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## "Whosoever Fights Monsters Should See to It That in the Process He Does Not Become a Monster:" Hunting the Sexual Predator with Silver Bullets--Federal Rules of Evidence 413-415--and a Stake Through the Heart--Kansas v. Hendricks

Joelle Anne Moreno

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**“WHOEVER FIGHTS MONSTERS SHOULD SEE TO IT THAT IN THE PROCESS HE DOES NOT BECOME A MONSTER” \*:  
HUNTING THE SEXUAL PREDATOR WITH SILVER BULLETS—FEDERAL RULES OF EVIDENCE 413-415—AND A STAKE THROUGH THE HEART—KANSAS V. HENDRICKS**

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\* FRIEDRICH W. NIETZSCHE, BEYOND GOOD AND EVIL 89 (Walter Kaufmann trans., 1989).

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Over the past five years, America has become enthralled and obsessed with the demonic “sexual predator.”<sup>1</sup> Politicians have manipulated images of incorrigible sexual monsters to win elections<sup>2</sup> and rally support for crowd-pleasing legislation.<sup>3</sup> Mainstream media have joined

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1. During the past five years, the term “sexual predator” has been used with increasing frequency to describe repeat sex offenders. For example, a search of all of the Nexis news files that predate 1992 reveals just 302 references to the term “sexual predator.” Search of LEXIS, Nexis Library, News File. By contrast, the Nexis news files for just the first six months of 1997, contain more than 1000 references to “sexual predator.” Search of LEXIS, Nexis Library, News File. Although the term “sexual predator” has only recently been popularized, our society has always been both fascinated and terrified by sexual violence. *See generally* Raquel Blacher, Comment, *Historical Perspective of the “Sexual Psychopath” Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889 (1995) (tracing 200 years of Anglo-American interest in sex crimes and the resulting public legislative responses). “Sexual predator” does not have a precise legal meaning. However, terms such as “sexual predator” and “sex offender” have generally been used to refer to individuals who have a history of committing crimes of a sexual nature, including rape, sexual assault, or child molestation.

2. *See, e.g.*, Chip Limehouse, *State Has Duty to Protect Citizens from Sexual Predators*, THE POST & COURIER, July 9, 1997, at 6 (discussing proposals by a South Carolina politician to establish post-sentence civil confinement laws for sexual predators); *Sexual Offenders Belong in Jail*, THE ATLANTA CONST., July 6, 1997, at 4F (criticizing proposals by two Georgia politicians to establish post-sentence civil confinement laws for sexual predators).

3. One additional legal development aimed at the sexual predator is the advent of

forces with tabloid news organizations to titillate the public with images of lurking fiends, disguised as our next-door-neighbors,<sup>4</sup> just waiting to terrorize women and children.<sup>5</sup> It is as if Freddy Krueger has invaded our social consciousness as effortlessly as he did his victims' dreams.<sup>6</sup>

As politicians and the media capitalize on the public fascination with sexual violence, this national spotlight increases our collective awareness of one type of criminal violence.<sup>7</sup> Heightened public sensitivity leads

mandatory community notification for sex offenders. On May 17, 1996, a federal version of New Jersey's Megan's Law, N.J. STAT. ANN. §§ 2C:7-1 to 2C:7-11 (West 1995), was signed into law by President Clinton. Megan's Laws require community notification and registration of released sex offenders. President Clinton made the following remarks at the signing ceremony:

Study after study has shown us that sex offenders commit crime after crime. . . . From now on, every state in the country will be required by law to tell a community when a dangerous sexual predator enters its midst. We respect people's rights, but today America proclaims there is no greater right than a parent's right to raise a child in safety and love. Today, America warns, if you dare to prey on our children, the law will follow you wherever you go, state to state, town to town.

*Text of Signing Ceremony of Meghan's [sic] Law* (CNN television broadcast, May 17, 1996), available in LEXIS, Nexis Library, CURNWS File, at transcript 1202-15. Mandatory community notification laws are beyond the scope of this Article and have been addressed elsewhere. See, e.g., Robert J. Martin, *Pursuing Public Protection Through Mandatory Community Notification of Convicted Sex Offenders: The Trials and Tribulations of Megan's Law*, 6 B.U. PUB. INT. L.J. 29 (1996).

4. The nationally-publicized 1994 murder of seven year-old Megan Kanka sparked campaigns to enact community notification statutes for sexual predators in her home state of New Jersey and throughout the U.S. See Martin, *supra* note 3, at 29-33. This famous crime is consistently described as having been committed by her "pedophile neighbor." See, e.g., Note, *Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders*, 109 HARV. L. REV. 1711, 1712 n.13 (1996) [hereinafter *Prevention Versus Punishment*].

5. People have a morbid fascination with the concept of the sexual predator, symbolized in Western culture by the archetype of the vampire. See Meredith Renwick, *Out of the Coffin, Into the Culture: Why Vampires Are a Fad in the 1990's*, THE TORONTO SUN, June 2, 1996, at C10 (describing "the vampire as a sexual predator" as "the most enduring element of the myth") (emphasis added). This connection is not lost on the mainstream press, especially when it can be exploited to garner public attention. See, e.g., *Don't Care for Study's Result? Do It Again*, FLORIDA TIMES UNION, Aug. 15, 1996, at B1 (describing a "vampire rapist" who drank the blood of his victims as a "sexual predator").

6. See A NIGHTMARE ON ELM STREET (New Line 1984) (depicting Wes Craven's villain, Freddy Krueger, who invades the dreams of his teenage victims to commit acts of sexual violence and murder).

7. See Margaret C. Livnah, *Branding the Sexual Predator: Constitutional Ramifications of Federal Rules of Evidence 413 Through 415*, 44 CLEV. ST. L. REV. 169, 172-73 (1996) (citing the controversial and well-publicized trials of William Kennedy Smith and Mike Tyson as catalysts for the public perception of a flawed legal system that, in turn, lead to the enactment of Rules 413-415); Leonore M.J. Simon, *Symposium: The Treatment of Sex Offenders: The Myth*

to greater general interest and more visible expressions of community outrage at violent sexual crimes.<sup>8</sup> The process comes full circle when legislators and the judiciary respond to perceived public concern by being “hard” on sex offenders.<sup>9</sup> This is the political and social climate that has created the “sexual predator” as jargon and encouraged the development of new legal rules designed to convict and confine these public villains.

As soon as we created the concept of the “sexual predator,” Congress and the Supreme Court acted swiftly to isolate this well-publicized threat to public safety by arming prosecutors and civil claimants with unique and powerful artillery. In the last two years: (1) Congress enacted Rules 413, 414, and 415 of the Federal Rules of Evidence (Rules 413-415), which dramatically expand the scope of evidence that may be used against an accused in federal criminal and civil sexual assault and child molestation cases; and (2) in *Kansas v. Hendricks*,<sup>10</sup> the Supreme Court upheld the indefinite post-sentence civil confinement of “sexually violent

*of Sex Offender Specialization: An Empirical Analysis*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 387, 402 (1997) (discussing how highly publicized child molestation crimes increase public fear of the repeat sex offender).

8. See Gary Gleb, Comment, *Washington’s Sexually Violent Predator Law: The Need to Bar Unreliable Psychiatric Predictions of Dangerousness from Civil Commitment Proceedings*, 39 UCLA L. REV. 213, 213-14 (1991) (describing how public outrage in Washington state following a highly-publicized child molestation case pressured the governor to appoint a task force that subsequently produced the first “Sexually Violent Predator Law” in the country).

9. The two legal developments discussed in this Article, Federal Rules of Evidence 413-415 and the sexual predator confinement statutes, are commonly interpreted as legislative and judicial responses to community outrage over sexual violence. This conclusion is supported by the legislative history of Rules 413-415. See 140 CONG. REC. H2433 (daily ed. Apr. 19, 1994) (statement of Rep. Molinari) (Federal Rules of Evidence 413-415 were introduced primarily as a response to the public perception of inadequacy in the prosecution of sexual predators); 138 CONG. REC. S15160 (daily ed. Sept. 25, 1992) (statement of Sen. Dole). This conclusion is also supported by the opinions of legal commentators. See *American Bar Association Criminal Justice Section Report to the House of Delegates*, 22 FORDHAM URB. L.J. 343, 353 (1995) (stating the Rules 413-415 were an effort by Congress “to appear tough on crime”) [hereinafter *ABA Report*]; Livnah, *supra* note 7, at 171-72 (stating that the Senate’s initial proposal for Rules 413-415, in March 1991, specifically cited the need to respond to public concerns that the American legal system could not adequately address increased violence against women and children). Similarly, the sexual predator confinement statutes have been viewed as a response to community pressure. See Marie A. Bochnewich, Comment, *Prediction of Dangerousness and Washington’s Sexually Violent Predator Statute*, 29 CAL. W. L. REV. 277, 278 (1992) (referring to the first “Sexually Violent Predator” statute, WASH. REV. CODE ANN. §§ 71.09.010-.902 (West 1975 & Supp. 1998), as a response “to public outcry against a string of brutal sex crimes”).

10. 117 S. Ct. 2072 (1997).

predators."<sup>11</sup> Together, these recent legal developments form a comprehensive program designed to increase conviction rates and indefinitely extend confinement terms for sex offenders.

On July 9, 1995, Congress enacted Federal Rules of Evidence 413-415.<sup>12</sup> These new rules were promulgated pursuant to the Violent Crime Control and Law Enforcement Act of 1994.<sup>13</sup> Rules 413-415

11. *Id.* at 2086.

12. Rule 413 reads, in relevant part:

(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.

Rule 414, reads in relevant part:

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

FED. R. EVID. 414.

Rule 415, reads in relevant part:

(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.

Rules 413-415 apply only to the small number of criminal and civil sex offense actions litigated in the federal courts. *See Katharine Q. Seelye, A New Hurdle as a Deal Nears on a Crime Bill*, N.Y. TIMES, Aug. 21, 1994, A1 (stating that federal cases account for only 3-5% of all U.S. sex offense prosecutions). However, thirty-four states and Puerto Rico have adopted evidentiary rules based, at least in part, on the Federal Rules of Evidence. *See Louis M. Natali, Jr. & Stephen Stigall, "Are You Going to Arraign His Whole Life?": How Sexual Propensity Evidence Violates the Due Process Clause*, 28 LOY. U. CHI. L.J. 1, 21 (1996). Thus, given the public obsession with sex offenses and the history of states modeling their evidentiary rules after the Federal Rules of Evidence, there is a strong possibility that many states will follow this lead and enact similar amendments to their evidentiary rules.

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

dramatically increase the likelihood that individuals accused of sex offenses will be convicted by creating a unique evidentiary presumption that testimony regarding a defendant's prior sex offenses is admissible in federal sexual assault and child molestation cases.<sup>14</sup> Under Rules 413-415, federal prosecutors and certain civil claimants<sup>15</sup> can reach back into a person's remote past, dredge up allegations or evidence of uncharged and unrelated sex offenses and present this testimony directly to the jury.<sup>16</sup> In addition, these rules provide prosecutors and civil claimants with a unique opportunity to argue that testimony regarding a defendant's past proves that he has a propensity to commit sex crimes.<sup>17</sup> Rules 413-415 are so new that they have just begun to reach the federal courts.<sup>18</sup>

On June 23, 1997, less than two years after Rules 413-415 became law, the Supreme Court made its own contribution to the arsenal used

14. See 137 CONG. REC. at S3240 (daily ed. Mar. 13, 1991) (stating that the probative value of evidence regarding a defendant's prior sex offenses is "strong").

15. See *supra* note 12 (Rules 413 and 414 apply to federal criminal cases and Rule 415 applies to federal civil sexual assault and child molestation cases.).

It is interesting to note the speculation that Paula Corbin Jones would use Rule 415 to introduce allegations and evidence of President Clinton's sexual history in her civil lawsuit. See Ellen Goodman, *In the Game of Mutual Public Humiliation, Paula Jones Is One Up*, BOSTON GLOBE, Nov. 2, 1997, at C7 (referencing the opinion of Professor Jane Aiken of Washington University that Ms. Jones' attorney will attempt to portray President Clinton as a sexual predator in order to take advantage of Rule 415); see also Jeffrey Toobin, *Castling Stones*, THE NEW YORKER, Nov. 3, 1997, at 54 (describing how "[l]awyers for the plaintiff [Paula Corbin Jones] will attempt to portray the President as a sexual predator").

16. See 140 CONG. REC. S12990 (statement of Sen. Dole that Rules 413-415 do not place any time limit on the admission of prior sex offenses); 140 CONG. REC. H8992 (statement of Rep. Molinari) (supporting the admission of prior sex offenses "notwithstanding very substantial lapses of time"); see also Natali & Stigall, *supra* note 12, at 30 (noting that because Rules 413-415 do not restrict evidence to a certain time frame prosecutors can proffer allegations that are more than ten years old). Compare FED. R. EVID. 609(b) (prohibiting the admission of evidence of a conviction of a crime that is more than 10 years old to attack the credibility of a witness, "unless the court determines . . . that the probative value . . . supported by specific facts and circumstances substantially outweighs its prejudicial effect").

17. Propensity evidence, sometimes referred to as character evidence, is presented to prove that the defendant is the kind of person who would have committed a certain type of crime. The congressional sponsors of the new rules clearly intended that Rules 413-415 permit the admission of prior sex offense allegations and evidence to prove propensity and character. See 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari). Without Rules 413-415, propensity evidence is generally excluded under Rule 404 of the Federal Rules of Evidence. See *infra* note 62 (quoting the text of Rule 404).

18. In 1997, the Second and Eighth Circuit Courts of Appeals issued the first comprehensive analyses of the new evidentiary rules. See *infra* pt. I.B.1. (discussing *United States v. Larson*, 112 F.3d 600 (2d Cir. 1997) and *United States v. Sumner*, 119 F.3d 658 (8th Cir. 1997)).

against sexual predators. In its recent, controversial decision in *Kansas v. Hendricks*,<sup>19</sup> the Court affirmed the right of a state to civilly confine any "sexually violent predator"<sup>20</sup> for an indefinite period of time *after* he has finished serving his prison sentence.<sup>21</sup>

There is a logical and sequential relationship between these two legal developments. Rules 413-415 get the sexual predator off the streets by expanding the scope of admissible evidence in sexual assault and child molestation cases, thereby increasing sex offender conviction rates. After the sex offender has been convicted, incarcerated, and served his prison sentence, sexual predator confinement laws keep the sexual predator off the streets by indefinitely postponing his release from confinement.

Rules 413-415 and the sexual predator confinement statutes also share three scientific-sounding justifications that have been widely accepted with little critical analysis: (1) that future sexual violence can be accurately predicted based on allegations and evidence of prior sex crimes; (2) that sex offenders have unusually high rates of recidivism; and (3) that certain criminals specialize in sex offenses. Proponents of Rules 413-415 and the sex offender confinement statutes have accepted these justifications without critical analysis and used them to explain the harsh and disparate treatment of this one type of criminal offense. However, the available empirical evidence highlights fundamental weaknesses in all three justifications.<sup>22</sup>

Rules 413-415 and the sex offender confinement statutes are a significant departure from normal criminal practice and procedure<sup>23</sup> without sufficient justification in law or science. Under these new laws, if a defendant is charged with rape, fact finders will hear compelling testimony<sup>24</sup> regarding his entire history of sexual misconduct,<sup>25</sup> despite

19. 117 S. Ct. at 2072.

20. There is no legal or semantic distinction between the terms "sexually violent predator," "sexual predator," and "sex offender" and they will be used interchangeably throughout this Article.

21. *Hendricks*, 117 S. Ct. at 2072. The Kansas Sexually Violent Predator Act at issue in this case is closely related to the sex offender confinement statutes that have been enacted in 19 states. See *infra* note 157 and accompanying text (discussing sex offender confinement statutes throughout the United States).

22. See *infra* pt. III (discussing the fact that there is no reliable empirical evidence for the three assumptions underlying both Rules 413-415 and the sexual predator confinement statutes).

23. See Jeffrey G. Pickett, Note & Comment, *The Presumption of Innocence Imperiled: The New Federal Rules of Evidence 413-415 and the Use of Other Sexual Offense Evidence in Washington*, 70 WASH. L. REV. 883, 883 (1995) (stating that Rules 413-415 "change two hundred years of evidentiary jurisprudence").

24. In fact, sponsors of Rules 413-415 specifically argued that evidence of a defendant's past sexual offenses is such a strong indicator of guilt that jurors should specifically consider the improbability that the same person would be mistakenly accused of a sexual offense more



the high probability that such uncharged, unsubstantiated, and remote testimony will significantly increase the likelihood of prejudice,<sup>26</sup> due process violations,<sup>27</sup> and mistake.<sup>28</sup> Introduction of this testimony to support conviction or indefinite confinement is likely to improperly influence jurors and judges by interfering with their ability to: (1) rationally weigh the relevant evidence;<sup>29</sup> (2) ascertain that the prosecu-

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than once. *See* 137 CONG. REC. S3240 (daily ed. Mar. 13, 1991) (stating that the occurrence of multiple false accusations is "highly improbable"). Of course, the possibility of misidentification is increased if, as is often the case, the defendant first became a suspect because he was known to the police based on his past criminal record. These type of assumptions are the very reason that evidence of prior criminal acts has traditionally been excluded. According to Wigmore:

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

JOHN H. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* 62.2, at 1212-13 (Tillers, rev. ed. 1993).

25. Rules 413-415 specifically contemplate the admission of allegations and evidence of prior sex offenses dating back to an accused's remote past. *See supra* notes 15-16 and accompanying text. Unlike all other civil commitment procedures, under the sexual predator confinement statutes, there is no requirement that the allegations that form the basis for the commitment decision be recent. Obviously, if a state intends to initiate commitment proceedings after an inmate has served his full prison term, a recency requirement would defeat that goal, when even the criminal act that resulted in the immediately preceding prison term may be remote in time.

26. Prejudice does not simply mean that the evidence is damaging to the defense. Rather, prejudice results when the evidence causes the fact-finder to decide the case on an improper basis or because the evidence is unduly persuasive and insufficiently probative of the defendant's guilt. *See* Susan M. Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 524 (1991); *see also* Livnah, *supra* note 7, at 180 (arguing that "evidence of prior sexual assault and child molestation [will] have a greater effect on the jury than evidence of prior nonviolent or nonsexual crimes").

27. Due process requires that a defendant be judged according to the relevant evidence probative of the current charge. *See, e.g., In re Winship*, 397 U.S. 358, 364 (1970) (holding that due process requires the prosecution to prove "beyond a reasonable doubt [] every fact necessary to constitute the crime with which [the defendant] is charged").

28. *See infra* text accompanying notes 65-67 and accompanying text (discussing how Rules 413-415 increase the probability of prejudice, due process violations, and mistake); *infra* text accompanying notes 72-76 (discussing how sexual predator confinement statutes permit prosecutors to use outdated and unsupported allegations to indefinitely confine sexual predators).

