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# Once a Rapist? Motivational Evidence and Relevancy in Rape Law

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## ARTICLES

### ONCE A RAPIST? MOTIVATIONAL EVIDENCE AND RELEVANCY IN RAPE LAW

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*Feminist scholars and activists have long sought to reform rape laws and evidence rules in order to increase the number of successful rape prosecutions in the United States. In partial response to these efforts, and in an effort to decrease crime, the 104th Congress amended the Federal Rules of Evidence by adding Rule 413, which makes prior acts of sexual assault by alleged rapists admissible in criminal sexual assault cases. The new Rule 413 was meant to level the legal playing field between rapists and their accusers. Professor Baker argues that the new Rule is misguided because it fails to recognize the different reasons why men rape. Consequently, the Rule is likely to affect poor and minority men and women adversely, to increase the number of men unjustly convicted, and ultimately, to yield fewer rape convictions than its proponents hope. Nevertheless, Professor Baker argues that prior act evidence can be an important means for identifying the motive of an accused rapist and, when properly understood, should be selectively admitted under Rule 404. This Article considers the various motivations behind the different typologies of rape and demonstrates how a more realistic understanding of motive can at once secure rape convictions, refute persistent stereotypes, advance our understanding of rape, and promote the equitable enforcement of the law.*

Rape is many things. It is a goal in and of itself. It is an instrument of torture. It is a means of proving masculinity. It is a means of getting sex. Many men rape. They have all done something very wrong. Most of them have not done something particularly extraordinary.

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An estimated 12.1 million women in America have been raped.<sup>1</sup> Little suggests that the incidence of rape is decreasing.<sup>2</sup> Rape's prevalence forces women to live with a fear of violation and attack that is essentially unknown to men.<sup>3</sup> This fear cripples women's ability to move freely and to live life as autonomous individuals.<sup>4</sup> It forces women to find protection, often from men,<sup>5</sup> and it fundamentally restricts women's liberty.<sup>6</sup> Clearly, therefore, there are powerful reasons for enacting rules that help to decrease the incidence of rape by securing more rape convictions.

In 1994, as part of the Violence Against Women Act (VAWA),<sup>7</sup> the U.S. Congress attempted to do just that by amending the Federal Rules of Evidence to allow the admission into evidence of prior acts of sexual assault in all criminal and civil sexual assault cases.<sup>8</sup> The enunciated purpose of the amendment is to "protect the public from crimes of sexual violence."<sup>9</sup> On its face, this would seem to be a laudatory and noncontroversial goal for feminists and nonfeminists alike.

<sup>1</sup> See CRIME VICTIMS RESEARCH AND TREATMENT CTR., *RAPE IN AMERICA: A REPORT TO THE NATION* 2 (1992) [hereinafter *RAPE IN AMERICA*].

<sup>2</sup> See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, *UNIFORM CRIME REPORTS FOR THE UNITED STATES: 1992*, at 23-24 (1993).

<sup>3</sup> See, e.g., MARGARET T. GORDON & STEPHANIE RIGER, *THE FEMALE FEAR* 8-22 (1989). Male prisoners may experience a comparable, if temporary, fear. See *infra* pp. 609-10.

<sup>4</sup> Adrienne Rich writes:

The undermining of self, of a woman's sense of her right to occupy space and walk freely in the world, is deeply relevant to education. The capacity to think independently, to take intellectual risks, to assert ourselves mentally, is inseparable from our physical way of being in the world, our feelings of personal integrity.

ADRIENNE RICH, *Taking Women Students Seriously*, in *ON LIES, SECRETS, AND SILENCE: SELECTED PROSE 1966-1978*, at 237, 242 (1979).

<sup>5</sup> See Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 540 (1993); Susan Griffin, *Rape: The All-American Crime*, in *FORCIBLE RAPE: THE CRIME, THE VICTIM, AND THE OFFENDER* 47, 54-55 (Duncan Chappell, Robley Geis & Gilbert Geis eds., 1977) [hereinafter *FORCIBLE RAPE*].

<sup>6</sup> Cynthia Grant Bowman writes: "The most fundamental definitions of liberty include the right of an individual to go where she chooses in spaces that are public." Bowman, *supra* note 5, at 520. Bowman quotes Hegel, who wrote: "It is a violation of my natural external freedom, not to be able to go where I please. . . . My personality is wounded by such experiences, because my most immediate identity rests in my body." *Id.* at 520 n.13 (citing Cheryl Benard & Edit Schlaffer, *The Man in the Street: Why He Harasses*, in *FEMINIST FRAMEWORKS: ALTERNATIVE THEORETICAL ACCOUNTS OF THE RELATIONS BETWEEN WOMEN AND MEN* 70, 70 (Alison M. Jagger & Paula S. Rothenberg eds., 2d ed. 1984) (quoting G.W.F. HEGEL, *TEXTE ZUR PHILOSOPHISCHEN PROPAEDEUTIK* (1840))) (internal quotation marks omitted).

<sup>7</sup> Pub. L. No. 103-322, 108 Stat. 1902 (1994). VAWA is a portion of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994), and both of these Acts are codified throughout the U.S. Code.

<sup>8</sup> See VAWA, Pub. L. No. 103-322, § 320, 935, 108 Stat. 1902, 2135-36 (1994) (codified as FED. R. EVID. 413 at 28 U.S.C. app. (1994)).

<sup>9</sup> 140 CONG. REC. S12,990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole); see also *id.* at H8991-92 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) (arguing that the amendment will address the distinctive characteristics of sexual assault cases, which make them difficult to prosecute).

This Article suggests, however, that the amendment cannot be justified in light of what feminist theory teaches us about rape and sex, what social science teaches us about who rapes and why they rape, and what history teaches us about who gets blamed.

After a brief introduction in Part I explaining the new Rule's background and the theory underlying evidentiary treatment of prior acts in general, Part II of this Article demonstrates how the new Rule relies on outmoded and demonstrably false stereotypes of who rapes, what rape is, and why rape might be different from other crimes. The new Rule's assumptions about what motivates rapists crumble quickly under the weight of feminist analysis, current social science evidence, and the failure of the Rule's proponents to explain why rape should be singled out for special evidentiary treatment. Moreover, empirical analysis of the social norms surrounding rape suggests that rules of evidence may be ill-equipped to overcome a normative system that resists punishing rape. Contrary to popular belief, much of the difficulty with securing rape convictions stems not from an evidentiary problem of credibility, but from a normative problem of desert.

The assumptions underlying the new Rule thus debunked, Part III of this Article analyzes the problems with singling rape out for special treatment. To be sure, the lasting harms of a legal system that condones, if not actively perpetuates, a world in which most rape goes unpunished augers strongly for severe measures to secure more rape convictions. Indeed, more convictions may follow with the new Rule, and an increased conviction rate may help to vindicate the harms that are done to some victims, but the costs of the new Rule may not be worth bearing.

The probability that juries will punish men for crimes that have not been proven, the improbability that the class of men punished will significantly expand, and the likelihood that the new evidentiary Rule will aggravate the already racist construction of rape law are equally compelling reasons to be wary of singling rape out for special treatment. The new Rule is likely to focus resources on a relatively small class of rapists and thereby ignore the majority of the men who actually rape. In doing so, the new rule will fail to reflect precisely what feminist scholarship of the past twenty-five years has established: the prevalence of rape in all social classes, among all races, and by all sorts of men. Furthermore, by singling rape out for special treatment, the new Rule fosters the prevailing view that rape is different from other crimes because rapists are "crazy." It is precisely this view of rape as psychopathology that allows the criminal justice system to ignore many rapes that do not fit a psychopathological model.

To break out of this restricted view of rape, we must start exploring the multidimensional aspects of rape and the question why men rape. In particular, we must unpack the term "rapist." What makes a

man rape? Is someone who has raped more of a "rapist" than someone who has killed is a "murderer" or than someone who has lied is a "liar"? Are all rapists alike in an essential way that makes them "rapists"? Although ostensibly addressing motivational issues, neither the new Rule itself nor its proffered rationales analyzes these questions. Part IV of this Article does. It presents different typologies of rape and suggests that the motivational questions regarding rape must be linked to the typology of the rape involved.

All rapes are not alike. They are not alike in the eyes of the men who commit them, and they are not alike in the eyes of the jurors and the public who judge them. The degree to which different kinds of rape adversely affect victims is still an open inquiry,<sup>10</sup> but it is all too obvious that the perpetrators of rape and the public-at-large view rape along a complex spectrum of permissibility. All rapes are, in part, about sex and masculinity and domination. But some rapes are predominantly about sex, some rapes are predominantly about masculinity, and some rapes are predominantly about domination. This Article argues that we cannot adequately address either the evidentiary problems in rape cases or the issues central to rape reform unless we begin to recognize and incorporate the rather obvious insight that not all rapes are the same.

Prior act evidence provides a medium through which we can address both the evidentiary problems in rape trials and the substantive issues of rape reform. Part V demonstrates how. By focusing on the different motivational theories presented in Part IV, courts can incorporate into evidence law the differences among rapes in a manner that both helps to secure rape convictions and helps to overcome the stereotypes and jury bias that continue to plague rape trials. The Federal Rules of Evidence already provide the vehicles necessary for courts to use prior act evidence to show not that all rapists are alike, but why different rapists rape. If used properly, prior act evidence can counter the preexisting stereotypes about rape, diminish the inequitable enforcement of rape law, and help to forge a more honest societal understanding of what rape is.

## I. BACKGROUND

Federal Rule of Evidence 404(b) prohibits the admission into evidence of "other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith."<sup>11</sup> This well-established Rule operates notwithstanding the clear probative value of prior act evidence. Whether something has happened before is usually

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<sup>10</sup> See Mary P. Koss, Thomas E. Dinero & Cynthia A. Seibel, *Stranger and Acquaintance Rape: Are There Differences in the Victim's Experience?*, 12 PSYCHOL. WOMEN Q. 1, 21-22 (1988).

<sup>11</sup> FED. R. EVID. 404(b).

relevant to an inference that it might happen again. Nonetheless, the law adheres to the prior act rule based on a belief that people tend to infer too much from past action; the past may not predict the future to the extent that juries presume that it does.<sup>12</sup> Prior act evidence is also likely to be highly prejudicial.<sup>13</sup> Evidence of the defendant's bad character or malicious prior acts may leave the jury particularly ill-disposed toward the defendant, and therefore unwilling to give him or her the presumption of innocence to which he or she is entitled.<sup>14</sup> If a past act is particularly heinous, the jury may feel the need to avenge the prior act, regardless of whether the case before it is meritorious.<sup>15</sup> Or the alleged past act may be probative, but because of the practical impossibility of fully developing the facts regarding the past act, there may be an insufficient nexus linking the defendant to the past act.<sup>16</sup>

Thus, prior act evidence "is objectionable, not because it has no appreciable probative value, but because it has too much."<sup>17</sup> Accordingly, as a general matter, prosecutors may not offer evidence of prior acts or character to prove that the defendant acted in conformity with those acts or character.<sup>18</sup> Yet Rule 404(b) also includes a list of exceptions to this general ban.<sup>19</sup> Prior acts may be admissible if offered not to show character or propensity, but to show "proof of motive, oppor-

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<sup>12</sup> See David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 MINN. L. REV. 529, 573-74 (1994); Miguel Angel Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1044-58 (1984); Roderick Munday, *Stepping Beyond Bounds of Credibility: The Application of Section 1(f)(ii) of the Criminal Evidence Act of 1898*, 1986 CRIM. L. REV. 511, 513-15. See generally 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5239, at 435-36 (1978) (discussing in detail the rationale behind Rule 404(b)).

<sup>13</sup> See RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 218-19 (2d ed. 1982).

<sup>14</sup> See EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 1:03, at 1-5 (1996).

<sup>15</sup> See MCCORMICK ON EVIDENCE § 190, at 346-47 (John William Strong ed., 4th ed. 1992).

<sup>16</sup> See *id.* (describing the need to consider whether proof of the prior act is convincing).

<sup>17</sup> 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 58.2, at 1212 (Peter Tillers rev., 1983).

<sup>18</sup> Recent criminology work casts some doubt on the propriety of excluding character evidence under Rule 404. Gottfredson and Hirschi argue that criminal motivation is primarily linked to an absence of self-control. See MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME 85-91 (1990). They contend that one's likelihood to commit a criminal act is much less a function of what the act is or why one might want to do that act than it is a function of one's lack of appreciation for the long-term consequences of doing that act. See *id.* These authors maintain that categorizing criminals by the crimes that they commit, as opposed to their general inclination to commit crimes, is misguided. See *id.* at 42-44, 273-74. This hypothesis directly challenges much of the theory underlying the general ban on the admission of prior acts. In essence, Gottfredson and Hirschi suggest that criminals commit crimes precisely because they have a propensity to ignore the long-term consequences of their acts. Still, it is possible that, even if general character is the best predictor of criminal behavior, the prejudicial effects of prior act evidence in individual criminal cases may outweigh its probative value.

<sup>19</sup> See FED. R. EVID. 404(b).

tunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."<sup>20</sup>

VAWA amended the Federal Rules of Evidence by adding Rule 413, which revokes the prior act rule for criminal sexual assault offenses by creating what is, in essence, a crime-specific exception for sexual assault.<sup>21</sup> Representative Susan Molinari, the House sponsor of the legislation, provided three reasons why the exception to the prior acts rule was necessary in the sexual assault context: first, the need to detect a *propensity* to commit sexual assault; second, the *improbability* that a rape defendant would be mistakenly accused; and third, the importance of additional evidence given the difficulty with *credibility* determinations in rape cases.<sup>22</sup> Senator Dole, the Senate sponsor of the amendment, gave almost identical reasons.<sup>23</sup> The legislative debates reveal little challenge to the Molinari/Dole reasoning.<sup>24</sup>

<sup>20</sup> *Id.*

<sup>21</sup> See Pub. L. No. 103-322, § 320,935, 108 Stat. 1902, 2135-36 (1994) (codified as FED. R. EVID. 413 at 28 U.S.C. app. (1994)). The amendment also added Rules 414 and 415, which revoke the prior act rule for child sexual abuse and civil sexual assault cases, respectively. See *id.*, 108 Stat. at 2136-37 (codified as FED. R. EVID. 414, 415 at 28 U.S.C. app. (1994)). The child abuse and civil rape trial provisions are outside the scope of this Article. The full text of Rule 413 is: Rule 413: Evidence of Similar Crimes in Sexual Assault Cases

- (a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.
- (b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
- (c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
- (d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved —
  - (1) any conduct proscribed by chapter 109A of title 18, United States Code;
  - (2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
  - (3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;
  - (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
  - (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

FED. R. EVID. 413.

<sup>22</sup> See 140 CONG. REC. H8991-92 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).

<sup>23</sup> See *id.* at S12,990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole).

<sup>24</sup> See *id.* at S12,550-52 (daily ed. Aug. 25, 1994) (statement of Sen. Dole); *id.* at H5437-40 (daily ed. June 29, 1994); *id.* at H2415-49 (daily ed. Apr. 19, 1994); sources cited *supra* notes 22, 23. Both Representative Molinari and Senator Dole drew attention to the work of David J. Karp, a Senior Counsel at the Office of Policy Development in the United States Department of Justice during the Bush Administration. See 140 CONG. REC. S12,990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole); *id.* at H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari). Karp had given a speech to the Evidence Section of the Association of American Law Schools in which he

After passage of VAWA, Congress forwarded the new amendment to the United States Judicial Conference for comment.<sup>25</sup> In February of 1995, 150 days after passage of the VAWA, the Judicial Conference Committee returned its recommendation,<sup>26</sup> strongly advising against adoption of the new Rule.<sup>27</sup> The Judicial Conference Committee, apparently unpersuaded by Congress's sparse justification for the new Rule, did not elaborate on why it found the enunciated justifications insufficient. Instead, the Committee emphasized that those prior acts that should be admitted into evidence may be admitted under the existing list of exceptions in Rule 404(b).<sup>28</sup> Again, the Committee did not elaborate. Because Congress did not act on the Committee's recommendation, the new Rule 413 became law in August of 1995.<sup>29</sup> Thus, the law now singles out sexual assault as the only crime to which the general prior act rule does not apply.<sup>30</sup>

## II. RAPE, RULE 413, AND THE RULE 413 RATIONALE

### A. *Distinctions Among Rapes*

To understand why Rule 413 is misguided, one must take heed of what we already know about rape. Because much of what we know about rape comes from narrative, I offer eight short accounts of rape. Most of these stories are not new; they have been circulating through the legal scholarship on rape for several years. Some of the stories are

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presented the Bush Administration's justification for the amendment. Congresswoman Molinari explicitly incorporated Karp's speech into the legislative history, *see id.* at H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari), and Karp's remarks were subsequently published, *see* David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15, 19-26 (1994); *see also* Dale A. Nance, *Foreword: Do We Really Want to Know the Defendant?*, 70 CHI.-KENT L. REV. 3, 8-14 (1994) (summarizing the new Rule and identifying in broad terms the difficulties inherent in admitting prior act evidence). It is worth noting, however, that both the National Organization for Women Legal Defense Fund and the American Civil Liberties Union opposed the new Rule because of the extraordinary liberties that it takes with previously established defendant rights. *See* 140 CONG. REC. H5439 (daily ed. June 29, 1994) (statement of Rep. Schumer).

<sup>25</sup> *See* § 320,935, 108 Stat. at 2137.

<sup>26</sup> *See* JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (1995), *reprinted in* 159 F.R.D. 51, 51-54 (1995).

<sup>27</sup> The Committee's vote was unanimous except for the one Justice Department member. *See id.* at 53.

<sup>28</sup> *See id.* at 52-53.

<sup>29</sup> *See* § 320,935, 108 Stat. at 2137.

<sup>30</sup> As a federal rule of evidence, Rule 413 applies only to rape prosecutions in federal court. Federal rape prosecutions represent a small percentage of the rape prosecutions brought nationwide, and as a result, Rule 413's direct effect on rape prosecutions is limited. The impact of Rule 413 is likely to be seen well beyond the relatively few federal rape prosecutions, however. Indeed, the chief Senate sponsor of the amendment stated that "it's possible — perhaps even likely — that the States may follow suit and amend their own rules of evidence [with regard to prior acts of sexual assault] as well." 140 CONG. REC. S10,276 (daily ed. Aug. 2, 1994) (statement of Sen. Dole).



here because they are familiar, so that we may analyze what the rules should be in those cases that we already know to be rape. All of the stories are here because they have helped us to feel, and therefore to know, the pervasiveness and destructiveness of rape.<sup>31</sup> They have validated unrecognized pain and given name to crimes that had no definition.<sup>32</sup> They have helped us to understand how the law's abstraction of rape has often ignored the reality of women's experience.<sup>33</sup> These stories are our source for what rape is, and they are our starting point for figuring out what to do about it.

### *Stranger*

On a May evening in Boston, a man held an ice pick to the throat of a woman stopped in her car and said: "Push over, shut up or I'll kill you." She did what he said and when he was finished, she fled from her car and he drove away.<sup>34</sup>

### *My Lai*

In March of 1968, "[t]he systematic shooting of old men, women and children at My Lai began at breakfast time. By 10:30 A.M. most of the wanton destruction of unarmed human beings . . . had already been accomplished . . . . It was at this time that enlisted men . . . witnessed their first attempted rape of the day." Several days later, a helicopter pilot looked down on My Lai from the air. He saw a body in the field below. "It was a woman," he said. "She was spread-eagled, as if on display. She had an 11th Brigade patch between her legs — as if it were some type of display, some badge of honor."<sup>35</sup>

### *New Bedford*

In 1983, a woman went to Big Dan's Tavern in New Bedford, Massachusetts, to buy cigarettes and to have a drink. She sat at the bar. After a verbal exchange between the woman and a man named Daniel Silva, who had been playing pool, Silva and a partner picked the woman up and carried her across the room as she screamed and sobbed. More men joined in the attack. Two men pulled down her pants, while another two men held her down. There were nine or ten men in the bar that night. It is not clear how many of them raped

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<sup>31</sup> See SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 11-15 (1975); DIANA E.H. RUSSELL, *THE POLITICS OF RAPE: THE VICTIM'S PERSPECTIVE* 24 (1974).

<sup>32</sup> See ROBIN WARSHAW, *I NEVER CALLED IT RAPE* 11-12 (1988).

<sup>33</sup> See SUSAN ESTRICH, *REAL RAPE* 1-7 (1987); Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1033-34 (1991); Lynne N. Henderson, *What Makes Rape a Crime?*, 3 BERKELEY WOMEN'S L.J. 193, 220-24 (1988) (reviewing ESTRICH, *supra*).

<sup>34</sup> This is Professor Susan Estrich's narrative of her own rape, which she recounts in ESTRICH, cited above in note 33, at 1.

<sup>35</sup> Brownmiller describes this incident in BROWNMILLER, cited above in note 31, at 103-05.

her. Those who were not raping her stood by and cheered. The rapes lasted more than two hours.<sup>36</sup>

### *St. John's University*

In 1989, a St. John's University student, "Sandra," accepted a ride home from a rifle-club teammate and fellow student, "Mike," who lived in a house with a group of other men. Sandra and Mike stopped at Mike's house because he said he needed money for gas; he invited Sandra inside to meet his housemates. Once inside, the men offered Sandra a drink. She said that drinking made her sick, but they insisted. She complied with their requests that she drink. At one point, Mike held the cup to her lips and forced her to drink. Sandra soon felt very ill and began to pass out. Mike took off her shirt and bra and began to kiss her. She then passed out completely. She awoke to find Mike's penis in her mouth. When she tried to remove it, he put it back in. She was too intoxicated to get up or move. She continued to drift in and out of consciousness. Other men in the household sodomized her and banged their penises against her head. She awoke to feel the men ejaculating on her chest.<sup>37</sup>

### *The Train*

"Vanessa was thirteen years old and very naive. She thought she had gone to [an older male friend's house] just to talk with somebody she had a crush on. A bunch of the fellas hid in closets and under beds. When she stepped inside and sat down, they sprang from their hiding places and blocked the door so that she couldn't leave. When I got there, two or three dudes were in the back room, trying to persuade her to give it up. . . . Some had never even had sex before, yet they were trying to act like they knew what to do. I fronted, too. I acted like I was eager to get on Vanessa, because that's how everybody else was acting. . . . She looked so sad that I started to feel sorry for her. Something in me wanted to reach out and do what I knew was right . . . . But I couldn't do that. It was too late. This was our first train together as a group. All the fellas were there and everybody was anxious to show everybody else how cool and worldly he was. . . . We weren't aware of what it symbolized at the time, but that train marked our real coming together as a gang."<sup>38</sup>

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<sup>36</sup> Two sets of defendants were tried and convicted for this incident. See *Commonwealth v. Cordeiro*, 519 N.E.2d 1328, 1329 (Mass. 1988); *Commonwealth v. Vieira*, 519 N.E.2d 1320, 1321 (Mass. 1988). For an extensive discussion of these crimes and the community's reaction, see Lynn S. Chancer, *New Bedford, Massachusetts, March 6, 1983 – March 22, 1984: The "Before and After" of a Group Rape*, 1 GENDER & SOC'Y 239, 244–45 (1987).

