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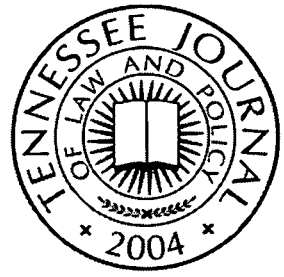

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A STATISTICAL LOOK AT THE SUPREME COURT'S 2009 TERM

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Whether a change in membership occurs or not, every Supreme Court term presents a unique set of controversies and decisions for legal scholars to examine. Herein, we offer a discussion of the Court's recently completed 2009-2010 term. Rather than analyzing specific opinions in detail (as many have already done), we generate a comprehensive statistical analysis of justice voting behavior for the term. In particular, we examine consensus and division on the Court, the ideological tenor of the term, voting alignments among the justices, the production of opinions, and the Court's overall ideological spectrum based on individual voting patterns. Ultimately, we also assess the ramifications of our findings for the future study of judicial behavior.

Production of Opinions

The Court handed down ninety full-opinion decisions during the 2009 term. Seventeen of these decisions came by way of *per curiam* opinions.[4] Ten of these *per curiam* opinions came in unanimous decisions, but the Court issued *per curiam* opinions in seven non-

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[4] "For the Court," i.e., not attributed to any particular justice.

unanimous decisions as well. In the seventy-three cases with signed majority opinions, the workload was evenly distributed.[5] All members of the Court wrote either eight or nine majority opinions, with the exception of Justice Stevens, who authored only six majority opinions. Justice Stevens, however, was the most prolific opinion writer overall, due predominantly to the fact that he wrote nearly twice as many dissents as anyone else on the Court. Justice Sonia Sotomayor opened her freshman term by writing the initial opinion of the Court, a unanimous decision in *Mohawk Industries v. Carpenter*.[6] Sotomayor went on to write an additional seven majority opinions, which put her at the Court's mean. Half of Justice Sotomayor's opinions for the Court involved unanimous cases; she also penned two concurrences, four dissents, and two opinions in which she concurred in part and dissented in part.

Table 1: Production of Opinions, 2009 Term

	Majority	Concurring	Dissenting	Concurring/ Dissenting in Part	Total Opinions
Stevens	6	13	12	2	33
Scalia	8	15	6	0	29
Thomas	8	13	4	1	26
Alito	8	10	7	0	25
Breyer	9	6	7	2	24
Kennedy	9	8	4	0	21
Sotomayor	8	2	4	2	16
Ginsburg	9	3	3	0	15
Roberts	8	3	2	2	15

[5] *See* Table 1: Production of Opinions, 2009 Term.
[6] Mohawk Indus. v. Carpenter, 130 S. Ct. 599 (2009).

Consensus and Division on the Court

In terms of the political ideology of decisions, much of the public discussion of the Court's 2009 term centered around two high-profile cases, *Citizens United v. Federal Election Commission*[7] and *McDonald v. City of Chicago*.[8] In *Citizens United*, the Court struck down a federal law limiting electioneering communications by corporations and labor unions.[9] In *McDonald*, the Court struck down a Chicago ordinance that effectively banned the possession of handguns.[10] Both decisions were widely seen as conservative; both were enormously controversial; and both were five-to-four rulings. Because the media, the attentive public, and the scholarly community focus on cases like these, where the Court is sharply divided, it seems that attention is often drawn to ideological divisions on the Court.

However, it should not be overlooked that, statistically, during the 2009 term, there was a substantial degree of consensus on the Court. This is not a new development. In fact, since 1953, the average number of unanimous decisions has been 41 percent.[11] In the 2009 term, 44.0 percent of the Court's decisions were unanimous.[12]

Further, 29.7 percent of all cases saw either a six or seven vote majority, indicating some controversy among the justices, but not a division that can be explained strictly along ideological lines.[13]

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[7] Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).
[8] McDonald v. Chicago, 130 S. Ct. 3020 (2010).
[9] *Citizens United*, 130 S. Ct. at 898.
[10] *McDonald*, 130 S. Ct. at 3050.
[11] HAROLD J. SPAETH ET AL., SUPREME COURT DATABASE CODE BOOK, *available at* http://scdb.wustl.edu (last visited June 1, 2010).
[12] *See infra* Table 2: Number of Decisions by Voting Margin, 2009-10 Term.
[13] *Id.*

Finally, 20.9 percent of the decisions could be classified as sharply divided—i.e., five-to-four rulings. Table 2 illustrates the breakdown of decisions by number of votes in the majority.[14]

Table 2: Number of Decisions by Voting Margin, 2009-2010 Term

Number of Votes for Decision	N	%
9	40	44.0%
8	5	5.5%
7	17	18.7%
6	10	11.0%
5	19	20.9%
Total	90	100.1%

Ideological Tenor of the 2009 Term

In a recent article in the *New York Times*, Adam Liptak asserted that the Roberts Court is "the most conservative one in living memory. . . ."[15] According to Liptak, "In its first five years, the Roberts court issued conservative decisions 58 percent of the time. And, in the term ending a year ago, the rate rose to 65 percent, the highest number in any year since at least 1953."[16]

Our coding of decisions handed down during the 2009 term,[17] however, reveals a significant reduction in the proportion of conservative decisions. As can be seen in Table 3, when all decisions are considered, including the

[14] *Id.*

[15] Adam Liptak, *Court Under Roberts Is Most Conservative in Decade*, N.Y. TIMES, July 24, 2010, http://www.nytimes.com/2010/07/25/us/25roberts.html?_r=2&hp.

[16] *Id.*

[17] HAROLD J. SPAETH ET AL., SUPREME COURT DATABASE CODE BOOK, *available at* http://scdb.wustl.edu/documentation.php?var=decisionDirection (last visited July 27, 2010).

forty-four cases that are unanimous, the rate of conservative decisions in the 2009 term is 51.1 percent.

When viewed in its totality, then, the 2009 term appears to have been a rather moderate one. Whether this is a single term aberration or the beginning of a shift in the Court's ideological leanings remains to be seen. Furthermore, whether this figure is skewed in any way by the large number of unanimous cases (which are more prevalent than they have been since 2005) also requires investigation.

Table 3: Ideological Direction of Decision and Issue Type by Unanimous/Non-unanimous Decision

Ideological Direction	**Unanimous**	**Nonunanimous**	**All Decisions**
Conservative	41.0%	59.2%	51.1%
Liberal	59.0%	40.8%	48.9%
Issue Type	**Unanimous**	**Nonunanimous**	**All Decisions**
Civil Rights/Liberties	50.0%	56.9%	53.8%
Economic	27.5%	23.5%	25.3%
Other	22.5%	19.6%	20.9%

As shown in Table 3, there is a significant difference in the ideological direction of the unanimous and non-unanimous decisions. Fifty-nine percent of the unanimous decisions were liberal, while only 41.0 percent of the unanimous decisions were conservative. It is also interesting to note that 50.0 percent of the Court's unanimous decisions involved issues of civil rights or liberties, matters on which we would expect disagreement along ideological lines. While these findings could be a

one-term anomaly, historical evidence suggests that they are not, as previous examinations of the Vinson, Warren, and Burger Courts reveal, among other things, that liberal outcomes were consistently more likely in unanimous cases during those eras, as well.[18] Whether this reflects a general liberal tenor in more settled areas of law and constitutional doctrine is one possibility that is open for debate.

Voting Alignments among the Justices

Beyond examining cases themselves, followers of the Court have long been interested in "voting blocs" on the bench.[19] Political scientists have been particularly concerned with political phenomena that lead to the formation of blocs of voters within ideological parameters.[20] Today, for example, it is common to hear media commentators refer to the Court's "liberal wing" or "conservative bloc." The 2009 term certainly provides support for such characterizations, as clear liberal and conservative coalitions appear.

However, before delving into an assessment of voting blocs, we must determine whether to examine all decisions, or simply non-unanimous ones, in our assessment of voting behavior. Within the judicial behavior literature, there has been a longstanding debate as to whether unanimous decisions should be included in measures of judicial ideology. Early on in the evolution of the field, C. Herman Pritchett argued that in cases in which there is no dissent, "presumably the facts and the law are so clear that no opportunity is allowed for the autobiographies of the

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[18] *See* Saul Brenner and Theodore S. Arrington, *Unanimous Decision Making on the U.S. Supreme Court: Case Stimuli and Judicial Attitudes*, 9 POL. BEHAV. 75-86 (1987).

[19] Stefanie A. Lindquist et al., *The Impact of Presidential Appointments to the U. S. Supreme Court: Cohesive and Divisive Voting Within Presidential Blocs,* 53 POL. RES. Q. 4, 795-814 (2000).

[20] *Id.*

justices to lead them to opposing conclusions."[21] Pritchett and others who favor this approach suggest that in unanimous cases, ideological preferences of the judges are tempered by non-controversial legal factors that lead to the nine to zero outcome.[22] As a result, they choose to focus on non-unanimous cases; that is what Jeffrey Segal and Harold Spaeth do in offering their "attitudinal model," which propounds the notion that justices are motivated solely by their ideological orientations.[23]

The rates at which justices agreed with one another in all non-unanimous cases during the most recent term are displayed in Table 4. The rates of agreement are consistent with the ideological leanings that Court followers would expect from each of the justices. For example, Justice Thomas agrees much more often with fellow conservatives Scalia and Alito, and Justice Stevens more often with the Court's liberal justices, such as Sotomayor and Breyer.

Table 4: Agreement Scores, 2009 Term
(Non-unanimous decisions only)

	Breyer	Ginsburg	Kennedy	Roberts	Sotomayor	Scalia	Stevens	Thomas
Alito	44.7%	35.4%	70.8%	79.2%	38.6%	64.6%	29.2%	70.8%
Breyer		77.1%	50.0%	50.0%	79.5%	31.3%	66.7%	33.3%
Ginsburg			61.2%	61.2%	75.6%	38.8%	59.2%	40.8%
Kennedy				79.6%	53.3%	65.3%	44.9%	55.1%
Roberts					53.3%	77.6%	40.8%	67.3%
Sotomayor						40.0%	71.1%	33.3%
Scalia							26.5%	85.7%
Stevens								24.5%

[21] C. Herman Pritchett, *Divisions of Opinion Among Justices of the United States Supreme Court, 1939-1941*, 35 AM. POL. SCI. REV. 5, 890 (1941).
[22] *See id.*
[23] JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

The mean level of agreement across all justices for the term is 54.9 percent. The highest level of agreement is between Justice Scalia and Justice Thomas, who voted together 85.7 percent of the time. The lowest level of agreement is between Justice Stevens and Justice Thomas, who agreed only 24.5 percent of the time. Lawrence Baum stated that "analyses based solely on non-unanimous decisions may provide an incomplete picture of individual and collective voting patterns in the Court's full set of decisions."[24] This suggests that unanimous cases should also be accounted for in crafting voting scores, as they still reveal ideological preferences of the justices.

Consistent with the notion that both kinds of cases should be examined, Table 5 displays agreement figures that are based on all decisions, including unanimous ones. The rates of agreement seen in Table 5 are of course higher across the Court, and for each pairing of justices. Justice Thomas still agrees much more often with Justice Scalia than he does with Justice Stevens, but the extremity of the difference is attenuated. The mean level of agreement for all cases in the 2009 term is 75.4 percent. The highest level of agreement is between Justices Scalia and Thomas, who voted together 92.0 percent of the time. The lowest level of agreement involves Justices Stevens and Thomas, who agreed only 57.5 percent of the time.

[24] Lawrence Baum, *Membership and Collective Voting Change in the Supreme Court,* 54 J. POL. 1, 8 (1992).

Table 5: Agreement Scores, 2009 Term (all decisions)

	Breyer	Ginsburg	Kennedy	Roberts	Sotomayor	Scalia	Stevens	Thomas
Alito	69.8%	75.9%	83.9%	88.5%	67.1%	80.5%	60.5%	83.9%
Breyer		87.4%	72.4%	72.4%	89.0%	62.1%	81.4%	63.2%
Ginsburg			78.4%	78.4%	86.7%	65.9%	77.0%	67.0%
Kennedy				88.6%	74.7%	80.7%	69.0%	75.0%
Roberts					74.7%	87.5%	66.7%	81.8%
Sotomayor						67.5%	84.1%	63.9%
Scalia							58.6%	92.0%
Stevens								57.5%

Given these voting alignments, it is easy to discern two voting blocs on the Court, as show in Table 6. The liberal bloc, consisting of Justices Breyer, