P.2d 485, 487 (Kan. 1957); *Scarborough v. State*, 37 So.2d 748, 750 (Miss. 1948); *People v. Molineaux*, 61 N.E. 286, 293-94 (N.Y. 1901); *Seay v. State*, 395 S.W.2d 40, 45 (Tex. Crim. App. 1965); *State v. Scott*, 175 P.2d 1016, 1022-23 (Utah 1947)).

116. 502 U.S. 62 (1991).

117. *Id.* at 78 (O’Connor, J., concurring) (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986); *In re Winship*, 397 U.S. 358, 364 (1970)).

118. *Id.* at 78 (O’Connor, J., concurring) (citing *Francis v. Franklin*, 471 U.S. 307, 313 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 521-23 (1979); *Patterson v. New York*, 432 U.S. 197, 215 (1977)).

propensity evidence creates a mandatory presumption that the accused committed the crime charged because he was involved in prior similar offenses. Parsed in this fashion, she implies that use of prior offenses violates due process.¹¹⁹

Although the Supreme Court has never explicitly held that propensity evidence violates due process, its decision in *Burnham v. Superior Court of California*¹²⁰ suggests that the current Justices may agree that admission of such evidence to prove action in conformity with a specific character trait would violate due process.¹²¹ It remains to be seen, however, whether the Supreme Court will explicitly hold that Rules 413–415 violate the Due Process Clause.

In addition to the Supreme Court's statements, courts of appeals routinely acknowledge the validity of the prohibition of propensity evidence,¹²² and some courts of appeals have expressly determined

119. *Id.* at 78 (O'Connor, J., concurring).

120. 495 U.S. 604 (1990).

121. In *Burnham*, the Court held that jurisdictional "presence" satisfied the notions of procedural due process. *Id.* at 628 (White, J., concurring), 628-29 (Brennan, J., concurring). Jurisdictional presence means presence within a jurisdiction such that courts of that jurisdiction can constitutionally exercise personal jurisdiction over the person present in that jurisdiction. Justice Scalia, joined by Chief Justice Rehnquist, Justice Kennedy and, in part, Justice White, concluded that "jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard. . . ." *Id.* at 619. Tracing century-old cases, Justice Scalia determined that one of the most firmly established principles in American jurisprudence is that presence within a forum confers jurisdiction over the person. *Id.* at 610-19 (citing, *inter alia*, *Potter v. Allin*, 2 Root 63, 67 (Conn. 1793)).

Thus, members of the Court defined what constituted procedural due process as what had developed over several centuries in Anglo-American jurisprudence. To the Justices, such an historical basis signifies a rule's acceptance as fundamental and well established. Similarly, the members of the Court likely will acknowledge that the ban on propensity evidence has become a fundamental conception of justice underlying our civil and political institutions, defining the community's sense of fair play and decency. See *supra* notes 77-118 and accompanying text for a discussion of the proposition that the propensity rule has become embedded in the notions of due process by virtue of its historical but continuing validity.

122. See generally *United States v. Gelzer*, 50 F.3d 1133, 1139 (2d Cir. 1995); *Henry v. Estelle*, 33 F.3d 1037, 1042 (9th Cir. 1994), *rev'd on other grounds sub nom. Duncan v. Henry*, 115 S. Ct. 887 (1995); *Government of the Virgin Islands v. Archibald*, 987 F.2d 180, 185 (3d Cir. 1993); *United States v. Has No Horse*, 11 F.3d 104, 106 (8th Cir. 1993); *United States v. Peden*, 961 F.2d 517, 520 (5th Cir. 1992); *Government of the Virgin Islands v. Pinney*, 967 F.2d 912, 914 (3d Cir. 1992); *United States v. Lasanta*, 978 F.2d 1300, 1307 (2d Cir. 1992); *United States v. Concepcion*, 983 F.2d 369, 392 (2d Cir. 1992); *Jammal v. Van De Kamp*, 926 F.2d 918, 920 (9th Cir. 1991); *Government of the Virgin Islands v. Harris*, 938 F.2d 401, 419, 420 (3d Cir. 1991); *United States v. Hadley*, 918 F.2d 848, 850-51 (9th Cir. 1990); *United States v. Fawbush*, 900 F.2d 150, 151-52 (8th Cir. 1990); *United States v. Brennan*, 798 F.2d 581, 589 (2d Cir. 1986); *United States v. Estabrook*, 774 F.2d 284, 287 (8th Cir.

that the prohibition is embedded in the Due Process Clauses of the Constitution.¹²³ These courts reason that if the jury can draw no permissible inferences from the propensity evidence, the evidence fundamentally prevents a fair trial.¹²⁴ For example, in *United States v. Young*,¹²⁵ the government prosecuted the defendants for a marijuana production and distribution business.¹²⁶ The district court permitted the government to offer evidence that the defendants also illegally produced alcohol.¹²⁷ The United States Court of Appeals for the Eleventh Circuit held that the district court improperly admitted the evidence regarding illegal alcohol production.¹²⁸ The court reasoned that the only inference the jury could draw from this evidence was that the defendants were more likely to have illegally produced marijuana because they had the disposition to do so as evidenced by their acts of illegally producing alcohol.¹²⁹ The court rejected the government's argument that the evidence was relevant to the issue of the defendants' intent, noting the dissimilarity between producing marijuana and alcohol.¹³⁰

Also illustrative is the decision of the United States Court of Appeals for the Ninth Circuit in *McKinney v. Rees*.¹³¹ The *McKinney* court expressly held that the use of evidence to show propensity

1985); *United States v. Harris*, 733 F.2d 994, 1006 (2d Cir. 1984); *United States v. Wagoner*, 713 F.2d 1371, 1374-76 (8th Cir. 1983); *United States v. Boykin*, 679 F.2d 1240, 1244 (8th Cir. 1982); *United States v. Diggs*, 649 F.2d 731, 737 (9th Cir. 1981); *United States v. Foskey*, 636 F.2d 517, 523 (D.C. Cir. 1980); *Brinlee v. Crisp*, 608 F.2d 839, 850 (10th Cir. 1979); *United States v. Beechum*, 582 F.2d 898, 910 (5th Cir. 1978) (en banc); *United States v. Burkhart*, 458 F.2d 201, 204 (10th Cir. 1972); *Lovely v. United States*, 169 F.2d 386, 388-89 (4th Cir. 1948); *United States v. Dia*, 826 F. Supp. 1237, 1240-42 (D. Ariz. 1993), *aff'd in part, vacated in part*, 39 F.3d 1189 (9th Cir. 1994).

123. *See, e.g.*, *Tucker v. Makowski*, 883 F.2d 877, 881 (10th Cir. 1989) (acknowledging that admission of other crimes evidence in criminal prosecution raises due process issue).

124. *See, e.g.*, *Jammal v. Van De Kamp*, 926 F.2d 918, 920 (9th Cir. 1991) (asserting that propensity evidence for which there are no permissible inferences violates due process).

125. 39 F.3d 1561 (11th Cir. 1994).

126. *Id.* at 1564.

127. *Id.* at 1572-73.

128. *Id.* at 1573.