<sup>37</sup> This narrative is recounted by Karen M. Kramer in *Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*, 47 STAN. L. REV. 115, 136–38 (1994).

<sup>38</sup> This narrative comes from NATHAN MCCALL, *MAKES ME WANNA HOLLER* 43–47 (1994).

*Spur Posse*

In the spring of 1993, a group of teenage boys in Southern California devised a game of sorts in which each boy was afforded a point every time that he achieved orgasm with a girl. The boys got points whether the girls were dates who consented and/or enjoyed the activity or "[w]hores you just nut and you leave." The typical act involved "just throw[ing] a couple of pumps, and you're done." Most of the girls involved were young teenagers between the ages of ten and sixteen.<sup>39</sup>

*Thomas*

Anne, a seventeen-year-old freshman at Stanford who had been at college only a few days, stopped by Thomas's room because she heard familiar music. Thomas was a twenty-three year-old varsity athlete. Thomas offered Anne a beer and some peppermint schnapps. She drank them. During a two-hour period, she drank eight glasses of schnapps. She began to feel very sleepy. She lay down. She and Thomas began to kiss. He undressed her. She felt intimidated by Thomas but did not initially ask him to stop. When she became aware that he wanted to "go[ ] beyond holding and kissing," she told him to stop. "I can't do this," she said, "I have a boyfriend." "[H]e doesn't have to know," Thomas said. "I'm a virgin," Anne protested. "No one has to know, your family doesn't have to find out, this can be between you and me. If you want it, it's O.K. I won't hurt you." Thomas proceeded to insert his erect penis into her vagina. Anne felt a sharp pain and said, "Ow, stop." Thomas stopped temporarily. After a few minutes of more kissing and fondling, he inserted his penis again. Again, she said, "Ow, stop." He stopped. Lying there afterwards, Thomas said, "If you don't want it in you, will you at least kiss it?"<sup>40</sup>

*John*

"We got home . . . . He'd left something in my refrigerator, so of course he had to come in . . . . I was saying something innocuous . . . and the next thing I know, I've been struck, and I've hit the floor . . . . And then he's on top of me, . . . and he's saying, 'I don't want

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<sup>39</sup> This story is told by Jennifer Allen in *Boys: Hanging with the Spur Posse*, ROLLING STONE, July 8-22, 1993, at 54, 55, 63, 128. For a discussion of the Los Angeles County District Attorney's Office decision to drop most of the charges against the Spur Posse members, see Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 15-18 (1994).

<sup>40</sup> The case is *State v. Thomas*, No. B9198729 (Palo Alto Mun. Ct. Nov. 13, 1991). The description is taken from a supplemental report prepared by a university police detective. See TIM FRECCERI, STANFORD DEP'T OF PUB. SAFETY, SUPPLEMENTAL REPORT 6-12 (1991); see also Kramer, *supra* note 37, at 141-42 (discussing the findings of the detective).

to hurt you. I don't want to hurt you. Don't scream. Relax and I won't hurt you.' . . . I had the feeling that I could get seriously hurt if I screamed. . . . When it was all over, he just sort of lay there, and then did the classic thing of apologizing. 'I've never done this before. Forgive me.'"<sup>41</sup>

In the past twenty years, feminists and legal scholars have made tremendous strides in recognizing the similarities between these narrative accounts.<sup>42</sup> To the women involved, these acts are rape. They are all horrific violations of women's physical and emotional integrity. They all represent ways in which men maintain power advantages over women by forcing them to live with a ubiquitous fear of rape.<sup>43</sup> The acts in these stories could all be considered felonies or misdemeanors under most state laws.<sup>44</sup> For people who are concerned about stopping rape and freeing women from the severe restrictions that the fear of rape imposes, recognizing the common criminality of these acts is indisputable progress. For purposes of criminal law, evidence law, and effective future rape reform, however, one cannot ignore how these rapes are different.

For instance, should evidence that a soldier raped on a tour of Vietnam be admissible in a subsequent date rape trial?<sup>45</sup> Should the

<sup>41</sup> Helen Rawson describes her rape in RUSSELL, cited above in note 31, at 89-90.

<sup>42</sup> With the exception of Nathan McCall's Train, *see supra* p. 571, all of the above accounts were either prosecuted as rape or were presented by their storytellers as incidents in which rape should be an appropriate charge because the acts were nonconsensual. The perpetrators were prosecuted in the New Bedford case, *see supra* note 36, the St. John's University case, *see* Kramer, *supra* note 37, at 137-40, and the Thomas case, *see supra* note 40. The man who raped Susan Estrich was never apprehended. *See* ESTRICH, *supra* note 33, at 3. Three of the soldiers at My Lai were formally charged with rape, but the charges were subsequently dropped. *See* BROWNMILLER, *supra* note 31, at 105. The Los Angeles County District Attorney's Office dropped all but one of the charges in the Spur Posse incident because of a policy "not to file criminal charges where there is consensual sex between teenagers." Oberman, *supra* note 39, at 16 (quoting Joan Didion, *Trouble in Lakewood*, NEW YORKER, July 26, 1993, at 46, 54) (internal quotation marks omitted). John's victim never pressed charges. *See* RUSSELL, *supra* note 31, at 90. For more developed discussions of the problems with defining consent, rape, and threats of force, *see* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 81-92 (1987), and Susan Estrich, *Palm Beach Stories*, 11 LAW & PHIL. 5 *passim* (1992). Compare Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1788-92 (1992) (grading the moral propriety of different kinds of pressures to have sex), and Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35, 45-65 (1992) (discussing distinctions between violent rape and inappropriate, but less egregious, invasions of sexual autonomy), with Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1448-49, 1453-59 (1993) (criticizing the notion that any kind of pressured sex might be deemed appropriate, particularly in a world in which the consequences for women who resist pressure can be grave).

<sup>43</sup> *See* SUSAN GRIFFIN, RAPE: THE POLITICS OF CONSCIOUSNESS 90-91 (1979).

<sup>44</sup> *See infra* notes 53-56 and accompanying text.

<sup>45</sup> Consider the comments of one of the members of Charlie Company, the unit responsible for My Lai. When asked why few informants talked about the rapes (as opposed to the other atroci-

"train" come into evidence in a trial not involving group activity? Should Spur Posse-type evidence come into a subsequent trial involving a rape with significant extrinsic violence?<sup>46</sup> Is Thomas's prior act of rape sufficiently comparable to a gang rape to be admissible in a subsequent gang rape trial? Without even acknowledging that there might be reasons to make distinctions, Congress has answered these questions affirmatively. Thus, Rule 413 fails to make any distinction between different kinds of rape. Failure to recognize such distinctions leads to a monolithic construction of rape that focuses on the small percentage of men who commit stereotypical rapes and stifles further attempts to understand why sexualized violence exists. If we are to secure rape convictions that are true and that touch every level of the population, we must recognize distinctions in motivation that Congress did not.

Under Rule 413, evidence of any "crime," defined as such under either federal or state law, is admissible in a subsequent civil or criminal sexual assault trial,<sup>47</sup> as long as the crime involved conduct forbidden by "chapter 109A of title 18, United States Code"<sup>48</sup>; nonconsensual genital or anal contact with the defendant or victim;<sup>49</sup> the derivation of "sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person"<sup>50</sup>; or an attempt or conspiracy to engage in any of the specified conduct above.<sup>51</sup> The admissibility of the evidence depends not on the character of the act, but on whether the act was illegal under state or federal law in the jurisdiction in which the prior act took place.<sup>52</sup> Differences among sexual as-

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ties committed by the unit), a squad leader noted: "That's an everyday affair. You can nail just about everybody on that — at least once. The guys are human, man." BROWN MILLER, *supra* note 31, at 104-05 (quoting squad leader John Smail) (internal quotation marks omitted).

<sup>46</sup> One Spur Posse parent, who defended the boys' conduct, said: "Nothing my boy did was anything that any red-blooded American boy wouldn't do." Michelle Stacey, *Bad Boys*, SEVENTEEN, Nov. 1993, at 124, 126 (internal quotation marks omitted). Was the man who raped Susan Estrich simply a "red-blooded American boy"?

<sup>47</sup> Just what "admissible" means is subject to some debate. See, e.g., Nance, *supra* note 24, at 9-10. The rule may require blanket admission of prior sexual assaults, or it may just allow judges to admit this evidence after doing the traditional Rule 403 balancing test for prejudice, see FED. R. EVID. 403.

<sup>48</sup> FED. R. EVID. 413(d)(1). Chapter 109A, entitled "Sexual Abuse," proscribes "[a]ggravated sexual assault," "[s]exual abuse," "[s]exual abuse of a minor or ward," and "[a]busive sexual contact." 18 U.S.C. §§ 2241-2244 (1994).

<sup>49</sup> See FED. R. EVID. 413(d)(2)-(3).

<sup>50</sup> FED. R. EVID. 413(d)(4).

<sup>51</sup> See FED. R. EVID. 413(d)(5).

<sup>52</sup> The act does not have to have been the subject of successful prosecution to be admissible. See 140 CONG. REC. H5438-39 (daily ed. June 29, 1994) (statements of Reps. Hughes and Schumer). Thus, a judge must determine whether the prior act happened, and if it happened, whether it was illegal. Judges determine whether the prior act was committed by the defendant by using a variety of standards of proof, all of which are less than the "beyond a reasonable doubt" standard. See IMWINKELRIED, *supra* note 14, § 2:08, at 2-20 to -23; MCCORMICK ON EVIDENCE, *supra* note 15, § 190, at 346.

sault statutes are overwhelming, however. State statutes differ substantially on what forms of sexual assault they proscribe. Marital rape is still legal in one state,<sup>53</sup> and rape by one's husband, former husband, or former cohabitant is almost always considered a lesser offense than assault on a stranger.<sup>54</sup> States differ on how to classify various types of rape and in what kind of force, threat, state of mind, consent or lack thereof is necessary for the acts to be considered criminal.<sup>55</sup> The variations on when and how proscriptions against statutory rape operate are baffling.<sup>56</sup> What is illegal in California is not illegal

<sup>53</sup> In Oklahoma, rape is defined as "intercourse involving vaginal or anal penetration accomplished with a male or female who is not the spouse of the perpetrator . . . under any of . . . [a variety of different] . . . circumstances." OKLA. STAT. tit. 21, § 1111 (Supp. 1995).

<sup>54</sup> See Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 46, 48 (1990).

<sup>55</sup> For both sexual assault and aggravated sexual assault, Texas requires that a defendant "intentionally or knowingly . . . cause[ ] [sexual conduct] . . . without [the victim's] consent." TEX. PENAL CODE ANN. §§ 22.011, .021 (West 1993). Force is an element of "aggravated sexual assault," but not of "sexual assault." *Id.* In Pennsylvania, intercourse without consent is "indecent assault," but is not considered "rape" unless certain other conditions are met. 18 PA. CONS. STAT. ANN. §§ 3121, 3126 (West Supp. 1996). The Pennsylvania statute does not define "consent." Neither Pennsylvania nor Texas define "force." California, on the other hand, has eliminated the "without consent" requirement and defines "duress" (the presence of which is sufficient to make intercourse "rape") to be:

[A] direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress.

CAL. PENAL CODE § 261(7)(b) (West 1988 & Supp. 1996). Thus, rape in California is not necessarily rape in Texas or Pennsylvania, and vice versa.

<sup>56</sup> In Michigan, sexual penetration with a child under 13 years of age is first degree criminal sexual conduct. See MICH. COMP. LAWS ANN. § 750.520b (West 1991). Any sexual contact with a child under 13 years old is second degree criminal sexual conduct. See *id.* § 750.520c. Any sexual contact with a 13 to 16 year old is third degree criminal sexual conduct. See *id.* § 750.520d. Any sexual contact between a 13 to 16 year old and someone who is five years his or her senior is fourth degree criminal sexual conduct. See *id.* § 750.520e. In Illinois, an accused under 17 years of age commits aggravated sexual assault if he or she commits an act of sexual penetration with a child under nine years of age, or if he or she commits an act of sexual penetration with a child between the ages of nine and 12 and the accused used force or threat of force to commit the act. See 720 ILL. COMP. STAT. 5/12-14 (West Supp. 1995). In New York, if the accused is 18 years old or more and engages in sexual intercourse with someone to whom he or she is not married and who is under 14 years old, he or she is charged with rape in the second degree. If the accused is 21 years old or older, it is third degree rape to engage in sexual intercourse with someone to whom the actor is not married and who is less than 17 years old. It is first degree rape to engage in intercourse with a female under the age of 11 years. See N.Y. PENAL LAW §§ 130.25-35 (McKinney 1987). Thus, in New York and Illinois, a 16 year old can have intercourse with a 12 year old with impunity, but that act would be second degree criminal sexual conduct in Michigan. One year later, that same act of intercourse could be prosecuted as an act of sexual penetration in Illinois, but would not be actionable in Michigan or New York. If the older actor has a birthday first, the act of intercourse that had been legal for two years in New York would become rape in the second degree. These differences are significant. Because of the average age of both rapists and rape victims, see *infra* notes 205-208 and accompanying text, statutory rape laws cannot be dismissed as a small part of the problem.

in Texas.<sup>57</sup> Individual state interpretations of critical terms, like force and consent, vary widely, and the defendant's state of mind can be, but is not always, critical.<sup>58</sup>

All of the narratives above may depict severe violations of women's autonomy, personhood, and physical and emotional integrity, and they all include a sexual component, but that does not make them all the same thing. The state statutes recognize that there are many different kinds of rape, involving very different kinds of force, manipulation, coercion, and degrees of consent. If there was consensus that all of these rapes were essentially the same act, we would not have the myriad of definitions that now fill the statute books. If there is no consensus that all of these rapes are essentially the same act, it is not at all clear that the commission of one kind of sexual assault is probative of a likelihood to commit another kind of sexual assault. By failing to make distinctions among rapes, Rule 413 curiously ignores the multidimensionality of most rape statutes.

### B. *A Large Class of Normal Human Beings*

The failure of Rule 413's proponents to provide any sound justification for singling rape out from other crimes also seriously compromises the Rule's validity. The first argument that was proffered in the legislative history suggests that, because rapists constitute a "small class of depraved criminals,"<sup>59</sup> they can be distinguished. As explained below, however, the last twenty-five years of research clearly demonstrate that the class of rapists is neither small nor particularly likely to be depraved. In a 1988 nationwide survey of more than 6100 college students, one in twelve college men admitted to committing rape.<sup>60</sup> Another study found forty-three percent of college males reporting that they had engaged in coercive sex.<sup>61</sup> The coercion ranged from ignoring women's protests to using physical force.<sup>62</sup> Fifteen percent of this

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<sup>57</sup> See *supra* note 55.

<sup>58</sup> See *infra* note 320 and accompanying text.

<sup>59</sup> Karp, *supra* note 24, at 24.

<sup>60</sup> See Mary P. Koss, *Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education*, in 2 RAPE AND SEXUAL ASSAULT 1, 11 (Ann Wolbert Burgess ed., 1988).

<sup>61</sup> See Karen R. Rapaport & C. Dale Posey, *Sexually Coercive College Males*, in ACQUAINTANCE RAPE: THE HIDDEN CRIME 217, 219-20 (Andrea Parrot & Laurie Bechhofer eds., 1991) [hereinafter ACQUAINTANCE RAPE]. Although this study relied on a self-report method, it was based in part on studies of adjudicated rapists. Other studies have found lower, but nonetheless startling percentages of men who admit to engaging in coercive sex. See Eugene J. Kamin, *Selected Dyadic Aspects of Male Sex Aggression*, 5 J. SEX. RES. 12, 27 (1969) (finding that 25% of college men reported involvement in sexually coercive behavior since they entered college); Mary P. Koss & Cheryl J. Oros, *Sexual Experiences Survey: A Research Instrument Investigating Sexual Aggression and Victimization*, 50 J. CONSULTING & CLINICAL PSYCH. 455, 455-57 (1982) (finding that 23% of men admitted to engaging in coercive sex).

<sup>62</sup> See Rapaport & Posey, *supra* note 61, at 219-20.

group acknowledged committing acquaintance rape; eleven percent admitted using physical restraint.<sup>63</sup> Twenty-three percent of a random sample of 1846 college-age men responded "yes" to the question: "Have you ever been in a situation where you became so sexually aroused that you could not stop yourself even though the woman didn't want to?"<sup>64</sup> These men may not all have been committing acts that resemble the acts of the soldiers at My Lai or the stranger with an ice pick, but they were all committing rape.<sup>65</sup> "Small" simply does not describe the size of the rapist class.

Numerous studies have also found that men who rape are "normal" to the extent that psychologists fail to find evidence of abnormality.<sup>66</sup> Male levels of sexual aggression do not correlate with elevated scores on the Psychopathic Deviate scale.<sup>67</sup> One well-cited study found that thirty-five percent of college men indicated a likelihood to rape if they were sure that they could get away with it.<sup>68</sup> Psychologists working with rapists in prison report that the incident of mental illness among rapists varies from only two to twenty percent.<sup>69</sup> Researchers have consistently failed to find significant psychological differences between the rapist and nonrapist populations.<sup>70</sup> There is simply no evidence, save the rape itself, suggesting that all or even most rapists are objectively depraved.

Nonetheless, a tendency to rape can be linked to objective variables. Macrosociological research on rape strongly suggests that the prevalence of rape is positively correlated with a variety of social phenomena, including the acceptance of gender inequality, the prevalence of pornography, and the degree of social disorganization in a commu-

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<sup>63</sup> See *id.* at 220.

<sup>64</sup> Koss & Oros, *supra* note 61, at 455-57.

<sup>65</sup> "Rape" is a notoriously difficult term to define. The generic term "rape" is used in this Article to mean, at a minimum, behavior that is clearly admissible under Rule 413, which is "contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person . . . [or] contact, without consent, between the genitals or anus of the defendant and any part of another person's body," FED. R. EVID. 413(d)(2), (3).

<sup>66</sup> See James V.P. Check & Neil Malamuth, *An Empirical Assessment of Some Feminist Hypotheses About Rape*, 8 INT'L J. WOMEN'S STUD. 414, 415 (1985).

<sup>67</sup> See *id.* The Psychopathic Deviate scale of the Minnesota Multiphasic Personality Inventory measures the score response correlation between interviewed subjects and people with known psychoses. See *id.*

<sup>68</sup> See *id.* at 416.

<sup>69</sup> See Lucy W. Taylor, *The Role of Offender Profiling in Classifying Rapists: Implications for Counselling*, 6 COUNSELLING PSYCHOL. Q. 325, 334 (1993). Men convicted of rape are probably the most likely of all rapists to have some sort of psychopathology, because these are the men who have raped enough times in ways that are sufficiently egregious to be convicted.

<sup>70</sup> See, e.g., Paul Schewe & William O'Donohue, *Rape Prevention: Methodological Problems and New Directions*, 13 CLINICAL PSYCHIATRY REV. 667, 668-72 (1993); Taylor, *supra* note 69, at 334.



nity.<sup>71</sup> The self-reported likelihood to rape is also strongly related "to acceptance of rape myths, acceptance of violence against women, and sex role stereotyping."<sup>72</sup> States with a high incidence of rape have a rate that is five to ten times greater than states with a low incidence of rape, thus suggesting that the prevalence of rape is linked to community norms.<sup>73</sup> What this suggests, in contradistinction to the legislative assumption and in support of feminist theory on the subject,<sup>74</sup> is that rape is culturally dictated, not culturally deviant. Given the prevalence of the social norms that encourage rape, one can hardly define the class of men who hold these norms as abnormal.

### C. Propensity

Advocates of Rule 413 also unabashedly and without proof suggest that rapists are more likely than other criminals to repeat their acts.<sup>75</sup> The evidence that we have is to the contrary. A 1989 Bureau of Justice Statistics recidivism study found that only 7.7% of released rapists were rearrested for rape.<sup>76</sup> In contrast, 33.5% of released larcenists were rearrested for larceny; 31.9% of released burglars were rearrested for burglary; and 24.8% of drug offenders were rearrested for drug offenses.<sup>77</sup> Only homicide had a lower recidivism rate than rape.<sup>78</sup> It is true that released rapists are more likely than other released prisoners to be rearrested for rape,<sup>79</sup> but that rapists are more likely than

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<sup>71</sup> See LARRY BARON & MURRAY A. STRAUS, *FOUR THEORIES OF RAPE IN AMERICAN SOCIETY: A STATE-LEVEL ANALYSIS* 185 (1989). Social disorganization theory posits that certain disruptive community influences, such as immigration, cultural heterogeneity, and technological change, damage the integrity of communities, which in turn leads to various forms of antisocial individual behavior. See *id.* at 10.

<sup>72</sup> Check & Malamuth, *supra* note 66, at 415.

<sup>73</sup> From 1980 to 1982, the rape rate in Alaska was 83.3 per 100,000, whereas in North Dakota, it was 9.3 per 100,000. See BARON & STRAUS, *supra* note 71, at 52. The studies also showed that the rape rate stayed consistent across urban and rural areas within states: states with high rape rates in their urban areas also had high rape rates in their rural areas. See *id.* at 56.

<sup>74</sup> See generally BROWNMILLER, *supra* note 31, at 11-15 (hypothesizing about the earliest cultural roots of rape); MACKINNON, *supra* note 42, at 85-92 (arguing, inter alia, that the crime of rape is defined according to what men think violates women, and that women continue not to report rape because the legal system does not perceive rape from their point of view). MacKinnon also states:

If sexuality is central to women's definition and forced sex is central to sexuality, rape is indigenous, not exceptional, to women's social condition. In feminist analysis, a rape is not an isolated event or moral transgression or individual interchange gone wrong, but an act of terrorism and torture within a systemic context of group subjection . . .

CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 171-83 (1989).

<sup>75</sup> See 140 CONG. REC. S12,990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole); Karp, *supra* note 24, at 20.

<sup>76</sup> See ALLEN J. BECK, U.S. DEP'T OF JUSTICE, *RECIDIVISM OF PRISONERS RELEASED IN 1983* (1989).