29. *See* HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 396 (1966) (discussing the empirical confirmation provided by the Chicago Jury Project of the fact that propensity evidence prevents jurors from being impartial triers of fact by generating hostility towards the defendant, especially if a previous victim was a child); Natali & Stigall, *supra* note 12, at 24-29 (describing how Rules 413-415 unconstitutionally require the factfinder to make

tor has met his burden of proof;<sup>30</sup> (3) make the necessary factual findings to establish any mental abnormality;<sup>31</sup> or (4) realistically balance a prospective assessment of danger to society against the individual's personal freedom.<sup>32</sup> At the same time, the defendant on trial for murder in the adjacent courtroom cannot be subjected to Rule 413-415 evidence and, if convicted, is ineligible for post-sentence civil confinement.

Rules 413-415 and the sexual predator confinement statutes single out one type of crime for enhanced prosecution and punishment<sup>33</sup> based on public fear, hatred, and desire for revenge. Politicians, the media, and some vociferous groups and individuals have worked together to focus public attention on sexual violence. Although sex crimes are a real and serious social problem, state and federal governments already have procedures for convicting and confining criminals, for example, enhanced and consecutive sentencing, recidivism statutes, and decreased plea bargain, parole, and probation authority. However, these groups consider those accused or convicted of sex offenses to be undeserving of the same legal rights as other defendants.

There are two obvious dangers to a system that uses public abhorrence to erode individual rights by increasing the government's ability to convict, incarcerate, and indefinitely detain individuals who commit certain crimes. The first is that as public opinion changes, lawmakers will continue to expand the field of individuals considered unworthy of constitutional protection. The second is that the new rules threaten to

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irrational and arbitrary inferences).

30. See, e.g., *ABA Report, supra* note 9, at 349 ("Jurors may be overwhelmed by an emotional response to the evidence [admitted under Rules 413-415] which interferes with their ability to hold the prosecution to its burden of proof beyond a reasonable doubt."); James J. 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, 110 (1994) (describing how jurors, exposed to evidence of past criminal behavior, may feel less responsible for their decision to convict, even without evidence sufficient to determine guilt beyond a reasonable doubt); 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) (describing how a jury repulsed by evidence of prior bad acts may overlook weaknesses in the prosecution's case).

31. See *infra* notes 185-89 and accompanying text (discussing the problems associated with a determining a mental abnormality).

32. See *infra* pt. III.A. (discussing the problems associated with predicting future sex offenses).

33. See Mary K. Danna, Note, *The New Federal Rules of Evidence 413-415: The Prejudice of Politics or Just Plain Common Sense?*, 41 *ST. LOUIS U. L.J.* 277, 297 (1996) (stating that Rules 413-415 "provide for differential treatment of a particular type of crime: sex offenses").

blur the distinctions between punishment of criminals and treatment of the mentally ill.<sup>34</sup>

The recent creation of the sexual predator as a legal concept raises critical questions about our criminal justice system. This Article explores the development of the "sexual predator" category and discusses how this new category of criminal fits within the existing judicial system. This Article begins by examining the origins of Rules 413-415. Second, this Article explores the recent federal court cases that provide the first interpretations and applications of Rules 413-415. Third, this Article discusses the origins of state sexual predator confinement statutes. Fourth, this Article discusses the Supreme Court's 1997 decision, *Kansas v. Hendricks*, upholding the constitutionality of the Kansas Sexually Violent Predators Act. Fifth, this Article demonstrates that there is no reliable empirical evidence to support the core factual, legal, and psychological assumptions that underlie the very concept of a sexual predator, by reviewing the most recent and relevant data on predictions of sexual violence, recidivism, and criminal specialization. Finally, this Article argues that, taken together, Rules 413-415 and *Kansas v. Hendricks*, reflect a legislative and judicial reaction to the current demonization of one type of violence. This response disregards the accuracy and effectiveness of these new legal schemes<sup>35</sup> and threatens to undermine the consistent and fair application of our criminal laws.

## I. RULES 413-415: GETTING THE SEXUAL PREDATOR OFF THE STREETS

### A. *The Legislative History of Rules 413-415*

Congress enacted Rules 413-415 on September 13, 1994, as part of the Violent Crime Control Law Enforcement Act of 1994 (Crime Bill).<sup>36</sup> However, these rules were initially drafted three years earlier,

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34. See Brief for the National Mental Health Association as Amicus Curiae in Support of Respondent at \*2, *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997) (No. 95-1649) (referring to the Kansas sexual predator confinement statute as "a misguided attempt to 'medicalize' the behavior of people who commit sexually violent offenses") [hereinafter Brief for the National Mental Health Association].

35. Obviously, a mere increase in the rate of conviction of sexual predators is only of societal value if the vast majority of the defendants are guilty of the charged offense. Similarly, an increase in the number of individuals confined is only of value if the vast majority of sexual predators confined under the sexual predator confinement statutes actually "suffer[] from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." KAN. STAT. ANN. § 59-29a02(a) (West 1994).

36. See *supra* note 13.

during the Bush Administration,<sup>37</sup> and were essentially unchanged during numerous unsuccessful enactment attempts between 1991 and 1994.<sup>38</sup> In fact, when the new evidentiary rules were first proposed in March 1991 they were rejected by Congressional Democrats who viewed the new rules as unconstitutional.<sup>39</sup>

Proponents of Rules 413-415 have consistently claimed that these rules are necessary to correct a grave imbalance in the American system of criminal justice.<sup>40</sup> The *Congressional Record* is replete with purported explanations and justifications for the new rules including that: (1) women and children must be protected from rapists and child molesters;<sup>41</sup> (2) sex crimes are generally committed by recidivists;<sup>42</sup> (3) admitting allegations and evidence of prior sex offenses will result in more convictions;<sup>43</sup> (4) admitting allegations and evidence of prior sex offenses will avoid delays caused by battles over admissibility;<sup>44</sup> (5) the rules are necessary to bolster the credibility of sex crime victims;<sup>45</sup> and (6) the rules will solve the problem of "technical" reversals on appeal.<sup>46</sup>

In August of 1994, Republican Representative Susan Molinari became the most vocal proponent of Rules 413-415 within the House of

37. See 137 CONG. REC. S3212 (daily ed. Mar. 13, 1991) (containing the text of Rules 413-415, in 801 of S. 635, 102 Cong. (1991)).

38. See Natali & Stigall, *supra* note 12, at 4 n.27 (listing 18 separate congressional attempts to promulgate Rules 413-415 between 1991 and 1994).

39. See *Perspectives on Proposed Federal Rules of Evidence 413-414: Introduction*, 22 FORDHAM URB. L.J. 265, 266 (1995).

40. See, e.g., 140 CONG. REC. at H2433 (daily ed. Apr. 19, 1994) (statement of Rep. Molinari); 138 CONG. REC. S15160 (Sept. 25, 1992) (statement of Sen. Dole).

41. See 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) ("I have long sought to protect the public from crimes of sexual violence. . ."); 137 CONG. REC. S4925 (daily ed. Apr. 24, 1991) (statement of Sen. Dole) (stating that the new rules would protect against "those criminals who prey on women").

42. See 140 CONG. REC. S10,276 (daily ed. Aug. 2, 1994) (statement of Sen. Dole).

43. See 140 CONG. REC. H5439 (daily ed. June 29, 1994) (statement of Rep. Kyl). Although Rules 413-415 are likely to increase the conviction rates for sex offenders, this argument ignores the fact that the current federal conviction rate for sex offenses is already 84%, which is considerably higher than the rate for other crimes. See David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15, 22 (1994). There is also a strong possibility that Rules 413-415 would increase convictions among both the innocent and the guilty. See *infra* note 81 and accompanying text.

44. See 140 CONG. REC. S10,276 (daily ed. Aug. 2, 1994) (statement of Sen. Dole).

45. See 140 CONG. REC. H8992 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) ("Knowledge that the defendant has committed rapes on other occasions is frequently critical in assessing the relative plausibility of these claims and accurately deciding cases that would otherwise become unresolvable swearing matches.").

46. See 140 CONG. REC. H2433 (daily ed. Apr. 19, 1994) (statement of Rep. Molinari) ("current law encourages reversals").

Representatives when she announced her intention to block passage of the Crime Bill unless it included the new evidentiary rules.<sup>47</sup> While Representative Molinari led the effort in the House, Minority Leader Bob Dole was regaling the Senate with the tale of Charles R. Getz, convicted in 1988 of raping his eleven year-old daughter.<sup>48</sup> According to Senator Dole, after the Delaware Supreme Court overturned Getz's conviction based on the improper admission of prior assaults, "the defendant walked."<sup>49</sup> Of course this outcome should seem odd to any first-year law student. In fact, Getz was immediately retried, convicted, and sentenced to life in prison.<sup>50</sup> However, the real story of Charles R. Getz would have had little influence on a Congress intent on responding to perceived public fear and outrage towards the sexual predator.<sup>51</sup>

In its desire to satisfy public bloodlust, Congress bypassed its usual rulemaking procedures when it enacted Rule 413-415.<sup>52</sup> The routine process, which involves a proposal by the Advisory Committee of the Judicial Conference, a period of public comment, Supreme Court adoption and congressional review, was completely ignored.<sup>53</sup> Instead, the Crime Bill established a mechanism granting the "Judicial Conference 150 days from the date of enactment to recommend amendments to the Rule[s]."<sup>54</sup> Under this process, if the Judicial Conference failed to make any recommended changes within the 150 days, the rules would

47. See 140 CONG. REC. H2433 (daily ed. Apr. 19, 1994) (statement of Rep. Molinari); 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).

48. *Getz v. State*, 538 A.2d 726, 728 (Del. 1988).

49. 140 CONG. REC. at S10,276 (daily ed. Aug. 2, 1994) (statement of Sen. Dole).

50. See generally *Getz v. State*, 582 A.2d 935 (Del. 1990). In fact, the congressional proponents of Rules 413-415 did not offer any evidence that a single guilty person had ever gone free because of evidence excluded under the existing federal rules. See Duane, *supra* note 30, at 100-01.

51. See *supra* note 11 (discussing how Rules 413-415 were enacted in response to perceived public fear, hatred, and desire for revenge).

52. Although some members of Congress opposed Rules 413-415, see, e.g., 140 CONG. REC. S10,277 (daily ed. Aug. 2, 1994) (statement of Sen. Biden); 140 CONG. REC. H5439 (daily ed. June 29, 1994) (statement of Rep. Schumer), there was no serious discussion or presentation of empirical evidence regarding the percentage of accused sex offenders (with prior criminal records) who are innocent and the potential effect of the new rules on those individuals. See 140 CONG. REC. H5438 (statement of Rep. Hughes) (opposing Rules 413-415 on the grounds that the existing rule-making process, which requires "a minimum of six levels of scrutiny" was ignored and that the rules were offered "after about 20 minutes' debate, without very much thought, and . . . [are] procedurally and substantively flawed").

53. See 28 U.S.C. § 2072 (1994); FED. R. EVID. 1102; see also STEPHEN A. SALTZBURG ET AL., 3 FEDERAL RULES OF EVIDENCE MANUAL 1808-09 (6th ed. 1994); *ABA Report, supra* note 9, at 350 (arguing that if Rules 413-415 had gone through the normal Rules Enabling Act process, some empirical justification would have been required).

54. SALTZBURG ET AL., *supra* note 53, at 575, 580, 583.

become effective 300 days after their original enactment, unless Congress provided otherwise.<sup>55</sup> If the Judicial Conference approved the rules, the rules automatically would become effective thirty days after the transmittal of Judicial Conference approval.<sup>56</sup>

The Advisory Committee of the Judicial Conference transmitted its report to Congress on February 9, 1995.<sup>57</sup> The Advisory Committee, with the single exception of the Department of Justice, unanimously opposed the new rules.<sup>58</sup> The Advisory Committee specifically concluded that Rules 413-415 would improperly: (1) "permit the admission of unfairly prejudicial evidence;"<sup>59</sup> (2) cause significant trial delay by creating "mini-trials within trials;"<sup>60</sup> and (3) "diminish significantly the protections that have safeguarded persons accused in criminal cases and parties in civil cases against undue prejudice."<sup>61</sup> Thus, the Advisory Committee recommended that Congress reconsider Rules 413-415, or in the alternative, that the provisions of Rules 413-415 be instead incorporated as amendments to existing Rules 404<sup>62</sup> and 405<sup>63</sup> of the

55. *See id.*

56. *See id.*

57. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE JUDICIAL CONFERENCE ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (submitted to Congress in accordance with section 320935 of the Violent Crimes Control and Law Enforcement Act of 1994, Pub. L. No. 103-322), reprinted in 159 F.R.D. 51 (1995) [hereinafter REPORT OF THE JUDICIAL CONFERENCE].

58. *See id.* at 53 (emphasizing the highly unusual near-unanimity of the members' opposition to the new rules); *see also* ABA Report, *supra* note 9, at 343-53 (describing the ABA's opposition to Rules 413-415).

59. REPORT OF THE JUDICIAL CONFERENCE, *supra* note 57, at 52.

60. *See id.* at 53.

61. *See id.* These concerns were specifically articulated by the ABA Criminal Justice Section:

Undoubtedly, a few cases will always exist in which the only relevancy link for admission is propensity and exclusion may result in what some believe to be an unwarranted retrial or acquittal. However, to catch that relatively small number of cases, the proponents of Rules 413-415 would drastically alter one of the fundamental premises underlying the Federal Rules of Evidence. *Currently, we do not round up the regular suspects and try them based on evidence of who they are rather than what they did in the particular case.*

ABA Report, *supra* note 9, at 349 (emphasis added).

62. Federal Rule of Evidence 404 reads, in relevant part:

(a) *Character evidence generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

Federal Rules of Evidence “in order to ‘clarify drafting ambiguities and eliminate constitutional infirmities.’”<sup>64</sup>

Despite this strong opposition within the legal community,<sup>65</sup> Congress ignored the Advisory Committee’s recommendations. On July 9, 1995, Rules 413-415 became effective, as originally proposed.

### B. *Assessing the Scope and Effect of Rules 413-415*

Rules 413-415 specifically permit the admission of all “evidence of [a defendant’s] commission of another offense or offenses of sexual assault or child molestation.”<sup>66</sup> The rules do not require evidence of a prior conviction. Moreover, Rules 413-415 do not specify a standard of proof for admissible evidence.<sup>67</sup> Thus, Rules 413-415 could be used to

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

....

(b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice . . . of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404.

63. Federal Rule of Evidence 405 reads as follows:

(a) *Reputation or Opinion.* In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) *Specific instances of conduct.* In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person’s conduct.

FED. R. EVID. 405.

64. *Perspectives on Proposed Federal Rules of Evidence 413-415*, 22 FORDHAM URB. L.J. 265, 267 n.10 (1995) (quoting REPORT OF THE JUDICIAL CONFERENCE, *supra* note 57, at 1).

65. *See supra* notes 58-61 and accompanying text (discussing the Advisory Committee’s conclusions); *see also ABA Report, supra* note 9, at 352 (predicting that an additional negative effects of the adoption of Rules 413-415 will be the erosion of Rule 412 of the Federal Rules of Evidence (the Federal Rape Shield Law)).

66. *See supra* note 12 (quoting text of Rules 413-415).

67. *See* Norman M. Garland, *Perspectives on the Proposed Federal Rules of Evidence 413-415: Some Thoughts on the Sexual Misconduct Amendments to the Federal Rules of Evidence*, 22 FORDHAM URB. L.J. 355, 357 (1995) (stating that some commentators have criticized the new rules for failing to limit admissible evidence to convictions and omitting a

admit arrests where no charge was made, acquittals, juvenile records, and unsupported accusations stretching back through the defendant's lifetime.

Rules 413-415 recently have been tested in the federal courts. These cases show that the federal judiciary has taken seriously Congress' intent that "in general the probative value of such evidence is strong, and is not outweighed by any overriding risk of prejudice."<sup>68</sup> Thus, courts have been willing to use Rules 413-415 to admit uncharged and remote allegations of a defendant's prior sex offenses. In fact, some courts have specifically concluded that Rules 413-415 permit the admission of allegations and evidence to prove a defendant's propensity to commit criminal acts, that would otherwise be excluded.<sup>69</sup> If future courts follow these judicial interpretations, Rules 413-415 will likely expand the scope of permissible allegations and evidence regarding prior offenses well beyond the circumscribed limits of Rule 404.<sup>70</sup> Taken

standard of proof).

68. 137 CONG. REC. S3239 (daily ed. Mar. 13, 1991).

69. See FED. R. EVID. 404. Propensity evidence is excluded under Rule 404 of the Federal Rules of Evidence, *see supra* note 62 (quoting text of Rule 404), unless it also satisfies one of the rule's specified exceptions. This is because:

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

FED. R. EVID. 404(a) advisory committee's note (quoting Cal. Law Revision Comm'n, Rep., Rec. & Studies 615 (1964)).

The dangers of propensity evidence have been specifically recognized by the Supreme Court. *See Huddleston v. United States*, 485 U.S. 681, 691 (1988) (expressing "concern" that evidence of prior bad acts might carry a risk of "unfair prejudice"). These dangers also have been addressed by legal commentators:

If the rule against the use of character evidence [Rule 404] means anything, a broad sexual proclivity exception available in all sex offense prosecutions is utterly inexplicable. . . . [I]f character evidence generally is excluded because its prejudicial impact normally outweighs its probative value, this theory of exclusion arguably applies to evidence of prior sexual misconduct—evidence of a most inflammatory type. . . . If we wish to use sexual propensity evidence against an accused, consistency demands that we abolish the propensity rule in its entirety.

1A WIGMORE ON EVIDENCE § 62.2, at 1345 (Peter Tillers rev. 1983).

70. Rules 413-415 may represent the beginning of a broader effort to eliminate the ban on propensity evidence embodied in Rule 404. Legal commentators anticipated the potential conflict between the new rules and Rule 404 even before the federal courts had the opportunity



together, these decisions confirm that under Rules 413-415, an individual accused of a sex crime may be denied the statutory and constitutional protections afforded other suspected offenders.<sup>71</sup>

The admission of allegations and evidence of past sexual offenses to establish guilt directly or indirectly (for example, by proving a propensity to commit certain crimes) creates substantial risks. Rules 413-415 increase the likelihood of prejudice<sup>72</sup> and due process violations<sup>73</sup> because these rules allow jurors to convict a defendant by inferring that allegations or evidence of past sexual offenses, which may be mistaken<sup>74</sup> or extremely outdated,<sup>75</sup> prove that he committed the current

for review. *See, e.g.,* Natali & Stigall, *supra* note 16, at 23-24 ("Because of the mandatory nature of the rules, in sexual assault and child molestation cases, the Federal Rules' general prohibition on the admission of character evidence to show disposition to commit offenses does not apply."); Livnah, *supra* note 7, at 176 (discussing the "troubling ambiguity regarding whether the amendments [Rules 413-415] permit the application of Federal Rule of Evidence 403"); James S. Liebman, *Proposed Evidence Rules 413 to 415—Some Problems and Recommendations*, 20 U. DAYTON L. REV. 753, 755-57 (1995) (stating that the new rules directly contravene Rule 404, which generally proscribes the use of propensity evidence).

In addition, Rules 413-415 may open the door to the admission of otherwise inadmissible hearsay evidence to prove a defendant's propensity to commit a particular crime. Federal Rule of Evidence 803(21) permits the admission of all hearsay in the form of "[r]eputation of a person's character among associates or in the community." FED. R. EVID. 803(21). Rule 803(21) is rarely used because Rule 404 precludes evidence of a person's character to show propensity. However, under Rules 413-415, prosecutors and certain civil claimants may now be permitted to offer hearsay testimony regarding the defendant's "reputation" for sexual aggression.

71. *See* Duane, *supra* note 30, at 104 (stating that "the new rules . . . single out sexual offenses for unique and 'special' treatment").

72. *See* Imwinkelried, *supra* note 30, at 296' (discussing the fact that evidence of sexual misconduct or child molestation has an extraordinary tendency to generate hostility towards the accused among jurors); Pickett, *supra* note 23, at 900-01 (arguing that sex offenders are held in such widespread contempt that juries may punish defendants based on prior bad acts disregarding other evidence).

73. The threat to due process created by the prejudicial effect of Rules 413-415 was specifically anticipated by the ABA Criminal Justice Section prior to enactment of the new rules.

Prejudice can result from overestimating the probative value of character evidence, or punishing the accused for past conduct or other crimes the defendant may have committed or will commit. Obviously, the prejudice of such acts is great. . . . [Jurors] may not care if sufficient evidence of guilt exists because they feel less responsibility for convicting an individual who they know has committed previous bad acts. Ultimately, the jury may reach its verdict without deciding the defendant's guilt in the present case.

*ABA Report, supra* note 9, at 349; *see also* Natali & Stigall, *supra* note 12, at 34-35 (stating that several courts of appeal have held that Rules 413-415 directly contravene the Due Process Clause).

74. *See* Duane, *supra* note 30, at 109 (discussing the fact that under Rules 413-415

crime.<sup>76</sup> Thus, individuals accused of sex offenses face a greater likelihood that their constitutional rights will be denied by jurors who: (1) overestimate the probative value of prior allegations and evidence;<sup>77</sup> (2) seek to punish the accused for presumed past conduct;<sup>78</sup> or (3) decide to protect society from the defendant's presumed future criminal conduct.<sup>79</sup> The prejudicial power of such testimony is so great that it may impede jurors' efforts to dispassionately evaluate the evidence in the instant case.<sup>80</sup> Rules 413-415 threaten the accuracy and integrity of

"antagonistic accusers with stale, uncertain, and possibly false allegations can easily come out of the woodwork after it becomes widely known that an accused rapist is heading for trial"); *see also* Pickett, *supra* note 23, at 886 ("The prohibition against using uncharged-misconduct evidence to prove propensity exists because much uncharged-misconduct evidence is only weakly relevant to the issue of a defendant's action at a later date.").

75. *See supra* notes 15-16 and accompanying text (discussing the admission of remote uncharged and unrelated allegations or evidence under Rules 413-415).

76. *See* KALVEN & ZEISEL, *supra* note 29, at 160-61, 178-79 (citing research that has shown that admission of a defendant's prior bad acts significantly increases the chance that a jury will convict a defendant).

77. The Supreme Court has long acknowledged the dangers of exposing the jury to an accused's prior offenses. *See, e.g.,* Michelson v. United States, 335 U.S. 469, 475-76 (1948) (evidence of a "defendant's prior trouble with the law, [or] specific criminal acts" is inadmissible because it will "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").

78. *See* Duane, *supra* note 30, at 110 (discussing the likelihood that defendants will be prejudiced by Rules 413-415 because jurors will be inclined to convict based on their disapproval of past crimes or suspicion that the defendant has committed other uncharged crimes, even without a finding of proof beyond a reasonable doubt); *see also* David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 MINN. L. REV. 529, 565 (1989) (stating that jurors who are presented with evidence to show propensity are more likely to convict a defendant because of who he is rather than what he did and may pay less attention to gaps or inconsistencies in the non-propensity evidence).

79. One commentator has noted that

even if [jurors] do not conclude that the defendant is guilty of the crime charged beyond a reasonable doubt, [jurors] will be inclined to convict him (at least in part) on the basis of their disapproval of his prior crimes, or their hunch that he has committed other crimes for which he was never caught, or their fear of letting him remain in the streets to commit future crimes.

*See* Duane, *supra* note 30, at 110 (discussing the likely effect of Rules 413-415 on jurors).

80. *See* Natali & Stigall, *supra* note 12, at 11 nn.69-71 (citing cases that support the proposition that evidence of prior bad acts is prejudicial because it jeopardizes the constitutionally mandated presumption of innocence); Anne E. Kyl, Note, *The Propriety of Propensity: The Effects and Operation of New Federal Rules of Evidence 413 and 414*, 37 ARIZ. L. REV. 659, 660-61 (1995) (stating that evidence admitted under the new rules "may allow judges and juries to make inferences of guilt based not only on the evidence of the specific crime with which a defendant is charged but on his past misdeeds as well").

our judicial system by increasing the probability of the most unjust scenario—increasing the rate of conviction of innocent defendants.<sup>81</sup>

However, the federal courts have not interpreted Rules 413-415 to guarantee the admission of all allegations and evidence of prior sexual offense in all cases. In fact, the first few judicial decisions interpreting Rules 413-415 reveal that judges have been reluctant to disregard the prejudice concerns of Rule 403,<sup>82</sup> particularly when they conclude that a defendant's prior offenses are not sufficiently similar to the current charge.<sup>83</sup>

### 1. The Federal Appellate Courts Interpret Rules 413-415

On April 30, 1997, the Second Circuit became the first federal appellate court to address the application of Rule 414.<sup>84</sup> In *United*

81. The probability that Rules 413-415 would increase convictions among both the innocent and the guilty was specifically anticipated by some legal commentators prior to the enactment of the new rules:

The legislative history of the new rules contains no acknowledgment of the undeniable fact that they can possibly lead to additional convictions *only* in the case of those defendants who (1) are acquitted under current law, and (2) have some sort of alleged history of sexual assault. . . . The answer to that crucial question—which was barely even mentioned in the Congressional debates leading to the passage of the rules—depends entirely on one's assumptions about the group of accused sex offenders who are acquitted under current law but have a suspect background: how many of them are innocent, and how many are guilty? Even if only 10% of that group are actually innocent, increasing the chances of convicting them all runs afoul of our society's fundamental constitutional value determination "that *it is far worse to convict an innocent man than to let a guilty man go free.*"

See Duane, *supra* note 30, at 108 (quoting *Francis v. Franklin*, 471 U.S. 307, 313 (1985)) (emphasis added).

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

83. See *infra* notes 101 & 103. The recent judicial interpretations of Rules 413-415, discussed in Pt. B.1.2., alleviate some of the previously articulated concerns regarding the possible limiting effects of the new rules on existing Rule 403. See, e.g., Natali & Stigall, *supra* note 12, at 30 ("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."); see also Livnah, *supra* note 7, at 177 (discussing the fact that the new rules will minimize the impact of Rule 403 because the "drafters believed that . . . prejudice was not a real concern").

84. The first federal appellate court to mention Rules 413-415 was the Tenth Circuit Court of Appeals. On July 8, 1996, in the case of *United States v. Roberts*, 88 F.3d 872, 875

*States v. Larson*,<sup>85</sup> the defendant appealed his conviction for interstate transportation of a minor with intent to engage in criminal sexual conduct.<sup>86</sup> The appeal was based on the admission, under Rules 413 and 404(b) of the Federal Rules of Evidence, of testimony regarding uncharged sex offenses that had allegedly occurred as much as sixteen to twenty years prior to trial.<sup>87</sup>

On appeal, Judge Kearse of the Second Circuit considered the application of both Rules 403<sup>88</sup> and 404(b)<sup>89</sup> to evidence otherwise admissible under the new evidentiary rule, Rule 414.<sup>90</sup> According to the Second Circuit:

The extent to which the court may exclude proper Rule 414 evidence as a result of a Rule 403 balancing analysis has not previously been addressed by this Court. [However,] [t]he sponsors of . . . Rule 414 noted that, in contrast to Rule 404(b), Rule 414 permits evidence of other instances of child molestation as proof of, *inter alia*, a "propensity" of the defendant to commit child molestation offenses. . . .<sup>91</sup>

Judge Kearse then considered all of the grounds for admissibility described in Rule 404(b).<sup>92</sup> After engaging in this analysis, Judge

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(10th Cir. 1996), the Tenth Circuit Court of Appeals determined that Rule 413 was inapplicable because the indictment had been filed before the rule's effective date. However, *Roberts* contained a brief discussion of Rule 413. According to the Tenth Circuit, Rule 413

will supersede in sex offense cases the restrictive aspects of Federal Rule of Evidence 404(b). In contrast to Rule 404(b)'s general prohibition of evidence of character or propensity, the new rules for sex offense cases authorize admission and consideration of evidence of an uncharged offense for its bearing "on any matter to which it is relevant."

*Id.* at 876 (citations omitted).

85. 112 F.3d 600 (2d Cir. 1997).

86. *See id.* at 602.

87. *See id.* The trial court concluded that the testimony regarding the prior uncharged sex offenses was admissible under Rule 413 and under Rule 404(b) to show intent. *See id.* However, the court excluded, without explanation, other testimony regarding prior sex offenses that had allegedly occurred 21-23 years before the trial. *See id.*

88. *See id.* at 604-05; *supra* note 82 (quoting text of Rule 403).

89. *See Larson*, 112 F.3d at 604; *see also supra* note 62 (quoting the text of Rule 404(b)).

90. *See Larson*, 112 F.3d at 604-05.

91. *Id.* at 604.

92. *See id.* at 604-05. Most state and federal case law interpret Rule 404(b) to allow evidence of a defendant's prior bad acts if the prosecutor can show a nexus to any goal *other* than simply proving that the defendant has a propensity to commit crimes. *See supra* note 62

Kearse concluded that the district court had properly applied a Rule 403 analysis of probity and prejudice to the evidence admitted under Rule 414.<sup>93</sup>

Thus, *United States v. Larson* is the first federal appellate court decision stating that Rule 414 does not require judges to abandon Rule 403 considerations of “unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”<sup>94</sup> In fact, Judge Kearse specifically emphasized the limiting role of Rule 403 when he stated that “[w]e view Rule 403 analysis in connection with evidence offered under Rule 414 to be consistent with Congress’s intent as reflected in the legislative history. . . .”<sup>95</sup>

At the same time, the *Larson* court declined the opportunity to interpret Rule 413 as imposing any particular standard of proof on evidence admitted under the new rule. The court applied the same broad interpretation of Rule 413 to the question of the recency of potentially admissible evidence.<sup>96</sup> According to the Second Circuit, “[n]o time limit is imposed on the uncharged offenses for which evidence may be admitted; as a practical matter, evidence of other sex offenses by the defendant is often probative and properly admitted, notwithstanding substantial lapses of time in relation to the charged offense or offenses.”<sup>97</sup>

Only three months later, on July 10, 1997, the Eighth Circuit Court of Appeal first confronted the application of Rule 413.<sup>98</sup> In *United States v. Sumner*, the defendant, who lived on Red Lake Indian reservation in Minnesota,<sup>99</sup> was charged with touching the genitals of the underage victim “D.D.” on two occasions.<sup>100</sup> A jury found him guilty and the court sentenced him to 210 months in prison.<sup>101</sup>

On appeal, Sumner argued that the trial court erred in admitting evidence of one conviction and one uncharged allegation of sexual

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(quoting the text of Rule 404(b)); see also *ABA Report*, *supra* note 9, at 348 (arguing that prior acts that tend to show anything other than propensity are admissible under Rule 404(b)).

93. See *Larson*, 112 F.3d at 605.

94. See *id.*; *supra* note 82 (providing text of FED. R. EVID. 403).

95. *Larson*, 112 F.3d at 604-05.

96. See *id.* at 605.

97. *Id.*

98. *United States v. Sumner*, 119 F.3d 658 (8th Cir. 1997).

99. See *id.* at 660. Various commentators have noted that Rules 413-415 will have a disproportionate impact on Native Americans because sexual assault or child molestation is only a federal offense if it occurs on Native American land or federal property. See, e.g., *ABA Report*, *supra* note 9, at 352; Duane, *supra* note 30, at 113-15.

100. See *Sumner*, 119 F.3d at 660.

101. See *id.*

assault on girls under the age of fourteen.<sup>102</sup> The trial court had denied the government's proffer of this evidence under Rule 414, stating that the new evidentiary rule was unconstitutional because it allowed the admission of " 'any kind of evidence to show propensity [to commit criminal acts] without allowing for the application of the Rule 403 balancing test.' "<sup>103</sup> However, the trial court admitted evidence of the charged and uncharged sexual assaults under Rule 404(b) after the government successfully argued that this evidence was relevant to show intent.<sup>104</sup>

The Eighth Circuit Court of Appeal found that the trial court erred when it admitted evidence of the prior sexual assaults to prove Sumner's intent.<sup>105</sup> According to Circuit Court Judge Wollman, intent is not at issue when the defendant denies only the criminal act and makes no specific denial of the intent element.<sup>106</sup> The Eighth Circuit Court of Appeal further concluded that the alleged and charged "abuse of the two other children [was] not sufficiently similar to [Sumner's] alleged abuse of D.D. to be relevant for showing opportunity, planning, or preparation."<sup>107</sup> According to the court, this evidence was inadmissible because it did nothing "more than show that Sumner [had] 'a propensity to commit crimes, which Rule 404(b) prohibits.' "<sup>108</sup>

Finally, the *Sumner* court concluded that the district court erred when it found that Rule 414 was unconstitutional.<sup>109</sup> According to the Eighth Circuit Court of Appeal, the trial court was incorrect in its assumption

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102. *See id.*

103. *See id.* at 661.

104. *See id.* at 660.

105. *See id.* at 661.

106. *See id.* at 660. At trial, Sumner defended himself by specifically denying that the alleged acts of abuse had occurred. *See id.* Sumner did not introduce any evidence regarding intent, and his attorney's opening statement and closing argument reflected his theory that the acts did not occur. *See id.* In the alternative, Sumner had offered to stipulate to the intent element, provided that the trial court preclude testimony regarding the two prior incidents. *See id.* Under these circumstances, the Eighth Circuit Court of Appeals found that "[i]f the defendant decides with 'sufficient clarity' to mount a defense that consists 'solely of a denial of the criminal act rather than a denial of the criminal intent, Rule 404(b) evidence on the issue of intent is not admissible.'" *Id.*

107. *See id.* at 661. The fundamental requirement of all admissible evidence is relevancy, regardless of its source or nature. *See* FED. R. EVID. 402 ("All relevant evidence is admissible, except as otherwise provided by . . . these rules. . . . [e]vidence which is not relevant is not admissible."). Relevant evidence is defined as "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.

108. *See Sumner*, 119 F.3d at 661.

109. *See id.*

that Rule 414 negates the application of Rule 403. Thus, Judge Wollman concluded:

Rule 414 states that evidence of other offenses "is admissible." This same language is used in Federal Rule of Evidence 402, ("[a]ll relevant evidence is admissible") and is similar to the language used in 404(b) ("may . . . be admissible"). Evidence admitted under both these rules is subject to Rule 403. . . . It is logical that Rule 403 applies to Rule 414 as well, and nothing in the language of Rule 414 precludes the application of Rule 403.<sup>110</sup>

In *Sumner*, the Eighth Circuit, like the Second Circuit in *Larson*, concluded that Rules 413 and 414 may be limited by Rule 403. However, by failing to establish a standard of proof or impose any type of "reasonableness" requirement on the recency of admissible evidence, the federal appellate courts have opened the door to the use of outdated, uncharged, and unsupported allegations against sex offenders that would be precluded if the defendant had been charged with any other crime.

## 2. The District Courts Interpret Rules 413-415

Three published district court opinions also have considered the application of Rules 413-415. These decisions offer additional guidance on the question of how these new rules should be reconciled with existing evidentiary rules.<sup>111</sup>

In July 1996, in the case of *Frank v. County of Hudson*,<sup>112</sup> a New Jersey district court concluded that prior uncharged allegations of sexual assault were inadmissible under Rules 413, 415, and 403 in ordinary sexual harassment and discrimination lawsuits.<sup>113</sup> The court began its

110. *Id.* at 661-62 (citations omitted).

111. In addition to the district court cases discussed in this Part, in July 1996, an Oregon district court briefly addressed the admissibility of uncharged allegations of sex offenses under Rules 404(b) and Rule 413. *See United States v. Jackson*, No. 95-388, 1996 U.S. Dist. LEXIS 11267, at \*3 (D. Or. July 22, 1996). The allegations at issue in *Jackson* included testimony regarding a 1990 incident that had occurred when the defendant was 17-years-old. *See id.* After considering the application of both Rule 404(b) and Rule 413, the *Jackson* court found that testimony regarding the 1990 incident was inadmissible because the alleged incident was not sufficiently similar to the instant case to be relevant to the issue of consent. *See id.* at \*9-\*10.

112. 924 F. Supp. 620 (D.N.J. 1996).

113. *See id.* at 625. The *Frank* court stated that the specific facts at issue opened the door to admission of the prior uncharged allegations. *See id.* According to the court, although "the ordinary sexual harassment or discrimination case will not justify the admission of evidence of prior sexual assaults, in this case plaintiffs have alleged assaultive behavior rather than mere verbal abuse or discriminatory treatment." *Id.*

analysis of the interrelationship between these evidentiary rules by finding that evidence proffered under Rules 413-415 "must still be shown to be relevant, probative and 'legally relevant' under FRE 403" in order to be admissible.<sup>114</sup> The *Frank* court narrowly interpreted the scope of Rules 413 and 415. Using the Rule 403 test, the court concluded that although the prior allegations were "relevant on the subject of [the defendant's] propensity to commit sexual assaults,"<sup>115</sup> they had minimal probative value.<sup>116</sup> The court then held that "[t]his low degree of probative value stacks up weakly against the statement's large potential for unfair prejudice."<sup>117</sup> The *Frank* court supported this conclusion by citing the "unique stigma" that is carried by child sexual abuse.<sup>118</sup> Finally, the court noted that, based on the specific facts at issue, "this is not the classic sort of case for which FRE 415 was enacted."<sup>119</sup>

In November 1996, in the case of *Cleveland v. KFC National Management Co.*,<sup>120</sup> a federal district court for the northern district of Georgia addressed the question of whether allegations of sexual misconduct are admissible under Rule 415 in a civil sexual harassment lawsuit.<sup>121</sup> This court specifically considered the interrelationship between Rule 415 and Rule 403. According to the court, "[s]ince Rule 403 operates in concert with Rule 415, it is proper for the undersigned to weigh the probative value against the prejudiciality of evidence that would otherwise be admissible under Rule 415."<sup>122</sup> The court also stated that because the defendant was a corporate entity, "Rule 415 is tempered by Rule 403 [and] evidence of a defendant's agent's misconduct must be both probative in that it proves corporate knowledge of similar misconduct and it must corroborate plaintiff's story; otherwise, the prejudicial effect on the jury is not substantially outweighed."<sup>123</sup>

The most recent federal district court case to address the new evidentiary rules, *United States v. Guardia*,<sup>124</sup> contains a detailed

114. *Id.* at 624.

115. *See id.* at 626.

116. *See id.* at 627.

117. *Id.* at 626.

118. *Id.*

119. *Id.* at 627. According to the court, the inherent difficulties of proof that Rule 415 was designed to overcome do not exist when there are multiple plaintiffs who support each other's claims. *See id.*

120. 948 F. Supp. 62 (N.D. Ga. 1996).

121. *See id.* at 62.

122. *See id.* at 66 (citing *Frank v. County of Hudson*, 924 F. Supp. 620, 626 (D.N.J. 1996)).

123. *Id.*

124. 955 F. Supp. 115 (D. N.M. 1997).



analysis of Rule 413. This case involved a criminal complaint against Dr. Guardia, a gynecologist at Kirkland Air Force Base, by Carla G., a patient.<sup>125</sup> During discovery, the prosecutors learned of several other women who had complained about Dr. Guardia's sexual advances and sought to subpoena these women to testify at trial.<sup>126</sup> In response, the defense then filed a motion in limine to preclude the admission of uncharged allegations under Rules 403, 404(b), or 413.<sup>127</sup>

The district court began its analysis by recognizing that there has been "debate on whether and how . . . Rules [413-415] would be construed in conjunction with Rules 403 and 404."<sup>128</sup> After summarizing the debate, the court concluded that "[a] common sense reading of Rule 403 . . . indicates that since it applies only to evidence otherwise admissible, it applies to evidence otherwise admissible under Rule 413."<sup>129</sup> However, the court also found that "Congress . . . intended Rule 413 to reverse the presumption against prior bad acts found in Rule 404(b) and this is likely to result in less evidence being excluded under the balancing test of Rule 403."<sup>130</sup>

After presenting its analysis of Rule 413, the court used its power under Rule 403 to limit "undue delay" and "waste of time" to exclude the proffered testimony:

This Court, however, has been unable to find any congressional history or legal authority to support the premise that Rule 413 is intended to substantially lengthen trials or require additional expert testimony. . . . [T]his Court is persuaded that the additional four witnesses the Government proposes to call under Rule 413 add little probative value to the testimony of the two prosecuting witnesses but have the definite potential to confuse the jury and unnecessarily extend the trial.<sup>131</sup>

The court also stated that the proffered testimony should be excluded "[b]ecause: the jury must first find that the defendant committed the uncharged crimes before it can use them as evidence of the charged crime, [therefore] the trial of a single offense can be converted into two, three, four, or more trials. . . ."<sup>132</sup>

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125. *See id.* at 117.

126. *See id.*

127. *See id.* at 116.

128. *See id.* at 117.

129. *Id.*

130. *Id.* at 118.

131. *Id.*

132. *Id.* at 119 (quoting 23 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL

Thus, the district courts that have examined Rules 413-415, like the appellate courts discussed in the previous section, have used Rule 403 to narrow the scope of the new rules. However, some federal courts have, at the same time, broadly interpreted the new rules by: (1) accepting that Congress intended Rules 413-415 to reverse the presumption against prior bad acts found in Rule 404(b);<sup>133</sup> (2) declining the opportunity to establish a reasonable standard of proof for potentially admissible evidence; (3) concluding that under Rules 413-415 "[n]o time limit is imposed on the unchallenged offenses for which evidence may be admitted;<sup>134</sup> and (4) permitting the use of otherwise inadmissible propensity evidence.

## II. SEXUAL PREDATOR CONFINEMENT STATUTES: KEEPING THE SEXUAL PREDATOR OFF THE STREETS

### A. *The Historical Development of Laws Requiring the Involuntary Commitment of Sexual Predators*

The United States has a long history of state laws requiring that sex offenders be involuntarily and indefinitely confined in mental health facilities.<sup>135</sup> Most of the early "sexual psychopath" statutes were enacted from the 1930s to the 1960s.<sup>136</sup> During this time, over half of the states had laws permitting the involuntary civil commitment and psychiatric treatment of "sexual psychopaths."<sup>137</sup> These laws treated sexual psychopathology as a mental disease or defect and required that

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PRACTICE AND PROCEDURE § 5412, at 264 (Supp. 1996)).

133. See *Cleveland v. KFC Nat'l Management Co.*, 948 F. Supp. 62, 64-65 (N.D. Ga. 1996); see also 1 STEPHEN A. SALTZBURG ET AL., *FEDERAL RULES OF EVIDENCE MANUAL* 577-78 (1995).

134. *Larson*, 112 F.3d at 605.

135. See Kelly A. McCaffrey, Comment, *The Civil Commitment of Sexually Violent Predators in Kansas: A Modern Law for Modern Times*, 42 U. KAN. L. REV. 887, 888-89 (1994).

136. See John Q. La Fond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV. 655, 659-60 (1992) (stating that over half of the states had "sexual psychopath statutes" by the late 1960s). Public outrage and fear of sex crimes, particularly crimes against children, were a motivating forces in the passage of these early sexual psychopath laws. See Blacher, *supra* note 1, at 896.

137. See La Fond, *supra* note 136, at 660; see also Blacher, *supra* note 1, at 903 ("By 1960, twenty-six states and the District of Columbia enacted some version of a sexually dangerous person statute."). But see Brief for the American Psychiatric Association as Amicus Curiae in Support of Leroy Hendricks, at \*21 n.17, *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997), (Nos. 95-1649, 95-9075) (discussing the fact that sexual psychopath statutes "were not put to wide-spread use (except in California)") [hereinafter American Psychiatric Association Brief].

a psychiatrist make decisions regarding diagnosis, treatment, and release.<sup>138</sup> Under the sexual psychopath statutes, convicted sex offenders were removed from the prison system and sentenced instead to mental health facilities for rehabilitative treatment.<sup>139</sup> Thus, the sexual psychopath laws represent early efforts to define when a state may deprive a person of liberty because he has committed a sex offense without providing the constitutional safeguards (for example, double jeopardy and ex post facto prohibitions, and the right to a jury trial) of the criminal law.

During the 1970s and 1980s legislators perceived that public opinion was shifting away from treatment and rehabilitation of sex offenders towards punishment and retribution; in response, many states repealed their sexual psychopath statutes.<sup>140</sup> Other factors influencing the re-examination of sexual psychopath laws included “the recognition that not all violent sexual offenders were likely to respond to the same type of therapy; the growing awareness that sex offenders were not mentally ill; the lack of proven treatment methods to reduce recidivism rates; and the rising concern for civil rights.”<sup>141</sup> By 1990, half of the states had repealed their sexual psychopath statutes<sup>142</sup> and, of the remaining states, only five have actively enforced their laws.<sup>143</sup> Thus, individuals who previously had been confined to psychiatric hospitals were now incarcerated in state penitentiaries.

Recently, a new type of statute has been developed to deal with the sex offender.<sup>144</sup> Modern “sexual predator” laws differ from the earlier

138. See Edwin H. Sutherland, *The Sexual Psychopath Laws*, 40 J. CRIM. L. & CRIMINOLOGY 543, 544 (1950).

139. See Annotation, *Statutes Relating to Sexual Psychopaths*, 24 A.L.R.2d 350, 351 (1967).

140. See Brian G. Bodine, *Washington's New Violent Sexual Predator Commitment System: An Unconstitutional Law and an Unwise Policy Choice*, 14 U. PUGET SOUND L. REV. 105, 105 (1990); Andrew Hammel, Comment, *The Importance of Being Insane: Sexual Predator Civil Commitment Laws and the Idea of Sex Crimes as Insane Acts*, 32 HOUS. L. REV. 775, 777 n.5; McCaffrey, *supra* note 135, at 889.

141. Blacher, *supra* note 1, at 906.

142. See Bodine, *supra* note 140, at 107 n.27 (listing 12 states and the District of Columbia having sexual offender commitment laws in effect in 1990); Blacher, *supra* note 1, at 906.

143. See Blacher, *supra* note 1, at 906-07.

144. The first of the new sexual predator statutes was enacted in Washington state following extensive community protests over a series of well-publicized sex offenses. See Bochnewich, *supra* note 9, at 280 (the Washington Sexually Violent Predator Statute was the legislature's response to “a firestorm of community shock and outrage over a string of continuing violent sex crimes in Washington”); Deborah L. Morris, Note, *Constitutional Implications of the Involuntary Commitment of Sexually Violent Predators—A Due Process Analysis*, 82 CORNELL L. REV. 594, 611 (1997) (“Washington's legislature enacted the Sexually Violent Predator Act in response to the 1989 attack of a Washington boy by a repeat sexual

“sexual psychopath” statutes. Most significantly, instead of replacing prison with civil confinement, the new laws permit states to continue to confine sexual predators for an indefinite time after he has served his full prison sentence.<sup>145</sup> Under the majority of the existing sexual predator confinement statutes, on a prisoner’s scheduled release date,<sup>146</sup> instead of leaving prison, he will simply be transferred to a high-security mental health treatment center located within the state penal system.<sup>147</sup>

On June 23, 1997, in *Kansas v. Hendricks*,<sup>148</sup> the Supreme Court upheld the Kansas Sexually Violent Predator Act. The Kansas statute, like most of the new sex offender confinement statutes, was modeled after the Washington Sexually Violent Predator Act.<sup>149</sup> The Kansas Act defines a “sexually violent predator” as, “any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.”<sup>150</sup> This statute is designed to apply to individuals who demonstrate a “mental abnormality or personality disorder,”<sup>151</sup> but do not suffer from

offender, Earl Kenneth Shriner, whose criminal history dated back to 1966.”) (citations omitted).

145. *See, e.g.*, KAN. STAT. ANN. §§ 59-2901 to -2941 (West 1994); MINN. STAT. ANN. §§ 33-6-301 to -505 (West 1994 & Supp. 1997); WASH. REV. CODE ANN. §§ 71.06.005 to .270 (West 1992).

146. *See, e.g.*, KAN. STAT. ANN. § 59-29a03 (West 1994) (providing for initiation of confinement procedures only for prisoners nearing release).

147. *See* KAN. STAT. ANN. § 59-29a07 (West 1994) (authorizing “civil” confinement by prison authorities if sexual predators are housed and managed separately from the general prison population); WASH. REV. CODE ANN. § 71.09.060(3) (West 1992) (“The facility shall not be located . . . [at] any state mental facility or regional habilitation center because these institutions are insufficiently secure for this population.”); *see also* Gleb, *supra* note 8, at 216 (describing how, under the Washington statute, sexual predators will be confined in “small prison-like treatment center[s] within the walls of the state prison . . . under high-security conditions,” in cells identical to all other prison inmates).

148. 117 S. Ct. 2072 (1997).

149. WASH. REV. CODE ANN. §§ 71.06.005 to .120 (West 1975 & Supp. 1991). It should be noted that in *Young v. Weston*, 898 F. Supp. 744, 754 (W.D. Wash. 1995), the district court struck down Washington’s Sexually Violent Predator Statute. However, the overall precedential value of the *Young* decision may be questioned in light of *Hendricks*, 117 S. Ct. at 2072.

150. KAN. STAT. ANN. § 59-29a02(a) (West 1994). This definition of the psychological criteria for determining who is a “sexually violent predator” matches, almost exactly, the relevant section of the Washington Sexually Violent Predator Statute. *See* WASH. REV. CODE ANN. § 71.09.020(1) (West 1997).

151. “Mental abnormality” is defined under the Act as “a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses.” *See* KAN. STAT. ANN. § 59-29a02(b) (West 1994). It should be noted that in *Young v. Weston*, 898 F. Supp. 744, 750 n.2 (W.D. Wash. 1995), the district court stated that the term “mental abnormality” contained in the state’s sex offender confinement statute has

a “mental illness.” Individuals who have a “mental abnormality” or “personality disorder” can be involuntarily confined as sexual predators,<sup>152</sup> despite the fact that they are not mentally ill and, therefore, could not be civilly committed under the Kansas general involuntary commitment statute.<sup>153</sup>

Under the Kansas statute, civil commitment procedures may be initiated against: (1) a presently confined person who “has been convicted of a sexually violent offense” and is scheduled for release; (2) a person who has been “charged with a sexually violent offense and who has been determined to be incompetent to stand trial;” or (3) a person who has been found “not guilty by reason of insanity of a sexually violent offense.”<sup>154</sup> Following a judicial determination that a person is a “sexually violent predator,”<sup>155</sup> Kansas requires continued confinement “until such time as the person’s mental abnormality or personality disorder has so changed that the person is safe to be at large.”<sup>156</sup> As of today, nineteen jurisdictions have sexual predator

“neither a clinically significant meaning nor a recognized diagnostic use,” is “unrecognized in the psychiatric community,” and is of “no value to treatment professionals.” *But see* Brief of the Association for the Treatment of Sexual Abusers as Amicus Curiae in Support of Petitioner at \*3-11, *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997) (No. 95-1649) (arguing that “mental abnormality” has meaning to mental health experts and is consistent with the diagnostic process and nomenclature of other psychiatric diagnoses) [hereinafter Brief of the Association for the Treatment of Sexual Abusers]; *supra* note 149 (questioning precedential value of this case).

152. State prosecutors generally will attempt to satisfy the burden of proving the requisite “mental abnormality or personality disorder” and propensity to commit future “predatory acts of sexual violence” through testimony regarding prior sex offenses and the expert opinions of mental health professionals. However, the use of scientific or medical testimony to interpret past sexual offenses suggests a degree of precision and accuracy that is unsupported by the empirical data. *See infra* pt. III.A.-C. (discussing the fact that mental health professionals cannot make reliable predictions based on empirical evidence regarding future violence, recidivism, or criminal specialization); *see also* Eric S. Janus, *The Use of Social Science and Medicine in Sex Offender Commitment*, 23 *NEW ENGLAND J. ON CRIM. & CIV. CONFINEMENT* 347, 361 (1997) (“The systematic integration of science in the language and operation of sex offender commitment statutes is the central prop in their claim for constitutional and policy legitimacy.”).

153. *See* KAN. STAT. ANN. § 59-29a01 (West 1994).

154. *See* KAN. STAT. ANN. § 59-29a03(a) (West 1994).

155. Under the Kansas Act, if state officials charged with the custody of sex offenders think that an inmate may meet the sexually violent predator standard, they are required to notify the Kansas Attorney General, who will determine whether the standard has been satisfied. *See* KAN. STAT. ANN. § 59-29a03 (West 1994). The Attorney General may then file a petition alleging that the person is a sexually violent predator. *See id.* § 59-29a04. If the court finds probable cause, the inmate is confined in a secure facility for evaluation. *See id.* § 59-29a05. A trial is then held in which the prosecutor must prove, beyond a reasonable doubt, that the individual is a sexually violent predator. *See id.* §§ 59-29a06 & 59-29a07.

156. KAN. STAT. ANN. § 59-29a07(a) (West 1994). The statute further requires that the confined sexually violent predator be given “care and treatment” that “conform to constitutional

confinement statutes.<sup>157</sup> However, immediately following the Supreme Court's decision in *Kansas v. Hendricks*, legislators from additional states began to propose similar legislation.<sup>158</sup>

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requirements," and an annual status review. *See id.* §§ 59-29a08 & 59-29a09. However, in light of the fact that the Kansas Act specifically states that sexually violent predators are "unamenable to existing mental illness treatment," *id.* § 59-29a01, the treatment requirement appears irrelevant and disingenuous. *See* Robert F. Schopp, *Sexual Predators and the Structure of the Mental Health System: Expanding the Normative Focus of Therapeutic Jurisprudence*, 1 PSYCH. PUB. POL'Y & L. 161, 168 (1995) ("Neither the statutes nor the courts adequately explain, however, the nature of the impairment thought to render these defendants appropriate for commitment but not amenable to ordinary treatment."); *see also infra* notes 213-24 and accompanying text (discussing the importance of treatment to the Supreme Court's analysis in *Hendricks*).

157. *See* ARIZ. REV. STAT. ANN. §§ 13-4601 to -4613 (West Supp. 1996); CAL. WELF. & INST. CODE § 6250 (West 1994 & Supp. 1997); COLO. REV. STAT. §§ 16-13-201 to -216 (1986 & Supp. 1998); CONN. GEN. STAT. ANN. §§ 17a-566 to -567 (West 1992); D.C. CODE ANN. §§ 22-3501 to -3511 (West 1981 & Supp. 1997); 725 ILL. COMP. STAT. §§ 205/1.01 to /12 (West 1992); IOWA CODE ANN. §§ 709.1 to .12 (West 1993 & Supp. 1997); KAN. STAT. ANN. §§ 59-29a01 to -29a15 (West 1994); MASS. ANN. LAWS ch. 123A, §§ 1-9 (Law. Co-op. 1989 & Supp. 1996); MINN. STAT. ANN. §§ 33-6-301 to -505 (West 1994 & Supp. 1997); NEB. REV. STAT. §§ 29-2922 to -2936 (1995); N.J. STAT. ANN. §§ 2C:47-1 to 2C:47-8 (West 1995 & Supp. 1996); N.M. STAT. ANN. § 43-1-1 (Michie 1993) (regarding "dangerous criminals"); OR. REV. STAT. §§ 426.510 to .680 (1995); TENN. CODE ANN. §§ 33-6-301 to -305 (1984 & Supp. 1996); UTAH CODE ANN. §§ 77-16-1 to -5 (Supp. 1993); VA. CODE ANN. §§ 19.2-300 to -302 (Michie 1990); WASH. REV. CODE ANN. §§ 71.06.005 to .270 (West 1992); WIS. STAT. § 980.01 (West 1985 & Supp. 1996). In addition, the legislatures in Arkansas, Ohio, Rhode Island, and South Carolina are considering adopting sexual predator statutes modeled on the Washington law. *See* 18th Ark. Leg., 2d Sess. (Ark. 1994); H.R. 396, 120th Ohio Gen. Ass., 1993-94 Reg. Sess. (Ohio 1993); H.R. 8350, R.I. Reg. Sess. (R.I. 1994); H.R. 3193, 1993 S.C. Statewide Sess. (S.C. 1993).

158. *See, e.g.,* Jodi Cohens, *Plan Would Delay Release for Sex Offenders*, DETROIT NEWS, July 4, 1997, at A13 (discussing proposed Michigan statute modeled on the Kansas Sexually Violent Predator Law); Michael Quinlan, *Some Kentucky Lawmakers Seek Similar Bill*, THE COURRIER-JOURNAL, June 24, 1997, available in 1997 WL 6643069 (discussing proposed Kentucky statute modeled on the Kansas Sexually Violent Predator Law); *Sex Predator Legislation*, PA. L. WEEKLY, Sept. 8, 1997, at 8 (discussing proposed Pennsylvania statute modeled on the Kansas Sexually Violent Predator Law). In addition, while *Kansas v. Hendricks* was pending before the Supreme Court, 39 states filed a joint amicus brief in support of Kansas. *See* Brief of the States of Washington, Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, and Wyoming, the Commonwealths of Kentucky, Pennsylvania, Virginia and Puerto Rico, The District of Columbia, the Territories of American Samoa and Guam, the Northern Mariana Islands, and the Virgin Islands, as Amici Curiae in Support of Petitioner, *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997) (Nos. 95-1649, 95-9075).

## B. *Kansas v. Hendricks: The Supreme Court Upholds a Sexual Predator Confinement Statute*

### 1. Background

On June 23, 1997, Justice Thomas, writing for a five-Justice majority that included Justices Rehnquist, Scalia, O'Connor, and Kennedy, delivered the opinion in *Kansas v. Hendricks*.<sup>159</sup> This landmark decision dramatically expanded a state's right to indefinitely confine those individuals that it has deemed sexual predators. Most significantly, Justice Thomas rejected the long-standing requirement that a person must suffer from a "mental illness"<sup>160</sup> before the state can initiate involuntary civil confinement procedures against him.

Justice Thomas began his opinion by reviewing the most significant aspects of the Kansas Sexually Violent Predator Act.<sup>161</sup> Under the Act, Kansas defined a "sexually violent predator" as: " 'any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.' "<sup>162</sup> A "mental abnormality" is defined as a " 'congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.' "<sup>163</sup> The Kansas statute applies to: (1) inmates convicted of a

159. *Hendricks*, 117 S. Ct. at 2076.

160. A "legal mental illness" has been defined as a "psychological impairment that undermines" an individual's capacity to direct his conduct through the process of practical reasoning and prevents him from guiding his conduct according to the rules available to the ordinary practical reasoner. See Schopp, *supra* note 156, at 179.

161. See *Hendricks*, 117 S. Ct. at 2076-78.

162. *Id.* at 2077 (citing KAN. STAT. ANN. § 59-29a02(a) (West 1994)). Kansas has argued that the use of the terms "mental abnormality" and "personality disorder" do not substantively change the civil commitment schemes that have been upheld by the Supreme Court in the past. However, this claim has been disputed by the National Mental Health Association:

[T]he Kansas statute strikes at the very heart of that system by failing to require a finding of mental illness to support commitment. . . . If Kansas were correct in asserting that the Act imposes no substantive change in the definition of mental illness, there would have been no need to enact it. The director of corrections could simply have instituted civil commitment proceedings against all those who were a danger to others as a result of a diagnosed mental illness.

Brief for the National Mental Health Association, *supra* note 34, at \*9.

163. *Hendricks*, 117 S. Ct. at 2077 (citing KAN. STAT. ANN. § 59-29a02(b) (West 1994)). A "mental abnormality" differs significantly from the type of "mental illness" traditionally

sexually violent offense and scheduled for release; (2) defendants charged with a sexually violent offense and found incompetent to stand trial; (3) defendants found not guilty by reason of insanity; and (4) defendants found not guilty because of a mental disease or defect.<sup>164</sup> Justice Thomas concluded his discussion of the Kansas Act by outlining its procedural safeguards and avenues of review.<sup>165</sup>

Justice Thomas then focused on Leroy Hendrick's criminal history. In 1984, Hendricks had been convicted of taking "indecent liberties" with two thirteen year-old boys.<sup>166</sup> By 1994, Hendricks had almost finished serving his prison sentence and was scheduled to be released to a halfway house that September.<sup>167</sup> Shortly before his release date, Kansas filed a petition seeking to continue to confine Hendricks as a "sexually violent predator."<sup>168</sup> This was the first attempt by the state to enforce its new Sexually Violent Predator Act.

In accordance with the Kansas Act, Hendricks requested a jury trial on the question of his status as a sexually violent predator.<sup>169</sup> During that trial, the jury heard testimony that included a 39-year-old plea agreement to indecent exposure, a 37-year-old conviction for lewdness, a 34-year-old conviction for molestation, and a 31-year-old conviction for sexual assault.<sup>170</sup> The court also heard testimony regarding uncharged sexual abuse that had allegedly occurred 22 years earlier. Kansas' chief psychologist testified that although Hendricks was a pedophile, he was not mentally ill.<sup>171</sup>

Hendricks offered testimony from psychiatrist Dr. William S. Logan who stated that it is impossible to accurately predict the "future

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required for involuntary civil commitment. *See infra* notes 208-09 and accompanying text (discussing the legal and scientific distinctions between the two terms).

164. *See Hendricks*, 117 S. Ct. at 2077 (citing KAN. STAT. ANN. § 59-29a07(a) (West 1994)).

165. *See id.* (citing KAN. STAT. ANN. §§ 59-29a06 to 59-29a11 (West 1994)).

166. *See id.* at 2078.

167. *See id.*

168. *See id.*

169. *See id.*

170. *See id.*

171. *See American Psychiatric Association Brief, supra* note 138, at \*8 ("Hendricks evidently suffers from no incompetence to care for himself or to make rational decisions; and his risk of committing another sex offense is precisely that, a risk."). Kansas also presented testimony from a clinical social worker, Lester Lee, and the chief psychologist at Larned State Hospital, Dr. Charles Befort. *Hendricks*, 117 S. Ct. at 2079, n.2. Lee testified that Hendricks had a "personality trait disturbance," a "passive aggressive personality," and pedophilia. *See id.* Dr. Befort testified that Hendricks suffered from pedophilia, a "mental abnormality" and was "likely to commit sex offenses against children in the future if not confined." *See id.*



dangerousness of a sex offender.”<sup>172</sup> Hendricks testified on his own behalf. Although Hendricks never stated that he would reoffend if he was released from prison, he told the court that when he is “stressed out” he is unable to control his urge to engage in sexual abuse.<sup>173</sup> Based upon this evidence, the trial court determined that, as a matter of Kansas law, Hendricks suffered from pedophilia and that pedophilia qualified as a “mental abnormality” as defined by the Act.<sup>174</sup> Kansas then committed Hendricks to the custody of the state until he could prove that he was not a danger to himself or others.<sup>175</sup>

Hendricks appealed his confinement decision to the Kansas Supreme Court claiming violations of the “Due Process, Double Jeopardy, and Ex Post Facto Clauses” of the Federal Constitution.<sup>176</sup> On March 1, 1996, that court found that Hendricks’ due process rights had been violated.<sup>177</sup> The Kansas Supreme Court concluded that substantive due process requires that, before an individual may be involuntarily committed, a state must prove that “the person is both (1) mentally ill; and (2) a danger to himself or others.”<sup>178</sup> According to the Kansas Supreme Court, because a “mental abnormality” is not a “mental illness,” Kansas failed to meet the first prong of this test.<sup>179</sup>

## 2. Legal Analysis

Justice Thomas began his analysis of the legal questions posed in this case by stating that the “mental abnormality” requirement of the Act satisfies substantive due process standards for the indefinite civil confinement of individuals who are not mentally ill.<sup>180</sup> According to the Court, “[i]t . . . cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty.”<sup>181</sup> To support this conclusion, Justice Thomas relied primarily on the recent case of *Foucha v. Louisiana*,<sup>182</sup> and a

172. See *Hendricks*, 117 S. Ct. at 2079 n.2 (citing the record on appeal).

173. See American Psychiatric Association Brief, *supra* note 137, at \*4.

174. See *id.* at \*5.

175. See *Hendricks*, 117 S. Ct. at 2079.

176. See *id.*

177. See *id.* (quoting *In re Hendricks*, 912 P.2d 129, 138 (Kan. 1996)).

178. See *id.* (quoting *Hendricks*, 912 P.2d at 137). The Kansas Supreme Court “did not address Hendricks’ ex post facto or double jeopardy claims.” See *id.*

179. See *id.*

180. See *id.*

181. *Id.* at 2080.

182. See *id.* at 2079-80 (citing *Foucha v. Louisiana*, 504 U.S. 71 (1992)). It should be noted that Justice Thomas dissented in *Foucha*, sharply criticizing the majority for failing to identify the fundamental right at issue or the appropriate standard of review. See *Foucha*, 504 U.S. at

turn-of-the-last-century case, *Jacobson v. Massachusetts*.<sup>183</sup> A brief review of these cases shows that the Court's analysis ignores significant distinctions between these cases and the central issues in *Hendricks*.

In *Foucha v. Louisiana*, the Supreme Court explored a Louisiana statute that permitted the state to confine defendants, who had been deemed "dangerous," to mental institutions after they had been acquitted by reason of insanity.<sup>184</sup> The defendant, Terry Foucha, was found not guilty by reason of insanity of the crimes of aggravated burglary and illegal discharge of a firearm.<sup>185</sup> The record shows that Foucha was not diagnosed with any mental illness but was determined to have an Antisocial Personality Disorder, not amenable to treatment.<sup>186</sup> Following the verdict, Foucha was committed to a state psychiatric hospital.<sup>187</sup> This post-acquittal confinement was for an indefinite term, and Foucha could not be released until he could prove that he was not a danger to himself or others.<sup>188</sup>

Justice White, writing for a plurality of the Court, struck down the Louisiana law. At the core of Justice White's analysis was the conclusion that "mental illness" is a constitutionally required element for involuntary civil commitment.<sup>189</sup> Justice White specifically stated that

116 (Thomas, J., dissenting). Justice Thomas concluded that the Louisiana statute was substantively reasonable. *See id.* at 123 (Thomas, J., dissenting).

183. *See Hendricks*, 117 S. Ct. at 2079 (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)).

184. *See Foucha*, 504 U.S. at 73.

185. *See id.* at 73-74.

186. *See id.* Antisocial Personality Disorder (APD) is defined as a "pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood." *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV 645-46 (Michael B. First, M.D. ed., 4th ed. 1994) (listing, among others, the following examples of behavior indicating APD: failure to honor financial obligations, "destroying property, harassing others, stealing," having an illegal occupation, physical fights, spouse and child abuse). In fact, the American Psychiatric Association has expressly disavowed any predictive quality to an APD diagnosis stating that classifying a person with APD "does not enhance the dubious reliability of a clinical prediction that the person will repeat his or her crime." Gleb, *supra* note 8, at 230-31. This has led some mental health professionals to criticize APD as a diagnosis that is based solely on an assumed predisposition to commit unlawful acts with little information regarding an individual's psychological condition. *See, e.g.,* Robert D. Hare et al., *Psychopathy and the DSM-IV Criteria for Antisocial Personality Disorder*, 100 J. ABNORMAL PSYCHOL. 391, 391 (1991); Janus, *supra* note 152, at 368 ("It is well established that seventy to eighty percent of all prisoners are diagnosable with antisocial personality disorder. . .").

187. *See Foucha*, 504 U.S. at 74.

188. *See id.*

189. *See id.* at 77-78; *see also* *Jones v. United States*, 463 U.S. 354, 362 (1983) ("[T]he Due Process Clause requires the Government in a civil-commitment proceeding to demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous."); Schopp,

“keeping Foucha against his will in a mental institution is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness.”<sup>190</sup> Although the Court opined that a state may constitutionally confine individuals who are both mentally ill and dangerous, Louisiana did not prove or even claim that Foucha was mentally ill.<sup>191</sup> Thus, *Foucha* stands for the proposition that involuntary civil commitment requires a finding of mental illness and cannot be based on predictions of dangerousness alone.<sup>192</sup>

According to the *Foucha* Court, a state can never prevail by arguing that its safety interests outweigh Foucha’s liberty interest.<sup>193</sup> Instead, the state must show “why its interests would not be vindicated by the . . . normal means of dealing with persistent criminal conduct.”<sup>194</sup> Thus, the Court found the Louisiana statute unconstitutional because the omission of a mental illness requirement from the civil confinement scheme violated the Due Process Clause.<sup>195</sup> Despite the clear holding in *Foucha*, Justice Thomas relied on this case as precedent for its

*supra* note 156, at 167 (stating that individuals “fall within the jurisdiction of either the criminal justice or mental health systems depending on the presence or absence of some type of mental illness”).

190. *Foucha*, 504 U.S. at 78. This conclusion was even echoed in the dissent. *See id.* at 94 (Kennedy, J., dissenting) (stating that it is “beyond question” that “in civil proceedings the Due Process Clause requires the State to prove both insanity and dangerousness by clear and convincing evidence”).

191. *See id.* at 80. In fact, the Court consistently criticized Louisiana for seeking “to perpetuate Foucha’s confinement . . . on the basis of his antisocial personality.” *See id.* at 78.

192. Prior to Justice Thomas’ recent reinterpretation of *Foucha*, this case was consistently viewed by state supreme courts and legal scholars as requiring a finding of “mental illness” to sustain an involuntary civil commitment. *See, e.g., In re Blodgett*, 510 N.W.2d 910, 914 n.5 (Minn. 1994), *cert. denied*, 115 S. Ct. 146 (1994). One court observed that

[i]n *Foucha v. Louisiana*, the United States Supreme Court held that a Louisiana civil commitment statute, which allowed a person acquitted by reason of insanity, who had an antisocial personality disorder but no longer a mental illness, to remain indefinitely committed to a mental hospital on the basis of dangerousness alone, violated substantive due process.

*Id.* (citation omitted); *see also* James W. Ellis, *Limits on the State’s Power to Confine “Dangerous” Persons: Constitutional Implications of Foucha v. Louisiana*, 15 U. PUGET SOUND L. REV. 635, 647-48 (1992); Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157, 174-75 (1996).

193. *See Foucha*, 504 U.S. at 82.

194. *See id.*

195. *See id.* at 83. Justice White also noted that, unlike criminal convicts, Foucha’s confinement was indefinite and his release conditioned on affirmative proof of his safety. *See id.* at 85. This distinction led Justice White to conclude that the Louisiana statute also denied Foucha equal protection of law. *See id.* at 84-85.

antithesis—the conclusion in *Hendricks* that proof that the state may mandate indefinite civil commitment without establishing that an individual suffers from a mental illness.<sup>196</sup>

The second case that Justice Thomas relied upon, *Jacobson v. Massachusetts*,<sup>197</sup> upheld the right of a state to force its residents to submit to vaccinations against smallpox in order to protect public health.<sup>198</sup> The *Jacobson* case is commonly understood to stand for the proposition that the state's interest in protecting the public can be sufficient to support mandatory vaccination which is a type of civil deprivation of liberty.<sup>199</sup> However, the *Jacobson* court did not address the methods that a state may use to enforce public health regulations and, therefore, did not reach the question of constitutionally acceptable enforcement mechanisms.<sup>200</sup> Thus, *Jacobson* does not speak to the central question at issue in *Hendricks*—whether, or under what circumstances, a state may use noncriminal procedures to deprive an individual of liberty.

Having dispensed with the “mental illness” prong of the *Foucha* test, Justice Thomas turned to *Foucha*'s second requirement—“dangerousness.” The Court first emphasized that “[t]he challenged Act unambiguously requires a finding of dangerousness either to one's self or to others as a prerequisite to involuntary confinement.”<sup>201</sup> Justice Thomas then noted that “[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment.”<sup>202</sup> Despite this assertion, at the core of the Court's decision is Justice Thomas's implicit acceptance of dangerousness alone as sufficient grounds for commitment under the Kansas Act.

Justice Thomas's test for indefinite civil confinement under the Kansas Act, on its face, appears to contain two requirements. According to the Court, confinement is constitutional if there is: (1) “evidence of past sexually violent behavior;” and (2) “a present mental condition that

196. This conclusion is also contradicted by the Supreme Court's more recent decision in *Cooper v. Oklahoma*, 116 S. Ct. 1373, 1383 (1996) (noting that for civil commitment “due process requires at a minimum a showing that the person is mentally ill”).

197. 197 U.S. 11 (1905).

198. *See id.* at 35.

199. *See, e.g.*, Edward P. Richards, *The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals*, 16 HASTINGS CONST. L.Q. 329, 341 (1989).

200. The *Jacobson* case is further distinguishable from *Hendricks*. The *Jacobson* Court dealt with the tangible public health threat of a smallpox epidemic, *see Jacobson*, 197 U.S. at 12, while *Hendricks* addressed the speculative danger posed by individuals who may, or may not, commit a certain type of crime at some point in the future.

201. *Hendricks*, 117 S. Ct. at 2080.

202. *Id.*

creates a likelihood of such conduct in the future.”<sup>203</sup> However, close examination of the Court’s decision reveals that the state can satisfy both prongs of the *Hendricks* test by presenting allegations of an individual’s past sex offenses which will establish his dangerousness.

The first prong of the *Hendricks* test requires nothing more than “evidence” of past sex offenses. In the context of this case, the Court found that this evidence can be comprised of allegations and judicial dispositions that date back as far as forty years.<sup>204</sup> The Court then permitted the state to recycle these same allegations to satisfy the second prong of the *Hendricks* test. According to Justice Thomas, “[p]revious instances of violent behavior are an important indicator of future violent tendencies.”<sup>205</sup> Using the Court’s own analysis, a history of violence satisfies the second prong of the test because it indicates a “present mental condition that creates a likelihood of such conduct in the future.”<sup>206</sup> Thus, the apparent distinction between parts one and two of Justice Thomas’ test are immaterial because the same allegations and evidence from an individual’s remote past will satisfy the first and second prongs of the *Hendricks* test.<sup>207</sup>

203. *See id.*

204. *See id.* at 2078 (referring to testimony by the defendant during trial that he had “exposed his genitals to two young girls” in 1955).

205. *Id.* at 2080 (quoting *Heller v. Doe*, 509 U.S. 312, 323 (1993)) (citations omitted); *see infra* pt. III (discussing the inherent unreliability of future predictions of violence based on past behavior and the lack of any reliable empirical evidence to support such inferences).

In the sex offender commitment cases, the courts have placed weight on the requirement that there be some nexus between the mental disorder and the violence. This nexus is said to exist when mental disorder “causes,” “specifically causes,” “results in,” “predicts,” or “explains” sexual violence. But courts have never explained what any of these complex concepts means, and have apparently never required anything more than conclusory expert opinions to support findings on the nexus issue.

*See Janus, supra* note 152, at 384 (citations omitted).

206. *See Hendricks*, 117 S. Ct. at 2080.

207. The assumption that past violence proves an abnormal mental condition has been directly contradicted by mental health experts. *See, e.g.*, Brief for the National Mental Health Association, *supra* note 34, at \*7-8 (“Criminal behavior, including sexually violent behavior, is more often the product of a failure of moral development, or insufficient impulse control, than it is a result of mental illness.”); Robert C. Boruchowitz, *Sexual Predator Law—The Nightmare in the Halls of Justice*, 15 U. PUGET SOUND L. REV. 827, 836 (1992) (stating that there is no psychological knowledge that links sexual offending “with a mental disorder or that supports a prediction that a given offender is more likely than not to reoffend violently”); Gleb, *supra* note 8, at 231-32 (discussing how judges and juries confronted with psychiatric testimony that a person is a sexual predator will be given “the erroneous and prejudicial impression that the person suffers from a condition that underwrites a prediction about his behavior”).

The Court's intention that sexual predator determinations be based on predictions of future dangerousness alone is further illustrated by the fact that the Kansas legislature and the Supreme Court: (1) made no attempt to characterize or define the requisite "mental condition" or "mental abnormality;"<sup>208</sup> (2) failed to describe the relationship between this psychological assessment and the traditional civil commitment requirement of "mental illness;"<sup>209</sup> and (3) omitted any explanation of how a "likelihood of such [sexually offensive] conduct in the future"<sup>210</sup> should be determined or evaluated. Finally, even assuming *arguendo* that a reliable determination of future criminal behavior were possible,<sup>211</sup> the Court gave no indication of how predictions of dangerousness should factor into the balance between public safety and individual liberty. Thus, the Court is willing to permit states to indefinitely confine individuals who have committed one type of crime and have served their full prison sentences, based solely on speculations regarding future dangerousness, without any further guidance or empirical support.<sup>212</sup>

Finally, Justice Thomas asserted that the Kansas statute—which contains no "mental illness" requirement and, on its face, states that it is intended to reach individuals who do *not* satisfy the existing standards for civil commitment—is "plainly of a kind with . . . other civil commitment statutes."<sup>213</sup> This equation of sexual predator confinement

208. See Schopp, *supra* note 156, at 169 (describing sexual predator statutes as "particularly problematic" because "[t]hey provide no explanation of the nature of the disorders supposedly suffered by these offenders or of the manner in which the disorders render the offenders dangerous"); Gleb, *supra* note 8, at 229 (describing the definition of a sexually violent predator as "distort[ing] current psychiatric theory").

209. See *supra* note 208 (discussing the fact the "mental illness" has a precise meaning in law and in science). In addition, none of the terms used by Justice Thomas in *Hendricks*, ("mental condition," "mental abnormality," and "mental disorder") is defined in the DSM-IV. See DSM-IV, *supra* note 186, at 13-24.

210. See *Hendricks*, 117 S. Ct. at 2080.

211. *But see supra* pt. III.A. (describing how there is no reliable empirical evidence that future dangerousness can be accurately predicted).

212. See American Psychiatric Association Brief, *supra* note 137, at 17 ("Far from providing an optional alternative to criminal remedies, the [Kansas Sexually Violent Predators] Act improperly creates an essentially indefinite involuntary extension of criminal incarceration.").

213. See *Hendricks*, 117 S. Ct. at 2080. This conclusion is belied by the fact that the Kansas Sexually Violent Predators Act begins by acknowledging that it is intended to reach individuals who would *not* fall within the standards that govern normal civil commitment under Kansas laws. See KAN. STAT. ANN. 59-29a01 (West 1994). The general Kansas civil commitment statute, unlike the Act at issue in *Hendricks*, requires that the individual eligible for commitment not only have a "severe mental disorder to the extent that such person is in need of treatment," and be "likely to cause harm to self or others," but also that the person lack the capacity "to make an informed decision concerning treatment. . . ." KAN. STAT. ANN. § 59-

with civil confinement of the mentally ill raises significant legal and policy issues and blurs the distinction between dangerous criminal behavior and recognized mental illness.

There are obvious dangers when legislators begin to expand and redefine the minimum psychological determination for indefinite involuntary civil commitment.<sup>214</sup> According to the American Psychiatric Association:

If "mental illness" were freely subject to legislative definition (through new terms like "mental abnormality" or otherwise), or if anyone "crazy" or "sick" enough to engage in repeated serious offenses could be civilly confined for that reason, the limits on deprivations of liberty to protect the public safety would quickly disappear.<sup>215</sup>

Justice Thomas' conclusion that the "mental abnormality" requirement contained in the Kansas statute is simply one of a "variety of expressions to describe the mental condition of those properly subject to civil confinement,"<sup>216</sup> ignores the fact that "mental illness" has a precise meaning in law and in science.

In the legal context, individuals are mentally ill when "impaired psychological process renders them incapable of meeting some legally relevant standard of adequate functioning."<sup>217</sup> Thus, a "mental abnormality" or "personality disorder" does not rise to the level of mental illness that would defeat criminal responsibility.<sup>218</sup> In the

2902(h) (West 1994).

214. See Schopp, *supra* note 156, at 168. "Mental health commitment of dangerous persons who are not mentally ill in order to control their behavior and protect the public, rather than to provide health care, distorts the function of the mental health system and undermines the legitimacy of mental health law by using it to circumvent the legitimate constraints on government force contained in the criminal law." *Id.* at 169.

215. American Psychiatric Association Brief, *supra* note 137, at \*21; see Stephen R. McAllister, *The Constitutionality of Laws Targeting Sex Offenders*, 36 WASHBURN L.J. 419, 454 (1997) (discussing the "legitimate concern about the State potentially having the power to label any condition as 'mental illness' and justify involuntary civil commitment on that basis, irrespective of medical and scientific knowledge").

216. See *Hendricks*, 117 S. Ct. at 2080. The accuracy of Justice Thomas' assumption is questioned by Justice Kennedy. See *id.* at 2087 (Kennedy, J., concurring) (stating that "if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it").

217. Schopp, *supra* note 156, at 170.

218. *But see* Brief of the Menninger Foundation, the American Alliance for Rights and Responsibilities, Justice for All, The New York Chapter of Parents of Murdered Children, Protecting Our Children, People Against Violent Crime, Victims Outreach, Inc., and Texans for Equal Justice as Amici Curiae in Support of Petitioner, *Hendricks*, 117 S. Ct. 2072 (1997) (No.

context of science/medicine, "[t]he term 'mental illness' is reserved for psychological conditions that impair virtually every aspect of the lives of people it affects. It does not apply to those who merely cannot resist deviant sexual urges whose origin, in any case, is unrelated to mental illness."<sup>219</sup> In fact, some recent scientific data show that clinically diagnosed mental illness may frequently be linked to violent behavior.<sup>220</sup> Thus, even if the Court's only, or primary, concern is preventing violence, eliminating the mental illness requirement may impede this goal. Moreover, the legal and scientific definitions of "mental illness" are not mentioned by the *Hendricks* court.<sup>221</sup> Thus, the Court does not find that Kansas' substitution of a mental illness requirement with a prediction of future dangerousness threatens the legitimacy of its confinement scheme.

State commitment schemes must be justified by either the state's police power or its *parens patriae* power.<sup>222</sup> If the state is acting under

95-1649) (stating that sexually violent predators (SVPs) "are responsible for their harmful conduct, unlike the insane, but that SVPs may be less culpable than others, because SVPs suffer from a mental affliction that makes them less able to resist certain criminal impulses") [hereinafter Brief of the Menninger Foundation].

219. Brief for the National Mental Health Association, *supra* note 34, at \*7. Mental illnesses are specific conditions that result in a loss of contact with reality and can be treated with medication and therapy. Violent sexual behavior is just that—behavior that is always under voluntary control. The rapist or pedophile must decide to commit the sexual act—the mental patient cannot. Bodine, *supra* note 140, at 106 n.13 (quoting the testimony of Dr. James D. Reardon, a board-certified forensic and institutional psychiatrist, before the Washington State Legislature in January 1990).

220. See 1 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 303 (D. Faigman et al. eds., 1997) (discussing the most recent data indicating that: the prevalence of violence is over five times higher among people who meet criteria for a DSM-III Axis I diagnosis, schizophrenia, major depression, or mania/bi-polar disorder (11-13%) than among people who are not diagnosable (2%)) [hereinafter MODERN SCIENTIFIC EVIDENCE].

221. See *Hendricks*, 117 S. Ct. at 2076-86. Justice Thomas attempted to justify his omission of any distinction between "mental illness" and terms such as "mental abnormality" or "mental condition" by explaining that "[l]egal definitions . . . must 'take into account such issues as individual responsibility . . . and competency,' [and] need not mirror those advanced by the medical profession." See *id.* at 2081 (citation omitted). However, nowhere in the Court's opinion or in the Kansas Act itself is there any discussion of "individual responsibility" or "competency."

222. *Parens patriae* literally means "parent of the country," and "refers traditionally to the role of [the] state as sovereign and guardian of persons under legal disability." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). The history of mental health law reflects the perpetual tension between police power concerns for individual liberty and *parens patriae* concerns for effective treatment. See, e.g., JOHN Q. LAFOND & MARY DURHAM, BACK TO THE ASYLUM 4-20 (1992). According to some commentators, the most recent social trends reduce the emphasis on civil liberties and increase the importance of involuntary confinement (intended to protect society) coupled with compelled treatment. See *id.* at 19-20.



its police power, the existence of a mental illness must be proved.<sup>223</sup> If the state is acting under its *parens patriae* power, treatment must be the primary purpose of the confinement.<sup>224</sup> In *Kansas v. Hendricks*, Justice Thomas broke legal ground and departed from established precedent when he upheld Kansas' Sexually Violent Predator Act while specifically rejecting the only two possible bases for legitimacy. First, Justice Thomas refused to require that Kansas prove that sexual predators failed to meet some legally relevant standard of behavior.<sup>225</sup> Thus, Kansas cannot be acting under its police powers. Second, Justice Thomas specifically rejected the *parens patriae* justification when he found that treatment of sexual predators need not be the primary goal of Kansas' confinement scheme.<sup>226</sup>

On the question of treatment, Justice Thomas dismissed Hendricks' claim that because the Kansas Act fails to offer any treatment to confined individuals, it is "little more than disguised punishment."<sup>227</sup> According to the Court, regardless of whether treatment is ineffective,<sup>228</sup> or treatment was not the state's overriding concern,<sup>229</sup> the omission of a treatment purpose does not create any constitutional infirmity or reveal any punitive intent.<sup>230</sup>

Justice Thomas' conclusion that treatment is irrelevant to the legitimacy of the statute was directly disputed by Justice Breyer. Writing for the dissent, Justice Breyer observed the following:

Kansas . . . concedes that Hendricks' condition is treatable; yet the Act did not provide Hendricks (or others like him) with any treatment until after his release date from prison and only inadequate treatment thereafter. These, and certain other, special features of the Act convince me that it was

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223. See *Morris*, *supra* note 144, at 639-40 (describing how the courts must first decide under what authority a state has derived its power to commit sexual predators, and then—if the state is relying on its police powers—mental illness must be established).

224. The diagnosis and treatment of a mental illness is central to the determination of whether a statute is civil or criminal. See *Hendricks*, 117 S. Ct. at 2087 (Kennedy, J., concurring) ("If the object or purpose of the Kansas law had been to provide treatment but the treatment provisions were adopted as a sham or mere pretext, there would have been an indication of the forbidden purpose to punish."); *id.* at 2092 (Breyer, J., dissenting) (stating that "one would expect a nonpunitive statutory scheme to confine, not simply in order to protect, but also in order to cure"); see also *Allen v. Illinois*, 478 U.S. 364, 369 (1986) (finding that a lack of concern for treatment supports a finding of punitive intent).

225. See *Hendricks*, 117 S. Ct. at 2080.

226. See *id.* at 2083-85.

227. See *id.* at 2083.

228. See *id.* at 2084 (noting instances where no treatment exists).

229. See *id.*

230. See *id.*

not simply an effort to commit Hendricks civilly, but rather an effort to inflict further punishment on him.<sup>231</sup>

The *Hendricks* facts show that Kansas made no effort to provide treatment to convicted sex offenders. The first time that the state even considered the possibility of treatment for Hendricks was on the eve of his release from prison, as part of its effort to continue his confinement.<sup>232</sup>

Finally, Justice Thomas rejected Hendricks' claims of violation of the Constitutional prohibitions on double jeopardy and ex post facto lawmaking.<sup>233</sup> According to the Court, these claims must fail because the Kansas Act is non-criminal.<sup>234</sup> In fact, Justice Thomas went so far as to say that the post-sentence indefinite confinement of sexual predators "does not implicate either of the two primary objectives of criminal punishment: retribution<sup>235</sup> or deterrence."<sup>236</sup> This conclusion is directly undermined by the testimony of the Kansas Attorney General, which was part of the record before the Court:

Most new laws against criminal conduct tend to provide punishment after the victimization has occurred. Senate Bill 525 [Kansas Sexually Violent Predators Act] will act prospectively and be preventative of criminal conduct and not just punitive. You have a rare opportunity to pass a law that will keep dangerous sex offenders confined past their

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231. *Id.* at 2088 (Breyer, J., dissenting); *see also id.* at 2091-92 (Breyer, J., dissenting) ("[W]hen a State believes that treatment does exist, and then couples that admission with a legislatively required delay of such treatment until a person is at the end of his jail term (so that further incapacitation is therefore necessary), such a legislative scheme begins to look punitive."); Gleb, *supra* note 8, at 215 (discussing the fact that the confinement of sexual predators use the "promise of treatment . . . only to bring an illusion of benevolence to what is essentially a warehousing operation for social misfits' ") (quoting *Cross v. Harris*, 418 F.2d 1095, 1107 (D.C. Cir. 1969)); Janus, *supra* note 152, at 365 (discussing the use of science to portray sex offender commitment laws as "holding out the promise of treatment rather than criminal punishment, and confinement").

232. *See Hendricks*, 117 S. Ct. at 2088.

233. *See id.* at 2081.

234. *See id.* at 2086. According to the Court, if a state labels a statute civil, that designation will be rejected "only where a party challenging the statute provides the clearest proof that the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention to deem it civil." *Id.* at 2082 (quotations omitted).

235. *See also id.* at 2082 ("The Act's purpose is not retributive because it does not affix culpability for prior criminal conduct.").

236. *Id.*; *see also id.* ("Nor can it be said that the legislature intended the Act to function as a deterrent. Those persons committed under the Act are . . . suffering from a 'mental abnormality' or a 'personality disorder' . . . [and] . . . are therefore unlikely to be deterred by the threat of confinement.").

scheduled prison sentence. *As I am convinced none of them should ever be released, I believe you, as legislators, have an obligation to enact laws that will protect our citizens through incapacitation of dangerous offenders.*<sup>237</sup>

Thus, it is difficult to give much weight to Justice Thomas' assertion that the Kansas legislature was wholly unmotivated by considerations of retribution or deterrence.<sup>238</sup> According to the American Psychiatric Association,

[t]he intent behind the Kansas Act, far from a *parens patriae* purpose focused on serving the interests of those subject to it, unmistakably focuses on incapacitation of such criminals to neutralize their potential for doing harm to others. The label "predator" connotes a purposeful actor to whom the State's attitude is hostility and a desire to restrain for other's sake, hardly empathic concern.<sup>239</sup>

Justice Thomas supported his assertion that the statute does not serve the goals of retribution or deterrence by concluding that "[f]ar from any punitive objective, the confinement's duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others."<sup>240</sup> However, this distinction is equally unpersuasive.

The fact that sex offenders can be released from commitments when they demonstrate that they are no longer dangerous is often cited as a basis for distinguishing sex offender commitments from criminal prosecutions, but this is only a contingent difference. . . . [T]his difference generally does not inure to the benefit of the sex offender.

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237. American Psychiatric Association Brief, *supra* note 137, at \*13-14 (emphasis added) (testimony of Kansas Attorney General in support of the Kansas Sexually Violent Predators Act).

238. Criminal punishment is generally considered retributive because it requires that a defendant deserve punishment for the offense. Similarly, deterrence can only be effective if an individual is capable of controlling his behavior. The Kansas Act mandates indefinite civil confinement for individuals who are not mentally ill. These individuals are appropriate targets for both retribution and deterrence because, unlike the mentally ill, they presumably had the necessary psychological capability to engage in practical reasoning regarding the conduct at issue.

239. American Psychiatric Association Brief, *supra* note 137, at \*13; *see also Prevention Versus Punishment*, *supra* note 4, at 1714 (stating that "commitment legislation [for sexual predators] literally immobilizes dangerous sexual deviants and, thus, presumably promotes both immediate and long-term public safety").

240. *Hendricks*, 117 S. Ct. at 2083.

In fact, the fixed, though brief, length of many criminal sentences is often cited as the chief justification for sex offender commitments. . . . [S]ex offender commitments are, in reality, lifetime incarcerations.<sup>241</sup>

Obviously, neither assurances by the Supreme Court, nor Kansas' disavowal of any punitive purpose, means anything to the individual subject to this potentially indefinite deprivation of liberty.

### III. NO RELIABLE EMPIRICAL EVIDENCE SUPPORTS THE THREE CORE JUSTIFICATIONS UNDERLYING RULES 413-415 AND THE SEXUAL PREDATOR CONFINEMENT STATUTES

The enactment of Rules 413-415 and the Supreme Court's decision in *Kansas v. Hendricks* demonstrate that legislators and the judiciary have singled out sexual predators for separate and more stringent treatment under the criminal laws. The wisdom and constitutionality of both legal developments depend on three fundamental underlying justifications: (1) that future sexual violence can be accurately predicted based on allegations and evidence of prior sex crimes; (2) that sex offenders have unusually high rates of recidivism; and (3) that certain offenders specialize in sex crimes. Moreover, both statutory schemes permit fact finders to arrive at these conclusions using uncharged and unsupported allegations from an individual's remote past.<sup>242</sup>

The congressional sponsors of Rules 413-415 cited all three fundamental assumptions in their efforts to enact the new evidentiary rules. Proponents of Rules 413-415 successfully argued: (1) that the best method for preventing future sex crimes is to enable prosecutors and civil plaintiffs to use allegations and evidence of prior sexual offenses to ensure convictions;<sup>243</sup> (2) that sex offenders are especially likely to

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241. Janus, *supra* note 192, at 191; *see also infra* notes 258-60 (discussing the obstacles that must be overcome by the confined sexual predator who attempts to overturn this designation and obtain release from confinement).

242. Under Rules 413-415, a jury may convict an individual for a sexual offense based, in whole or part, on allegations and evidence of prior sexual offenses. Under the sexual predator confinement statutes, similar allegations and evidence of prior sexual offenses are used to justify confinement: however, this testimony is often presented in conjunction with expert analysis. *See* Janus, *supra* note 152, at 355 (discussing the routine admission of expert testimony in civil commitment cases, "despite the acknowledged shortcomings of the science underlying it").

243. In the words of a primary Congressional sponsor of Rules 413-415, "[t]he past conduct of a person with a history of rape or child molestation provides evidence that he or she has the combination of aggressive and sexual impulses that motivates the commission of such crimes and lacks the inhibitions against acting on these impulses." 140 CONG. REC. H2433 (daily ed. Apr. 19, 1994) (statement of Rep. Molinari); *see also* Livnah, *supra* note 7, at 176 (stating that

be recidivists,<sup>244</sup> and (3) that certain offenders specialize in sex crimes.<sup>245</sup> Although these justifications are based on assumptions regarding the psychology of sexual aggression, recidivism, and criminal specialization, Congress made no effort to support these assumptions with any empirical or scientific evidence<sup>246</sup> or to distinguish among the different types of offenses encompassed within Rules 413-415.

The Supreme Court's decision in *Kansas v. Hendricks*, along with the text of the Kansas Act at issue, illustrate how sexual predator confinement statutes rely on the same three fundamental assumptions.<sup>247</sup> The statute itself states:

[A] small but extremely dangerous group of *sexually violent predators* exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the [Kansas general involuntary commitment statute]. . . . In contrast to persons appropriate for civil commitment under [the Kansas general involuntary commitment statute] . . . , sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. *The legislature further finds that sexually violent*

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under Rules 413-415, "sexual offenses, unlike other crimes, are treated with the further presumption that evidence of prior acts or accusations is admissible to show the probability of acting in conformity with a bad character as to similar offenses").

244. See 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) (stating that sex crimes are generally committed by recidivists); 137 CONG. REC. S3240 (daily ed. Mar. 13, 1991) (statement of Rep. Molinari).

245. See 137 CONG. REC. S4925 (daily ed. Apr. 24, 1991) (statement of Sen. Dole) (stating that the new rules would protect against "those criminals who prey on women"); 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) (describing how Rules 413-415 will protect the public from those criminals who commit acts of sexual violence).

246. Consider one commentator's comment:

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

See Duane, *supra* note 30, at 113.

247. See Janus, *supra* note 152, at 361 (discussing the fact that proponents of sexual predator confinement statutes use science as "the central prop in their claim for constitutional and policy legitimacy").

*predators' likelihood of engaging in repeat acts of predatory violence is high.*<sup>248</sup>

Thus, the Kansas Act first assumes that sex offenders are especially likely to engage in "repeat acts of predatory violence."<sup>249</sup> The Kansas Act incorporates the second justification by presuming that a class of sexually violent predators can be identified and defined based on their criminal specialization. The third assumption was made explicit by Justice Thomas in his decision upholding the Act. According to the *Hendricks* Court, the role of prior allegations and evidence of sex offenses is critical to the confinement decision because, "[p]revious instances of violent behavior are an important indicator of future violent tendencies."<sup>250</sup>

A. *There Is No Reliable Empirical Evidence  
that Future Sex Offenses Can Be  
Accurately Predicted*

Predictions of future dangerousness are central to the justifications underlying both Rules 413-415 and the sexual predator confinement statutes.<sup>251</sup> However, psychiatric and psychological diagnoses are not immutably true insights into human behavior; instead, they are efforts to understand and explain patterns of behavior using scientific methods and theory.<sup>252</sup> According to the American Psychiatric Association,

248. KAN. STAT. ANN. § 59-29a01 (West 1994) (emphasis added).

249. American Psychiatric Association Brief, *supra* note 137, at \*1, \*7-8 ("Validity of the Kansas Act would . . . require a general state power to confine people indefinitely based on predictions that they would 'likely' cause serious harm. Such a power has never been approved by this [Supreme] Court and would threaten our most basic traditions of liberty.").

250. *See Hendricks*, 117 S. Ct. at 2080 (quoting *Heller v. Doe*, 509 U.S. 312, 323 (1993)). The Kansas Attorney General introduced evidence against *Hendricks* that included a 39-year-old plea agreement to indecent exposure, a 37-year-old conviction for lewdness, a 34-year-old conviction for molestation, and a 31-year-old conviction for sexual assault. *See id.* at 2078. The court also heard testimony from *Hendricks*' stepchildren regarding uncharged sexual abuse that had allegedly occurred 22 years earlier. *See id.* at 2079 n.2.

251. *See supra* notes 35-36 and accompanying text (discussing how congressional proponents of Rules 413-415 successfully argued that the new rules were necessary to protect women and children from rapists and child molesters who, unless convicted, were likely to become repeat sex offenders); *supra* notes 39-40 and accompanying text (discussing Justice Thomas' definition of "mental illness" in *Hendricks* which "requires evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future"); *see also* Brief of the Menninger Foundation, *supra* note 218, at \*17 (stating that Rules 413-415 "illustrate the widespread professional consensus that prior incidents of child molestation are legitimately probative to show a defendant's propensity to commit additional acts of the same nature").

252. The inability of psychiatric professionals to predict violence has been specifically

“there is, in the area of psychiatric prediction of violence by the mentally ill, nothing like the level of certainty applicable to a contagious disease.”<sup>253</sup>

Mental health experts have sought to discover reliable techniques for predicting violent behavior.<sup>254</sup> However, it is generally accepted in the scientific community that predictions of future dangerousness are, at best, only one-third accurate.<sup>255</sup> This means that at least 66% of all positive predictions of future violence will be mistaken and these so-called “dangerous” individuals will not commit the predicted future crimes.<sup>256</sup> In fact, even the most positive assessment of clinicians’ abilities to predict future violence has concluded that “representative data from the past [two] decades suggests that clinicians are able to distinguish violent from nonviolent patients with a modest, better-than-chance level of accuracy.”<sup>257</sup>

recognized by the Supreme Court. *See, e.g., Heller v. Doe*, 509 U.S. 312, 323 (1993) (There are “difficulties inherent in diagnosis of mental illness. . . . It is thus no surprise that many psychiatric predictions of future violent behavior by the mentally ill are inaccurate.”); *Addington v. Texas*, 441 U.S. 418, 429 (1979) (“Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous.”).

253. American Psychiatric Association Brief, *supra* note 137, at \*18.

254. “There is a long tradition in criminology of using statistical (often called actuarial) techniques in predicting recidivism by release prisoners.” MODERN SCIENTIFIC EVIDENCE, *supra* note 220, at 309 (citing JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS 322-28 (3d ed. 1994)).

255. *See* Bochnewich, *supra* note 9, at 293-94 (citing JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR (1981) (noting the one-third accuracy rate is “widely accepted”)); *see also* JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 48 (1981) (stating that most studies of long-term predictions by psychiatrists have found that only one out of five or six predictions of violent behavior are accurate); Thomas Grisso & Paul S. Appelbaum, *Is it Unethical to Offer Predictions of Future Violence?*, 16 LAW & HUMAN BEHAVIOR 621, 626 (1992) (the research shows that expert predictions of violence are merely matters of probabilities are rarely more than 50% accurate).

It should be noted that following John Monahan’s seminal work on the validity of clinical predictions of violence, there was only one study of violence predictability published between 1979 and 1993. This study concluded that 39% of defendants whose pretrial mental health assessment indicated a medium or high likelihood of future dangerousness had committed a dangerous act during a two-year follow-up. *See* MODERN SCIENTIFIC EVIDENCE, *supra* note 220, at 308 (citing Diana S. Sepejak et al., *Clinical Predictions of Dangerousness: Two Year Follow-up of 408 Pre-trial Forensic Cases*, 11 BULL. OF THE AM. ACAD. OF PSYCHIATRY AND THE L. 171 (1983)).

256. *See* Bochnewich, *supra* note 9, at 294 (citation omitted).

257. Douglas Mossman, *Assessing Predictions of Violence: Being Accurate About Accuracy*, 62 J. CONSULTING & CLINICAL PSYCHOL. 783, 790 (1994); *see also* MODERN SCIENTIFIC EVIDENCE, *supra* note 220, at 312 (discussing the fact that studies of post-hospitalization violence are suspect because they “suffer from the additional selection bias that only those patients clinically predicted to be non-violent were released”).

In fact, predictions of future violence are so inaccurate and unreliable that in *Barefoot v. Estelle*,<sup>258</sup> Justice Blackmun specifically stated that "the unanimous conclusion of professionals in this field [is] that psychiatric predictions of long-term future violence are wrong more often than they are right."<sup>259</sup> The American Psychological Association reached a similar conclusion when it determined that "the validity of psychological predictions of violent behavior . . . is extremely poor, so poor that one could oppose their use on the strictly empirical grounds that psychologists are not professionally competent to make such judgments."<sup>260</sup> Obviously, there is a real danger that incorrect predictions of future sex offenses are just as likely to be acted upon by the judge or jury. "The jury can be guided by any kind of testimony from anyone who has data that may be useful, but often the predictions of a psychiatrist concerning the future dangerousness of the defendant are the most convincing testimony for the jury."<sup>261</sup>

Despite this lack of reliable empirical support, legislators based Rules 413-415 and the sexual predator confinement statutes on the assumption that judges and juries can use allegations and evidence of prior sexual offenses to determine guilt and predict future dangerousness. Under both statutory schemes, these prognostications may be based on allegations and evidence of prior sex offenses stretching back throughout the accused's lifetime.<sup>262</sup> Under these circumstances, the use of remote

258. 463 U.S. 880 (1983).

259. *Id.* at 921 (Blackmun, J., dissenting). *But see* Schall v. Martin, 467 U.S. 253, 278-79 (1984) (noting that predictions of future dangerousness form "an important element in many decisions, and we have specifically rejected the contention . . . 'that it is impossible to predict future behavior' ") (quotation omitted).

260. *Report of the Task Force on the Role Of Psychology in the Criminal Justice System*, 33 AM. PSYCHOLOGIST 1099, 1110 (1978); *see also* Charles P. Ewing, "Dr. Death" and the Case for an Ethical Ban on Psychiatric and Psychological Predictions of Dangerousness in Capital Sentencing Proceedings, 8 AM. J.L. & MED. 407, 409 (1983) ("Over the past two decades, empirical research has consistently demonstrated that psychiatric and psychological predictions of dangerousness generally prove to be inaccurate."); Gleb, *supra* note 8, at 224-25 ("[T]here is widespread agreement among psychiatrists that clinical predictions of long-term dangerousness are highly unreliable."); Robert Menzies et al., *The Dimensions of Dangerousness Revisited*, 18 LAW & HUMAN BEHAV. 1, 25 (1994) ("[O]n the critical question—namely, whether experts or instruments can reliably and validly differentiate between potentially violent and innocuous human subjects—the overwhelming body of empirical evidence remains highly equivocal.")

261. JONAS ROBITSCHER, *THE POWERS OF PSYCHIATRY* 198 (1980) (discussing death penalty determinations).

262. *See supra* text accompanying notes 89 & 97 (discussing the fact that in *United States v. Larson*, 112 F.3d 600, 605 (2d Cir. 1997), the court concluded that under Rule 413 "[n]o time limit is imposed on the uncharged offenses for which evidence may be admitted; as a practical matter, evidence of other sex offenses by the defendant is often probative and properly admitted,



allegations and evidence, which raise the specter of prejudice, due process violations, and mistake, presents a significant threat to the fundamental principles of fairness and impartiality underlying our criminal justice system.<sup>263</sup>

Moreover, sexual predator confinement schemes that allow judges to use allegations and evidence of remote past offenses are a significant departure from well-established general civil confinement procedures.

Standard civil commitments are usually triggered by relatively recent acts of violence or threatening behavior. The issue for prediction is whether the individual will be violent in the relatively short term. On the other hand, sex offender commitment predictions are likely to be based on violence that is quite remote, occurring often years or decades before the commitment proceedings. . . . In addition, sex offender commitment statutes appear to be aimed at long term, rather than short term, predictions. Both recency of past violence and short future horizons are thought to enhance predictive accuracy.<sup>264</sup>

In addition, general civil commitment procedures, unlike sexual predator determinations, require a diagnosis of mental illness.<sup>265</sup> Predictions of violence predicated on a finding of mental illness are arguably more reliable because they are based upon the observation of active psychiatric/psychological symptoms.<sup>266</sup> By contrast, it is more difficult to

notwithstanding substantial lapses of time in relation to the charged offense or offenses.”); *supra* note 170 and accompanying text (discussing the fact that under the Kansas Sexually Violent Predators Act, upheld by the Supreme Court in *Hendricks*, 117 S. Ct. at 2078, Kansas used allegations and evidence that dated back as far as 39 years to confine Hendricks as a sexual predator).

263. See *supra* notes 23-28 and accompanying text (describing how the introduction of remote allegations and evidence against an accused under Rules 413-415 and the sexual predator confinement statutes increase the possibilities of prejudice, due process violations, and mistake).

264. Gleb, *supra* note 8, at 237 (“[I]n one crucial respect, it is easier for the state to confine sexual predators than the mentally ill. . . . Sexual predators can be confined without any recent overt evidence of dangerousness, unlike mentally ill confinees.”); Janus, *supra* note 192, at 200-01 (citations omitted); see Stephen Lally, *Steel Beds v. Iron Bars; New Laws Muddle How to Handle Sex Offenders*, WASH. POST, July 27, 1997, at C1 (discussing the fact that in civil commitment proceedings “[t]he potential for danger needs to be immediate”).

265. A “mental illness” diagnosis is not required for the imposition of either Rules 413-415 or the sexual predator confinement statutes. *But see* Pickett, *supra* note 23, at 903 (proposing that a finding of mental compulsion should be a threshold test for admissibility of prior sexual offenses under Rules 413-415).

266. See Edward P. Mulvey, *Assessing the Evidence of a Link Between Mental Illness and Violence*, 45 HOSP. & COMMUNITY PSYCHIATRY 663, 665 (1994) (stating that “[a]ctive symptoms are probably more important as a risk factor than is simply the presence of an

predict the future behavior of sex offenders who are frequently "[p]ersons whose mental afflictions leave them with a measure of self-control . . . [because] they retain the ability to plan, wait, and delay the indulgence of their maladies until presented with a higher probability of success."<sup>267</sup>

Finally, psychiatrists and psychologists have consistently refused to designate a particular mental illness that explains sexual violence.<sup>268</sup> This resistance can be explained by the fact that rape and other forms of sexual violence are not considered to be the result of one consistent type of mental illness.<sup>269</sup> In fact, there is a general consensus in the mental health community that the psychological factors that contribute to sex offenses are not distinct from the psychological factors that may contribute to other forms of violence.<sup>270</sup> Thus, the fact that there is

identifiable disorder") (emphasis omitted).

267. See *In re Linehan*, 544 N.W.2d 308, 318 (Minn. Ct. App.), *aff'd*, 557 N.W.2d 171 (Minn. 1996); see also Gina Kolata, *The Many Myths About Sex Offenders*, N.Y. TIMES, Sept. 1, 1996, § 4, at 10 (citing the research of Dr. Raymond Rosen, professor of psychiatry at the Robert Wood Johnson Medical School, finding that 40% of pedophiles are not motivated by uncontrollable sexual urges but instead are "acting out aggressively with women or children" or "are criminal types who will break society's laws in any way they can").

268. Most mental health professionals believe that sex offenses are not the product of mental illness. See, e.g., Adarsh Kaul, *Sex Offenders—Cure or Management?*, 33 MED. SCI. L. 207, 208 (1993) (stating that each sex offender "presents a unique combination of sexual, emotional and situational difficulties" so that sexual offenses are only "[o]ccasionally . . . a result of mental illness"). In fact, sexual predator confinement laws have been widely criticized within the mental health community. See, e.g., Hammel, *supra* note 140, at 804 (discussing the mental health community's striking opposition to sexual psychopath and sexually violent predator laws in the face of strong public pressure).

269. See Raymond A. Knight & Robert A. Prentky, *Classifying Sexual Offenders: The Development and Corroboration of Taxonomic Models*, HANDBOOK OF SEXUAL ASSAULT: ISSUES, THEORIES, AND TREATMENT OF THE OFFENDER 23 (W.L. Marshall et al. eds., 1990) (proposing four separate classifications for sex offenders: opportunistic, pervasively angry, sexual, and vindictive); Hammel, *supra* note 140, at 802 ("[A] diagnosis of mental illness that may subject one to confinement should at least be reasonably well defined and accepted in the psychiatric community."); Schopp, *supra* note 156, at 168 ("The sexual predator statutes are particularly problematic, however, because they address certain offenders as both responsible for their offenses under the criminal law and civilly committable with no clear explanation or justification.").

270. See Hammel, *supra* note 140, at 804 n.236 ("There is no distinct line between sex offenders and other law violators . . . sex offenders have been found to suffer from no single category of mental pathology; the same varying symptoms of basic difficulties are also found in thieves, murderers, burglars and extortionists.") (quoting HENRY WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 28 n.6 (1954)); see also Stephen J. Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CAL. L. REV. 54, 59 (1982) ("The primary theoretical reason for allowing involuntary commitment of only the mentally disordered is the belief that their legally relevant behavior is the inexorable product of uncontrollable disorder, whereas the legally relevant behavior of normal persons is the product

little consensus on the cause of sexually offensive behavior makes predictions about the effects, sexual violence, even more difficult and unreliable.

B. *There Is No Reliable Empirical Evidence that Sex Offenders Have a Higher Rate of Recidivism than Other Offenders*

There is no reliable empirical evidence that criminal recidivism rates are greater among sex offenders than among any other group of offenders.<sup>271</sup> In fact, statistical analyses of sex offender recidivism statistics indicate that sex offenders' rates are lower than the rates of most other criminal offenders.<sup>272</sup> In addition, "[t]he variety and gravity of methodological problems in existing [sex offender] recidivism

of free choice.") (citation omitted).

271. See Nancy Hobbs, *The Bogeyman May Be Closer than You Think; Pedophiles Often Know Victims, Psychologists Say*, SALT LAKE CITY TRIB., Apr. 28, 1997, at D2 (citing a spokesman of the Utah Department of Corrections finding that "[t]he recidivism rate is significantly lower for all sex offenders than for other types of criminals. . . . [w]here the normal recidivism rate is 47 percent, the rate for all sex offenders is between 20 and 30 percent"); Simon, *supra* note 7, at 392 ("[T]here is currently no empirical evidence to suggest that sex offenders have different recidivism rates than nonsex offenders."). *But see, e.g.*, Brief for the National Mental Health Association, *supra* note 34, at \*3 ("Leading researchers have concluded that sexually violent criminal behavior is relatively intractable, and there is little evidence that treatment effectively reduces recidivism."); Kristen Delguzzi, *Controversy Stalks Sexual Predator Laws*, THE CINCINNATI ENQUIRER, June 30, 1997, at A1 (citing a 1989 study of Ohio prisoners showing a 45.2% recidivism rate for sex offenders and a 44.7% recidivism rate for all other violent offenders); Margit C. Henderson & Seth C. Kalichman, *Sexually Deviant Behavior and Schizotypy: A Theoretical Perspective with Supportive Data*, 61 PSYCHIATRIC Q. 273, 273 (1990) (citing the results of a study in which child molesters self-reported an average of 72 victims).

Moreover, neither statutory scheme presents any empirical evidence to support the two assumptions necessary to justify the recidivism claim: (1) that allegations and evidence of prior sex offenses is more predictive of future sex offenses than predictive of future non-sexual offenses; and (2) that allegations and evidence of past sexual offenses, rather than past non-sexual offenses, are more predictive of future sex offenses.

272. See Livnah, *supra* note 7, at 171 n. 16 (citing a 1989 Bureau of Justice Statistics study that found that "31.9% of released burglars were rearrested for burglary, 24.8% of drug offenders were rearrested for a drug offense, 19.6% of violent robbers were rearrested for robbery, while only 7.7% of rapists were rearrested for rape"); Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127, 155 (1993) (citing studies showing that "[t]he national recidivism rate for rearrest within three years [is] . . . 65%" for serious criminals in general, 50% for violent criminals, 30% for pedophiles and adolescent child abusers, and 25% for rapists); *The Sex Offender Down the Block*, ST. LOUIS POST-DISPATCH, Aug. 31, 1997, at 2B (citing study by the United States Department of Justice showing that "rapists have one of the lowest rates of recidivism—about one-fifth that of burglars" and research from Johns Hopkins showing an eight percent recidivism rate among pedophiles).

studies . . . often undermines confidence in their results."<sup>273</sup> For example, compiling the results of various sex offender recidivism studies is complicated by the fact that there is no single consistent definition of what constitutes recidivism for sex offenders.<sup>274</sup> A comprehensive review of interpretable sex offender recidivism results concluded that there is "such variability among study results, [that] it is difficult to make any meaningful statement about the number of sex offenders who continue to commit sex offenses"<sup>275</sup> and that "progress in our knowledge about sex offender recidivism will continually elude us until adequate resources of time, money, and research expertise are devoted to this issue."<sup>276</sup>

It is also difficult to assess how sex offender recidivism rates are affected by different treatment methods.<sup>277</sup> The value of different therapeutic practices and their effects on recidivism is uncertain.<sup>278</sup>

273. Lita Furbey et al., *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULL. 3, 4 (1989).

274. *See id.* at 7-8 (discussing the fact that depending on the study, recidivism may be defined as: (1) "reconviction for the same type of offense," (2) "recommission [without conviction] of the same type of offense," (3) "recommission [without conviction] of any sex offense," or (4) recommission, without conviction, of any type of offense).

275. *Id.* at 22.

276. *Id.* at 27.

277. This difficulty is attributable, in part, to the fact that sex offender "treatment is still in its infancy." *See* Lally, *supra* note 256; *see also* Barbara K. Schwartz, *Effective Treatment Techniques for Sex Offenders*, 22 PSYCHIATRIC ANNALS 315 (1992) (stating that until the late 1970s and early 1980s state legislators accepted the philosophy that sex offenders would not benefit from psychiatric treatment). In addition, there is no way to measure successful treatment. All of the existing data is based upon the determination that treatment has failed, following an offender's reconviction, rearrest, or recommission of a criminal offense.

278. *See Hendricks*, 117 S. Ct. at 2083 ("Hendricks' argument assumes that treatment for his condition is available, but that the State has failed (or refused) to provide it. . . . [However], '[t]he record reflects that treatment for sexually violent predators is all but nonexistent.' ") (quoting *In re Hendricks*, 912 P.2d 129, 136 (Kan. 1996)); *Bailey v. Gardebring*, 940 F.2d 1150, 1155 (8th Cir. 1991) (finding no evidence to support the claim that sexual psychopaths are treatable), *cert. denied*, 503 U.S. 952 (1992); *In re Blodgett*, 510 N.W.2d 910, 916 (Minn.) (stating that treatment of sex offenders is often "problematic"), *cert. denied*, 115 S. Ct. 146 (1994); *see also* Furby et al., *supra* note 273, at 27 ("There is as yet no evidence that clinical treatment reduces rates of sex reoffenses in general and no appropriate data for assessing whether it may be differentially effective for different types of offenders.") *But see The Sex Offender Down the Block*, *supra* note 272, at B2 (citing research showing that pedophiles who receive treatment have only a 3% recidivism rate); Brief of the Association for the Treatment of Sexual Abusers, *supra* note 150, at 8 ("There is increasing evidence . . . that state-of-the-art treatment programs developed over the last decade significantly reduce [sex offender] recidivism."); W.L. Marshall & W.D. Pithers, *A Reconsideration of Treatment Outcome with Sex Offenders*, 21 CRIM. JUST. & BEHAV. 10, 10-24 (1994) (arguing that the disappointing results of prior sex offender treatment programs is the result of obsolete and limited treatment programs and that current comprehensive treatment regimes are beginning to show promising results).

Current treatment for pedophilia, for example, includes psychotherapy (seeking to alter behavior through self-understanding), cognitive behavioral therapies, (including therapies designed to create aversion towards pedophilic impulses), and pharmacological treatments (using medication to dampen the sex drive).<sup>279</sup> These treatments, in varying degrees, provide some benefits,<sup>280</sup> however, there is little empirical evidence of the effectiveness of any specific treatment program. There is certainly no evidence to support the assumption—contained in the sexual predator confinement statutes—that sex offenders have unique treatment needs that differ from other offenders.<sup>281</sup> In fact, civil commitment may be anti-therapeutic when applied to individuals who are not mentally ill and, display the degree of autonomy and comprehension necessary to establish criminal responsibility.<sup>282</sup>

Despite the lack of empirical support, Rules 413-415 and the sexual predator confinement statutes are based on the assumption that sex offenders are more likely to be recidivists than other offenders.<sup>283</sup> The recidivism argument was explicitly advanced by the congressional sponsors of Rules 413-415.<sup>284</sup> In the context of the sexual predator confinement statutes, the assumption of higher rates of recidivism was

279. See American Psychiatric Association Brief, *supra* note 137, at \*27-28.

280. See *id.* at \*29 n.26 (citing summary of treatment methods for pedophilia contained in the General Accounting Office Report, *Sex Offender Treatment: Research Results Inconclusive About What Works to Reduce Recidivism* at 20-21 (June 1996)). But see Furby et al., *supra* note 273, at 25 (concluding that treatment is generally ineffective based on two studies, one comparing treated offenders with those who had declined treatment within the same program and a second comparing studies of treated offenders with independent studies of untreated offenders).

281. See Janus, *supra* note 152, at 376 (stating that “the needs sex offenders have for treatment could be met in prison or other settings, and therefore do not justify hospitalization”). But see Brief for the National Mental Health Association, *supra* note 34 (“Mental health facilities are largely unequipped to handle the treatment need of violent sexual predators, and lack the experience necessary to deal with such a population.”).

282. See Janus, *supra* note 192, at 212 (“Civil commitment . . . undermines the fundamental assumption of humanity and free agency. In this sense, it is anti-therapeutic when it is applied to people whose freedom and autonomy are sufficient for responsibility. . . . And, it is anti-therapeutic because its message is contrary to the central theme of rehabilitation, that violent offenders can, and must, take responsibility for their own actions.”); see also Janus, *supra* note 152, at 377 (stating that the assertion that disordered sex offenders lack control “is a generalization that the scientific literature directly contradicts”) (citations omitted).

283. See e.g., *Dealing with Sex Offenders* (National Public Radio broadcast, July 22, 1997), available in 1997 WL 12821159 (discussing the fact that California Governor Pete Wilson proclaimed that “sex offenders have a 90% recidivism rate,” despite the fact that the most recent statistics from The U.S. Department of Justice show that only 8% of rapists will be rearrested for rape); *Attorney Presses Child Molester’s Quest for Anonymity Communities*, L.A. TIMES, Mar. 31, 1997, at A3 (quoting California Assemblywoman Barbara Alby’s statement that sex offense “is a crime that we know has unbelievably high recidivism rates”).

284. See *supra* note 35 and accompanying text.

used to justify the requirement that individuals remain confined until they can affirmatively establish that they are no longer a danger to themselves or others.<sup>285</sup>

There are at least four fundamental flaws inherent to the recidivism justification for Rules 413-415 and the sexual predator confinement statutes. First, as discussed above, there is no empirical evidence that sex offenders have higher recidivism rates than other offenders. In fact, their rates may be lower than the rates of other offenders. Second, such purportedly scientific evidence presented by the prosecutor is extremely difficult for the accused to undermine.<sup>286</sup> Third, once an individual has been deemed by a court to be a sexual predator and found to pose a direct danger to society, it is difficult for this determination to be undone. This difficulty is enhanced by the fact that most sexual predator confinement statutes keep discharge decisions within the control of the same court that initially made the commitment decision.<sup>287</sup> Thus, the confining court and the state's mental health experts have every incentive to avoid the responsibility (and possible liability) that might result from any guarantee of the sexual predator's future safe behavior, while continued confinement of the sexual predator presents no negative consequences to these decision-makers. Fourth, the confinement setting usually does not provide adequate opportunities to observe or evaluate progress in the treatment of the sex offender, simply because the opportunity to commit such crimes is not available. Thus, observed good behavior is considered less predictive of the progress towards elimination of the mental abnormality<sup>288</sup> and can easily be discounted when compared to past violence. For example, since 1975 not one person committed as a sex offender in the state of Minnesota has been released.<sup>289</sup>

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285. See *In re Blodgett*, 510 N.W.2d 910, 916 (Minn.) (Wahl, J., dissenting) (questioning whether a prisoner could ever prove that he was no longer a danger to himself or others if the state has previously established that he has no control over his sexual impulses), *cert. denied*, 115 S. Ct. 146 (1994); Gleb, *supra* note 8, at 216 (Sexual predator confinement statutes "create[ ] a very high risk that people who would not repeat their crimes if free will be held indefinitely under conditions that make it hard for them to show that they are not dangerous.").

286. See Gleb, *supra* note 8, at 234 (discussing the fact that a psychiatric expert for the defense would be unable to offer reliable countervailing predictions of non-dangerousness, but would be limited to critiquing the expertise of the prosecution's expert).

287. See KAN. STAT. ANN. § 59-29a10 (West 1994).

288. See *In re Hofmaster*, 434 N.W.2d 279, 281 (Minn. Ct. App. 1989) (explaining that "good behavior in the artificial environment of a hospital is not conclusive on the question of dangerousness to the public, experts testify the proposed patient remains mentally ill and dangerous").

289. See Janus, *supra* note 192, at 206.

*C. There Is No Reliable Empirical Evidence  
that Sex Offenders Specialize in  
One Type of Crime*

Criminological research shows that most criminal offenders do not specialize in one type of crime.<sup>290</sup> The idea of criminal specialization comes from the desire to attach labels to offenders so that policy decisions can appear to target the specific criminal acts that are at the forefront of public attention. However, labeling an individual as a "sex offender" based solely on a past arrest or conviction for rape or child molestation is not only misleading, in itself,<sup>291</sup> but can result in misguided and ineffective legislative decisions. The empirical evidence shows that few criminals specialize in sex offenses.<sup>292</sup> "[T]he idea that sex offenders specialize results from official focus on the most serious crimes that an offender commits. Perceived specialization ignores criminal and deviant behavior that is inconsistent with the perceived specialty. The belief in specialization, however, can result in legal policies that adversely affect public safety."<sup>293</sup> The assumption that sex offenders specialize presupposes that these individuals are somehow unique and identifiable.<sup>294</sup> However, existing evidence shows instead that individuals who commit sex offenses cannot be identified by their criminal patterns of behavior because, like all other repeat offenders,

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290. See Leonore M. J. Simon, *Do Criminal Offenders Specialize in Crime Types?*, 6 APPLIED & PREVENTIVE PSYCHOL. 35 (1997); see also Larry E. Beutler et al., *Evaluation of "Fixed Propensity" to Commit Sexual Offenses: A Preliminary Report*, 22 CRIM. JUST. & BEHAV. 284, 284-86 (1995) (describing how legal and mental health professionals often mistakenly view criminal offenders as specialists because the data showing a lack of specialization is not well known outside the field of criminology).

291. See Furby et al., *supra* note 273, at 5 ("[A]ny classification scheme based solely on the instant offense could be misleading.").

292. See Laureen Aljazireh, *Historical, Environmental, and Behavioral Correlates of Sexual Offending by Male Adolescents: A Critical Review*, 11 BEHAV. SCI. & L. 423 (1993) (stating that even within a purported class of sex offenders there is no evidence of specialization by type of sexual crime); Mark R. Weinrott & Maureen Saylor, *Self-Report of Crimes Committed by Sex Offenders*, 6 J. INTERPERSONAL VIOLENCE 286, 297 (1991) (stating that sex offenders do not specialize by type of victim, *i.e.*, adult v. child, stranger v. nonstranger).

293. See Simon, *supra* note 7, at 387.

294. See Furby et al., *supra* note 273, at 5 ("[T]here is now rather compelling evidence that most sex offenders suffer from multiple paraphilias. For example, a rapist (based on the instant offense) is fairly likely to have had sexual contact with a minor female during his adult life.") (citation omitted); Simon, *supra* note 7, at 387, 390 n.9 (describing how the standard psychophysiological assessment device for sex offenders, penile plethysmography (which is used to determine which stimuli elicit sexual arousal in male subjects), has questionable validity and reliability).

they are equally likely to engage in repeat acts of nonsexual criminal and delinquent behavior.<sup>295</sup>

In 1997, Dr. Leonore M.J. Simon published the results of an extensive study testing the assumption that sex offenders are specialists.<sup>296</sup> This study compared patterns of criminal specialization against patterns of criminal versatility among three groups of offenders: (1) general violent offenders; (2) rapists; and (3) child molesters.<sup>297</sup> Dr. Simon began by contrasting the criminal behavior of the general violent offenders to the rapists.<sup>298</sup> Analysis of this data revealed that "both types of offenders show substantial recorded versatility of offending. . . . [and] have comparable records for nonviolent crimes such as theft, burglary, and drug offenses."<sup>299</sup> The study found the same degree of versatility among the child molesters.<sup>300</sup> Thus, Dr. Simon found no empirical support for the assumption of sex offense specialization.

The implications of Dr. Simon's study are profound. Based on the correlation of recent and extensive criminological data, Dr. Simon concluded that "[p]redictions of future dangerousness based on past sexual offending are bound to be inaccurate."<sup>301</sup> Because Dr. Simon found no statistical support for the assumption that so-called "sex offenders" are more likely to commit sex crimes than any other type of crime, this empirical evidence severely discredits the final core justification for both Rules 413-415 and the sexual predator confinement statutes—that certain criminals specialize in sex offenses.

Without the assumption of criminal specialization, it makes no sense, in the context of Rules 413-415, to permit prosecutors and civil claimants to admit allegations and evidence of prior sex offenses to prove that the defendant is more likely to have committed the charged crime. Similarly, there is no empirical support for the assumption that the indefinite civil commitment of sexual predators will decrease future sex crime rates. This study shows that "[i]t cannot be predicted that a

295. See Aljazireh, *supra* note 292, at 430 (estimating that 40%-60% of all adolescent sexual offenders have a nonsexual criminal history).

296. See Simon, *supra* note 7, at 393-403 (providing seven tables to depict the results).

297. See *id.* at 393.

298. See *id.* at 395.

299. *Id.*

300. See *id.* at 399. Dr. Simon explains that although her multivariate findings indicate that child molesters are less versatile than other offenders, see *id.* at 400, this is the likely result of: (1) the different data sources available for child molesters; (2) the lack of self-reports for this group; and/or (3) the selective prosecution of this group of offenders in response to the high publicity that surrounds these crimes. See *id.*

301. *Id.* at 402.



given sex offender's next crime will be a sex crime, just as it cannot be predicted that a convicted robber will next commit another robbery."<sup>302</sup>

## V. CONCLUSION

"As soon as men decide that all means are permitted to fight an evil, then their good becomes indistinguishable from the evil that they set out to destroy."<sup>303</sup>

The sexual predator is the true crime vampire. Congress and the Supreme Court attributed demonic characteristics to one type of criminal behavior when they armed prosecutors and civil claimants with the special tools of Rules 413-415 and the sexual predator confinement statutes to battle this perceived fiend. However, when the justifications and assumptions used to support these legal schemes are examined, we may discover that those assigned to protect society are motivated by public hatred and vindictiveness rather than fundamental legal principles of impartiality and reason.

In their rush to quell public fears and satisfy perceived community desires for revenge, legislators and the judiciary have created separate rules of criminal justice applied only to those accused of sex offenses. The recently devised comprehensive program to eradicate the sexual predator uses Rules 413-415 to introduce allegations and evidence of all of the defendant's prior sex offenses against him at trial, and then—after he has been convicted, sentenced, and served his full sentence—permits the use of these same allegations and evidence to confine him indefinitely within the prison system. These two statutes were enacted with little discussion of, or concern for, the fact that they will dramatically increase the probability of prejudice, due process violations, and mistake, for individuals accused of one type of crime. Instead, these enhanced methods of conviction and detention have been justified with scientific-sounding core assumptions<sup>304</sup> that are unsupported by reliable empirical evidence.

Rules 413-415 and the sexual predator confinement statutes erode individual rights by enhancing the government's ability to convict, incarcerate, and indefinitely detain individuals who commit crimes that

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302. *Id.* at 401.

303. CHRISTOPHER DAWSON, *THE JUDGMENT OF THE NATIONS* (1942).

304. *See Janus, supra* note 152, at 378 (describing how unsupported statements purporting to explain sexual violence are "devastating to the claim of legitimacy through science" and the fact that "courts fail to avail themselves of existing science where it would be most informative—in making generalizations about groups of people—calls into question the bona fides of the entire science claim").

are currently viewed as particularly abhorrent. Together these laws create two obvious dangers. The first danger is that as public opinion changes, the path has been cleared for legislators to use these same flawed assumptions to justify enhanced methods of conviction and confinement for additional offenses. This would enable lawmakers and judges to deny certain individuals their constitutional rights and liberties whenever the tide of fear, hatred, and revenge turns to a new criminal behavior.<sup>305</sup>

The second danger arises when legislators and the judiciary are permitted to blur the distinctions between punishment of responsible criminal actors and treatment of the mentally ill. A democratic society has only two legitimate means to deprive an individual of liberty, its police power and its *parens patriae* power. The distinction between these two methods of advancing social goals preserves both the moral force of the criminal law and the unique role of the mental health system.

The mental health component applies only to those who suffer legal mental illness because addressing competent practical reasoners within the mental health component distorts the conventional public morality by misrepresenting the standards of competence and culpability. This distortion denigrates the defendants, misleads the public, and undermines the moral force of the larger institution of social control.<sup>306</sup>

If, as the empirical evidence indicates, there is no legitimate basis for disparate treatment of sex offenders—mental health professionals and psychiatric hospitals should not be converted into wardens and jails.

The problem of sexual violence is real. To protect the safety of the public, sex offenders must be subjected to some form of social control. However, the government must adopt procedures for convicting and confining sex offenders that reflect the fair, impartial, and consistent application of fundamental legal principles. The goal of public safety

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305. See *Prevention Versus Punishment*, *supra* note 4, at 1728 (“[C]ourts must be especially attentive to legislative enactments that ‘use[ ] [sic] public health and safety rhetoric to justify procedures that are, in essence, punishment and detention.’ ”) (quoting *Artway*, 876 F. Supp. 666, 687 (D.N.J. 1995), *aff’d in part and vacated in part*, 81 F.3d 1235 (3d Cir. 1996)); see also Greg Moran, *Fighting Criminal Activity with Civil Law*, SAN DIEGO UNION-TRIB., Dec. 15, 1997, at A1 (discussing the fact that prosecutors are turning to civil methods of law enforcement (*i.e.*, sexual predator confinement laws, injunctions, civil forfeiture) more frequently and how, according to one commentator, these civil tactics “make an end-run around protections built into criminal laws”).

306. Schopp, *supra* note 156, at 181.

can and should be met through the use of the police power, by such efforts as: (1) longer sentences;<sup>307</sup> (2) decreased plea bargains for shorter terms; (3) prosecutors seeking consecutive rather than concurrent prison terms; (4) recidivism statutes used to lengthen terms; (5) parole and probation restrictions to increase oversight on non-incarcerated offenders. The “sexual predator” classification should not be used to justify enhanced methods of conviction or confinement unless the factual basis for this distinction among offenders can be established to a reasonable degree of scientific certainty *and* the state is unable to pursue its interests through normal criminal justice procedures.<sup>308</sup>

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307. See Brief for the National Mental Health Association, *supra* note 34, at \*3 (stating that the Kansas Sexually Violent Predators Act was “an attempt to remedy the effects, beginning in the late 1970s, of lenient sentencing practices for sexually violent offenders”).

308. In fact, the medical evidence shows that the criminal justice system may be just as effective as the mental health system at providing treatment for sex offenders. See Janus, *supra* note 192, at 206 (describing how all forms of sex offender treatment currently employed are equally available and equally effective within the criminal and civil confinement systems); see also *Letters from the People*, ANCHORAGE DAILY NEWS, Oct. 11, 1997, 14D (containing a statement by psychiatrist, Dr. Lee M. Griffin, that “[t]his ruling [*Kansas v. Hendricks*] has led to outcries from psychiatrists . . . who state that the ruling is actually life imprisonment in a state hospital using ‘mental or personality disorder’ as a pretext to fill in the void left by inadequate prison sentences and prison overcrowding”).