129. *Id.*

130. *Id.*

131. 993 F.2d 1378 (9th Cir. 1993); *see also* *Henry v. Estelle*, 33 F.3d 1037 (9th Cir. 1994), *rev'd on other grounds sub nom. Duncan v. Henry*, 115 S. Ct. 887 (1995) (Ninth Circuit case holding that admitting evidence of prior acts of child molestation violates the Due Process clause); *see also infra* notes 248-55 and accompanying text (discussing *Henry*).

violates the Due Process Clause.¹³² In *McKinney*, the victim, the defendant's mother, died after her assailant slit her throat.¹³³ The police failed to identify a murder weapon.¹³⁴ However, the police found the defendant at the scene of the crime wearing a Buck knife on his belt.¹³⁵ At trial, the court permitted the prosecution to introduce evidence that one year earlier the police had confiscated a knife owned by the defendant.¹³⁶ The court also admitted evidence that the defendant at times in the past had worn a knife while wearing camouflage and had scratched the words "Death is His" on the door to his dormitory room closet.¹³⁷ The jury convicted the defendant of murdering his mother.¹³⁸

The Ninth Circuit affirmed the district court's grant of the defendant's federal habeas corpus petition.¹³⁹ The court held that admission of the "other acts" evidence deprived the defendant of a fair trial in violation of the Due Process Clause.¹⁴⁰ The court explained that the evidence regarding the knife the police had confiscated one year earlier was not relevant.¹⁴¹ The court remarked that the only inference the jury could have drawn from such evidence was improper.¹⁴² Similarly, the court reasoned that the evidence of the accused's wearing camouflage and scratching "Death is His" on his dormitory closet door created an impermissible inference that the accused had a propensity to murder his mother.¹⁴³

Other authority, namely state case law and various codes of evidence, suggest that the rule against using propensity evidence to show action in conformity with a particular character trait is a concept

132. *McKinney*, 993 F.2d at 1385-86.

133. *Id.* at 1381.

134. *Id.*

135. *Id.*

136. *Id.* at 1382.

137. *Id.*

138. *Id.* at 1379.

139. *Id.* at 1386.

140. *Id.* The court also noted that use of propensity evidence is impermissible under the Federal Rules of Evidence and California Rules of Evidence. *Id.* at 1380 (citing FED. R. EVID. 404(b); CAL. EVID. CODE § 1101 (West Supp. 1993)); *but see* CAL. EVID. CODE § 1108 (West Supp. 1996) (providing for the admission of evidence of prior sexual offenses committed by a defendant accused of a sexual offense, unless the evidence is inadmissible because of the risk of undue prejudice, confusing the issues, or misleading the jury).

141. *McKinney*, 993 F.2d at 1382.

142. *Id.* Specifically, the court refused to permit the jury to draw the inference that, because the accused owned a knife which the police confiscated one year earlier, the accused was the type of person who owned the knife used to murder his mother. *Id.*

143. *Id.* at 1383.

embedded in the Due Process Clause. For example, the Federal Rules of Evidence¹⁴⁴ and the evidence rules of thirty-four states illustrate the fundamental proscription against using propensity evidence as well.¹⁴⁵ Many states have transported Rule 404 of the Federal Rules of Evidence into their own codes of evidence.¹⁴⁶

Moreover, the common law precedents in other states and the District of Columbia demonstrate steadfast adherence to the propensity rule.¹⁴⁷ For example, in *People v. Zackowitz*,¹⁴⁸ Chief Justice

144. See FED. R. EVID. 404 (proscribing use of propensity evidence to show action in conformity with character trait); see also *supra* notes 61-65 and accompanying text (discussing the codification of the common law rule barring use of propensity evidence in the Federal Rules of Evidence).

145. See generally ALASKA R. EVID. 404 (West 1994); COLO. R. EVID. 404 (West 1989); DEL. R. EVID. 404 (Michie 1991); FLA. STAT. ANN. ch. 90.404 (West Supp. 1996); HAW. R. EVID. 404 (Michie 1995); IDAHO R. EVID. 404 (Michie 1994); IOWA R. EVID. 404 (West 1996); KAN. STAT. ANN. § 60-447 (1994); KY. R. EVID. 404 (Michie 1994); LA. CODE EVID. ANN. art. 404 (West 1995); ME. R. EVID. 404 (West 1996); MICH. R. EVID. 404 (West 1996); MINN. R. EVID. 404 (West 1980); MISS. R. EVID. 404 (1994); MONT. R. EVID. 404 (1995); NEB. REV. STAT. § 27-404 (1995); NEV. REV. STAT. § 48.045 (Michie 1996); N.H. R. EVID. 404 (Michie 1996); N.J. R. EVID. 404 (West 1993); N.M. R. EVID. 404 (Michie 1994); N.C. GEN. STAT. § 8c-1, R. 404 (Michie 1988 & Cumm. Supp. 1995); N.D. R. EVID. 404 (Michie 1996); OHIO R. EVID. 404 (Baldwin 1994); OKLA. STAT. ANN. tit. 12 § 2404 (West 1993); OR. REV. STAT. § 40.170 (1988); R.I. R. EVID. 404 (Michie 1993); S.D. CODIFIED LAWS ANN. § 19-12-4 and § 19-12-5n (Michie 1995); TENN. R. EVID. 404 (Michie 1996); UTAH R. EVID. 404 (Michie 1996); VT. R. EVID. 404 (1995); WASH. R. EVID. 404 (West 1995); W. VA. R. EVID. 404 (Michie 1996); WYO. R. EVID. 404 (Michie 1996). But see ARIZ. REV. STAT. ANN. § 13-1420 (West Supp. 1996) (providing that for defendants charged with sexual offenses "the court may admit evidence that the defendant committed past acts which would constitute a sexual offense and may consider the bearing this evidence has on any matter to which it is relevant"); CAL. EVID. CODE § 1108 (West Supp. 1996) (providing for the admission of evidence of prior sexual offenses committed by defendant accused of a sexual offense, unless the evidence is inadmissible because of the risk of undue prejudice, confusing the issues, or misleading the jury); TEX. CRIM. PROC. CODE ANN. art. 38.37 (West Supp. 1996) (providing that, notwithstanding Rules 404 and 405, TEXAS RULES OF CRIMINAL EVIDENCE, evidence of other crimes, wrongs, or acts committed by the defendant against a child who is the victim of the alleged offense shall be admitted for its bearing on relevant matters).

146. See *supra* notes 65-68 and accompanying text for a discussion of Rule 404 of the Federal Rules of Evidence.

See *supra* note 145 for a list of states that have incorporated Rule 404 of the Federal Rules of Evidence into their evidence codes.

147. See generally *Anonymous v. State*, 507 So. 2d 972, 973-74 (Ala. 1987); *State v. Holliday*, 268 A.2d 368, 369 (Conn. 1970); *Artis v. United States*, 505 A.2d 52, 56 (App. D.C. 1986); *Brown v. State*, 398 S.E.2d 34, 34 (Ga. Ct. App. 1990); *People v. Kannapes*, 567 N.E.2d 377, 379-80 (Ill. App. Ct. 1990); *Penley v. State*, 506 N.E.2d 806, 808 (Ind. 1987); *Ross v. State*, 350 A.2d 680, 684 (Md. 1976); *Commonwealth v. Chalifoux*, 291 N.E.2d 635, 638 (Mass. 1973); *State v. Clark*, 801 S.W.2d 701, 703 (Mo. Ct. App. 1990); *People v. Powell*, 543 N.Y.S.2d 818, 819 (N.Y. App. Div. 1989); *Commonwealth v. Lark*, 543 A.2d 491, 497 (Pa. 1988); *State v. Griffin*, 285 S.E.2d 631, 633-34 (S.C. 1981); *Brooks v. Commonwealth*, 258 S.E.2d 504, 506 (Va. 1979).

Cardozo, writing for the New York Court of Appeals, reversed a murder conviction because the trial court had permitted certain propensity evidence.¹⁴⁹ In *Zackowitz*, the accused had been charged with shooting a heckler on the street who had propositioned the accused's wife.¹⁵⁰ The trial court permitted the prosecution to admit evidence that the accused, at the time of the murder, kept various firearms in his apartment.¹⁵¹ Justice Cardozo held that the trial court should have excluded the weapons evidence, as it manifestly infected the fairness of the trial.¹⁵² He reasoned that the only purpose of the evidence was to show that the accused "was a man of vicious and dangerous propensities, who because of those propensities was more likely to kill with deliberate and premeditated design than a man of irreproachable life and amiable manners."¹⁵³ Justice Cardozo explained in a memorable and oft-quoted passage that the rule against using propensity evidence was historically of fundamental importance in criminal prosecutions:

If a murderous propensity may be proved against a defendant as one of the tokens of his guilt, a rule of criminal evidence, long believed to be of fundamental importance for the protection of the innocent, must be first declared away. Fundamental hitherto has been the rule that character is never an issue in a criminal prosecution unless the defendant chooses to make it one.¹⁵⁴

Besides the case law and codes of evidence, various commentators have suggested that admission of propensity evidence violates the Due Process Clauses.¹⁵⁵ For example, Wigmore, in discussing the inadmissibility of bad acts to show the character of the accused, enumerated the policies typically associated with the Due Process Clause as reasons justifying the ban on propensity evidence.¹⁵⁶ Similarly, a district court judge asserted that the ban on propensity

See *infra* notes 249-54 and accompanying text for a discussion of state cases where courts have excluded propensity evidence in cases of sexual abuse and child molestation.

148. 172 N.E. 466 (N.Y. 1930) (Cardozo, C.J.).

149. *Id.* at 469.

150. *Id.* at 467.

151. *Id.*

152. *Id.* at 469.

153. *Id.* at 467.

154. *Id.* at 468.

155. See WEINSTEIN, *supra* note 86, ¶ 404[01], at 404-18 (noting that ban on propensity evidence was "molded by underlying constitutional pressures"); Duane, *supra* note 9, at 108 ("[The] use of character evidence . . . would violate the Constitutional guarantees of Due Process and the presumption of innocence.").

156. See WIGMORE, *supra* note 74, § 58.2, at 1213-15.

evidence is central to the criminal law concept that the law protects the accused from forced inculcation by proof of past misconduct.¹⁵⁷

IV. RULES 413–415 OF THE FEDERAL RULES OF EVIDENCE VIOLATE THE DUE PROCESS CLAUSE

A. *The Rules Contravene the Prohibition Against Propensity Evidence, Firmly Embedded in the Constitution*

As demonstrated above, state and federal case law and various codes of evidence indicate that the proscription against admitting propensity evidence as substantive evidence is embedded in the Due Process Clause of the Constitution. The propensity rule, which is one of the most fundamental conceptions of justice, was developed over several centuries, and defines the community's sense of fairness.¹⁵⁸ This is evidenced by the settled usage and mode of proceeding that existed in English common and statutory law.¹⁵⁹ Hence, admission of propensity evidence in a sexual assault or child molestation trial violates due process.¹⁶⁰

Rules 413–415 each state in mandatory language that evidence of other offenses of sexual assault or child molestation *is admissible*. Thus, the new rules *require*, in criminal and civil cases involving sexual assault and child molestation, admission of proffered evidence of the accused's or civil defendant's commission of other offenses of sexual assault or child molestation.¹⁶¹ Because of the mandatory nature of the rules, in sexual assault and child molestation cases, the

157. See WEINSTEIN, *supra* note 86, ¶ 404[04], at 404-26.

158. See *Dowling v. United States*, 493 U.S. 342, 352-53 (1990) (discussing parameters for determining what constitutes "due process").

159. Cf. *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) (defining what constitutes due process by referring to historical and continuing legal traditions); *Hurtado v. California*, 110 U.S. 516, 528 (1884) (same); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276-77 (1855) (same).

160. Cf. *Estelle v. McGuire*, 502 U.S. 62, 78 (1991) (O'Connor, J., concurring) (suggesting that admitting evidence of prior crimes to show disposition to commit crime charged may violate due process); *Spencer v. Texas* 385 U.S. 554, 570, 573-74 (1967) (Warren, C.J., dissenting) (commenting that use of prior convictions to show propensity is fundamentally at odds with policies underlying due process); *Brinegar v. United States*, 338 U.S. 160, 174 (1949) (implying prohibition of admitting propensity evidence is embedded in Due Process Clause); *McKinney v. Rees*, 993 F.2d 1378, 1385-86 (9th Cir. 1993) (holding that use of evidence to show propensity violates Due Process Clause); *Tucker v. Makowski*, 883 F.2d 877, 881 (10th Cir. 1989) (acknowledging that admission of other crimes evidence in criminal prosecution raises due process issues).

161. See *supra* notes 1-3 for relevant text of Rules 413–415.

Federal Rules' general prohibition on the admission of character evidence to show disposition to commit offenses does not apply.¹⁶²

Since the rules provide that propensity evidence may be considered for any matter to which it is relevant, it is clear that Rules 413–415 automatically invite introduction of prior offenses of sexual assault or child molestation. The federal prosecutor will proffer such evidence *solely* for the purpose of showing that, because the accused previously committed acts of sexual assault or child molestation, the accused is a person of dangerous and criminal character, a person likely to have sexually assaulted the victim or molested a child.¹⁶³ Although character is relevant,¹⁶⁴ as Justices Jackson and Cardozo noted, it has traditionally been excluded on policy grounds embedded in the fundamental notions of due process.¹⁶⁵

B. The Rules Unconstitutionally Require Irrational and Arbitrary Inferences

There are several basic points that we may make about the Due Process Clause and its effect on trial procedures. The Framers meant the clause to be flexible and did not seek to prescribe a specific set of rules.¹⁶⁶ The purpose of a constitution is to provide only the basic outline and to allow courts and legislatures to work out the details.¹⁶⁷ The Due Process Clause works as a bar to certain police practices, statutory presumptions, evidentiary rulings, instructions, and comments of prosecutors. Thus, it works in the negative and, as applied by courts, results in a series of prohibitions or “shall nots.”¹⁶⁸

162. See, e.g., FED. R. EVID. 404(a) (prohibiting admission of evidence of person's character trait to prove action in conformity therewith); FED. R. EVID. 404(b) (barring admission of other crimes, wrongs, or acts to prove character of person in order to show action in conformity therewith). See also *supra* notes 65-68 and accompanying text for relevant text and discussion of Rule 404 of the Federal Rules of Evidence.

163. See, e.g., *People v. Zackowitz*, 172 N.E. 466, 467-68 (N.Y. 1930) (Cardozo, C.J.) (explaining propensity evidence).

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

165. See *id.* at 475-76 (commenting that prosecution may not proffer evidence of prior offenses even though it may be logically persuasive that accused is, by propensity, a probable perpetrator of crime); See also *Zackowitz*, 172 N.E. at 467-68 (acknowledging relevance of character but concluding that character can never be an issue in criminal prosecution because of fundamental ban on propensity evidence).

166. See *Duncan v. Louisiana*, 391 U.S. 145, 148-50, 156-58 (1968) (extending right to jury trial in criminal prosecutions to state defendants); *Adamson v. California*, 332 U.S. 46, 66-68 (1947) (Frankfurter, J., concurring) (discussing flexibility of Fourteenth Amendment); *Palko v. Connecticut*, 302 U.S. 319, 326 (1937) (commenting on absorption of first eight amendments to Constitution in Fourteenth Amendment).

167. See *United States v. Leon*, 468 U.S. 897, 932 (1984) (Brennan, J., dissenting).

168. *Chambers v. Mississippi*, 410 U.S. 284, 294-303 (1973) (exclusion of

For instance, police shall not strike a suspect during interrogation¹⁶⁹ or initiate the idea of committing a crime.¹⁷⁰ The Clause, as applied to police practices, has its own long history, but it is only of indirect use in determining whether a rule of evidence breaches the Fifth or Fourteenth Amendments.¹⁷¹ The core right is, after all, nothing more or less than a fair trial.¹⁷²

In the context of a fair trial, a substantial body of case law holds that “rationality” is essential to permit inferences based on evidence. The rule that presumptions and inferences be rationally grounded and pass the “more likely than not test” is one important facet of the body of decisional law. Specifically, the holdings in *Leary v. United States*¹⁷³ and various other cases clearly establish that an inference is “‘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.”¹⁷⁴

In *Leary*, the Supreme Court held that possession of marijuana would not support an inference that the defendant knew that the substance had been imported.¹⁷⁵ The Court noted that marijuana is grown both domestically and abroad.¹⁷⁶ The Court therefore reasoned that the inference was irrational and arbitrary because the available data did not substantially assure that the majority of marijuana users knew

declarations against penal interest and limitations on the right to cross-examine a critical witness “denied [defendant] a trial in accord with traditional and fundamental standards of due process”).

169. *Brown v. Mississippi*, 297 U.S. 278, 285-87 (1936).

170. *United States v. Russell*, 411 U.S. 423, 436 (1973).

171. *See, e.g., Palko*, 302 U.S. 319 at 323.

172. *See, e.g., Chambers*, 410 U.S. at 294-303 (evidentiary rulings by trial court deprived defendant of fair trial).

173. 395 U.S. 6 (1969).

174. *Id.* at 36 (citing and discussing *Tot v. United States*, 319 U.S. 463 (1943). Compare *United States v. Gainey*, 380 U.S. 63 (1965), with *United States v. Romano*, 382 U.S. 136 (1965)). In *United States v. Gainey*, the Court upheld an instruction that “unexplained presence at a still” permitted an inference that a person was “carrying” on the business of a distiller. *Gainey*, 380 U.S. at 67-68. The Court concluded that the “carrying on offense” was comprehensive, and common knowledge of the character of a still was permissible. *Id.* at n.6. However, in *United States v. Romano*, the Court made the important distinction that “presence” at a still would not support an inference of “possession, custody, or control.” *Romano*, 382 U.S. at 141. The Court concluded that possession was a narrower offense and presence was “too tenuous to permit a reasonable inference of guilt” for that offense. *Id.* “[T]he inference of the one fact [possession] from proof of the other [presence] is arbitrary.” *Id.* (citing *Tot v. United States*, 319 U.S. 463, 467 (1943)).

175. *Leary*, 395 U.S. at 52-53.

176. *Id.*

of their marijuana's origin.¹⁷⁷ Thus, the Court concluded that the presumption denied the defendant due process of law because the presumed fact did not more likely than not "flow from the proved fact on which it was made to depend."¹⁷⁸

However, in *Turner v. United States*,¹⁷⁹ decided one year after *Leary*, the Court allowed an inference of knowledge of importation to flow from the possession of heroin.¹⁸⁰ The Court noted that little, if any, heroin is domestically manufactured.¹⁸¹ The Court therefore reasoned that it was permissible for the jury to infer that heroin users knew that the substance had been imported.¹⁸²

In *Barnes v. United States*,¹⁸³ the Court upheld another inference. In *Barnes*, the Court held that the jury could permissibly find beyond a reasonable doubt that the accused, in possession of recently stolen Treasury checks payable to persons he did not know, knew the checks were stolen.¹⁸⁴ The Court reasoned that the "traditional common law inference deeply rooted in our law" for unexplained possession of recently stolen property would permit a jury to infer that the accused knew the property was stolen.¹⁸⁵ The Court therefore concluded that the permissive inference satisfied the requirements of due process.¹⁸⁶

More recently, the Court held that state rules that excluded classes of evidence without an analysis of reliability violated due process. In *Chambers v. Mississippi*,¹⁸⁷ the Court concluded that a state rule excluding all declarations against penal interest without reference to the reliability of the declarations denied due process.¹⁸⁸ In *Rock v. Arkansas*,¹⁸⁹ the Court, following its holding in *Chambers*, held that a *per se* exclusion of a defendant's post-hypnotic statements violated due process because it excluded reliable and unreliable evidence without examining corroborative details.¹⁹⁰

177. *Id.* at 52.

178. *Id.* at 36; *see also id.* at 52-53 (noting that to presume that the majority of marijuana users knew the origin of their marijuana would result in "serious incursions into the teachings of *Tot*, *Gainey*, and *Romano*").

179. 396 U.S. 398 (1970).

180. *Id.* at 415-16.

181. *Id.* at 416.

182. *Id.*

183. 412 U.S. 837 (1973).

184. *Id.* at 845.

185. *Id.* at 843.

186. *Id.* at 846.

187. 410 U.S. 284 (1973).

188. *Id.* at 294-303.

189. 483 U.S. 44 (1987).

190. *Id.* at 56-61.

These teachings of the Court may create some disagreement in application, but the constitutional test is clear: an inference must be rational.¹⁹¹ Let us apply this constitutional test to Rule 413. If a defendant were convicted of the crime of rape in 1990, is it more likely than not that he committed the crime of rape for which he is on trial in 1996? Or, on the other hand, is it “irrational and arbitrary” to use the proved fact, a 1990 rape conviction, to establish the presumed fact in issue, the 1996 rape? Is there a “substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend”?¹⁹²

There is simply no assurance, substantial or insubstantial, to support such a nexus. Any discussion of the facts beyond the skeleton provided demonstrates the redundancy of the new rules and the genius of Rule 404. Once we begin to ask any qualifying questions about the facts, seeking to know whether the crimes involved similar victims, or were limited to a specific time, place, or *modus operandi*, we run squarely into well developed exceptions to the general prohibition in Rule 404(a) against propensity evidence.¹⁹³ Propensity evidence does not pass the more likely than not test. So we see that what the new rules do is eliminate the need to ask for a justification for admission as required by Rule 404(b) and rely on propensity evidence without being honest or principled about doing so.¹⁹⁴ The new rules sweep *all* past offenses and *all* past offenders into a single category. The only foundation for admissibility is the mere fact of past involvement or a past accusation, for even prior acquittal would not bar admissibility since the rules expressly state that evidence of mere *commission* of another offense is admissible. Thus, the new rules operate in an all or nothing manner and violate *Chambers* and *Rock*, as well as the holdings set forth in *Leary* and its progeny.¹⁹⁵

The new rules appear to be a crude effort by the legislature to expand the notion that sexual offenders have higher rates of recidivism than other types of offenders, such as burglars, drug offenders, and violent robbers. However, as noted here and elsewhere, there is no scientific or statistical support for this legislative theory. A recent

191. See *supra* text accompanying notes 173-78 (discussing the requirement of “rationality” for inferences).

192. See *supra* notes 173-78 and accompanying text (discussing the “more likely than not” test).

193. E.g., FED. R. EVID. 404(b). See *supra* notes 65-68 and accompanying text (discussing Rule 404).

194. See *supra* notes 67-68 and accompanying text (discussing Rule 404(b)).

195. See *supra* notes 187-90 and accompanying text (discussing *Chambers* and *Rock*).

Justice Department study of same-offense recidivism of approximately 100,000 prisoners reports a 7.7% recidivism rate for rapists, compared to 31.9% for burglars, 24.8% for drug offenders, and 19.6% for violent robbers.¹⁹⁶

Moreover, the new rules paint too broadly and sweep *all* sexual assaults and *all* child molestation into the same category. There is no attempt to set out standards that might rationally connect sex offenders by category (*e.g.*, rapists, sodomites, fondlers, peeping toms, fetishists, and others). Even the term "child molestation" is too broad because the victims range from toddlers to pre-teens. Without some distinction based on preferences that would rationally categorize sex offenders, there is no "assurance" that the crime in issue has been more likely than not committed by the person on trial who has at some point sexually assaulted or molested an unknown victim in an unknown manner. Indeed, the circumstances of these prior offenses are not relevant as far as these rules state.

Finally, the language of the new rules is circular. For instance, Rule 413 states that another sexual assault is admissible and may be considered for "its bearing on any matter to which it is relevant." This adds nothing to the general definition of relevance set forth in Rule 401¹⁹⁷ or to the list of specific exceptions to the ban on propensity under Rule 404(b). Theoretically, it threatens confusion by creating another relevance barrier for the prosecutor to leap after clearing the Rule 401 and Rule 404(b) barriers. The absence of a time frame in the new rules lends additional force to the irrationality and arbitrariness arguments. Signature crimes gain their power to persuade by virtue of the proximity in time, place, and method. As time passes, someone may commit a similar crime.¹⁹⁸ That is why the common law rules require strong evidence of similarity as a foundation of admissibility. As time passes, the inference—that the presumed fact is more likely than not to flow from the proved fact—loses substance.

196. See ALLEN J. BECK & BERNARD E. SHIPLEY, U.S. DEP'T OF JUSTICE, *RECIDIVISM OF PRISONERS RELEASED IN 1983*, at 6 (1989).

197. Rule 401 of the Federal Rules of Evidence provides in full: "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. 401.

198. See *United States v. Beasley*, 809 F.2d 1273, 1277 (7th Cir. 1987) (noting that similar crimes will be committed by other people, given enough time, hence, "the value of the other acts as an earmark is diminished").

C. *The Rules Prevent a Fundamentally Fair Trial*

In addition to the rules failing the Supreme Court's "historical test" of what constitutes due process and unconstitutionally requiring irrational and arbitrary inferences,¹⁹⁹ the new rules violate the basic notion of fundamental fairness embodied in the Due Process Clause. Fundamental fairness is essential to the concept of justice; the very integrity of the judicial system depends on convictions or acquittals given by persons who are fair.²⁰⁰ By requiring admission of propensity evidence in sexual assault and child molestation cases, the rules violate due process because they prevent a fundamentally fair trial.²⁰¹

By requiring the admission of propensity evidence, the rules prevent a fundamentally fair trial, and thus violate due process, for several reasons. As the drafters of Rule 404 of the Federal Rules of Evidence recognized, the basic nature of propensity evidence prevents a constitutionally fair trial.²⁰² If the federal prosecutor proffers evidence showing that the accused is by propensity more likely to have committed the sexual assault or act of child molestation in the case, jurors will likely credit the evidence with more weight than it deserves.²⁰³ Such evidence so over-persuades jurors that they will lose their impartiality and pre-judge the accused as one with a bad general character. Therefore, jurors exposed to propensity evidence more readily convict the accused.²⁰⁴ This denies the accused a "fair

199. See *supra* notes 158-65 and accompanying text (discussing how the rules fail the Supreme Court's "historic test" for determining what constitutes due process); see also *supra* notes 166-98 and accompanying text (discussing the rules' unconstitutional requirement of irrational and arbitrary inferences).

200. *Powers v. Ohio*, 499 U.S. 400, 413 (1991).

201. Cf. *People v. Zackowitz*, 172 N.E. 466, 469 (N.Y. 1930) (Cardozo, C.J.) (concluding that propensity evidence manifestly defeats fairness of trial).

202. Although prior crimes evidence is highly probative, it is constitutionally impermissible for the jury to infer from this evidence that the accused committed the charged act of sexual assault or child molestation. Cf. *Jammal v. Van De Kamp*, 926 F.2d 918, 920 (9th Cir. 1991) (asserting that propensity evidence for which there are no permissible inferences violates due process). See also *supra* note 77 and accompanying text (discussing fundamental fairness as essential to the concept of justice).

203. See *supra* note 74 (discussing tendency of jury to overvalue propensity evidence). Jurors will credit propensity evidence with more weight than it deserves even though recent research has indicated that character traits are not sufficiently stable enough over time to permit reliable inferences that one acted in conformity with a character trait. See *Leonard, supra* note 75, at 25-31; *Mendez, supra* note 75, at 1041-60.

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

opportunity to defend against a particular charge.”²⁰⁵ Moreover, “[i]t is fundamental to American jurisprudence that ‘a defendant must be tried for what he did, not for who he is.’”²⁰⁶

The new rules also impair a fair trial because they overly burden the accused. The prosecutor, armed with the new rules as ammunition, will introduce evidence of prior offenses, thus forcing the accused to continuously mount defenses against such evidence. It should be remembered that the rules permit *any* type of evidence regarding sexual assault or child molestation.²⁰⁷ The propensity evidence does not have to be a prior conviction. Moreover, the rules do not restrict the evidence to a certain time frame. Thus, the rules permit a prosecutor to proffer testimony that the defendant sexually assaulted or molested another person more than ten years in the past. The accused must counter the prosecutor’s damning evidence *seriatim*, preventing him from mounting an adequate defense to the sexual assault or child molestation charge that is the subject of the trial.²⁰⁸ Further, not only is admission of propensity evidence overly burdensome, it also blurs the issues in the case. Rather than focusing on the sexual assault or child molestation at issue in the trial, the propensity evidence will redirect the jury’s attention from the determination of the actual issue in the case.²⁰⁹

In addition, the new rules prevent a fair trial by vitiating a district court’s discretion to admit evidence regarding the commission of other offenses of sexual assault or child molestation.²¹⁰ By mandating that prior acts evidence *is admissible*, the rules prohibit a district court from balancing the probativeness and prejudice of such evidence as permitted in Rule 403 of the Federal Rules of Evidence.²¹¹ Thus, the

205. *Id.*

206. *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)).

207. See *supra* notes 1-3 for relevant text of Rules 413-415.

208. See *Dowling v. United States*, 493 U.S. 342, 362 (1990) (Brennan, J. dissenting) (asserting that introduction of prior crimes evidence requires defendant to mount second defense to offense for which defendant has already been punished or acquitted).

209. Liebman, *supra* note 6, at 755; cf. *People v. Zackowitz*, 172 N.E. 466, 468 (N.Y. 1930) (Cardozo, C.J.) (asserting that admission of propensity evidence predisposes the jury to view the defendant as guilty).

210. *But see* Anne Elsberry Kyl, Note, *The Propriety of Propensity: The Effects and Operation of New Federal Rules of Evidence 413 and 414*, 37 ARIZ. L. REV. 659, 669-73 (1995) (arguing that Rules 413 and 414 merely create discretionary exceptions to ban propensity evidence).

211. Rule 403 of the Federal Rules of Evidence provides in full:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

accused in cases involving sexual assault and child molestation does not receive potential fairness protections, because the rules are not subject to the district court's discretion to balance the potential prejudice and probativeness of the propensity evidence.

Regardless of whether the rules are subject to Rule 403 balancing, they needlessly and unduly prejudice the person accused in sexual assault and child molestation cases, in absolute contravention of Rule 404 of the Federal Rules of Evidence.²¹² Such evidence impresses upon the jurors the notion that the accused is a "wretch."²¹³ Thus, there is a great risk that jurors will incorrectly decide a case because the jury will find the accused's prior acts repugnant.²¹⁴ Propensity evidence tends to poison the jurors' minds, preventing them from being impartial triers of fact by generating hostility against the accused.²¹⁵ This is especially true in sexual assault and child molestation cases.²¹⁶ The Chicago Jury Project provided empirical confirmation of this observation.²¹⁷ In that study, researchers discovered that jurors classified sex offenses as reprehensible,²¹⁸ especially if the victim was a young child.²¹⁹ Subsequent research has confirmed the Chicago Jury Project findings.²²⁰

issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FED. R. EVID. 403.

212. See *supra* note 69 (outlining courts' and commentators' numerous justifications for the propensity rule, and general conclusion that propensity evidence is highly prejudicial).

213. *Boyd v. United States*, 142 U.S. 450, 458 (1892); see also *Spencer v. Texas*, 385 U.S. 554, 570 (1967) (Warren, C.J., dissenting) (same).

214. See, e.g., Imwinkelried, *Undertaking the Task*, *supra* note 72, at 296; William Roth, *Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach*, 9 PEPP. L. REV. 297, 300 n.9 (1982).

215. See HARRY C. UNDERHILL, CRIMINAL EVIDENCE § 182, at 326 (4th ed. 1935); WEINSTEIN, *supra* note 86, ¶ 404[18], at 404-116.1; Imwinkelried, *Undertaking the Task*, *supra* note 72, at 296.

216. See, e.g., *Scott v. Lawrence*, 36 F.3d 871, 874 (9th Cir. 1994) (commenting that rape and sexual assault convictions are among most prejudicial types of information presented to jury); *United States v. Ham*, 998 F.2d 1247, 1252 (4th Cir. 1993) (noting that the implications of prior acts of child molestation and abuse of women are highly inflammatory and prejudicial), *cert. denied*, 116 S. Ct. 513 (1995); *United States v. Buhl*, 712 F. Supp. 53, 57 (E.D. Pa. 1989) (recognizing that juror hostility heightened in sexual assault cases), *aff'd without op.*, 899 F.2d 1219 (3d Cir. 1990).

217. See generally HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966).

218. *Id.* at 397.

219. *Id.* at 396-97.

220. See BUREAU OF JUSTICE STATISTICS BULLETIN, U.S. DEP'T OF JUSTICE, BULLETIN: THE SEVERITY OF CRIME (Jan. 1984) (reporting that survey of 60,000 adults revealed offenses of rape and child molestation were seen as the most heinous crimes after homicide).

The new rules also prevent a fundamentally fair trial because they jeopardize the constitutionally mandated presumption of innocence until proven guilty.²²¹ As the Supreme Court commented in *Taylor v. Kentucky*,²²² the presumption of innocence, though not part of the text of the Constitution or the Bill of Rights, is a part of the basic historical fabric, and must therefore be included in criminal jury instructions.²²³ Several judges opposed the new rules on grounds that the proscription against using propensity evidence is part of the presumption of innocence.²²⁴ The rules, by admitting propensity evidence in sexual assault and child molestation cases, eviscerate the presumption of innocence because jurors no longer will presume the accused innocent. Rather, on hearing evidence that the accused committed prior acts of sexual assault and child molestation, jurors will deem the accused reprehensible and a "bad person."²²⁵ What is even more abhorrent is that none of the new rules require that the propensity evidence be a prior conviction. Thus, the rules permit jurors to conclude that the accused is an evil person based on mere *allegations* of sexual assault or child molestation that may have occurred long in the past.

Coextensive with the rules' jeopardizing the constitutionally mandated presumption of innocence, the new rules, by causing jurors to presume that the accused is guilty based on prior acts, impermissibly relieve the government of proving each element of a criminal offense of sexual assault or child molestation beyond a reasonable doubt. As the Supreme Court asserted in *In re Winship*,²²⁶ the traditional and time-tested standard of "proof beyond a reasonable

221. See *Taylor v. Kentucky*, 436 U.S. 478, 490 (1978) (concluding presumption of innocence is concept embodied in due process); *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (noting that presumption of innocence is basic component of fair trial under American system of criminal justice); *Spencer v. Texas*, 385 U.S. 554, 575 (1967) (Warren, C.J., dissenting) (commenting that propensity evidence jeopardizes presumption of innocence); *Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."); *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977) (discussing bar on propensity evidence as concomitant to presumption of innocence).

222. 436 U.S. 478 (1978).

223. *Id.* at 479, 490. *Taylor* thus demands that courts not ignore certain fundamental principles.

224. See *Reuben*, *supra* note 50, at 21 (reporting on judges' concerns over constitutionality, inconvenience, and fundamental fairness of new rules).

225. *Michelson v. United States*, 335 U.S. 469, (1948); see also *United States v. Peden*, 961 F.2d 517, 520 (5th Cir. 1992) (noting risk that jury will characterize accused as "evil person"); *Bryden & Park*, *supra* note 70, at 565; *Liebman*, *supra* note 6, at 754.

226. 397 U.S. 358 (1970).

doubt” governs criminal trials and must be part of criminal jury instructions even though it is not explicitly set out in the Constitution.²²⁷ The reasonable doubt concept “dates at least from our early years as a Nation” and “[t]he ‘demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula ‘beyond a reasonable doubt’ seems to have occurred as late as 1798.’”²²⁸ While individual states are free to define the reasonable doubt concept somewhat differently,²²⁹ they are not free to dispense with it when the prosecutor’s burden is explained to the jury. Thus, the Due Process Clause defines the floor below which neither a court, legislature, nor prosecutor may proceed without reversal.

Rules 413–415 violate the fundamental due process principles prohibiting presumptions that relieve the prosecution of its burden of persuasion or proof of guilt beyond a reasonable doubt on every element of an offense.²³⁰ The rules *require* admission of prior rapes and child molestation. Such evidence will cause the jury to presume that the accused committed the crime charged based on prior similar offenses.²³¹ It should be noted that it is constitutionally irrelevant whether the rules are viewed as merely creating an inference as opposed to a presumption. A permissive inference is in violation of the Due Process Clause when “the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury.”²³² Repulsed by the evidence of prior sexual assault or child molestation offenses, the jury will overlook weaknesses in the prosecution’s case in order to punish the accused for the prior offenses.²³³ Thus, the rules unconstitutionally relieve the government

227. *Id.* at 361-62.

228. *Id.* (quoting CHARLES MCCORMICK, EVIDENCE § 321, at 681-82 (1954)).

229. Compare *Commonwealth v. Jones*, 602 A.2d 820, 823 (Pa. 1992) (permitting trial court discretion in defining reasonable doubt in instructions) with CAL. PENAL CODE § 1096 (West Supp. 1996) (statutorily defining reasonable doubt as “that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.”).

230. See *Francis v. Franklin*, 471 U.S. 307, 313 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 520-23 (1979); *Patterson v. New York*, 432 U.S. 197, 215 (1977).

231. See, e.g., *United States v. Peden*, 961 F.2d 517, 520 (5th Cir. 1992) (asserting that jurors will likely convict on belief that accused is evil).

232. *Francis*, 471 U.S. at 314-15.

233. See, e.g., Imwinkelried, *Undertaking the Task*, *supra* note 72, at 288.

of its burden of proof beyond a reasonable doubt on each element of the crime charged.²³⁴

Finally, the rules prohibit a fundamentally fair trial because they essentially criminalize a person's status. The axiom of fundamental fairness embedded in the Due Process Clause is that an accused need only answer for the crime charged. The United States Supreme Court reinforced this principle by holding, in *Robinson v. California*,²³⁵ that the Constitution prohibits legislatures, including Congress, from criminalizing a person's status.²³⁶ By mandating admission of propensity evidence, Rules 413–415 prompt argument to jurors that they should convict because the accused is a sex offender. In essence, this allows the jury to consider the accused's status as a rapist or child molester in its determination of guilt.²³⁷ Thus, in direct contravention of the Due Process Clause, Congress has impermissibly criminalized the status of a former rapist or child molester.²³⁸

*D. Lower Courts Hold That Admission of Propensity Evidence
in Trials Involving Sexual Assault and Child Molestation
Violates Due Process*

Although the United States Supreme Court has never expressly so concluded,²³⁹ several courts of appeals have held that admission of propensity evidence in sexual assault and child molestation cases in order to show action in conformity with a character trait violates due

234. See, e.g., *Estelle v. McGuire*, 502 U.S. 62, 78 (1991) (O'Connor, J., concurring) (asserting principles underlying due process prohibit presumptions relieving government of burden of proof of guilt beyond reasonable doubt on every element of offense).

235. 370 U.S. 660 (1962).

236. *Id.* at 667 (holding unconstitutional a California statute that criminalized being addicted to the use of narcotics instead of the use, sale, possession, or purchase of narcotics).

237. Cf. Edward J. Imwinkelried & Miguel A. Mendez, *Resurrecting California's Old Law on Character Evidence*, 23 PAC. L.J. 1005 (1992) (asserting that the Constitution forbids punishing a person for drug addict status).

238. See A.B.A. Criminal Justice Section Report, *supra* note 55, at 351 (asserting that admission of propensity evidence in sexual offense cases implicates constitutional ban against criminalizing status); see also Norman M. Garland, *Some Thoughts on the Sexual Misconduct Amendments to the Federal Rules of Evidence*, 22 FORDHAM URB. L.J. 355, 356 n.10 (1995) (suspecting same).

239. See *Estelle v. McGuire*, 502 U.S. 62, 75 n.5 (1991) (declining to reach issue of whether admitting propensity violates due process); *Spencer v. Texas*, 385 U.S. 554, 572-74 (1967) (Warren, C.J., dissenting) (commenting that while the Court has never held that use of prior convictions to show propensity violates due process, the Court's decisions have suggested that it does). See also *supra* notes 97-108 and accompanying text (discussing Supreme Court decisions that imply that admission of propensity evidence in fact violates due process).

process. State courts have similarly excluded propensity evidence in sexual assault cases.²⁴⁰

The United States Court of Appeals for the Fourth Circuit, in *Lovely v. United States*,²⁴¹ was one of the first courts to reject admission of propensity evidence in a sexual assault case. In *Lovely*, the defendant was accused of raping a victim on federal land.²⁴² The district court permitted the government, over defense counsel's objection, to proffer evidence that the defendant had raped another woman on the same federal land fifteen days before the rape for which the defendant was charged.²⁴³ The Fourth Circuit held that admission of the prior acts evidence was reversible error.²⁴⁴ The court indicated that the defendant received a fundamentally unfair trial in violation of due process.²⁴⁵

240. See, e.g., *Vaughn v. State*, 604 So. 2d 1272, 1272-73 (Fla. Dist. Ct. App. 1992) (excluding evidence of prior rape); *Reichard v. State*, 510 N.E.2d 163, 165-66 (Ind. 1987) (holding trial court erred in admitting propensity evidence of prior rapes); *Brown v. State*, 459 N.E.2d 376, 379 (Ind. 1984) (concluding trial court committed reversible error by admitting testimony regarding other rapes committed by accused); *People v. Sanza*, 509 N.Y.S.2d 311, 314-15 (N.Y. App. Div. 1986) (determining evidence that accused previously raped three individuals was inadmissible); *White v. Commonwealth*, 388 S.E.2d 645, 647 (Va. Ct. App. 1990) (holding evidence of prior sexual assault inadmissible), *overruled on other grounds sub nom.* *Lavinder v. Commonwealth*, 407 S.E.2d 910 (Va. Ct. App. 1991); *State v. Satarelli*, 655 P.2d 697, 700-01 (Wash. 1982) (concluding trial court should have excluded evidence of prior rape by defendant charged with acquaintance rape).

Although Rules 413-415 are only relevant with respect to federal trials involving sexual assault and child molestation, one of the primary purposes of the rules, according to the rules' proponents, is to encourage states to import the new rules into their evidence codes. See 140 CONG. REC. S10,276 (daily ed. Aug. 2, 1994) (statement of Sen. Dole). The overarching ramification, then, is that not only will the rules violate the Due Process Clause of the Fifth Amendment, but also the Due Process Clause of the Fourteenth Amendment. Moreover, the states' adoption of the new rules will contravene the ban on propensity evidence in thirty-eight states' evidence codes and the common law precedents in the remaining twelve states and the District of Columbia. See *supra* notes 145 and 147 (list of states' statutory and common law proscriptions against using propensity evidence in order to show action in conformity with a particular character trait); see also Duane, *supra* note 9, at 105 (suggesting that it is the "height of arrogance for Congress to amend the Federal Rules of Evidence" in order to "teach" the states how to properly amend their evidence codes to permit admission of propensity evidence in cases involving sexual assault and child molestation where such offenses are typically tried).

241. 169 F.2d 386 (4th Cir. 1948).

242. *Id.* at 387-88.

243. *Id.* at 388.

244. *Id.*

245. See, e.g., *Spencer v. Texas*, 385 U.S. 554, 573-74 (1967) (Warren, C.J., dissenting) (asserting that *Lovely* suggested that evidence of prior crimes introduced for no purpose other than to show criminal disposition violates due process). In *Lovely*, the court appeared to apply the historical test for determining what constitutes due

The rule which thus forbids the introduction of evidence of other offenses having no reasonable tendency to prove the crime charged, except in so far as they may establish a criminal tendency on the part of the accused . . . arises out of the *fundamental demand for justice and fairness which lies at the basis of our jurisprudence*. If such evidence were allowed . . . persons accused of crime [sic] would be greatly prejudiced.²⁴⁶

Recently, several other courts of appeals have expressly held that admitting evidence of prior acts of sexual assault and child molestation in cases involving sexual assault and child molestation violates due process. For example, in *Henry v. Estelle*,²⁴⁷ the United States Court of Appeals for the Ninth Circuit held that admission of highly prejudicial, extrinsic, child molestation evidence, which charged the courtroom atmosphere emotionally, denied the accused due process.²⁴⁸ In *Henry*, the defendant was accused of child molestation.²⁴⁹ The trial court admitted evidence of an uncharged prior act of child molestation allegedly committed by the accused.²⁵⁰ The Ninth Circuit held that admission of the propensity evidence denied the accused due process.²⁵¹ The court commented that admission of prior acts evidence violates due process if the jury cannot draw any permissible inference from the evidence and the evidence prevents a fair trial.²⁵² The court determined that the propensity evidence was not probative of any material issue in the case, and the only inference the jury could have drawn was that the accused was of depraved character who had the

process. *Lovely*, 169 F.2d at 388-91. In so doing, the court remarked as to the proscription against admitting propensity evidence to show action in conformity with a particular character trait. *Id.* at 389 (citing *People v. Molineux*, 61 N.E. 286, 293 (N.Y. 1901)); see also *supra* note 87 (discussing *Molineux*).

246. *Lovely*, 169 F.2d at 389 (emphasis added).

247. 33 F.3d 1037 (9th Cir. 1994), *rev'd on other grounds sub nom.* *Duncan v. Henry*, 115 S. Ct. 887 (1995). The Supreme Court in *Duncan* held that the habeas petitioner had failed to exhaust, in state court, his claim that the state trial court's admitting propensity evidence denied him due process of law. *Duncan*, 115 S. Ct. at 888. The Ninth Circuit, in *Henry v. Estelle*, 52 F.3d 809, 809 (9th Cir. 1995), subsequently vacated its prior decision based on the Supreme Court's reversal. *Id.* However, neither the Supreme Court nor the Ninth Circuit addressed the Ninth Circuit's earlier conclusion that admission of propensity evidence in a child molestation case violates an accused's right to due process. Accordingly, neither court implicated the Ninth's Circuit's imprimatur on the argument that admission of propensity evidence in child molestation cases violates due process.

248. *Henry*, 33 F.3d at 1042-43.

249. *Id.* at 1038.

250. *Id.* at 1039.

251. *Id.* at 1042-43.

252. *Id.* at 1042.

disposition to molest children.²⁵³ The court remarked that such an inference is impermissible.²⁵⁴

Similarly, the United States Court of Appeals for the Eighth Circuit has held that admission of propensity evidence in sexual assault and child molestation cases violates due process. In *United States v. Has No Horse*,²⁵⁵ the defendant was convicted of aggravated sexual abuse of an eleven-year-old girl in violation of 18 U.S.C. § 2241(c)²⁵⁶ and sexual abuse of a minor in violation of 18 U.S.C. § 2243(a).²⁵⁷ The district court permitted the government to proffer testimony through two other young girls that the defendant had made sexual advances toward them.²⁵⁸ The Eighth Circuit reversed the defendant's conviction, concluding that admission of the other crimes evidence prejudiced his right to a fair trial.²⁵⁹ The court noted that the admitted propensity evidence was not relevant to intent, knowledge, or common scheme or plan, and was impermissibly relevant only to show the defendant had the disposition to commit the crimes charged.²⁶⁰

In *United States v. Fawbush*,²⁶¹ the defendant was charged with aggravated sexual abuse in violation of federal law.²⁶² At trial, the district court permitted the government to call the accused's two adult daughters who testified that the accused had sexually abused them as children, impregnating one at the age of fifteen.²⁶³ The Eighth Circuit reversed the conviction.²⁶⁴ The court determined that admitting the testimony regarding the father's prior sexual abuse of his daughters was highly inflammatory.²⁶⁵ The court stated that the significant prejudice against the defendant which resulted from admission of the propensity evidence outweighed its probative value.²⁶⁶ The court

253. *Id.*

254. *Id.*

255. 11 F.3d 104 (8th Cir. 1993).

256. 18 U.S.C.A. § 2241 (West Supp. 1996) (prohibiting sexual act with person under 12 years of age).

257. 18 U.S.C.A. § 2243 (West Supp. 1996) (prohibiting sexual act with minor between ages of 12 and 15, where defendant is at least 4 years older than minor).

258. *Has No Horse*, 11 F.3d 105.

259. *Id.* at 105-06.

260. *Id.* at 106.

261. 900 F.2d 150 (8th Cir. 1990).

262. *Id.* at 150.

263. *Id.* at 151.

264. *Id.* at 152.

265. *Id.*

266. *Id.*

commented that the proffered evidence diverted the jury's attention from the material issues in the trial.²⁶⁷

Finally, the United States Court of Appeals for the Third Circuit recently held that admission of propensity evidence in sexual offense cases violates due process.²⁶⁸ In *Government of the Virgin Islands v. Archibald*,²⁶⁹ the accused was convicted of aggravated rape.²⁷⁰ At the accused's trial, the district court had permitted evidence that the accused had committed a prior rape.²⁷¹ The Third Circuit held that the propensity evidence was extremely prejudicial and should have been excluded.²⁷² The court reasoned that it was highly likely that the jury had drawn an improper character inference from the proffered propensity evidence.²⁷³ The court commented that the prior acts evidence was not probative of any material issue in the case except to prove disposition to commit the offense charged.²⁷⁴

V. CONCLUSION

Notwithstanding the centuries-old prohibition against propensity evidence and the likelihood that they violate due process, Congress myopically promulgated Federal Rules of Evidence 413, 414, and 415.²⁷⁵ As demonstrated above, the new rules violate due process by

267. *Id.*

268. See also *Government of Virgin Islands v. Pinney*, 967 F.2d 912 (3d Cir. 1992). In *Pinney*, the defendant was convicted of aggravated rape. *Id.* at 913. At the defendant's trial, the court permitted the government to introduce evidence through the victim's sister that the defendant had raped her six years earlier. *Id.* at 914. The trial court instructed the jurors that they could not consider such as evidence as proof that the defendant was a bad person of depraved character. *Id.* at 915. The Third Circuit held that the propensity evidence was not admissible. *Id.* at 916. The court commented that notwithstanding the trial judge's instruction, "courts must take a realistic view of the capabilities of the human mind and must, therefore, acknowledge that there are situations in which the risk that jurors will not follow the court's instructions is unacceptably high." *Id.* at 918. The court implied that the propensity evidence was so significant that the defendant's trial had been fundamentally tainted. *Id.* at 917-18.

269. 987 F.2d 180 (3d Cir. 1993).

270. *Id.* at 182.

271. *Id.* at 183. The evidence consisted of testimony by the victim's mother who testified that the accused had fathered the child of the victim's sister. *Id.* The victim's sister gave birth to the child at the age of fifteen, thus revealing that the accused had sexual intercourse with the victim's sister when she was thirteen or fourteen years old. *Id.* Under Virgin Islands law, the accused's sexual intercourse with a thirteen or fourteen year old constituted third degree statutory rape. *Id.*

272. *Id.* at 186-87.

273. *Id.* at 185-87.

274. *Id.* at 185.

275. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935(a), 108 Stat. 1796, 2135-37 (codified as amended at 28 U.S.C. app. art. IV

contravening the historically grounded and fundamental prohibition of propensity evidence. The rules require irrational and arbitrary inferences, and they will prevent fair trials.

Although similar rules had been previously proposed by several members of Congress²⁷⁶ and commentators,²⁷⁷ many in the legal community argued that such rules violate due process²⁷⁸ by contravening a fundamental conception of justice developed in Anglo-American jurisprudence.²⁷⁹ These opponents included legal organizations such as the ABA,²⁸⁰ as well as a majority of judges, law professors, and lawyers, many of whom opposed Rules 413–415 on grounds that the rules violated due process.²⁸¹ The Federal Rules of Evidence have been seriously undermined by Congress's hasty incursion into an area where traditional modes of judicial interpretation and scholarship have worked extremely well. The Judicial Conference's Advisory Committee has well served the cause of evidence reform. It has come to treat the "Rules" as an important body of law not to be trifled with because of political and legislative whim. The Committee has cautiously and infrequently amended the rules.²⁸² When amendments have been made, they followed serious study and/or suggestions of the Supreme Court. Rules 413–415 represent popular political fads, as do recent legislative actions such as Megan's

Rules of Evidence 413, 414, 415 (1994)) (effective July 9, 1995).

276. See *supra* note 27 for earlier proposals of Rules 413–415.

277. See generally Sara Sun Beale, *Prior Similar Acts in Prosecutions for Rape and Child Abuse*, 4 CRIM. L.F. 307 (1993); Bryden & Park, *supra* note 70; Chris Hutton, *Comment, Prior Bad Acts Evidence in Cases of Sexual Contact with a Child*, 34 S.D. L. REV. 604 (1989); David J. Kaloyanides, *The Depraved Sexual Instinct Theory: An Example of Propensity for Aberrant Application of the Federal Rule of Evidence 404(b)*, 25 LOY. L.A. L. REV. 1297 (1992); John E.B. Myers, *Uncharged Misconduct Evidence in Child Abuse Litigation*, 1988 UTAH L. REV. 479 (1988); Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127 (1993).

278. But see Roger C. Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right About Consent Defense Cases*, 22 FORDHAM URB. L.J. 271 (1995) (asserting that evidence of prior bad acts of nonconsensual sexual assault should be admissible when the defendant raises a consent defense to sexual assault charges).

279. See *supra* Part II (discussing the constitutional status of the proscription against admission of propensity evidence).

280. See A.B.A. Criminal Justice Section Report, *supra* note 55, at 347.

281. See Reuben, *supra* note 50, at 21; Woo, *supra* note 51, at B8.

282. See Raeder, *supra* note 12, at 344–45; Leonard, *supra* note 6, at 305.

Law,²⁸³ “three strikes you’re out” statutes,²⁸⁴ death sentences for drug dealers,²⁸⁵ and other political panaceas for the “crime problem.” These are often enacted with little or no regard for the Constitution and other important rules of law. Many legislators act irresponsibly in order to satisfy the fears of constituents. Each election presents a tidal wave of fad legislation thrown against the bulwark of legal protection created by the Constitution, serious legislators, judges, and scholars. It remains to be seen if the American people will remain secure against these constant erosions. The courts will soon provide the answer.

283. See N.J. STAT. ANN. § 2C: 7-1 to 11 (West Supp. 1995) (codifying Megan’s Law which mandates that released sexual offenders notify the community via registration as a sex offender).

284. See, e.g., 18 U.S.C. § 3559(c)(1)(A)(i) (1994) (mandating life imprisonment for conviction of serious, violent felony if person has previously been convicted of two or more serious, violent felonies).

285. See, e.g., 21 U.S.C. § 848(e)(1)(A)(1994) (mandating death penalty for “Drug Kingpins”).