<sup>77</sup> See *id.*

<sup>78</sup> See *id.*

<sup>79</sup> See *id.*

others to rape again does not distinguish rapists from other criminals.<sup>80</sup> Larcenists are twenty-five percent more likely to be rearrested for larceny than rapists are to be rearrested for rape.<sup>81</sup> Arguing from the statistics, a crime-based prior act exception is better suited to larcenists and drug offenders than to rapists.<sup>82</sup>

Admittedly, there are a number of reasons to believe that the recidivism rate for rape is higher than the Bureau of Justice Statistics suggests. Many women choose not to report that they have been raped even if they acknowledge that they were raped.<sup>83</sup> Other women do not even consider illegal and are therefore highly unlikely to report acts that clearly qualify as sexual assault.<sup>84</sup> Studies show that rapists in jail have usually raped two or three times before getting caught.<sup>85</sup>

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<sup>80</sup> Most criminals are generalists, however. See *id.* Someone who has been arrested for larceny is more likely to be a rapist than someone who has never been arrested for larceny or rape. The arrest statistics prove that criminals are recidivistic, but they show no reason to distinguish rapists from other criminals. See GOTTFREDSON & HIRSCHI, *supra* note 18, at 36, 92.

<sup>81</sup> Pedophiles may constitute their own special class of particularly recidivistic rapists, see Lawrence Wright, *A Rapist's Homecoming*, NEW YORKER, Sept. 4, 1995, at 56, 68-69, but the prior sexual acts of pedophiles would be treated under new Federal Rule of Evidence 414, not Rule 413, see *supra* note 21.

<sup>82</sup> Some may argue that the greater harm caused by rape justifies treating rapists differently than larcenists or drug-offenders. The legal system usually incorporates this difference at sentencing, however, not in the evidentiary rules that are used to establish whether the crime happened.

<sup>83</sup> See Lita Furby, Mark R. Weinrott & Lyn Blackshaw, *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULL. 3, 27 (1989) (finding that fewer than 10% of sexual offenses are reported). Diana Russell's San Francisco survey found that only 9.5% of women who were attacked reported the crime to the police. See DIANA E.H. RUSSELL, *SEXUAL EXPLOITATION: RAPE, CHILD SEXUAL ABUSE, AND WORKPLACE HARASSMENT* 31 (1984). A later study in Los Angeles found only a 3% report rate for rape. See Tracy Wilkinson, *Violence Against Women Pervasive, Panel Told*, L.A. TIMES, Oct. 17, 1990, at B1.

<sup>84</sup> A Los Angeles study found that although the respondents knew "the difference between consensual and nonconsensual sex, they were frequently reluctant to apply the label 'rape' to . . . examples of forced sexual relations." Jacquelyn W. White & John A. Humphrey, *Young People's Attitudes Toward Acquaintance Rape*, in ACQUAINTANCE RAPE, *supra* note 61, at 43, 46 (citing Jacqueline D. Goodchilds, Gail L. Zellman, Paula B. Johnson & Roseann Giarusso, *Adolescents and Their Perceptions of Sexual Interactions*, in 2 RAPE AND SEXUAL ASSAULT, *supra* note 60, at 245, 268). The study found that "56% of the girls and 76% of the boys believed forced sex is acceptable under at least some circumstances." *Id.* at 47 (citing Goodchilds, Zellman, Johnson & Giarusso, *supra*, at 255). In one study of Rhode Island eleven to fourteen year olds, 51% of the boys and 41% of the girls believed that it was acceptable for a man to force sex on a woman if he had "spent a lot of money" on her. *Id.* (quoting RHODE ISLAND RAPE CRISIS CTR., *THE QUESTION OF RAPE* (1988)) (internal quotation marks omitted). Sixty-five percent of the boys and 47% of the girls said that it was permissible for a man to force sex on a woman if they had been dating for over six months. See *id.* Eighty-seven percent of the boys and 79% of the girls thought marital rape impossible. See *id.* These perceptions are not limited to junior high school students. Thirty percent of whites, 26% of blacks, and 44% of Mexican-Americans questioned in an extensive rape survey in San Antonio defined rape as requiring an unknown man and force or threat of violence. See JOYCE E. WILLIAMS & KAREN A. HOLMES, *THE SECOND ASSAULT: RAPE AND PUBLIC ATTITUDES* 115 (1981).

<sup>85</sup> In one study, incarcerated rapists admitted to having committed between two to five times as many sex crimes as those for which they were apprehended. See A. Nicholas Groth, Robert E. Longo & J. Bradley McFadin, *Undetected Recidivism Among Rapists and Child Molesters*, 28

Proponents of Rule 413 who suggest that these kind of problems with recidivism statistics are limited to sexual assault crimes are simply wrong, however. Other crimes, particularly consensual crimes like gambling, prostitution, and drug offenses, are notoriously underreported.<sup>86</sup> Nor are rapists alone in being apprehended and convicted only after they have repeatedly engaged in comparable illegal conduct.<sup>87</sup>

If the rule against prior act admissibility is meant to guard against any one particular evil, that evil is the tendency of the jury to interpret prior act evidence as propensity evidence.<sup>88</sup> Yet propensity theory is precisely what advocates of Rule 413 invoke: "It would be quite a coincidence if a person who just happened to be a chronic rapist was falsely or mistakenly implicated in a later crime of the same type."<sup>89</sup> There are two significant problems with this invocation of coincidence. First, as discussed above, proponents cannot justify the use of the word "chronic" to describe rapists.<sup>90</sup> There is simply no proof that someone who has raped is a chronic rapist, any more than someone

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CRIME & DELINQ. 450, 453-54 (1982); see also Judith V. Becker & John A. Hunter, Jr., *Evaluation of Treatment Outcome for Adult Perpetrators of Child Sexual Abuse*, 19 CRIM. JUST. & BEHAV. 74, 82 (1992) (explaining that "undetected crime is quite extensive among sex offenders and that official data may reveal only a small percentage of the total sexual offenses committed"). There are no comparable studies on how many larcenies larcenists would admit to having committed or on how many drug offenses drug dealers would admit to having committed before their incarceration.

<sup>86</sup> Because many people do not think that much of what legally qualifies as rape is rape, victims are likely to underreport rape for reasons that do not apply to crimes without such definitional problems. This distinction does not necessarily mean that rape is more underreported than consensual crimes, however. More importantly, even if one assumes, for whatever reason, that recidivism rates for rapists are higher than reported statistics, one cannot necessarily conclude that any one individual rapist is likely to be recidivistic.

<sup>87</sup> See Bryden & Park, *supra* note 12, at 573. Despite underreporting problems, 24.8% of drug offenders, who commit victimless crimes, were rearrested. See BECK, *supra* note 76, at 2. The problem of addiction readily explains recidivism among drug offenders and might justify a prior act exception for this offense. There is no comparable physiological or psychological evidence that most rapists are addicted to rape.

<sup>88</sup> See generally JACK B. WEINSTEIN, MARGARET A. BERGER & JOSEPH M. McLAUGHLIN, WEINSTEIN'S EVIDENCE ¶ 404[04], at 404-26 to 404-27 (1996) (discussing the rationale behind the exclusion of propensity evidence); 22 WRIGHT & GRAHAM, *supra* note 12, at § 5239 (discussing Rule 404(b)).

<sup>89</sup> Karp, *supra* note 24, at 20. Karp might be trying to draw on the doctrine of chances, an English theory of admissibility which Professor Imwinkelried has extensively analyzed. See Edward J. Imwinkelried, *A Small Contribution to the Debate over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions*, 44 SYRACUSE L. REV. 1125, 1134 (1993). The doctrine permits admitting evidence that suggests that a proffered story is particularly improbable or implausible. See *id.* at 1134-35. As Imwinkelried notes, however, admitting evidence based on the improbability or implausibility of so many innocent involvements or accidental losses is very different from admitting evidence based on the unlikelihood of multiple false accusations. See *id.* at 1135. The proper use of the doctrine of chances is discussed below in section V.B.

<sup>90</sup> See *supra* pp. 578-80.

who has robbed a bank is a chronic bank robber.<sup>91</sup> Second, the facially attractive appeal to coincidence ignores the reality of police processes. It is not so strangely coincidental for one who has been previously apprehended to be charged again if the universe of perpetrators from which the victim identifies her attacker is limited to photographs supplied by the police.<sup>92</sup> Mug shot identifications are standard practice for stranger rapes.<sup>93</sup> They are also notoriously unreliable<sup>94</sup> and overvalued by juries.<sup>95</sup> This process will only become more unreliable and further riddled with prejudice if prior acts become admissible. Chances of conviction will increase if the prior act evidence is admissible because juries will overvalue it; police will therefore have significantly more incentive than they already do to convince a victim that the man who raped her is the man in the picture — a man whom the police know to have been involved in a previous rape. The prior actor is easier for police to find (because they know who he is), easier for the victim to identify (because his picture is placed in front of her), and easier for the jury to convict (because the prior act evidence makes it more comfortable in finding him guilty).

In fairness to the proponents of Rule 413, their assumptions about who rapes find support in many state court opinions. These courts have developed what is known as the “lustful disposition” or “depraved sexual instinct” exception to the general prohibition on prior act evidence.<sup>96</sup> Not all courts accept this exception,<sup>97</sup> but those that

<sup>91</sup> There may indeed be some chronic rapists, *see infra* section V.A.3, but that does not mean that every rapist is a chronic rapist.

<sup>92</sup> *See* LEMPERT & SALTZBURG, *supra* note 13, at 216–17.

<sup>93</sup> The coincidental theory has more force in those situations in which consent is a defense and identity is not at issue. In that case, the prior act evidence may be appropriately admitted because it sheds light on the credibility of the defendant’s claim that he thought the victim consented. This idea is developed below more fully in section V.B.

<sup>94</sup> Susan Estrich describes the identification process after her rape:

Late that night, I sat in the Police Headquarters looking at mug shots. I was the one who had insisted on going back that night. My memory was fresh. I was ready. They had four or five to “really show” me; being “really shown” a mug shot means exactly what defense attorneys are afraid it means. . . . One shot looked familiar until my father realized that the man had been the right age ten years before. It was late. I didn’t have a great description of identifying marks or the like: no one had ever told me that if you’re raped, you should not shut your eyes and cry for fear that this really is happening, but should keep your eyes open and focus so you can identify him when you survive.

ESTRICH, *supra* note 33, at 2; *see also* ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 142–44 (1979) (discussing numerous studies demonstrating the unreliability of witness identifications).

<sup>95</sup> *See* Bryden & Park, *supra* note 12, at 576; Bryan L. Cutler, Steven D. Penrod & Thomas E. Stuve, *Juror Decision Making in Eyewitness Identification Cases*, 12 LAW & HUM. BEHAV. 41, 54 (1988).

<sup>96</sup> This exception has a variety of different names including, *inter alia*, “lascivious,” “lewd,” “licentious,” and “lustful.” *See* IMWINKELRIED, *supra* note 14, § 4:15, at 4-41.

<sup>97</sup> *See, e.g.,* Getz v. State, 538 A.2d 726, 733–34 (Del. 1988); Pendleton v. Commonwealth, 685 S.W.2d 549, 552 (Ky. 1985); State v. Zybach, 761 P.2d 1334, 1336 (Or. Ct. App. 1988).

do rest the exception on the previously discussed misconceptions that rapists are rare and particularly recidivistic,<sup>98</sup> and on a belief that the private nature of the act justifies letting in prior act evidence due to the absence of corroborating witnesses.<sup>99</sup>

Since the 1950s, commentators have been soundly criticizing this exception.<sup>100</sup> Recidivism statistics have never supported an exception based on the presumption that rapists are particularly recidivistic.<sup>101</sup> The private nature of sex crimes hardly distinguishes them from other criminal acts: thieves and murderers rarely commit their criminal activity in plain view of potential witnesses. Nor can gang rapes be considered private. The rapes at My Lai, the "train" run on Vanessa, and the St. John's University incident were all clearly public events. Nonetheless, the belief that rape is different from other crimes continues. In 1987, a Missouri court, in justifying the lustful disposition exception, wrote:

It is clear the great majority of the courts recognize, perhaps depending upon the nature of the act, the commission of a sex crime has an inherent significance as evidence the perpetrator has previously committed . . . the same or other similar sex crime. Common sense dictates that most sex crimes are the result of a mental or an emotional state not often terminated by one act.<sup>102</sup>

The Missouri court's assessment of common sense is shared by others. Independent research suggests that many people think that rapists rape because they are crazy.<sup>103</sup> As demonstrated above, however, most rapists are not crazy.<sup>104</sup> Most men who commit sexual assault suffer from no diagnosable mental disorder. They rape in conformity with, rather than in deviance from, social norms. Thus, what is distinctive about rape is not that rapists are crazy and recidivistic, but that every-

<sup>98</sup> See *Lannan v. State*, 600 N.E.2d 1334, 1336-38 (Ind. 1992) (discussing a number of cases adopting the exception).

<sup>99</sup> See Edward L. Summers, Comment, *Admissibility of Prior Criminal Acts as Substantive Evidence in Criminal Prosecutions*, 36 TENN. L. REV. 515, 528 (1969); Recent Decision, *Evidence: Admissibility in Criminal Prosecutions of Evidence of Other Crimes Committed by Defendant*, 28 CAL. L. REV. 516, 516-17 (1940). See generally IMWINKELRIED, *supra* note 14, § 4:14, at 4-37 (noting that courts originally began to accept evidence of prior deviant sexual misconduct in part because of problems of proof).

<sup>100</sup> See James M.H. Gregg, *Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses*, 6 ARIZ. L. REV. 212, 234-36 (1965); M.C. Slough & J. William Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 333 (1956); Recent Decision, *supra* note 99, at 518. See generally IMWINKELRIED, *supra* note 14, § 4:14, at 4-37 (reviewing literature criticizing the exception).

<sup>101</sup> See Gregg, *supra* note 100, at 233-34; Slough & Knightly, *supra* note 100, at 334.

<sup>102</sup> *State v. Taylor*, 735 S.W.2d 412, 415 (Mo. Ct. App. 1987).

<sup>103</sup> See WILLIAMS & HOLMES, *supra* note 84, at 118.

<sup>104</sup> The term "crazy" is used loosely here to mean "seriously disturbed." Many of the men in the narratives appear normal, however, and not especially disturbed. The objective studies clearly suggest that most rapists do not meet objective diagnostic criteria for pathology. See *supra* notes 66-70 and accompanying text.

one assumes that rapists are crazy and recidivistic. If this "common sense" assumption is actually misguided and rapists are no more likely than others to repeat their acts, then the evidentiary rule should cut in the opposite direction of the lustful disposition exception and Rule 413: courts should be particularly careful to exclude prior sexual act evidence because jurors are particularly likely to believe (inappropriately) in a rapist's psychopathologically induced tendency to repeat his acts.<sup>105</sup> As explained in Part V, the most appropriate treatment of rape relies on neither of these blanket approaches to prior acts of sexual assault.

Both empirical evidence and theoretical analysis refute the cultural understanding of rape that gives rise to the lustful disposition exception and Rule 413. The belief that prior act evidence is particularly probative because rapists are sexually deviant reflects traditional common understanding but nothing else. To avoid these misunderstandings, courts must start evaluating what truly motivates different kinds of rape. Through such an analysis, courts will find permissible and supportable theories for prior act admission in rape prosecutions.

#### D. Credibility

The proponents of Rule 413 appeal to one final rationale for the Rule: enhancing victim credibility. Prior act evidence is necessary because, as Senator Dole stated on the Senate floor:

Alleged consent by the victim is rarely an issue in prosecutions for other violent crimes — the accused mugger does not claim that the victim freely handed over his wallet as a gift — but the defendant in a rape case often contends that the victim engaged in consensual sex and then falsely accused him.<sup>106</sup>

A tendency for juries to believe that rape victims consented to the alleged acts may indeed distinguish rape from other crimes.<sup>107</sup> For no other crime have juries been systematically encouraged to entertain the

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<sup>105</sup> There are also other reasons to be wary of the lustful disposition exception and its psychopathology rationale. Originally, the exception was used only to introduce evidence of prior sexual acts with the same person. See Gregg, *supra* note 100, at 218. The evidence was thought probative of the defendant's particular disposition toward that particular person. See *id.* Without significant analysis, courts then began to expand the exception to prior "deviant" acts with third parties. See IMWINKELRIED, *supra* note 14, § 4:14, at 4-37 to -38. For instance, at first, the exception was limited to "aberrant, abnormal, degenerate, depraved, deviant, perverted, psychopathic, rare, or unnatural sexual conduct. Under this exception, the courts admitted evidence of homosexual acts, incest, child molestation, and sodomy but excluded evidence of 'normal' sexual misconduct such as heterosexual rape." *Id.* (footnotes omitted). Gradually, courts also began to admit prior acts for "non-deviant" acts, like heterosexual rape, in order to show "defendant's lascivious, lewd licentious or lustful disposition." *Id.* § 4:15, at 4-41 (footnotes omitted).

<sup>106</sup> 140 CONG. REC. S12,990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole).

<sup>107</sup> See DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 247-99 (1989); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 10 (1977); Kenneth A. Cobb & Nancy R. Schauer, *Michigan's Criminal Sexual Assault Law*, in *FORCIBLE RAPE*, *supra* note 5, at 170, 177.

idea that the victim is making the criminal charge up out of whole cloth. Lord Matthew Hale's jury instruction and its variants require juries to consider: one, that a rape charge is easily made by the victim; two, that a rape charge is difficult to defend against; and three, that the testimony of the victim requires special scrutiny.<sup>108</sup> Over half of the states still permit this instruction,<sup>109</sup> even though its inaccuracies are transparent.

Because rape has definitional problems that make it particularly likely to be underreported<sup>110</sup> and because rape is a significantly underreported crime,<sup>111</sup> the truth is that even if rape allegations could be easily made, most are not made at all.<sup>112</sup> Moreover, the combination of "unfounded" cases<sup>113</sup> and jury bias<sup>114</sup> results in a remarkably low conviction rate in rape prosecutions.<sup>115</sup> Empirical studies confirm that false rape charges are not more prevalent than false charges of other crimes.<sup>116</sup> In other words, Lord Hale had it precisely backwards: rape allegations are not easily made, and they are very easy to defend against.

Nonetheless, an honest evaluation of rape prosecutions reveals that some rape allegations have been easier to defend against than others. The defense's success in these cases usually turns on its ability to impugn the credibility of the complaining victim. The defense has a harder time impugning victim credibility when there is evidence of in-

<sup>108</sup> See A. Thomas Morris, Note, *The Empirical, Historical and Legal Case Against the Cautionary Instruction: A Call for Legislative Reform*, 1988 DUKE L.J. 154, 154-55.

<sup>109</sup> See *id.* at 156.

<sup>110</sup> See *supra* notes 83, 86.

<sup>111</sup> See Furby, Weinrott & Blackshaw, *supra* note 83, at 27.

<sup>112</sup> See RUSSELL, *supra* note 31, at 13; Furby, Weinrott & Blackshaw, *supra* note 83, at 27; Wilkinson, *supra* note 83, at B1. A National Victim Center's study indicates that 84% of rape victims do not report the rape to the police. See RAPE IN AMERICA, *supra* note 1, at 6.

<sup>113</sup> Police and prosecutors consider cases "unfounded" when they determine that the victims' rape allegations are unverifiable or unprosecutable. See Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 ST. JOHN'S L. REV. 979, 1010-11 (1993) (suggesting that police and prosecutors deem cases unfounded that do not fit neatly into the violent, stranger-rape paradigm).

<sup>114</sup> See generally HUBERT S. FEILD & LEIGH B. BIENEN, JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW 54-57 (1980) (revealing that a series of misconceptions inform prospective jurors' attitudes about rape); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1057 (1991) (arguing that jurors' acceptance of rape myths deprives the victim of a fair trial). A good deal of jury bias stems from a belief that women routinely fabricate rape stories. Williams and Holmes found that 40% of white men, 63% of white women, 92% of black men, 41% of black women, 73% of Mexican-American men, and 57% of Mexican-American women believe that men are often falsely accused of rape. See WILLIAMS & HOLMES, *supra* note 84, at 136. The rather high percentage of black men who believe women often fabricate claims of rape may well reflect the reality that black men have suffered a history of false rape accusations. See *infra* section III.C. Other problems with different kinds of jury biases are discussed throughout Parts II and III.

<sup>115</sup> See GARY LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 129-31 (1989) (revealing that, of 881 reported rapes in Indianapolis in the early 1970s, 326 resulted in arrest, and 103 resulted in conviction).

<sup>116</sup> See Morris, *supra* note 108, at 164-66.

jury extrinsic to the rape itself,<sup>117</sup> when the victim is raped by a stranger,<sup>118</sup> or when the victim is sexually inexperienced.<sup>119</sup> Women should not have to show extrinsic injury, lack of acquaintance, or sexual inexperience to prove rape; but when these factors do coalesce, women have been believed.

Moreover, white women — particularly white women accusing black men — have been believed, often regardless of the extrinsic circumstances.<sup>120</sup> Indeed, the sad truth is that black-on-white rape constitutes the one instance in which Lord Hale got it right. The white woman's charge against the black man is easily made — in fact, the fabrication has been encouraged. In the Reconstructionist and post-Reconstructionist South, a white woman who was found to have had consensual sexual relations with a black man subjected herself to lynching if she did not cry rape.<sup>121</sup> The Scottsboro Boys<sup>122</sup> and Willie McGee,<sup>123</sup> and the parable of Tom Robinson that has been taught to hundreds of high school students each year in *To Kill a Mockingbird*,<sup>124</sup> all attest to our collec-

<sup>117</sup> See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 252–53 (1966); Wallace D. Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 WASH. L. REV. 543, 604–05 (1980); Robert A. Weninger, *Factors Affecting the Prosecution of Rape: A Case Study of Travis County, Texas*, 64 VA. L. REV. 357, 386–87 (1978).

<sup>118</sup> See ESTRICH, *supra* note 33, at 9, 14; SEDELLE KATZ & MARY ANN MAZUR, *UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS* 210 (1979); Schafran, *supra* note 113, at 1011.

<sup>119</sup> See Berger, *supra* note 107, at 15–20.

<sup>120</sup> Consider the reactions of the police responding to Susan Estrich's rape, which was depicted in *Stranger*, see *supra* p. 570. The police first asked her if the rapist was a "crow," which was their term for a black person. See ESTRICH, *supra* note 33, at 1. Then they asked her if she knew the man. See *id.* They believed her when she said she did not, because "as one of them put it, how would a nice (white) girl like [her] know a crow?" *Id.*

<sup>121</sup> See Griffin, *supra* note 5, at 47, 63.

<sup>122</sup> In 1931, nine black youths, who had hopped a freight train and gotten into a fight with some white youths on the train, were convicted of raping two white women who had hopped the same train. See BROWNMILLER, *supra* note 31, at 230–31. The black boys were arrested after the white boys reported the fight, and the two white women were held in jail with the threat of vagrancy and prostitution charges held over them during the trial, at which they testified for the prosecution. See *id.* Eight of the nine black youths were sentenced to die. See *id.* at 231. Two years later, one of the women recanted. See *id.* at 234. Eventually, all of the Scottsboro "boys" were acquitted, but the final man did not go free until 1951. See *id.* at 235.

<sup>123</sup> The year in which the last Scottsboro "boy" was acquitted was also the year in which Willie McGee was executed for raping Willametta Hawkins. See *id.* at 239. Hawkins, a white woman, claimed that she had been raped by a black man who broke into her house while her husband and two of her children were asleep in the next room. See *id.* Former Congresswoman Bella Abzug, as a young labor lawyer, defended McGee. See *id.* at 243–44. As Abzug commented to Susan Brownmiller: "The affair between [Hawkins and McGee] was common knowledge among blacks and whites." *Id.* at 244. This evidence was never presented, however, because "[n]o jury was going to believe it. Challenging the word of a white woman just wasn't done. . . . Nobody believed you could win an interracial rape case in a Southern court." *Id.*

<sup>124</sup> See HARPER LEE, *TO KILL A MOCKINGBIRD* 231–35, 241, 269 (1960).



tive cultural recognition that white women have indeed, at times, fabricated rape stories involving black men.<sup>125</sup>

This fabrication problem is the exception, not the rule. In reality, the percentage of interracial rape is a remarkably small fraction of all rapes in our society, notwithstanding a social climate that continues to exploit and exacerbate public perceptions of black rapists.<sup>126</sup> In 1987, only fourteen percent of white rape victims were raped by black men.<sup>127</sup> One study found that only thirty percent of *stranger* rapes of white women were committed by black men.<sup>128</sup> Nonetheless, if the justification for admitting prior act evidence is to boost the credibility of victims, history not only fails to support, it seriously undermines the propriety of doing so when a white woman is accusing a black man. The problems with victim credibility are not universal to all rapes.

There is an even deeper problem with the credibility rationale, however. In many rape cases, the issue is not one of credibility: juries acquit

<sup>125</sup> See Jennifer Wiggins, *Rape, Racism and the Law*, 6 HARV. WOMEN'S L.J. 103, 114-16 (1983) (discussing the threat black men face of being unjustly prosecuted for rapes of white women). Many authors suggest that rape fabrications were encouraged because they gave white men an excuse to perpetuate a newly found and remarkably effective form of social control — lynching. See, e.g., BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY 193-215 (Gerda Lerner ed., 1972); ANGELA Y. DAVIS, WOMEN, RACE & CLASS 172-201 (1981); IDA B. WELLS, CRUSADE FOR JUSTICE: THE AUTOBIOGRAPHY OF IDA B. WELLS 69-71 (Alfreda M. Duster ed., 1970). Before the Civil War, most of the men lynched in the South were white abolitionists. See DAVIS, *supra*, at 183-85. Slaves were too valuable as property to hang. See *id.*

<sup>126</sup> A 1973 study of newspapers in New Orleans concluded:

On the explosive issue of rape, the nature of black involvement is distorted in the transition from the police blotter to the news article. The proportionate amount of incidents in which a black man rapes a white woman is overreported and articles which describe an intraracial rape are written in such a manner that they suggest an interracial event.

Daniel J. Abbott & James M. Calónico, *Black Man, White Woman — The Maintenance of a Myth: Rape and the Press in New Orleans*, in CRIME AND DELINQUENCY: DIMENSIONS OF DEVIANANCE 141, 151 (Marc Riedel & Terence P. Thornberry eds., 1974); see also Wiggins, *supra* note 125, at 115 (arguing that biased press coverage of rape often exacerbates public anger against black men accused of, but not convicted of rape).

The political manipulation of white America's fears of the black rapist is probably best exemplified by then-presidential candidate George Bush's use of Willie Horton's image — the image of a black convicted rapist — in campaign advertisements. See MICHAEL TONRY, MALIGN NEGLECT — RACE, CRIME, AND PUNISHMENT IN AMERICA 11-12, 181-82 (1995). Moreover, black men are punished far more harshly than their white counterparts who are convicted of rape. See FEILD & BIENEN, *supra* note 114, at 116-18 (noting that, when the victim was black, black and white defendants were treated comparably, but when the victim was white, the black defendant was treated much more harshly than the white defendant); Gary D. LaFree, *The Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 AM. SOC. REV. 842, 852 (1980). See generally Erin Edmonds, *Mapping the Terrain of Our Resistance: A White Feminist Perspective on the Enforcement of Rape Law*, 9 HARV. BLACKLETTER J. 43, 45 (1992) (arguing that rigorous enforcement of the "white man's" rape law will only exacerbate the overprosecution of Black men); Wiggins, *supra* note 125, at 113-14 (noting that punishment for rape continues to be meted out in a racially discriminatory manner).

<sup>127</sup> See Irene Sege, *Race, Violence Make Complex Picture*, BOSTON GLOBE, Jan. 31, 1990, at 1.

<sup>128</sup> See CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF VIOLENT CRIME 10 (1991).

notwithstanding the fact that they believe the victim. The issue is where to place the blame. The most comprehensive study of citizens' perceptions of rape found that sixty-six percent of one sample group believed that women's behavior or appearance provokes rape.<sup>129</sup> Thirty-four percent believe that "women should be held responsible for preventing their own rape."<sup>130</sup> Another study found that "most respondents, including victims, saw women's behavior and/or appearance as the second most frequent cause of rape."<sup>131</sup> A more recent survey of 500 adult Americans found that thirty-eight percent of men and thirty-seven percent of women believe that a woman is partly to blame for her own rape if she dresses seductively.<sup>132</sup> Given these perceptions, a victim's credibility may well be irrelevant — many jurors are going to blame her anyway.

Consider the remarks of one New Bedford woman regarding the Big Dan rape case: "I'm also a woman, but you don't see me getting raped. If you throw a dog a bone, he's gonna take it — if you walk around naked, men are just going to go for you."<sup>133</sup> The defense counsel in that case rhetorically asked what the victim was doing "running around the streets getting raped?"<sup>134</sup> He conceded the veracity of the victim's story in his defense; he acknowledged that she was raped; he just blamed her for it.<sup>135</sup> Consider also the remarks of a Florida jury foreman after acquitting a defendant who had been charged with knifing, beating with a rock, and twice raping a woman dressed in a lace miniskirt and wearing no underwear: "We felt she . . . asked for it for the way she was dressed . . . . The way she was dressed with that skirt, you could see everything she had. She was advertising for sex."<sup>136</sup> The jury believed that the woman had been slashed with a knife, hit with a rock, and raped. They just did not care. Enhancing that woman's credibility would have done no good.<sup>137</sup>

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<sup>129</sup> See FEILD & BIENEN, *supra* note 114, at 54.

<sup>130</sup> *Id.*

<sup>131</sup> WILLIAMS & HOLMES, *supra* note 84, at 118. These white respondents named perpetrators' mental illness as the primary cause of rape of white women. See *id.* The falsity of this proposition and the extent to which Rule 413 nevertheless relies on it are discussed above. See *supra* pp. 576–77.

<sup>132</sup> See Schafran, *supra* note 113, at 995 n.58 (citing Telephone Survey of 500 Adult Americans by Yankelovich Partners, Inc., for Time/CNN (May 8, 1991)).

<sup>133</sup> Chancer, *supra* note 36, at 251.

<sup>134</sup> MACKINNON, *supra* note 74, at 171 (quoting defense counsel Edward Harrington) (internal quotation marks omitted).

<sup>135</sup> See *id.*

<sup>136</sup> *Jury: Woman in Rape Case 'Asked For It'*, CHI. TRIB., Oct. 6, 1989, at 11.

<sup>137</sup> Of course, admitting the prior act evidence of the defendant in these cases might not do any harm either, and it might enhance the jury's willingness to convict because the jury will be less sympathetic to the accused. See *infra* section III.A. The question, however, is whether the proffered reason for a rule — that it will help secure rape convictions by bolstering victim credibility — justifies the potential harms stemming from singling out rape for special evidentiary treatment. Analysis of the potential harms stemming from a blanket rule of admissibility follows in the next Part.

Blaming women is not the only problem undermining the credibility rationale, however. Refusing to blame men is another. One juror, discussing the St. John's University case, explained that the jury's "main concern . . . [was not] want[ing] to ruin the boys' lives."<sup>138</sup> One year after the New Bedford trial, a crowd of approximately 6000 citizens held a vigil outside City Hall in New Bedford in support of the four men who had been convicted.<sup>139</sup> The crowd did not claim that the woman was lying; they just felt that the men should not have been convicted.<sup>140</sup> The members of Charlie Company remained reluctant to talk about the prevalence of rape at the My Lai massacre because the rape behavior did not seem that culpable: "You can nail just about everybody on [this] — at least once. The guys are human, man."<sup>141</sup>

This refusal to blame men for conduct that the law clearly proscribes is not a credibility problem. It is a culpability problem. Many people reject the legal system's treatment of rape. As one observer said after the acquittal of seven college students who were tried for third-degree sexual assault of a seventeen year old: "I don't believe she was raped . . . I believe they ran a train on her."<sup>142</sup> Regardless of how the statute defined sexual assault, this observer most likely would not have convicted the defendants unless the facts met his definition of culpable male behavior. Apparently, "trains" did not do so.

Thus, even after the laws have been altered to reflect a variety of different degrees of rape, juries still acquit. According to one Michigan prosecutor, who bemoaned the state of the law after the extensive rape reform movement:<sup>143</sup> "The old law was simple. . . . The only requirements for conviction were vaginal penetration and force, and cases were won or lost on the facts, not the law."<sup>144</sup> Yet the juror and observer stories described above suggest that, notwithstanding the changes in the law, jurors still judge cases on their assessment of the facts. Put succinctly, juries nullify. The law can make previously commonplace and

<sup>138</sup> Joseph Fried, *St. John's Juror Tells of Doubts in Assault Case: He Says He Went Along with Vote to Acquit*, N.Y. TIMES, Sept. 14, 1991, at 24.

<sup>139</sup> See Chancer, *supra* note 36, at 239-40, 248-52.

<sup>140</sup> See *id.* at 251. Chancer's investigation of New Bedford's reaction revealed that the town's hostility toward the victim was motivated, at least in part, by a feeling that the Portuguese defendants had been prosecuted because they, like much of the New Bedford community, were Portuguese. See *id.* at 248-49.

<sup>141</sup> BROWNMILLER, *supra* note 31, at 105 (quoting squad leader John Smail, who said this to journalist Seymour Hersh) (internal quotation marks omitted).

<sup>142</sup> Chris S. O'Sullivan, *Acquaintance Gang Rape on Campus*, in ACQUAINTANCE RAPE, *supra* note 61, at 140, 140 (alteration in original) (quoting a Michigan State University senior, who said this to a local newspaper reporter after the students were acquitted) (internal quotation marks omitted).

<sup>143</sup> For specific examples of the reform efforts, see the statutes cited above in notes 55-56.

<sup>144</sup> Jay A. Reich & Duncan Chappell, *The Prosecutorial Response to Michigan's Criminal Sexual Conduct Law: Business as Usual* 22-23 (1976) (unpublished manuscript, on file with the Gallagher Law Library, University of Washington), quoted in Loh, *supra* note 117, at 618 n.368.

nonculpable acts criminal; it can call these acts "rape" or "sexual assault"; but the law cannot make juries convict.<sup>145</sup> Susan Estrich has written that admitting prior acts of sexual misconduct will be probative if those prior acts indicate that the rapist "sees sex when others see rape."<sup>146</sup> The problem with securing many rape convictions, however, is that regardless of what the rapist sees, when the law says rape, many juries don't care.

In sum, Rule 413 and its supporting rationale fail to acknowledge, much less incorporate, most of what scholars have learned about rape in the past twenty-five years. Rule 413's proponents rely on antiquated notions of rapists as rare, depraved psychopaths who have some sort of perverse psychological need for sex. Because rape is common, because rapists are often psychologically "normal," because many different kinds of men with many different psychological makeups rape, and because the prevalence of rape is more positively correlated to social norms regarding the acceptance of sexual violence and traditional gender roles than it is to any particular sexual need, the given rationale fails to justify Rule 413.

Furthermore, a theory that admits into evidence prior acts of sexual assault in order to boost victim credibility mistakes juror disbelief for juror disregard. The studies of juries and public attitudes regarding rape strongly suggest that the real problem with rape convictions is the latter, not the former.<sup>147</sup> Jurors seem to assume that women must live within very rigid norms of appropriate sexual conduct. These norms include proscriptions on drinking, dressing in certain manners, and leaving home on her own. If a woman breaches these norms, her credibility becomes largely irrelevant because the jury will not bother to vindicate her violation. And sometimes, even if the victim does not breach the norms of proper conduct, when the alleged acts are not seen as particularly egregious, juries simply refuse to blame the alleged actors. This is a serious problem, but it is not a credibility problem. It is not at all

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<sup>145</sup> As Judge Bazelon wrote:

With respect to responsibility the jury has two functions. In the first place it measures the extent to which the defendant's mental and emotional processes and behavior controls were impaired at the time of the unlawful act. . . . The second function is to evaluate that impairment in light of community standards of blameworthiness, to determine whether the defendant's impairment makes it unjust to hold him responsible.

*United States v. Eichberg*, 439 F.2d 620, 624-25 (D.C. Cir. 1971) (per curiam) (footnotes omitted). The extent to which a rape defendant's mental and emotional processes and behavior controls are impaired when he rapes is discussed in Part IV below. Regardless whether one believes that a man is in any way "impaired" when he rapes, however, the key problem with securing jury convictions is that the man's behavior is evaluated in light of community standards of blameworthiness. For an elaboration on the theory of jury nullification, consult Alan W. Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 166 *passim* (1972).

<sup>146</sup> Estrich, *supra* note 42, at 26.

<sup>147</sup> See FIELD & BIENEN, *supra* note 114, at 47.

obvious that a rule aimed at enhancing victim credibility will help the situation.

### III. POTENTIAL HARMS

The analysis in Part II does not necessarily suggest that prior acts of sexual assault must always be excluded in rape prosecutions. After all, as discussed above,<sup>148</sup> there are often problems with victim credibility. The fact that other criminals repeatedly engage in their criminal behavior does not mean that rapists do not. All rapists may not be "crazy" as a matter of medical diagnosis, but there is a strong argument that we should treat them as such because rape *should* be considered pathological. Rape inflicts grave, lasting, and debilitating injuries not only on its victims, but also on all women, who must live with the fear of its prevalence.<sup>149</sup> Consequently, one might argue that the benefits from an overinclusive prior act exception outweigh any theoretical and doctrinal inadequacies of such an exception. This Part more fully develops the problems with an overinclusive prior act rule.

#### A. *Truth in Prosecuting*

Those who endorse Rule 413 as a means of overcoming the harms that rape perpetuates need to recognize the inferences that are likely to accompany a prior act exception. Admitting prior act evidence may increase the chance of conviction, but such admissions will also increase the risk that a jury will punish the defendant for acts other than those for which he is on trial.<sup>150</sup> For instance, in the St. John's University case, if evidence of the housemates' prior acts had come into evidence, those men would have seemed less sympathetic and the jury might have been more willing to "ruin" those boys' lives. Moreover, given a choice between a provocatively dressed woman and the man she accuses, a jury may be more willing to side with the woman if the jury knows that the man has previously raped other women. The jury can continue to believe that a woman asks for it, but if the man she accuses has stabbed, hit, and raped other women before, then the jury might be much more willing to excuse her indiscretion and to blame him. To the extent that a case does not present serious factual questions of what happened and instead presents issues of blame allocation and jury nullification, the prior act evidence may be critical because it will be probative of overall blameworthiness. Prior acts will make the defendant seem like a generally less sympathetic person. In-

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<sup>148</sup> See *supra* p. 585.

<sup>149</sup> See, e.g., GRIFFIN, *supra* note 43, at 24.

<sup>150</sup> This may be a price that reformers are willing to pay in order to help minimize the harms of rape, but one should at least be conscious of the process by which convictions will be secured.

deed, the prior act evidence will encourage juries to focus on precisely what they are not supposed to focus on — character.<sup>151</sup>

There is little doubt that many men have benefited from a background myth of good character (“nice boys do not rape”). Many rape victims have also suffered from background myths of bad character (“only bad girls get raped”).<sup>152</sup> A prior act exception may help to dispel these myths, but it will only do so by encouraging the jury to reconceptualize the defendant as a “bad boy,” not a “nice boy.” Admitting prior acts of sexual assault will encourage the jury to make a quintessential character determination based on the cumulative behavior of the accused, not on his responsibility for the alleged act. Reasonable people concerned about the prevalence of rape may disagree about the appropriateness of allowing such character assessments. Given the history of the unsupported background myths that have obstructed rape trials,<sup>153</sup> allowing character assessments may be an acceptable compromise, but it is nonetheless a compromise for a criminal justice system that purports to punish acts, not people.

Moreover, it is a compromise that imposes additional costs. First, the defendant’s blameworthiness will be assessed based on acts that may not have been proven beyond a reasonable doubt.<sup>154</sup> This is a heavy burden to place on defendants. Second, by relying on cumulative evidence, Rule 413 perpetuates a notion that overall blameworthiness is the operative focus, and if “you can nail just about everybody on [this], at least once,”<sup>155</sup> one rape may not be seen as blameworthy. Thus, juries may become even more likely than they are now to decide that one rape need not be punished. Third, in a world in which prior acts of rape are admissible, a recidivism theory may become the norm. If jurors come to expect prior act evidence, jurors may start to view the absence of prior acts as evidence cutting against the likelihood that the accused is a “rapist.”<sup>156</sup> Thus, regardless whether one rape need be punished, juries may be less likely to believe that one rape actually happened. If the man accused has not shown himself to be a “rapist,” jurors will be less likely to believe that he did it.

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<sup>151</sup> See *supra* pp. 566–67.

<sup>152</sup> See *supra* p. 587.

<sup>153</sup> See *supra* note 114.

<sup>154</sup> The factual finding as to whether the prior act happened is made by the judge, in limine, under a preponderance of the evidence standard. See IMWINKELRIED, *supra* note 14, § 2:08, at 2–20. Moreover, as James Duane notes, the admissibility presumption of Rule 413 may override the general rule excluding hearsay evidence. See James Joseph Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95, 120–22 (1995).

<sup>155</sup> BROWNMILLER, *supra* note 31, at 105.

<sup>156</sup> In such a world, defendants might also offer testimony from former sexual partners who would testify to the absence of forced or coerced sex. This testimony would be relevant to show that the defendant does not fit into the jury’s image of a “rapist.”

*B. Guilty and Still Free*

Rule 413 is also likely to increase the chances of wrongful conviction and perpetuate stereotypes of the chronic rapist. As discussed above,<sup>157</sup> Rule 413 gives police an added incentive to arrest men who have allegedly been involved in rapes before because the likelihood of conviction increases based on prior act evidence. In a world of limited resources, the police will concentrate on those identified perpetrators whom they have the best chance of convicting. Thus, the chances of being arrested and prosecuted for stranger or acquaintance rape will be greater for the man who has a history of rape that the police are aware of, regardless whether that history has been previously proven or prosecuted.<sup>158</sup>

Police are more likely to be aware of the histories of men who have already encountered the criminal justice system — a class of men that is overwhelmingly poor and minority.<sup>159</sup> The added police incentive to arrest and prosecute alleged prior offenders, coupled with the established juror belief that rapists are naturally recidivistic, will increase the chances of wrongfully convicting those men who are least likely to have access to high quality legal counsel and most likely to be victims of discrimination. Poor, minority men with an alleged prior record will be much more likely to be falsely identified, improperly tried, and wrongfully convicted for stranger rapes that they did not commit.

The fact that different classes of men have varying degrees of familiarity with the criminal justice system will also lead to unfairness in acquaintance rape prosecutions. Police are more likely to pursue and arrest a man who has been identified by his victim if the police already know who that man is and if they know that the chances of conviction will increase because of their knowledge of his alleged prior acts. In a world of limited resources, the police will concentrate on those identified perpetrators whom they have the best chance of convicting. This problem is not one of sending an innocent man to jail, but it is one of disproportionate enforcement visited against the class of men who have had previous exposure to the criminal justice system. The increased number of acquaintance rape convictions will come at the expense of poor, minority men and at the expense of women who are assaulted by nonpoor, nonminority men.

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<sup>157</sup> See *supra* p. 581.

<sup>158</sup> See *supra* note 52.

<sup>159</sup> See *Developments in the Law — Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1495 (1988) [hereinafter *Developments*]. Forty-six percent of those arrested for violent crime in 1984 were black even though blacks constituted less than 12% of the population. See *id.* at 1520 (arguing that “prosecutors are more likely to pursue full prosecution, file more severe charges, and seek stringent penalties in cases involving minority defendants”). The most recent statistics reveal comparable numbers: in 1993, 45.7% of those arrested for violent crime were black. See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES: 1993, at 235 tbl.43 (1994) [hereinafter UNIFORM CRIME REPORTS 1993].

Disproportionate enforcement against underprivileged classes perpetuates the stereotypes surrounding who rapes and what a rapist "is." By focusing resources on the relatively small class of rapists for whom convictions will be easier — those who already have an alleged history of sexual assault — we will be ignoring a large percentage of the men who actually rape.<sup>160</sup> The law will continue to excuse men who, by virtue of class or race privilege, are much less likely to have experience with the criminal justice system and are therefore much less likely to be the targets of prosecution. Thus, the legal system will fail to reflect precisely what feminist scholarship has fought to establish: that rape is a crime across all classes, among all races, and by all sorts of men.<sup>161</sup>

Reports on the effectiveness of rape reform have already documented this problem.<sup>162</sup> A study in the State of Washington indicates that rape-reform measures may increase the chances that men already in the system will be convicted of rape,<sup>163</sup> but rape-reform measures often do not increase the chances of convicting those men who tend to escape the system altogether.<sup>164</sup> In the words of Wallace Loh, the reform measures created "not a bigger mousetrap, only a better mousetrap."<sup>165</sup> A better mousetrap may be one kind of improvement over the current mousetrap, but if part of the purpose of rape reform is to expand the class of those convicted to include the diversity of men

<sup>160</sup> Recent studies of college-educated men strongly suggest that a significant number of rapes are perpetrated by men who are not likely to have had prior exposure to the criminal justice system. See *supra* pp. 576–77. Scholars exploring the prevalence of rape find rape in all classes and among all races. See generally RUSSELL, *supra* note 31 (discussing various accounts of rape across time, class, and culture). Still, 41.3% of those men arrested for rape in 1993 were black. See UNIFORM CRIME REPORTS 1993, *supra* note 159, at 235 tbl.43. Yet given the prevalence of rape, see *supra* p. 564, and particularly the prevalence of nonstranger rape, see RAPE IN AMERICA, *supra* note 1, at 4 (at least 78% of rapes are perpetrated by men known to the victim), it is highly unlikely that over 40% of the rapes committed in this country were committed by black men.

<sup>161</sup> See generally BROWNMILLER, *supra* note 31, at 174–209 (profiling the varied characteristics of "average" rapists and cautioning against overreliance on generalized "police blotter" statistics); GRIFFIN, *supra* note 43, at 1–24 (arguing that the instinct to rape is, in some form, present in all male psyches); RUSSELL, *supra* note 31, *passim* (relating the personal narratives of women who have been raped and describing victims and rapists of varied races and socioeconomic status).

<sup>162</sup> Numerous states have been instituting various types of rape reform since the early 1970s. For a survey of these reforms, see NATIONAL INST. FOR LAW ENFORCEMENT AND CRIMINAL JUSTICE & LAW ENFORCEMENT ASSISTANCE ADMIN., DEP'T OF JUSTICE, FORCIBLE RAPE: AN ANALYSIS OF LEGAL ISSUES 1–4 (1978).

<sup>163</sup> See Loh, *supra* note 117, at 593. The Washington reform efforts included: changing the substantive definition of rape to focus more on the actor's use of force and less on the victim's resistance; including different degrees of rape; and matching the penalty structure to varying degrees of culpability. See *id.* at 550.

<sup>164</sup> See *id.* at 578–79. As Loh notes, the symbolic importance of more rape convictions is meaningful, see *id.* at 593, but in this case, that symbolism may come at the cost of perpetuating certain rape myths.

<sup>165</sup> Loh, *supra* note 117, at 593.



who actually commit rape, admitting prior act evidence may very well fail to accomplish that goal. The men convicted of rape will be those already familiar with the criminal justice system. Middle class white men — a significant percentage of whom admit to raping<sup>166</sup> — will continue to go free.

### C. Racial Impact

Rule 413 must also confront the deeply disturbing intersection of rape and race,<sup>167</sup> the ubiquity and power of which is well-documented.<sup>168</sup> Between 1930 and 1967, 405 of the 455 men executed for rape in this country were black.<sup>169</sup> The death penalty is no longer permitted for rape convictions,<sup>170</sup> but black men still receive more severe penalties for rape. One study in Dallas found that the median sentence for a black man who raped a white woman was nineteen years, whereas a white man who raped a black woman received a ten-year sentence.<sup>171</sup> Black men who rape white women receive much greater penalties than do other men who rape white women.<sup>172</sup>

The legal system also clearly discriminates against black women.<sup>173</sup> Police often take complaints of black women less seriously because police lack "confidence in the veracity of black complainants and [believe] in the myth of black promiscuity."<sup>174</sup> This lack of confidence is

<sup>166</sup> See *supra* pp. 576–77.

<sup>167</sup> This section's discussion of race is largely confined to how the enforcement of rape laws has affected black men and women. Discriminatory enforcement of criminal law is certainly not limited to blacks, *see, e.g.*, CORAMAE RICHEY MANN, *UNEQUAL JUSTICE: A QUESTION OF COLOR* 115–65 (1993), but a comprehensive discussion of the interrelationship between rape and all other minority cultures is beyond the scope of this Article.

<sup>168</sup> See BROWNMILLER, *supra* note 31, at 210–55; ESTRICH, *supra* note 33, at 35–38; PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* 26–31, 206–07 (Quill ed., William Morrow and Co. 1996) (1984); *see also* MACKINNON, *supra* note 42, at 81–82 (discussing the paradigm of the black rapist); RUSSELL, *supra* note 31, at 129–88 (discussing rape prosecutions against black men); Griffin, *supra* note 5, at 62–64 (discussing how black-on-white rape is used for the benefit of white men). For more comprehensive discussions of how the cultural meaning of rape cannot be understood without an understanding of race, see Kristin Bumiller, *Rape as a Legal Symbol: An Essay on Sexual Violence and Racism*, 42 U. MIAMI L. REV. 75, 85–88 (1987); Edmonds, cited above in note 126, at 43–49; and Wriggins, cited above in note 125, at 123–33.

<sup>169</sup> See MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 75 (1973) (citing BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, NATIONAL PRISONER STATISTICS, CAPITAL PUNISHMENT 1930–1970, at 12 tbl.4 (1971)).

<sup>170</sup> See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

<sup>171</sup> See Ray F. Herndon, *Race Tilts the Scales of Justice*, DALLAS TIMES HERALD, Aug. 19, 1990, at A1.

<sup>172</sup> See Gary D. LaFree, *The Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 AM. SOC. REV. 842, 852 (1980).

<sup>173</sup> Alice Walker puts this point most succinctly: "Who knows what the black woman thinks of rape? Who has asked her? Who cares?" ALICE WALKER, *Advancing Luna — and Ida B. Wells, in YOU CAN'T KEEP A GOOD WOMAN DOWN* 85, 93 (1981).

<sup>174</sup> Comment, *Police Discretion and the Judgment that a Crime Has Been Committed — Rape in Philadelphia*, 117 U. PA. L. REV. 277, 304 (1968).

completely unfounded. Black women are more likely to be raped than white women.<sup>175</sup> It cannot be gainsaid that rape of black women, even brutal, violent stranger rape, was legal and commonplace in much of the country for most of our nation's history.<sup>176</sup> Rape of women slaves was routine.<sup>177</sup> Today, men of all races who are convicted of raping black women are sentenced less severely than men convicted of raping white women.<sup>178</sup>

The disparate treatment of the black rapist and the legal indifference to black women victims helps solidify a belief that rape is only heinous if a black man rapes a white woman. All women suffer from this misguided construction. What does a black rapist do to a white woman that a white rapist does not do? What does a white rapist not do to a black woman? As Kristin Bumiller writes: "[t]he cultural meaning of rape is rooted in a symbiosis of racism and sexism that has tolerated the acting out of male aggression against women and, in particular, black women."<sup>179</sup>

A system that perpetuates a belief that black-on-white rape is worse than, and possibly even fundamentally different than, white-on-black rape, black-on-black rape, or white-on-white rape belittles the harm that is inflicted by white men and mischaracterizes the harm implicit in rape. The need to protect "white womanhood," which underlies our raced cultural conceptualization of rape, is rooted in a commodified notion of sexuality that ignores the reality of rape. Traditionally, white womanhood had to be protected in order to save white women for white men. This white patriarchal construction of white womanhood reflects a refusal to acknowledge women as complete human beings whose sexualities are an integrated part of their autonomous selves. To speak of protecting womanhood is to abstract and commodify a woman's womanhood.<sup>180</sup> Women do not need their *womanhood* protected; they need their *selves* protected.<sup>181</sup> As should

<sup>175</sup> See Lee H. Bowker, *Women as Victims: An Examination of the Results of L.E.A.A.'s National Crime Survey Program*, in *WOMEN AND CRIME IN AMERICA* 158, 162-64 (Lee H. Bowker ed., 1981).

<sup>176</sup> See DAVIS, *supra* note 125, at 24-26; Wiggins, *supra* note 125, at 118. *Christian v. Commonwealth*, 64 Va. (23 Gratt.) 954 (1873), is instructive. The Supreme Court of Appeals dismissed the case against a black man who raped a black woman with these words: "Without any interference, or any outcry on her part, together with his after conduct, show, we think, that his conduct, though extremely reprehensible, and deserving of punishment, does not involve him in the crime which this statute was designed to punish." *Id.* at 959.

<sup>177</sup> See DAVIS, *supra* note 125, at 24-26.

<sup>178</sup> See Wiggins, *supra* note 125, at 121-22.

<sup>179</sup> Bumiller, *supra* note 168, at 88.

<sup>180</sup> This construction of sexuality might only make "sense" in a culture that commodifies its sexuality in other ways. See *infra* section IV.A.2.

<sup>181</sup> The Supreme Court declared that "[s]hort of homicide, [rape] is the 'ultimate violation of self.'" *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion) (quoting LISA BRODYAGA, MARGARET GATES, SUSAN SINGER, MARNA TUCKER & RICHARDSON WHITE, U.S. DEP'T OF JUSTICE, *RAPE AND ITS VICTIMS: A REPORT FOR CITIZENS, HEALTH FACILITIES, AND CRIMINAL*

be painfully clear by now, the harm implicit in rape is a harm to the autonomy and integrity of the woman as a person,<sup>182</sup> regardless of her race, regardless of the race of the perpetrator, and regardless of the extent of external violence or familiarity with the victim.<sup>183</sup> Womanhood has nothing to do with rape.

If history has taught us anything, it is that we must be wary of rape laws that do not actively guard against their racist implementation. The racist manipulation of rape law in the past, the almost complete discounting of women of color, the ongoing exploitation of racist stereotypes in prosecution and sentencing, and the racist paradigm's perpetuation of an autonomy-robbing sense of womanhood all confirm the need to recognize and remedy the race-laden construction of rape law. Rule 413 not only fails to help remedy a history of racist rape law enforcement, it seriously runs the risk of aggravating it. Because black men are disproportionately involved with the criminal justice system<sup>184</sup> and because police are going to be more likely to arrest those people whom they know to have some history of sexual offense,<sup>185</sup> the police are going to be even more likely to arrest black men disproportionately. Because juries have always been and continue to be prejudiced against black men, whose "character" they are more likely to associate with criminality and rape,<sup>186</sup> juries are likely to convict black men of rape disproportionately.

In his 1995 book, *Malign Neglect: Race, Crime, and Punishment in America*, Michael Tonry argues that when our criminal justice system ignores the foreseeable racially disparate impact of crime-control measures, it does so to its own detriment and in clear disregard of moral

JUSTICE AGENCIES 1 (1975) (quoting Morton Bard & Katherine Ellison, *Crisis Intervention and Investigation of Forcible Rape*, POLICE CHIEF, May 1974, at 68, 71.)

<sup>182</sup> This idea has been expressed in several ways. Stephen Schulhofer uses the phrase "sexual autonomy." Schulhofer, *supra* note 42, at 65. Lynne Henderson suggests that rape denies a woman's "personhood." See Henderson, *supra* note 33, at 226-27.

<sup>183</sup> Rape is also rape regardless whether the victims have whatever it is that womanhood represents. In theory, I presume, a white male rapist violates a woman's womanhood too, but he does not violate her *white* womanhood. Whatever this abstract concept of womanhood might mean, it is clear that, because violating white womanhood is worse than violating womanhood, white men are simply incapable of committing the crime that black men can commit.

<sup>184</sup> See generally Lee P. Brown, *Bridges over Troubled Waters: A Perspective on Policing in the Black Community*, in BLACK PERSPECTIVES ON CRIME AND THE CRIMINAL JUSTICE SYSTEM 79, 79 (Robert L. Woodson ed., 1977) ("[B]lacks are more likely to be arrested than whites. If arrested, they are more likely to be convicted. . . . [O]nce convicted, blacks are more likely to be placed in institutions."); Gwynne Peirson, *Institutional Racism and Crime Clearance*, in BLACK PERSPECTIVES ON CRIME AND THE CRIMINAL JUSTICE SYSTEM, *supra*, at 107, 111 (identifying factors that perpetuate racial imbalance in the criminal justice system); *Developments*, *supra* note 159, at 1477 (noting disparities in the criminal justice system's treatment of blacks and whites).

<sup>185</sup> See *supra* p. 581.

<sup>186</sup> See Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 136-39 (1987).

responsibility.<sup>187</sup> According to Tonry, we must be careful to examine our crime policies because: "The text may be crime. The subtext is race."<sup>188</sup> Statistics make clear that crime by blacks is not increasing, in either severity or frequency, but that disproportionate punishment of blacks is.<sup>189</sup> Rule 413 is likely to exacerbate this disproportionality.<sup>190</sup>

In order to combat rape, we must be concerned with transforming the socialized images of sexuality and violence that permeate our culture, but as Patricia Williams writes, "[s]urely a part of socialization ought to include a sense of caring responsibility for the images of others that are repositied within us."<sup>191</sup> Rape-reform measures that exploit white fear of the minority rapist<sup>192</sup> and perpetuate myths of his prevalence hardly seem transformative.

In sum, Rule 413's rape-based exception to the general rule excluding prior act evidence encourages juries to focus on blameworthiness, potentially decreases the likelihood that juries will convict a defendant for one rape, and encourages juries to believe that a man who rapes only once is not a "rapist." In addition, Rule 413 increases the likelihood that innocent, disadvantaged men will go to jail for stranger rapes that they did not commit and does little to increase convictions against those men who have always evaded prosecution. Disproportionately convicting black men of rape is particularly troubling given how law enforcement has been used to victimize black men and to ignore the reality of what rape means to both black and white women.

#### IV. THE MOTIVE QUESTION

Refusing to take measures to help secure more rape convictions simply because those measures may exacerbate preexisting inequities in the system is hardly an acceptable outcome, however. The above analysis, although it explains what is wrong with the supporting rationale for Rule 413 and why Rule 413 may do more harm than good,

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<sup>187</sup> See TONRY, *supra* note 126, at 32-39.

<sup>188</sup> *Id.* at 6.

<sup>189</sup> See *id.* at 4.

<sup>190</sup> As mentioned above in note 167, racially discriminatory enforcement of criminal law is not limited to blacks. Because Rule 413 is currently only a federal rule of evidence and rape is usually only prosecuted as a federal offense when it takes place on Indian land or federal property, Rule 413's effect will be visited disproportionately against Native Americans. In the last five and a half years, 26 of the 40 prosecutions under 18 U.S.C. § 2241 for aggravated sexual abuse were related to acts perpetrated on Indian reservations, and over 22% of the defendants in those actions were Native American. See MANN, *supra* note 167, at 43. Native Americans constitute only 0.6% of the U.S. population, however. See *id.* at 38 tbl.2-1. The criminal justice system's history of bias against Native Americans is just as rich and disturbing as is its history of discrimination against blacks. See, e.g., *id.* at 115.

<sup>191</sup> Williams, *supra* note 186, at 151.

<sup>192</sup> For a discussion of the central role of taboo and fear in the white construction of black sexuality, see CORNELL WEST, RACE MATTERS 119-31 (1994).

offers nothing to help secure more rape convictions. Yet reducing the incidence of rape is still a goal of indisputable importance. In order to secure more rape convictions without perpetuating or exacerbating current inequities and myths, we must start focusing both our academic inquiry and legal practice on the question of why men rape. By focusing on the question of why, we accomplish two different goals. First, we pave the way for a more equitable and comprehensive enforcement of rape law by belying the myths of who rapes. Second, we pave the way for more effective and realistic rape-reform measures by furthering our collective understanding of what rape is and why sexualized violence exists.

For too long, juries have essentially ignored the question of why men rape. Instead, juries have assumed, wrongly, that rapists rape because they are crazy and because women ask for it.<sup>193</sup> This neglect of the "why" question is somewhat odd, given the importance of motivational questions in criminal trials. For many crimes, of course, motive is obvious. People rob banks, snatch purses, cheat on their taxes, or blackmail others for money or personal gain. For some crimes, however, particularly crimes that do not involve pecuniary reward, motive can be much more difficult to discern. It is for this reason that Rule 404(b) incorporates a motive exception into the general rule excluding prior act evidence.<sup>194</sup> Understanding why a defendant might have done an act is critical to determining whether he did it. If prior acts indicate motive that is otherwise not obvious, those prior acts may be admissible under the motive exception in Rule 404(b).<sup>195</sup>

Apparently, some commentators find the emphasis on motive, at least in rape cases, misplaced. David Bryden and Roger Park write, without explication, that "[m]otive is not a mystery in a sex crime case."<sup>196</sup> Really? Think back to the narratives offered at the outset of

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<sup>193</sup> See *supra* note 131 and accompanying text.

<sup>194</sup> See FED. R. EVID. 404(b).

<sup>195</sup> Often, prosecutors try to use the motive rationale to introduce what is essentially propensity evidence. In *United States v. Powell*, 587 F.2d 443 (9th Cir. 1978), the government offered evidence of a prior conviction of marijuana distribution to show that the defendant had a motive to distribute marijuana. See *id.* at 448-49. The court properly rejected a motive theory of admissibility, however, because the prior act evidence did not shed light on why the defendant might have distributed the contraband; it only suggested that he had done it before. See *id.* at 449. The motive to distribute contraband is the motive to make money, and that motive is discernible without any social context. In contrast, admissible "[m]otive evidence, by its nature, provides a reason for the commission of the offense." *People v. Hendricks*, 495 N.E.2d 85, 108 (Ill. App. Ct. 1986) (suggesting that evidence of an internal conflict between a defendant's conduct, including an escalation of sexual aggression, and his espoused religious beliefs showed why he had a motive to kill his family). The Supreme Court of Illinois overturned this ruling, finding that the prior act evidence did not demonstrate an "escalation of sexual aggression." *People v. Hendricks*, 560 N.E.2d 611, 621 (1990). But the state supreme court did not reject the underlying motivational theory, that is, if prior acts demonstrate a reason or motive, they may be admissible. *Id.* at 620-21.

<sup>196</sup> Bryden & Park, *supra* note 12, at 544.

Part II. Is it obvious why the man who raped Susan Estrich did it? Is it obvious why the St. John's University athletes sodomized a comatose guest in their house? What motivated John, the man who apologized after raping his date, to rape her? Is it obvious why Nathan McCall joined that train? Was he motivated by the same thing that John was? Were the soldiers at My Lai motivated by the same thing motivating Thomas, the Stanford athlete who said "[i]f you don't want it in you, will you at least kiss it?"<sup>197</sup> We may be able to develop answers to these questions, and with some analysis I hope to do so. But one can hardly dismiss the motive question in rape law as self-evident, particularly given well-documented and demonstrably false public belief<sup>198</sup> about rapist motivation. What follows is an explication of the "why" question. The answers to the "why" question vary in different situations; rapists do not all rape for the same reasons. We learn essential lessons about what rape is — and why juries respond to it as they do — by delving into the question of why men rape.<sup>199</sup> By analyzing why men rape, we also better understand when prior acts of sexual assault should be admissible.

#### A. Sex

1. *Sex and Lovemaking.* — Some men rape because they want sex. Possibly aware of this, a number of academics, in an effort to explain what rape is, have attempted to define what sex should be and what rape is not.<sup>200</sup> Rape is not lovemaking. Lovemaking, according to one such feminist theory, is "the practice of a communicative sexuality, one which combines the appropriate knowledge of the other with respect for the dialectics of desire."<sup>201</sup> Another theory posits that "sexual conduct is mutual and acceptable when animating inducements are

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<sup>197</sup> FRECCERI, *supra* note 40, at 10 (quoting the victim Anne, who quoted her rapist Thomas) (internal quotation marks omitted); see also *supra* note 40 and accompanying text (relating story).

<sup>198</sup> See *supra* pp. 577, 581–82.

<sup>199</sup> The law's failure to address the motivational questions raised by rape may well stem from a reluctance to acknowledge social responsibility for rape. On the one hand, by constructing the problem of rape as one of individual and not social pathology, society avoids analyzing how social norms may foster rape. On the other hand, scholars such as Bryden and Park, who admit that rapists are not psychopaths but assume that rapist motivation is obvious, see Bryden & Park, *supra* note 12, at 534–44, seem to prove true the most radical of the feminist interpretations of intercourse, see, e.g., ANDREA DWORKIN, INTERCOURSE 122–25 (1987) (stating that intercourse is an act that men do to women, not an activity that men and women do together). A desire to rape is only obvious if one assumes that there is some overriding, omnipresent desire for sex regardless of consent, that is, a motive for sex that is completely separate from the person with whom one is having the experience.

<sup>200</sup> Catharine MacKinnon writes: "Perhaps the wrong of rape has proved so difficult to define because the unquestionable starting point has been that rape is defined as distinct from intercourse, while for women it is difficult to distinguish the two under conditions of male dominance." MACKINNON, *supra* note 74, at 174 (emphasis added).

<sup>201</sup> Lois Pineau, *Date Rape: A Feminist Analysis*, 8 LAW & PHIL. 217, 234–35 (1989).

the parties' desires for sexual pleasure or for intimacy."<sup>202</sup> One need not dispute the accuracy of these definitions of lovemaking, or their benefit in helping us to understand and restructure sexuality, in order to question their utility in rape-reform efforts.<sup>203</sup> Consider Thomas, the athlete, or the numerous date rapists who seem to expect a dating relationship to continue notwithstanding the fact that they have raped the woman that they want to date.<sup>204</sup> On the evenings of the rapes in question, these men might well have sought to practice communicative sexuality. They may have been looking for shared sexual pleasure and intimacy. That was what motivated them. That was what they wanted. That was what sex was supposed to represent and help them achieve. But, in reality, they had no idea what they were looking for. The abstract goal may have been lovemaking, but it is exceedingly difficult to understand communicative sexuality, sexual pleasure, and intimacy, particularly when one is young and inexperienced.

Rapists are young. Donna Schram found that the majority of sex offenders represented in police data are between eighteen and twenty-five years old.<sup>205</sup> In a San Antonio study, thirty-four percent of the rapists were under age twenty-five; sixty-eight percent were under age thirty.<sup>206</sup> Research documents that coercive behavior in college men is positively correlated with immaturity, irresponsibility, and lack of social conscience.<sup>207</sup> Youth probably commit a disproportionate number of all crimes,<sup>208</sup> but what is important in analyzing rapist motivation is that youthful predisposition for irresponsible and criminal activity coincides with male sexual coming of age.

Immature or inexperienced men, unfamiliar with what lovemaking is but looking for it and cast by culture into the role of pursuer, go experimenting. The experimenting can become coercive because many

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<sup>202</sup> Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 862 (1988).

<sup>203</sup> See Schulhofer, *supra* note 42, at 70.

<sup>204</sup> See RUSSELL, *supra* note 31, at 103, 113 (reporting that rape victims tell stories of men who continue to ask their victims out on dates).

<sup>205</sup> See NATIONAL INST. OF LAW ENFORCEMENT AND CRIMINAL JUSTICE & LAW ENFORCEMENT ASSISTANCE ADMIN., DEP'T OF JUSTICE, *FORCIBLE RAPE: FINAL PROJECT REPORT 8-9* (1978) (indicating that Donna Schram was the principal author).

<sup>206</sup> See WILLIAMS & HOLMES, *supra* note 84, at 74. The medians reported by both of these studies are probably inappropriately high. The numbers represent the men who were reported, not the high school and college age men who committed rapes that their victims did not report or acts that many men and women of that age group refuse to view as rape and therefore do not report. See *supra* note 84.

<sup>207</sup> See Rapaport & Posey, in *ACQUAINTANCE RAPE*, *supra* note 61, at 220. All violent criminals may be seen as irresponsible and lacking in social conscience, but to understand the minds of most rapists, particularly most date rapists, one must recognize that a huge number of these "men" are "boys." Both male aggression and sexual activity peak when men are young. See Craig T. Palmer, *Twelve Reasons Why Rape Is Not Sexually Motivated: A Skeptical Examination*, 25 J. SEX RES. 512, 516-17 (1988).

<sup>208</sup> See GOTTFREDSON & HIRSCHI, *supra* note 18, at 124-28.

boys are taught that power, dominance, and violence can be arousing to women.<sup>209</sup> Leaving aside the question whether we ought to regulate or ban pornography, its existence and the prevalence of its distribution clearly affect the extent to which men believe that violence is sensual.<sup>210</sup> Men who believe that women enjoy sexual violence are more likely to use force to obtain sex<sup>211</sup> and are more likely to self-report a willingness to rape.<sup>212</sup> In one study, respondents who were exposed to a depiction of a woman being sexually aroused by assault showed an increased belief that rape and all forced sexual acts<sup>213</sup> could be pleasurable to women. These men perceived rape victims as suffering only minimal trauma.<sup>214</sup> Another study of college men and women found that their exposure to films depicting sexual violence against women increased their acceptance of interpersonal violence against women.<sup>215</sup> Sociological studies confirm that distribution of violent pornography is positively correlated to an increased rape rate.<sup>216</sup> Given these findings, it is not surprising that many men who want to make love end up committing sexual assault.

Even when boys do not presume that power and coercion are pleasurable for women, their use of physical strength to get what they want is comprehensible and common. Consider a typical response to the candy machine that refuses to dispense the candybar for which one has inserted seventy-five cents. One puts in the money, pushes the button, and nothing happens. Maybe one puts in another seventy-five cents; maybe one just pushes the buttons again, this time with more force. Then one pushes the buttons a third time, with even more force. Finally, one slams the palm of one's hand against the machine in an effort to get the candybar to fall. This is a common use of force to get what one wants and feels entitled to. It is usually a pointless

<sup>209</sup> See MACKINNON, *supra* note 42, at 146, 148; Neil M. Malamuth & James V.P. Check, *Sexual Arousal to Rape Depictions: Individual Differences*, 92 J. ABNORMAL PSYCHOL. 55, 64-65 (1983).

<sup>210</sup> When I use the term pornography here, I mean pornography that incorporates violence, not just graphic depictions of sex. See *infra* note 216.

<sup>211</sup> See Malamuth & Check, *supra* note 209, at 60-61.

<sup>212</sup> See Todd Tieger, *Self-Rated Likelihood of Raping and the Social Perception of Rape*, 15 J. RES. PERSONALITY 147, 149 (1981).

<sup>213</sup> I distinguish these two concepts only because they may be distinguished in the respondents' minds.

<sup>214</sup> See Check & Malamuth, *supra* note 66, at 419.

<sup>215</sup> See *id.* at 419-20. When participants in these studies are debriefed on the actual effects of rape on its victims, they are much less likely to view violence as sensual and rape as pleasurable. See Malamuth & Check, *supra* note 209, at 55-67.

<sup>216</sup> See BARON & STRAUS, *supra* note 71, at 185-87. These authors are quick to point out that extremely graphic, nonviolent pornography decreases aggression against women, and studies done in the United States, Denmark, Sweden, and West Germany show no increase in the rape rate in the years following legalization and increased circulation of pornographic materials. See *id.* These findings suggest that the key to pornography's link to rape is pornography's violent content.



and relatively harmless use of force against inanimate objects. The comparable use of force against animate objects is, in contrast, often effective and very harmful.

Many rapes involve comparable uses of force. The kinds of encounters that are marked by brief assertions of power,<sup>217</sup> constant cajoling,<sup>218</sup> or infusion of a great deal of alcohol often involve force, coercion, and domination as an instrumental means of getting sex. In a study of college students, Margaret Hamilton and Jack Yee found that rape is more often a form of instrumental aggression, by which the authors indicate a means of attaining the goal of sexual gratification, than it is a means of expressing anger or hostility toward women.<sup>219</sup> The fact that these rapes involve violence does not mean that, from the perpetrator's perspective, they are not fundamentally about sexual experimentation. Most of these young men do not understand the distinctions between lovemaking and sex and rape. Some of them might even be trying to make love. Although they want to, their dates do not. Precisely because the lines of personhood and autonomy are so confused during sex,<sup>220</sup> men try to force what they want. Intimacy necessarily involves a breaking down of boundaries; it is no surprise that people experimenting with intimacy do not initially understand the rules of trespassing against those boundaries.<sup>221</sup>

2. *Sex and Shoplifting*. — No doubt, many readers are incensed at the candy-machine analogy. Women are not goods. Rape is not theft. Robbery is not the ultimate violation of self next to murder.<sup>222</sup> Goods have no self. Women do. I draw the commodification analogy purposefully, however, not to endorse commodification as a normatively appropriate way for the law to conceptualize rape and/or sex, but to demonstrate that the commodification framework may best ex-

<sup>217</sup> As one of the rape victims that was interviewed by Diane Russell commented: "He used all of his strength [only once], and he was very forceful and kept me down. That was when I realized how much stronger he was than I. And that was the only time that he had to be that forceful." RUSSELL, *supra* note 31, at 102 (internal quotation marks omitted).

<sup>218</sup> Constant cajoling (plus alcohol and unsolicited action) is how one might characterize the Thomas story. See *supra* p. 572.

<sup>219</sup> See Margaret Hamilton & Jack Yee, *Rape Knowledge and Propensity to Rape*, 24 J. RES. PERSONALITY 111, 119 (1990).

<sup>220</sup> Robin West writes: "[S]exual submission has erotic *appeal* and *value* when it is an expression of *trust*; is damaging, injurious and painful when it is an expression of *fear*; and is *dangerous* because of its ambiguity . . ." Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 129 (1987).

<sup>221</sup> Rapists are clearly not alone in failing to understand the rules of trespass in this regard. A study of Los Angeles teenagers found that although the respondents knew the difference between consensual and nonconsensual sex, "they were frequently reluctant to apply the label 'rape' to the examples of forced sexual relations." White & Humphrey, *supra* note 84, at 46 (citing Goodchilds, Zellman, Johnson & Giarusso, *supra* note 84, at 268); see also White & Humphrey, *supra* note 84, at 47 (describing a study of Rhode Island eleven to fourteen year olds).

<sup>222</sup> See *supra* note 181.

plain both the defendant's state of mind and society's frequent failure to condemn men for rape.

For some, sex is a commodity,<sup>223</sup> and if sex is a commodity, then taking it is theft. The definitions of lovemaking discussed above may attempt to resist the classification of sex as a commodity, but most people rarely, if ever, discuss the personal, intimate, and shared experiences of sex. We live in a culture that rarely discusses sex as anything other than a commodity. Indeed, the more objectified and commodified the conversation, the easier it is for most people — especially young people — to talk about sex.<sup>224</sup> Some people are never able to talk about the intimate aspects of sex, even if they do understand them. It is hardly surprising that most young people neither talk about nor understand sexual intimacy.

Instead, youths, particularly young men, are bombarded by a culture that sexualizes commodities and commodifies women's sexuality. Companies sell products by selling the sexuality of the women endorsing the product.<sup>225</sup> The product and the sex are purposefully conflated. Sex is also purposefully commodified. Men can easily buy sex, even though all but one state prohibit prostitution.<sup>226</sup> Men can also buy pornography and purchase tickets to peep shows. What motivates many rapists may not be substantively different from that which motivates men who go to prostitutes or purchase tickets to peep shows. None of these acts requires mutual enjoyment or emotional intimacy, and they are all called sex. Thus, men are able to satisfy a desire for sex without having to incorporate the complexities of sexually intimate communication.

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<sup>223</sup> Various prominent academics have adopted the commodification framework when writing about rape. See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 202 (3d ed. 1986); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1125-27 (1972); Dripps, *supra* note 42, at 1786. For criticism of the commodification framework as it applies to sex, see Guido Calabresi, *Thoughts on the Future of Economics in Legal Education*, 33 J. LEGAL EDUC. 359, 363-64 (1983); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1879-87 (1987); and West, cited above in note 42, at 1442-43. Margaret Radin suggests that "[o]nly an inferior conception of human flourishing" could condone an instrumental, commodified view of sex. Radin, *supra*, at 1884. The analysis of lovemaking noted above clearly rejects the commodification theory. See Chamallas, *supra* note 202, at 780; Pineau, *supra* note 201, at 227; *supra* p. 600. All of this debate suggests, of course, that we are far from a social consensus on what sex is or even what it should be.

<sup>224</sup> Consider the language that most teenagers use to discuss sex: "How far did you get?" "Did you score?" "Did you get some?" "Did you give it up?"

<sup>225</sup> See Antonia Abbey, *Misperception as an Antecedent of Acquaintance Rape: A Consequence of Ambiguity in Communication Between Women and Men*, in ACQUAINTANCE RAPE, *supra* note 61, at 96, 103.

<sup>226</sup> Prostitution is legal in Nevada, and notoriously underreported and ignored in the states in which it is illegal. See Jody Freeman, *The Feminist Debate Over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists, and the (Im)Possibility of Consent*, 5 BERKELEY WOMEN'S L.J. 75, 78 (1989). The existence of "red light" districts or their equivalent demonstrates social acquiescence to prostitution, notwithstanding its illegality. See Gail Pheterson, *Not Repeating History*, in A VINDICATION OF THE RIGHTS OF WHORES 3, 8-10 (Gail Pheterson ed., 1989).

This cultural endorsement and marketing of sex as a commodified good leads to an increased desire for, and sense of entitlement to, sex.<sup>227</sup> Most men are taught that sexual desire is like hunger: when it is there, you satisfy it. Women are candybars. Of course, food is not free and neither is sex, but precisely because men can and do pay for sex,<sup>228</sup> taking it without consent becomes much less morally reprehensible than other violent crimes. Thus, it is not surprising that one study found that thirty-nine percent of convicted rapists were caught in the course of a robbery.<sup>229</sup> As many of these men conceded, they raped because she was there.<sup>230</sup> They were already breaking the laws of trespass and ownership — why not take one more thing?

Men know that taking sex without consent is wrong, but many men do not perceive it as *really* bad. The relationship between alcohol and rape demonstrates this point. In one study of college men who had committed sexual assault, seventy-five percent said that they had used alcohol or drugs prior to the assault.<sup>231</sup> Another study of convicted rapists found a comparable seventy-five percent who admitted to using drugs or alcohol prior to the attack.<sup>232</sup> All of the college gang rapes that were analyzed in a 1985 study involved alcohol.<sup>233</sup> This direct relationship between alcohol use and rape exists, despite clear scientific evidence showing that “[a]lcohol disinhibits psychological sexual arousal and suppresses physiological responding.”<sup>234</sup> What may explain the correspondence between alcohol use and rape therefore is not alcohol’s affect on sex drive, but rather alcohol’s tendency to decrease inhibitions against taking that to which one has no right. Teenagers get drunk and go get sex in the same way that they get high and go to the 7-11 to shoplift candybars. They know it is wrong, but it is not *that* bad. Most adolescents do not get drunk and go rob banks. They do not get drunk and commit murder. They do get

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<sup>227</sup> Consider the sense of entitlement witnessed by one of Diana Russell’s interviewees. When asked what she thought motivated the man who raped her, she said: “I think what was going on in his head was, ‘Me, Graham, horny. You, woman!’” RUSSELL, *supra* note 31, at 93 (internal quotation marks omitted). This woman had already told Graham that she “really wanted to go to bed with [him] but [was] just feeling so lousy.” *Id.* at 92 (internal quotation marks omitted). He forced her anyway. *See id.* at 93.

<sup>228</sup> The act can be paid for directly, as in the case of prostitution, or more indirectly, as in the case of paying for dinner. A surprising number of both men and women accept the idea that once a man has paid for an evening, he has paid for the right to have sex.

<sup>229</sup> *See* DIANA SCULLY, UNDERSTANDING SEXUAL VIOLENCE: A STUDY OF CONVICTED RAPISTS 141-42 (1990).

<sup>230</sup> *See id.*

<sup>231</sup> *See* Kramer, *supra* note 37, at 116.

<sup>232</sup> *See* Deborah R. Richardson & Georgina S. Hammock, *Alcohol and Acquaintance Rape*, in ACQUAINTANCE RAPE, *supra* note 61, at 83, 85.

<sup>233</sup> *See* JULIE K. EKHART & BERNICE R. SANDLER, ASS’N AM. COLLEGES, CAMPUS GANG RAPE: PARTY GAMES? 7 (1992).

<sup>234</sup> Leif C. Crowe & William H. George, *Alcohol and Human Sexuality: Review and Integration*, 105 PSYCHOL. BULL. 374, 384 (1989).

drunk and break little rules. They shoplift and joyride and vandalize. The rule against raping, particularly date raping, is like the rule against shoplifting — it is a little rule.<sup>235</sup>

The above analysis is deeply disturbing. However much men do view women as candybars, women are not candybars. Because women are not candybars, rape is not shoplifting. Rape, at least in the words of one survivor, “is death.”<sup>236</sup> It is “a primal experience to which other events might be meaningfully analogized — the ‘rape’ of the land, the ‘rape’ of a people. But rape itself cannot be reduced to other painful experiences.”<sup>237</sup> The social proscription against inflicting such a horrific experience upon another human being should be a powerful one; it should be a Big Rule, not a little rule. But currently, it may very well not be. This little-rule hypothesis explains, in part, both why people refuse to condemn rape and why juries acquit.<sup>238</sup> Juries do not send men to jail for pocketing candybars.<sup>239</sup>

For more than twenty-five years now, feminists have been writing to tell the world that rape is annihilation, that it is like murder, that it is really, really bad.<sup>240</sup> The reluctance of juries to convict rapists and the public opinion research on rape suggest that most people still refuse to believe this message. People may not be able to see what rape is, however, until they reconceptualize what sex is. It will be hard for

<sup>235</sup> In some more violent neighborhoods, the distinction between Big Rules and little rules may be diminishing. Thus, a rambunctious night with adolescent friends that might “normally” be expected to lead to joy riding and shoplifting in some communities may, in others, lead to armed robbery and aggravated assault.

<sup>236</sup> Henderson, *supra* note 33, at 226.

<sup>237</sup> West, *supra* note 42, at 1449.

<sup>238</sup> The people who best understand the gravity of the harm that is inflicted by rape appear to be those who have known rape victims. Feild and Bienen found that jurors who have known a rape victim are less likely to distinguish between women “who were asking for rape” and those who were not. See HUBERT S. FEILD & LEIGH B. BIENEN, JURORS AND RAPE 132 (1980). If one knows firsthand how rape violates a woman’s personhood, one is less likely to view the sex involved as some “thing” that was carelessly left unprotected.

<sup>239</sup> The little-rule theory also explains why one very effective date rape-avoidance strategy is to say: “This is rape and I’m calling the cops.” Daniel Goleman, *When the Rapist Is Not a Stranger: Studies Seek New Understanding*, N.Y. TIMES, Aug. 29, 1989, at C1 (internal quotation marks omitted). Men know that what they are doing is wrong, but they do not think that they will get caught and they do not associate what they are doing with rape. Other useful resistance strategies include indicating early on that you are not interested in sex, screaming, fighting physically, and claiming to have a venereal disease. See LINDA BROOKOVER BOURQUE, DEFINING RAPE 53–54 (1989).

<sup>240</sup> “Annihilation” does not quite work as a metaphor for rape either. Lynne Henderson, in writing that “rape is life-negating; it is death,” Henderson, *supra* note 33, at 226, seems to endorse the death analogy more as a means of rejecting other analogies for rape, such as an invasion of bodily integrity, privacy, or personal autonomy, than as a positive endorsement of the murder analogy. As the Supreme Court noted, rape is not murder, it is just more like murder than any other crime. See *Coker v. Georgia*, 433 U.S. 584, 597–98 (1977) (plurality opinion). Robin West writes simply: “Rape is sui generis.” West, *supra* note 42, at 1449.

people to believe that rape is like murder as long as we maintain a commodified view of sex. If sex is a commodity, taking it is theft.

The commodification of sex and the relative impunity with which society treats extorting that commodity, coupled with the prevalence of sexualized violence and instrumental physical aggression, explain several different kinds of rape. These theories explain the confused and somewhat pathetic date rapists looking for some amorphous concept of lovemaking,<sup>241</sup> and the theories explain why some men want sex and simply take it without entertaining any illusion of lovemaking.<sup>242</sup> Commodification may also, in part, explain what motivated the soldiers at My Lai. The soldiers wanted sex because it was a good, like any other, that they could take from the enemy.

But theories of commodification and instrumental aggression have their limits. They cannot explain why the soldiers at My Lai placed their 11th Brigade patch between the legs of the women whom they left dead, spread-eagled in a field. Nor does either theory explain why the men in New Bedford cheered and goaded the others into performance. Commodification and instrumental aggression do not explain why men who do not want to rape the victim of a train nonetheless do so. These theories seem incomplete as an explanation of why the group of St. John's University students had sex with a woman who was not even conscious, and they do not explain why the Spur Posse gang needed a point system. If the commodified good is its own reward, why bother to keep score?

### B. *Relationships Among Men*

1. *Uniting.* — The questions just posed are best answered by examining how men use rape to relate to other men. Men often rape women to demonstrate their strength, virulence, and masculinity to other men. For these men, having an audience is critical; intercourse is instrumental.<sup>243</sup> The authors of one of the first extensive studies of men who rape conclude that "[m]en do not rape women out of a sexual desire for other men, but they may rape women, in part, as a way to relate to men."<sup>244</sup> Chris O'Sullivan, studying fraternity rapes,

<sup>241</sup> Thomas ("[w]ill you at least kiss it?") and John ("I've never done this before. Forgive me.") could fall into this category. *See supra* pp. 572-73.

<sup>242</sup> This grouping could include rapes like those conducted by the Spur Posse, *see supra* p. 572, and men whose introductory line is: "You're so pretty, I may just have to rape you."

<sup>243</sup> For men motivated by a desire for commodified sex, the woman is instrumental to the goal of sex. For men motivated by a desire to relate to other men, the sex itself becomes instrumental and, of course, so does the woman. The woman's mere instrumentality can result in her being left comatose.

<sup>244</sup> A. NICHOLAS GROTH WITH H. JEAN BIRNBAUM, *MEN WHO RAPE: THE PSYCHOLOGY OF THE OFFENDER* 116 (1979). The authors offer the testimony of a man who was arrested for a "pair rape": "I'm balling her, and she says to me, 'You're either good or it's been a long time since I've had it.' I said, 'Tell that to my cousin [the codefendant].' After we had her, we asked her who was the best." *Id.*

writes that "participation in a group sexual assault is motivated by the relationships among the men, for the purpose of maintaining or creating images and roles within the group."<sup>245</sup>

Thus, the Spur Posse boys developed a point system to distinguish themselves from each other. The more points the boys got, the more respect they commanded within the group. The need to relate to other men also explains the St. John's University incident. Those boys ejaculated on that comatose woman's chest, sodomized her, and whipped their penises across her comatose face to show off to each other. They could not have been trying to control or show off to her; she was unconscious. Nor were they necessarily likely to have assaulted her if they had been acting alone.

One study found that most gang rapes involve an instigator and followers. Forty-three percent of the gang rape offenders studied were followers.<sup>246</sup> Followers only rape in the context of the gang. It is the group and the need to "confirm his masculinity, achieve recognition, and/or retain his acceptance with his co-offenders" that motivates the follower.<sup>247</sup> The men in New Bedford who cheered for their friends and then took their turn at raping the victim were not looking for sex as much as camaraderie. Nathan McCall joined the train not because he wanted sexual gratification, but as he admits, because he wanted to show his fellow gang members how "cool and worldly he was" and because he wanted to be a part of the ceremony that marked the "coming together as a gang."<sup>248</sup>

2. *Dividing*. — Men also rape women in order to establish power over, or distinction from, other men. Again, using women at a purely instrumental level, men rape women who they view to be the property of other men.<sup>249</sup> These rapists rape not because they want or need the good — i.e., the sex or the woman — but because the good belongs to a man whom they wish to insult. Thus, the U.S. soldiers left the 11th Brigade patch in order to impugn the honor of North Vietnamese men. The U.S. soldiers could have gotten their sex without leaving manifest evidence that they had done so. They could have just killed the women in the same way in which they destroyed the village's animals, property, and elderly men. By making the fact of their rapes public, the soldiers added further insult to the enemy. This view explains why rapes during war time often take place in public or are committed in front of civilian witnesses,<sup>250</sup> and it explains why

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<sup>245</sup> O'Sullivan, *supra* note 142, at 146.

<sup>246</sup> See GROTH WITH BIRNBAUM, *supra* note 244, at 113.

<sup>247</sup> *Id.*

<sup>248</sup> MCCALL, *supra* note 38, at 45-47.

<sup>249</sup> The tendency to treat women as the property of other men is almost certainly buttressed by the cultural commodification of sex. As explained above in section IV.A.2, women are often viewed as goods.

<sup>250</sup> See Jeri Laber, *Bosnia — Questions of Rape*, N.Y. REV. BOOKS, Mar. 25, 1993, at 3, 4.

rape and war have gone hand in hand since there has been war.<sup>251</sup> The rapist seeks to demonstrate the superiority of his team. He does this by raping the property of the enemy.

This use of rape to insult or denigrate other men has particular impact in racial contexts. Perhaps Eldridge Cleaver described it best: "Rape [is] an insurrectionary act. It delighted me that I was defying and trampling upon the white man's law, upon his system of values, and that I was defiling his women . . . . I felt I was getting revenge."<sup>252</sup> As Cleaver himself admits, he started out raping black women for practice,<sup>253</sup> but what motivated him to keep raping white women was a desire to send a message to white men.

Fear that interracial rapes are motivated by such a desire to divide and denigrate can also partially explain the racist enforcement of rape law. Some members of white culture are particularly offended by interracial rape not because the white woman has suffered a more egregious violation, but because all of white culture, its "law" and "system of values," has been defied. Black men were lynched for raping white women precisely because white men understood that rape was intended to be used as a weapon against white men and white women.

### C. Power and Anger

1. *Power*. — In 1977, Nicholas Groth, Ann Burgess, and Lynda Holmstrom published an influential psychological analysis of rapist motivation. Their thesis, in short, was:

[I]n *all* cases of forcible rape three components are present: power, anger and sexuality. The hierarchy and interrelationships among these three factors, together with the relative intensity with which each is experienced and the variety of ways in which each is expressed, may vary . . . . [But] power or anger dominates and . . . rape, rather than being primarily an expression of sexual desire, is, in fact, the use of sexuality to express issues of power and anger.<sup>254</sup>

Recent research refutes the universality of this power typology: Groth and his coauthors limited their studies to more traditional rapes,<sup>255</sup> and

<sup>251</sup> See BROWNMILLER, *supra* note 31, at 31-34. As General Patton commented, "unquestionably" there will be rape during war. See *id.* at 73. Raping a woman in front of her husband is considered a "doubly vengeful act." *Id.* at 90.

<sup>252</sup> ELDRIDGE CLEAVER, SOUL ON ICE 14 (1968), cited in BROWNMILLER, *supra* note 31, at 251.

<sup>253</sup> See *id.*

<sup>254</sup> A. Nicholas Groth, Ann Wolbert Burgess & Lynda Lytle Holmstrom, *Rape: Power, Anger, and Sexuality*, 134 AM. J. PSYCHIATRY, 1239, 1240 (1977).

<sup>255</sup> At the time of this study, Dr. Groth worked in penal institutions. He studied rapes that were detailed by men who had been convicted or by victims who self-reported as victims to the emergency room of a major public hospital. See *id.* at 1239. Groth's later work included men who had been apprehended, but found to be incompetent to stand trial or not criminally responsible; offenders who were apprehended, but not tried; offenders who were tried and not convicted; and offenders who were identified and detected through hospitals and mental health programs,

later studies conducted with convicted rapists indicate that factors as diverse as an inability to interpret heterosocial messages,<sup>256</sup> an acceptance of interpersonal violence,<sup>257</sup> and a desire for intimacy<sup>258</sup> all operate interactively, not independently,<sup>259</sup> to motivate some men to rape. Nonetheless, no one disputes the role that power and anger play in many rapes.

Rape necessarily involves an assertion of power. As discussed above, some men use this power instrumentally, to get sex, or to get sex in order to relate to other men.<sup>260</sup> Other men use power for its own sake. Power rapists rape because they want to establish control over their victims.<sup>261</sup> They rarely exert more strength than is necessary to force their victims into submission.<sup>262</sup> Rape — the act of controlling — not sex, is critical to their motivation to rape.

This kind of motivation explains a variety of kinds of rape. For instance, the prison rapist may rape to establish himself above his victim in the prison hierarchy; by dominating his victim, he elevates his own position. He may also establish power in the prison community because, like others who share or display their rapes, he sends the message that, "because I rape, I deserve your respect."

Unlike many of the rapes that were described in the previous section, however, power rapists also rape to establish control over their particular victims.<sup>263</sup> The identity of the subject/victim is critical. Power rap-

but not apprehended. See GROTH WITH BIRNBAUM, *supra* note 244, at xii-xiii. These subjects are particularly unlikely to have committed acquaintance rapes, which is the most common form of rape, see RAPE IN AMERICA, *supra* note 1, at 4.

<sup>256</sup> See David N. Lipton, Elizabeth C. McDonel & Richard M. McFall, *Heterosocial Perception in Rapists*, 55 J. CONSULTING & CLINICAL PSYCHOL. 17, 17 (1987).

<sup>257</sup> See Neil M. Malamuth & James V.P. Check, *The Effects of Mass Media Exposure on Acceptance of Violence Against Women: A Field Experiment*, 15 J. RES. PERSONALITY 436, 443 (1981).

<sup>258</sup> See W.L. Marshall, *Intimacy, Loneliness and Sexual Offenders*, 27 BEHAV. RES. & THERAPY 491, 496-97 (1989).

<sup>259</sup> See Neil M. Malamuth, *Predictors of Naturalistic Sexual Aggression*, 50 J. PERSONALITY & SOC. PSYCHOL. 953, 953 (1986); Schewe & O'Donohue, *supra* note 70, at 672.

<sup>260</sup> See *supra* pp. 602, 606-07.

<sup>261</sup> Some may argue that, in a system of male dominance, all heterosexual sex, or at least all sex involving some sort of penetration of a female orifice, is an aggrandizement of the man's power over the woman; sex necessarily involves male control over women. See DWORKIN, *supra* note 199, at 63; MACKINNON, *supra* note 74, at 174. If this is true, then distinctions between men who want sex and men who want power are fruitless. Other feminist writers dispute this construction, however. Sex need not be about superiority if sexual submission takes place in an atmosphere of trust. See, e.g., West, *supra* note 220, at 129. Women's search for their authentic sexualities may, for some women, need to take place in intimate heterosexual relationships. See Ruth Colker, *Feminism, Sexuality, and Self: A Preliminary Inquiry into the Politics of Authenticity*, 68 B.U. L. REV. 217, 259-60 (1988) (reviewing CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987)).

<sup>262</sup> See GROTH WITH BIRNBAUM, *supra* note 244, at 25.

<sup>263</sup> As suggested earlier, see *supra* section IV.B., for many group rapists, it does not matter whom they rape; the act of raping accomplishes the desired goals. For example, Nathan McCall



ists want to control their particular victim. They use rape to do so. As one analyst of prison systems explains, "[t]here aren't many weapons in prison, so the penis becomes a weapon of control. . . . It is how prisoners assert themselves and show others that they are unassailable."<sup>264</sup> Once prison rapists have other methods of control at their disposal, for instance, when they get out of prison, they do not necessarily continue to rape those over whom they want control. There is no evidence that prison rapists become chronic rapists or that they choose to have sex with other men once they leave prison.<sup>265</sup>

This is not to say that either heterosexual or homosexual power rapes are devoid of a sexual component. Some prison rapists rape to get a "punk" and provide themselves with a sexual outlet.<sup>266</sup> Some heterosexual power rapists rape women to establish sexual control. Consider the comments of several men studied in an analysis of male attitudes toward sexual violence. These men do not self-report for having raped,<sup>267</sup> but they were asked to explain their feelings about rape:

If I were actually desperate enough to rape somebody, it would be from wanting the person, but also it would be a very spiteful thing, just being able to say, "I have power over you and I can do anything I want with you," because really I feel that *they* have power over *me* just by their presence.<sup>268</sup>

When you see a girl walking around wearing real skimpy clothes, she's offending you and I guess rape would be a way of getting even.<sup>269</sup>

I've always felt powerless to come on to a woman who was being that sexual. . . . She had all this power.<sup>270</sup>

Although some deeply disturbing notions of power and sexuality must inform these men's understanding of rape, it is also clear that, for these men, rape is different than sex. They would not rape to have sex,

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speaks of joining trains because trains were being run, not because of who was being trained. See MCCALL, *supra* note 38, at 45.

<sup>264</sup> Claire Armitstead, *Meat on the Table*, GUARDIAN, July 21, 1994, §2, at 14 (quoting Wayne Wooden, director of the Criminal Justice Program at California State University at Pomona) (internal quotation marks omitted).

<sup>265</sup> See Stephen Donaldson, *A Million Jockers, Punks, and Queens: Sex Among American Male Prisoners and Its Implications for Concepts of Sexual Orientation* (visited Nov. 5, 1996) <<http://www.spr.org/docs/prison-sex-lecture.html>> (on file with the Harvard Law School Library) (reproducing a lecture delivered at a Columbia University Seminar on Homosexualities on February 4, 1993).

<sup>266</sup> See *id.*; see also Jim Hogshire, *So You're Going to Prison . . .*, ESQUIRE, Jan. 1995, at 91, 92-93 (explaining that male prisoners who are often beaten and raped are known as "punks" and usually become the sexual slave of their "master"). A "punk" provides constant sexual access for his pimp. See Josh Getlin, *I'm Still Fighting*, L.A. TIMES, May 20, 1994, at E1 (reporting that the body of a "punk" belongs to another prisoner as long as the punk remains incarcerated).

<sup>267</sup> At least they have not been caught and do not acknowledge that they have raped. See TIMOTHY BENEKE, *MEN ON RAPE* 44 (1982).

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 54.

<sup>270</sup> *Id.* at 60. These stories suggest that when juries blame women for bringing on their own rape, they may be blaming women for "robbing" men of their sense of control and power.

nor would they rape to show off to other men. They would rape to assert control, albeit sexual, over a very specific subject — their victim.

This kind of motivation also explains much marital rape. A husband rapes in order to assert control over a wife who is somehow defying his command. His wife may not want to have sex,<sup>271</sup> or she may simply have annoyed him. He rapes her to control her, to make her his subject. Often, the husband also assaults his wife in less sexual ways: he punches her, he throws her downstairs, he shoots bullets at her, he chokes her. Sometimes he just rapes her. Unlike the man in prison, the husband has many weapons in his arsenal; his penis is just one of them. But like the man in prison, he uses his penis to establish control over his victim.

2. *Anger and Sadism.* — Groth and his colleagues also developed an anger rapist typology. The anger rapist assaults his victim completely.<sup>272</sup> He attacks all parts of her body, often forces her to engage in repeated, nonsexual degrading acts, and uses much more violence than is necessary to force her into submission.<sup>273</sup> “The aim of this type of rapist is to vent his rage on his victim and to retaliate for perceived wrongs or rejections he has suffered at the hands of women. . . . This offender displays a great deal of anger and contempt toward women.”<sup>274</sup> The offender “does not seek out a specific victim but instead discharges his anger onto someone who is immediately available.”<sup>275</sup> Some anger rapists reach the point of what Groth calls sadism. In these situations, “[t]here is a sexual transformation of anger and power so that aggression itself becomes eroticized.”<sup>276</sup> Often these rapists murder their victims after, and possibly even before, raping them.<sup>277</sup> Many of these rapists rape with increasing frequency.<sup>278</sup>

Most of the angry and sadistic rapists are men who, with some degree of medical certainty and social consensus, we can label mentally ill.<sup>279</sup> Many of these men suffer from psychopathology. Everybody agrees that what these men do breaks a Big Rule. Everybody agrees that these men should be punished. These men are the paradigm,<sup>280</sup> but they are not most rapists. Seventy percent of rape victims report no physical injury and another twenty-four percent report only minor physical injury.<sup>281</sup> Most rape victims are not victims of

<sup>271</sup> See RUSSELL, *supra* note 31, at 122.

<sup>272</sup> Many domestic violence abusers may also fall into this category.

<sup>273</sup> See Groth, Burgess & Holmstrom, *supra* note 254, at 1241.

<sup>274</sup> *Id.*

<sup>275</sup> GROTH WITH BIRNBAUM, *supra* note 244, at 44.

<sup>276</sup> *Id.*

<sup>277</sup> See JANE CAPUTI, *THE AGE OF SEX CRIME* 27–29 (1987).

<sup>278</sup> See Taylor, *supra* note 69, at 331.

<sup>279</sup> See Groth, Burgess & Holmstrom, *supra* note 254, at 1243.

<sup>280</sup> In a comprehensive analysis of serial rapists, Jane Caputi suggests that our cultural eroticization of violence, our commodification of women's body parts, and our fascination with serial rapists promote the sadistic rapist's “crazy” behavior. See CAPUTI, *supra* note 277, at 5–13.

<sup>281</sup> See RAPE IN AMERICA, *supra* note 1, at 4.

angry, sadistic rapists. This does not mean that most rape victims are not raped; it does not mean that rape victims fabricate their stories; and it does not mean that what happens to them is okay. It does belie the common belief that rapists are crazy men whose sadistic hunger for sex or hatred of women compels them to rape.

## V. ADMISSIBILITY

The motivational typologies just presented permit courts to admit prior acts of rape under Rule 404(b)'s motive exception without relying on Rule 413.<sup>282</sup> Judges should incorporate these typologies into Rule 404(b) determinations of admissibility because the traditional assumptions about rapist motivation that underlie Rule 413 are inadequate. First, justifications that root rapist motivation solely in sexual desire are seriously flawed. Having sexual desire does not distinguish a rapist from the rest of the population. More importantly, what leads many rapists to rape is not a perverse or abnormal sexual need, but a common, if distressing, failure to understand or appreciate the gravity of the harm that they inflict when they obtain sex by force. This failure is linked to the cultural acceptance of sexualized violence, instrumental aggression, and a commodified view of sexuality.<sup>283</sup> Second, justifications for a rape exception that assume psychopathological motivation are also flawed. The differences between rapes, the group norms that encourage rape, and the extensive psychological work that has been done with rapist and nonrapist populations clearly refute the universality of a psychopathology theory.<sup>284</sup> The following analysis can also be used under existing evidence law in state courts, most of which have a motive exception comparable to Rule 404(b).

The motivational analysis in Part IV suggests, however, that it is often possible to answer the question why men rape without separating rapists out as a distinct kind of criminal or relying on stereotypes of rapists. Research on domestic violence provides an important analogy. In her 1991 article on battered women and self-defense, Holly Maguigan warns of the dangers inherent in separating out and typifying battered women.<sup>285</sup> Maguigan argues that reforms based on a prototypical paradigm of how battered women behave exclude the nonparadigmatic victims of domestic violence.<sup>286</sup> Moreover, Maguigan

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<sup>282</sup> See FED. R. EVID. 404(b). Rule 404(b) provides several exceptions to Rule 404's general ban on prior act evidence. See *id.* Prior act evidence may come into evidence if offered to show motive, opportunity, preparation, plan, knowledge, identity, or absence of mistake or accident, but not to show propensity or character. See *id.*; *supra* pp. 567-68 and note 195.

<sup>283</sup> See *supra* section IV.A.2.

<sup>284</sup> See *supra* section II.B.

<sup>285</sup> See Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 383-85 (1991).

<sup>286</sup> See *id.* at 437-38.

explains that the substantive and evidentiary reforms that have been proposed to help battered women are not necessary because the social-context evidence that is critical to imparting an understanding of the circumstances surrounding domestic violence is already admissible under preexisting evidence rules.<sup>287</sup> By "maximizing jurors' access to information about the social context of the act of the defendant whose case they must decide,"<sup>288</sup> the law can minimize the extent to which preexisting biases control trials and minimize the use of exclusionary stereotypes.

The same principles apply in rape prosecutions. By supplying juries with the motivational and social-context evidence that explains why men rape, we avoid the need to define the paradigmatic rape and thereby help discard the notion that rapists are somehow weird, perverted, and different from normal men. We also help discard the notion that there are legitimate and illegitimate rape victims. Stereotypical constructions of rape have made rape convictions particularly hard to secure because the men on trial often do not appear to be weird, perverted, or different, and the women victims often fail to reflect the pure (and white) image that jurors feel the need to protect. Focusing on the social context within which men rape will force society to examine the true, yet disturbing, reasons for rape. This change in focus will both help to secure more rape convictions and help to advance our cultural understanding of rape.

Courts should rely on two Rule 404(b) exceptions. The first and most important exception is motive.<sup>289</sup> The second exception, which addresses problems of defendant (not victim) credibility, is absence of mistake.<sup>290</sup> Admittedly, both of these exceptions, and indeed most of evidence law, rely on judges' discretion. Judges, who are influenced by the same rape myths and cultural norms that affect jurors, may not use this discretion appropriately. They may not take the time and en-

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<sup>287</sup> See *id.* at 420-31.

<sup>288</sup> *Id.* at 459.

<sup>289</sup> Courts have rarely discussed or applied the motive exception of Rule 404(b) in rape cases. Arguably, the "lustful disposition" exception is rooted in motivational theory because its premise posits lust as the motivation for rape. The courts that use the lustful disposition exception, however, construe it as something other than a subset of Rule 404's motive rule. See *Lannan v. State*, 600 N.E.2d 1334, 1339 (Ind. 1992) ("[S]uch evidence may be admissible despite its tendency to show bad character or criminal propensity, if it makes the existence of an element of the crime charged more probable that it would be without such evidence." (emphasis omitted) (quoting *Bedgood v. State*, 477 N.E.2d 869, 872-73 (Ind. 1985)) (internal quotation marks omitted)); *State v. Taylor*, 735 S.W.2d 412, 415 (Mo. Ct. App. 1987) ("[W]henver the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible . . . ." (quoting *People v. Peete*, 169 P.2d 924, 930 (Cal. 1946) (en banc)) (internal quotation marks omitted)). Perhaps this reticence to place these admissions under the Rule 404(b) motive exception stems from a hesitancy to delve into the complex issues of sexuality, power, and violence that underlie a comprehensive rape inquiry.

<sup>290</sup> See *FED. R. EVID.* 404(b).

ergy necessary to analyze fully why and when certain motivational typologies are applicable. But they should. Judges should be willing and eager to discard the old stereotypes and to help forge a new judicial understanding of rape. Rules that remove the question of admissibility from the judges' discretion will obscure the critical distinctions between different types of rapists and, therefore, different kinds of rapes. Thus, in order to break through our culture's restrictive understanding of rape, we may have to trust judges to do their job carefully.

One way of cabining the inevitable disadvantages of allowing too much judicial discretion in an area rife with stereotypes and bias is to require written decisions by judges who admit prior act evidence in sexual assault cases. Most evidentiary decisions are made by trial judges without a complete explanation. These decisions are routinely affirmed by appellate courts on the theory that "the trial process is the one legal area that the judge should control with as little interference as possible."<sup>291</sup> This deferential theory is less persuasive in the rape context, however, given the arguable historical failure of rape trials to secure just results that protect both victim and defendant.<sup>292</sup> Rape may be the one area in which it is important to encourage supervision of the trial process. Requiring written opinions for prior sexual assault admissibility determinations would be one way to facilitate such supervision. The following discussion offers the kind of analysis that judges should engage in and appellate courts should review when weighing the admissibility of prior acts of sexual assault.

### A. Motive

1. *Rape and Status*. — For those rapes committed within the context of a group that uses sex as a means of bonding and affecting status within the group, evidence of how rapes affect that status should be admissible to show particularly strong motive. The "point" the group member receives, the privilege that inures to him, or the bonding that results from the act of collectively raping all suggest a cultural medium in which sex is used as a currency, the accumulation of which gives one more power or status. In these groups, there is always added incentive to have sex, not because sex itself is a goal, but because something else comes with it. Imagine, for instance, that two friends, Bill and Frank, make a twenty-dollar bet in which Bill bets Frank that he will have sex with Mary. Two weeks later, Mary

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<sup>291</sup> JACK H. FRIEDENTHAL & MICHAEL SINGER, *THE LAW OF EVIDENCE* 5 (1985); see also LEMPERT & SALTZBURG, *supra* note 13, at 2–3 (noting the "propensity of the courts to dispose of evidence issues without discussion in a catch-all paragraph, to rationalize rulings below as correct, or to conclude, without reasons, that possible errors below could not have affected the trial results").

<sup>292</sup> See *supra* section II.D.

reports that Bill raped her. Few people would dispute that evidence of the bet should come in to show particular motive. Many male groups, gangs, and clubs have the equivalent of an ongoing bet. That is why they develop a point system and rape in groups and make public their rapes. The status that inures to them for having raped provides the same kinds of incentives to rape as did the money for Bill. Rule 404(b) should permit admitting evidence of these incentives, as demonstrated through the mores, culture, and discourse of the group.

The critical evidence to be used in situations involving such groups will not necessarily be the prior acts of rape. The fact that one man raped before is less probative of motive and more likely to be prejudicial than is evidence of the specific group mores that encourage rape. Extrinsic evidence of how the group functions must be admitted to show why members of this group rape. Evidence that men have raped before does not necessarily explain why they rape. On the other hand, the existence of a point system, the messages of accomplishment, or the desire to train new members explains why men in these groups have an incentive to rape that other men do not have.<sup>293</sup> Accordingly, that evidence should be admissible under Rule 404(b)'s motive exception.

A comparable analysis supports the admission of prior acts evidencing the existence of a competition or war in which the male participants rape the other side's women in order to gain advantage.<sup>294</sup> The evidence should be admitted to show that these men use rape as a tool to denigrate the enemy. The rapist engaged in such a war has added incentive to rape because his rape will bring him a benefit that consensual sexual encounters, or rapes outside of the context of war, will not.<sup>295</sup> This motive does not indicate that all prior acts of rape should come in against a soldier. The prior acts should only come in

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<sup>293</sup> For instance, evidence of the language that Nathan McCall's gang used, in addition to testimony regarding the rapport with the group, *see* MCCALL, *supra* note 38, at 43-47; *supra* p. 571, should be admissible because it demonstrates motive. Hearsay should not be a problem because the statements would come in to show that encouraging, cajoling, and aggrandizing words were said, not that they were true. *See* FED. R. EVID. 801(c).

Admittedly, this kind of evidence is closely related to character evidence, which is inadmissible, *see* FED. R. EVID. 404, but the group norms should be admissible in light of the critical motivational answers that they provide. Courts in other contexts have recognized the importance of how group-based norms affect motive. *See* *People v. Patterson*, 610 N.E.2d 16, 35-36 (Ill. 1992) (holding that evidence of gang participation was admissible to show a motive to steal guns).

<sup>294</sup> The use of rape in this manner suggests that rape can be prosecuted as both a rape, that is, a sexual assault on a woman, and as a war crime. In addition, if one assumes that there is a state of racial antagonism between racial groups domestically, such a rape could be prosecuted as a hate crime, that is, a racially motivated destructive act. Yet people should not assume that racial animus motivates all interracial rapes any more than they should assume that racial animus motivates all nonsexual interracial assaults. To suggest that the law can treat all interracial rapes as hate crimes gives legitimacy to the white culture's heightened sense of offense at interracial rape. Clearly, strong policy reasons exist not to endorse such an assumption.

<sup>295</sup> A man may be a "soldier" in an informal war (between racial groups, for instance).

to the extent that they show that the soldier used rape to conquer the enemy.<sup>296</sup> Prior acts suggesting that the accused raped previously — because he wanted sex or because he wanted the status that would inure to him in a group — are irrelevant under this theory.<sup>297</sup> The man who has raped in all kinds of circumstances saves himself from his own prior act evidence because the breadth of the prior act evidence suggests that it is not the situational norms that provided him with an incentive to rape.<sup>298</sup>

For many rapists, however, the situational norm motivates the rape.<sup>299</sup> This means that men who have left a group and are no longer subject to its sex-as-currency culture should not necessarily have to answer to prior act evidence showing that they once raped as part of such a group, if comparable dynamics did not give them added incentive to rape in the instant case. The group dynamics are relevant to the extent that they show that the accused belonged then, and belongs now, to a group in which his motive to rape distinguishes him from men not in that or similar groups. In other words, if the circumstances surrounding a prior incident reveal the motive to rape in a subsequent incident, then the prior incident should be admissible under Rule 404(b)'s motive exception. If, however, the previous and subsequent incidents do not appear to be motivated by the same kind of status-seeking behavior, then the prior act evidence should not be admissible.

This admissibility theory finds support in recent research, which has found that "the field of personality and social psychology has produced widespread agreement that behavior is simultaneously a function of disposition and situation, and their mutual interaction."<sup>300</sup> If there are group dynamics that suggest an added incentive or reason to rape, evidence of these dynamics should be admissible. Many men

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<sup>296</sup> Contrary to General Patton's assertions about the inevitability of rape in war, *see supra* note 251, apparently North Vietnamese soldiers did not rape as a means of denigrating their enemy, *see* BROWNMILLER, *supra* note 31, 90–91. This restraint may suggest that, if the social taboo against raping is strong enough, soldiers will not use rape as a systematic tool of destruction. *See id.* at 91.

<sup>297</sup> There will be mixed-motive situations, however. Group rapes during war may serve the double purpose of denigrating the enemy and letting soldiers bond with each other.

<sup>298</sup> Evidence of such a man's repetitive behavior might be admissible under the repetitive-behavior rationale discussed below in section V.A.3.

<sup>299</sup> If situational norms do not explain the motive to rape, then logically, people who support recent legislative efforts to have sex offenders register with their local police departments, *see, e.g.,* 730 ILL. COMP. STAT. ANN. 150/3 (West 1992); N.J. STAT. ANN. § 2C:7-3 (West 1995), should be prepared to register every soldier who raped on a tour in Vietnam and every college student who "could not stop himself." Brownmiller's interviews with reporters and soldiers who served in Vietnam, *see* BROWNMILLER, *supra* note 31, at 86–113 (describing the pervasiveness of rape in the Vietnam War), and the numbers of men willing to self-report rape, *see supra* p. 601 and note 61, indicate that the number of registrars might overwhelm the process.

<sup>300</sup> Susan Marlene Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevance*, 27 CRIM. L. BULL. 504, 518 (1991).

would not rape were it not for the group. Many men are followers, not leaders.<sup>301</sup> Many men may grow out of the adolescent need for acceptance that leads many of these groups to coalesce in the first place. Men who are not living in a culture of hate for the enemy may not be at all inclined to rape other women. Other men may rape regardless of group dynamics. The norms surrounding one previous rape can show the particular group dynamics that encourage the behavior.

2. *Rape As Punishment.* — Evidence of a rapist's particular anger and animosity toward or desire to control a particular victim should also be admissible under the motive exception in Rule 404(b). When this anger and animosity have manifested themselves in prior acts of violence, which may or may not include rape, these prior acts should be admitted. The current lustful disposition exception,<sup>302</sup> which is rooted in a belief that sexual desire motivates the rapist, completely fails to capture the relevant dynamic. Desire for dominance and control motivates many rapists. Courts should be aware that the antagonism between the accused and the victim is highly probative of why the accused might rape. Again, consider Frank and Bill. Frank and Bill used to be friends. Frank now accuses Bill of beating him up outside a bar. Evidence that Bill had been angry at Frank for some extrinsic reason would be admissible in the assault trial. Indeed, if there were no witnesses, which is often the case in rape, evidence of animosity would be essential. Without it, Frank could not explain why Bill hit him.

Some commentators suggest that this kind of prior act evidence — a series of acts perpetrated against the same person — is nothing other than propensity evidence that is disguised as motive, because all that the evidence shows is the propensity of the defendant to attack the victim.<sup>303</sup> But these authors fail to see the critical distinction between an abstract propensity to hurt and a specific propensity to hurt one person. An abstract propensity to harm may suggest a general criminal disposition. A propensity to attack one person suggests motive — be it hate, jealousy, or anger — to harm that one individual. General propensity evidence demonstrates a link between a defendant and violent behavior.<sup>304</sup> Prior acts perpetrated against one particular victim demonstrate a link between the defendant, the behavior, and the victim. For instance, evidence that Bill had yelled violently at Frank before the assault or that he had hit Frank previously links Bill's pro-

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<sup>301</sup> See *supra* p. 607.

<sup>302</sup> See *supra* pp. 581–82.

<sup>303</sup> See LEMPERT & SALTZBURG, *supra* note 13, at 226.

<sup>304</sup> The Gottfredson and Hirschi hypothesis, see *supra* note 18, may suggest that this kind of general criminal disposition should be admissible because it indicates a lack of control. However, if one accepts this theory, one is hard-pressed to maintain any semblance of Rule 404's general ban on character evidence.



pensity to hurt specifically to Frank. The nexus to the victim makes the prior acts against that victim far more probative than generalized violent behavior, precisely because the prior acts show a motive to hurt that victim, whereas general propensity evidence does not. Thus, prior violence or evidence of vengeance by the defendant against the rape victim should be admissible to show a motive that might otherwise be elusive.

Various courts have already recognized the importance of this kind of prior act evidence to show motive in the domestic violence context. "When one spouse or partner in a relationship commits a crime against the other, 'any fact or circumstance relating to ill-feeling; ill-treatment; jealousy; prior assaults; personal violence; threats or any similar conduct or attitude . . . are relevant to show *motive* and *malice* in such crimes.'"<sup>305</sup> In the rape context, this kind of evidence will be particularly useful in securing rape convictions against previous or current lovers and husbands. Prior acts in these instances should come in to show that the accused used rape as a weapon against a particular victim. The fact that he may have had consensual sex with the victim when he was not angry does not mean that he was incapable of using nonconsensual sex as a weapon against her when he was angry.<sup>306</sup>

Judges and juries have been insufficiently cognizant of how rape can be used to punish. They have often ignored the rapist who rapes to punish his victim. Emphasizing the element of anger focuses on the violence that makes the act rape, not sex, and helps the jury understand why the rapist did it. Emphasizing the violence also draws juror attention away from the sexual nature of the act. This process should help diminish juries' tendencies to discount rapes in cases of marital and lover abuse. The rapist's anger, not his preexisting sexual attraction to the victim, explains his motive. Thus, prior acts and behavior should be admissible if they demonstrate the motive to hurt.

3. *A Need To Rape*. — Neither of the above Rule 404(b) motivational theories — group dynamics or punishment — would allow the admission of numerous prior acts of rape perpetrated randomly against many different victims. Evidence that a man rapes different women

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<sup>305</sup> *Mitchell v. United States*, 629 A.2d 10, 13 (D.C. 1993) (footnote omitted) (quoting *Romero v. People*, 460 P.2d 784, 788 (Colo. 1969)); see also *Romero*, 460 P.2d at 788 (holding that evidence of past marital troubles was admissible to show the defendant's motive in murdering his wife); *Garibay v. United States*, 634 A.2d 946, 948 (D.C. 1993) ("[I]n cases involving domestic violence, evidence of previous hostility between spouses or lovers may be of particular relevance to show motive . . ."); *Commonwealth v. Faison*, 264 A.2d 394, 401 (Pa. 1970) (holding that a witness's testimony as to the defendant's threats to her were admissible to show malice).

<sup>306</sup> For research on the overlap between marital rape and domestic violence, see DIANA E.H. RUSSELL, *RAPE IN MARRIAGE* 87-101 (1982), which states: "It is clear from our survey that there is a large and significant group of women who experience both wife rape and wife beating . . . [although there is also] a smaller but significant group of women who experience only wife rape." *Id.* at 100-01.

on a random basis probably does not indicate motive to hurt a particular victim or motive to secure status relative to other men. Some men may rape without having a specific reason to do so. Some men may be complete strangers to their victims. These men may rape because they feel powerless and frustrated in the world. They may rape to show themselves that they can do it or to get satisfaction out of controlling someone — anyone — else. Unfortunately, inflicting feelings of powerlessness and frustration on others does not distinguish rapists. Comparable feelings manifest themselves in nonsexualized acts of random violence.<sup>307</sup> Windows get smashed. People get mugged and hurt more severely than they would if the perpetrator had just wanted money. People often commit random violence just to lash out at the world rather than at any particular victim. Men who rape just to lash out at the world cannot necessarily be distinguished, at a motivational level, from men who lash out in other ways. Particularly frustrated people may smash windows and mug and rape people, all in an attempt to alleviate frustration and a general sense of powerlessness.<sup>308</sup>

Prior acts of rape in these situations may nonetheless be admissible if they occur with sufficient frequency and if they suggest that rape is a special means of violent expression for the accused. That someone rapes repeatedly strongly suggests that he has a need, or a particularly strong internal desire, to rape. The repetitious nature of the conduct indicates that there is a motive to rape, even if that motive is not discernible to the rest of us. The prior acts show that a need exists, not what the need is.<sup>309</sup>

This avenue of admissibility will be most effective against angry men who rape to alleviate their frustration. Men who act out their

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<sup>307</sup> See GOTTTFREDSON & HIRSCHI, *supra* note 18, at 36, 92 (explaining that most men actually arrested for rape tend to have committed other crimes).

<sup>308</sup> For instance, one man arrested in Chicago in 1995 for sexually assaulting three women and robbing a fourth had been previously convicted of attempted armed robbery, home invasion, burglary, possession of a stolen vehicle, and sexual assault, most of which occurred in separate incidents. See Andrew Martin & Maurice Possley, *Convicted Rapist, 27, Is Charged with 3 Sex Attacks on North Side*, CHI. TRIB. (S.W. ed.), Mar. 30, 1995, § 2, at 5. Such cumulative acts clearly suggest someone who is incapable or unwilling to live within the parameters of the law and who is likely to commit violent acts. Taken as a whole, however, the acts do not necessarily indicate that this man is more of a "rapist" than a "thief."

<sup>309</sup> This theory should be distinguished from one that bases prior act admission on a distinctive pattern of rape. See *United States v. Sneezzer*, 983 F.2d 920, 924 (9th Cir. 1992) (holding that a prior act involving the defendant abducting a woman from a highway, driving her to a remote spot on the Navajo Reservation, and raping her was admissible in a trial involving a comparable abduction from a highway, transportation to a remote spot on the same reservation, and a subsequent rape); *United States v. Hadley*, 918 F.2d 848, 851 (9th Cir. 1990) (admitting testimony regarding forcible sodomy of other minor victims against a defendant charged with forcibly sodomizing a student). As these cases indicate, if two rape incidents are sufficiently similar, many jurisdictions already admit prior act evidence under a distinct pattern theory according to Rule 404(b).

feelings of powerlessness by raping women are likely to do so repeatedly.<sup>310</sup> These kinds of repetitive rapists are the ones for whom rape becomes a distinguishable means of violent expression.<sup>311</sup>

The problem with this theory of admissibility is its susceptibility to the potential abuses outlined above. In essence, it allows prior acts to show that the defendant is one of those "crazy" men who rape women, even though there are real costs to perpetuating the belief that all rapists rape because of individual pathology. Police and prosecutors will continue to use race and class stereotypes to identify certain men as deviant or crazy and, therefore, likely to rape. Thus, judges should be certain that the prior act evidence actually establishes an internally motivated individual need or pathology to rape. One or two prior acts may not establish such a pathology. Three or four prior acts probably do. In order to avoid the potential prejudices detailed above, courts must make sure not to admit evidence suggesting a stereotype when the prior act evidence itself does not verify the applicability of that stereotype.

### *B. Absence of Mistake*

The motivational theories discussed above would allow evidence of prior acts of rape to come into evidence under Rule 404(b) when those prior acts give insight into why the defendant may have done the alleged act. These theories thus avoid the inaccurate and antiquated stereotypes of rapists that currently animate and justify Rule 413. Still, these new theories do little to combat the stereotypes and prejudices that are often built into a defendant's consent to rape defense. They do little, for instance, to prevent the defendant from exploiting the myth that "she wanted it" or "she asked for it." To combat this kind of exploitation, courts need an evidentiary rule that allows juries to question the defendant's story. The absence of mistake rationale in Rule 404(b) provides such a rule.

The traditional Rule 404(b) "mistake" exception allows the admission of prior act evidence to show that the defendant's theory of mistake is not credible.<sup>312</sup> For instance, the defendant might say: "I know

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<sup>310</sup> See MCCORMICK ON EVIDENCE, *supra* note 15, § 190, at 346. Rapes motivated by this kind of desire for control might also be prosecuted as gender-based hate crimes. Unlike Eldridge Cleaver's professed motivating animus, *see supra* p. 608, the motivating animus in these cases is hatred of women, not hatred of a woman's particular racial group.

<sup>311</sup> A comparable theory of admissibility could also allow for the admission of repeated prior acts of other crimes, the motive of which is difficult to discern. Smashing windows once or twice does not indicate a need to smash windows; smashing windows every night does indicate such a need.

<sup>312</sup> See FED. R. EVID. 404(b); *cf.* *Andresen v. Maryland*, 427 U.S. 463, 483-84 (1976) (holding that evidence of liens on other lots that were sold by the defendant were admissible to show that the defendant's failure to deliver the instant lot free of encumbrances was not "mere inadvertence"); *United States v. Huels*, 31 F.3d 476, 478 (7th Cir. 1994) (holding that evidence of the

I took it, but I thought it was my property when I took it." If the defendant has been engaged in numerous prior incidents of theft in which he also mistakenly thought the stolen goods were "his" property, his mistake looks much less honest. The prior acts come in to show the implausibility of his story. Likewise, if the defendant alleges that he thought the victim consented and there are prior incidents in which he also (mistakenly) thought that his victims consented, his claim of mistake looks much less believable.<sup>313</sup>

This theory of admissibility is closely related to the British doctrine of chances. As evidence scholar Edward Imwinkelried explains, under the doctrine of chances, "[t]he more frequently the accused is involved in [suspicious] circumstances, the less plausible the claim of [innocence]."<sup>314</sup> Thus, prior acts of rape should be admissible under the doctrine of chances if they seriously undermine the plausibility of the defendant's defense. When a defendant suggests that "she wanted it," but both the instant victim and previous victims dispute defendant's assertions that "they wanted it," his claims seem much less plausible.<sup>315</sup>

Some commentators, including Professors Imwinkelried, Bryden, and Park, suggest that prior acts are relevant in these instances because they go to a defendant's intent to commit rape.<sup>316</sup> Drawing an analogy to receipt of stolen goods cases, these authors argue that, just as previous acts of receiving stolen goods belie a defendant's assertion that he did not intend to receive stolen goods, previous acts of rape belie the defendant's assertion that he did not intend to rape the victim.<sup>317</sup>

However, this analysis confuses intent and credibility. In rape trials, intent is often irrelevant.<sup>318</sup> Numerous scholars have suggested that a finding of negligence should be sufficient to secure a rape con-

defendant's previous attempts to grow marijuana was admissible to rebut the defendant's assertion that he inadvertently wandered into a marijuana garden).

<sup>313</sup> Two other state courts have begun to recognize the importance of prior act evidence when a rape defendant offers a defense of consent. See *State v. Lamoureux*, 623 A.2d 9, 14 (R.I. 1993) ("[I]ntroduction of [evidence of the prior act of rape] was reasonably necessary in order to negate the defense of consent and to prove . . . that the defendant was not operating under the mistaken belief that consent had been given."); *Rubio v. State*, 607 S.W.2d 498, 501 (Tex. Ct. App. 1980) (stating that "when a defendant in a prosecution for rape raises the defensive theory of consent," then "[t]he State may . . . offer extraneous offenses which are relevant to that consented issue."). In a widely celebrated case, however, a Florida court refused to admit prior incidents of rape against William Kennedy Smith when he raised the defense of consent. See *Bryden & Park*, *supra* note 12, at 520; *Estrich*, *supra* note 42, at 12.

<sup>314</sup> Imwinkelried, *supra* note 89, at 1133.

<sup>315</sup> See *Bryden & Park*, *supra* note 12, at 577; Imwinkelried, *supra* note 89, at 1133.

<sup>316</sup> See *Bryden & Park*, *supra* note 12, at 580; Imwinkelried, *supra* note 89, at 1133.

<sup>317</sup> See *Bryden & Park*, *supra* note 12, at 551-52; Imwinkelried, *supra* note 89, at 1132-33.

<sup>318</sup> When intent is relevant, at least one court has admitted prior acts to prove intent. See *Rubio*, 607 S.W.2d at 502.

viction.<sup>319</sup> Rape is a strict liability crime in many states.<sup>320</sup> Whether the defendant intended to make love, have sex, or rape is irrelevant if the victim did not consent. The real evidentiary issue is not a defendant's intent; it is his veracity. Is it plausible that he believed that she consented? Prior acts of rape should come in under the mistake exception of Rule 404(b) to show that whatever his intent, his averred belief that she consented is implausible.

This avenue of admissibility does not avoid all of the problems with regard to prior act evidence. As suggested above, juries often implicitly acknowledge the implausibility of the defendant's consent defense, but nonetheless acquit because they blame women or refuse to blame men.<sup>321</sup> Mindful of these concerns, courts should use the absence of mistake rationale when the potential prejudicial harms to the defendant are unlikely to be severe. The more the credibility cards are stacked in favor of the defendant and against the victim, the more appropriate it is to use this rationale. Thus, a court should be more willing to admit prior acts suggesting nonconsent if the facts suggest that the jury might be particularly likely to favor the defendant. If the accused does not have prior experience with the criminal justice system and if race is not likely to be an issue, then the prior act evidence should come in because, in these situations, defendants are more likely to reap the benefits of a "nice boy" myth. Similarly, a defense that highlights the victim's "culpable" behavior and thereby exploits the myth that "women ask for it" should open the door for the prosecution to dispel another myth — that "nice boys do not rape." The more that the defendant flaunts his good character and thereby relies on stereotypes that excuse men ("nice boys do not rape"), and the more that the defendant relies on stereotypes that blame women ("she asked for it"), the less likely the prior act evidence is to be unduly prejudicial, because the defendant is already benefiting from the background myths that prejudice the victim.<sup>322</sup> In essence, therefore, a proper Rule 403 balancing coupled with the absence of mistake analysis under Rule

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<sup>319</sup> See *ESTRICH*, *supra* note 33, at 94–98; *Dripps*, *supra* note 42, at 1804; see also *Schulhofer*, *supra* note 42, at 74–77 (arguing that the absence of positive consent, regardless of the perpetrator's intent, should count as nonconsent).

<sup>320</sup> See, e.g., 720 ILL. COMP. STAT. 5/12–15(1) (West 1994) (indicating that the accused does not need the intent to rape); MICH. COMP. LAWS § 750.520(b)(1)(c) (1979) (same); *State v. Reed*, 479 A.2d 1291, 1296 (Me. 1984). In contrast, Texas requires that a defendant "intentionally or knowingly" cause sexual conduct, TEX. PENAL CODE ANN. §§ 22.011, .021 (West 1994), and the relevant federal statute requires that the defendant "knowingly cause[ ] another person to engage in a sexual act" by using force, or threats, or by attempting to do so, 18 U.S.C. § 2241(a) (1994).

<sup>321</sup> See *supra* pp. 587–89.

<sup>322</sup> Rule 404(a)(1) allows the prosecution to introduce character evidence in order to rebut a defendant's proffer of pertinent character-trait evidence. See FED. R. EVID. 404(a)(1). Given the prevalence of the myth that "good boys do not rape" and the corresponding likelihood that the jury will assign "niceness" evidence undue weight, the standard for the admissibility of prior acts of sexual should not be particularly high.

404(b) should often lead to the conclusion that this prior act evidence is not likely to be unduly prejudicial and should therefore be admitted to show the implausibility of the defendant's story.<sup>323</sup>

## VI. CONCLUSION

Rule 413 is a dangerous means of securing more rape convictions. Its rationale is not supported by evolving understandings of rape. Moreover, maintaining the belief that rape's distinction from other crimes lies in the character of its perpetrators, not in the effect on its victims, imposes costs on those men who can least afford to bear them, and on women who are forced to live in a legal system that, despite the overwhelming evidence to the contrary, treats rape as social deviance. The legal endorsement of social-deviance theory hinders feminist efforts to confront rape for what it is.

Ironically, the avenues necessary to admit prior acts of rape are, and have been, available for some time. That they have not been used reflects the legal system's reticence to examine the root causes of rape. This Article begins that examination and demonstrates that Rule 404(b)'s exceptions hold a great deal of promise. By analyzing the conditions under which men rape and acknowledging how men use rape in different situations, evidence law can help to secure convictions of those rapists who have enjoyed the benefits of perverse stereotypes without perpetuating those stereotypes or further punishing those men who have already been unfairly victimized by the law's paradigmatic approach to rape.

This Article argues against a blanket rule allowing admission of prior acts of sexual misconduct. Instead, judges should weigh the probative value of the prior act evidence, by evaluating how it indicates motive or absence of mistake, and the prejudicial value of the evidence, by evaluating whether it is likely to exacerbate preexisting prejudices and stereotypes regarding rape. The motivational typolo-

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<sup>323</sup> Neither does this theory of admissibility require abandoning Rule 412, which prohibits the introduction of the victim's sexual history (except for a history with the accused) into the rape trial. *See* FED. R. EVID. 412. That a woman has had sex with men before is not probative of her veracity any more than that the defendant's consensual sexual history is probative of his veracity. However, prior incidents, if they exist, of her (insupportably) "crying" rape *should* come in because they go to the veracity of her instant accusation. Likewise, prior acts of him "crying" consent go to the veracity of his instant defense.

Historically, the victim's prior sexual conduct was admissible because it was thought probative of her willingness to consent. *See* 22 WRIGHT & GRAHAM, *supra* note 12, § 5238, at 412-14. Rule 412 dispenses with this outdated logic. The fact that a woman has consented with other men in the past is no longer thought probative of her willingness to consent with every man, *see* 124 CONG. REC. 34,912 (1978) (statement of Sen. Mann), and the likelihood that the jury will be prejudiced by such evidence is quite high, *see* *United States v. Kasto*, 584 F.2d 268, 271-72 (8th Cir. 1978) (holding that, without circumstances that enhance its probative value, evidence of unchastity by an alleged rape victim is insufficiently probative to "outweigh its highly prejudicial effect").

gies presented in this Article may not be complete, but they are more accurate than the heretofore prevalent, monolithic depiction of rapists. Further academic and cultural examination of rape may reveal new or different motivational theories. As new theories develop, it may be appropriate for judges to incorporate them into admissibility determinations. Blanket rules, such as Rule 413, which adopt a monolithic approach, fail to incorporate the complexity and diversity evident in all of the acts that the law calls rape. Judicial discretion must acknowledge this diversity, and judicial decisions should be informed and justified by what we know to be the multidimensional aspects of rape.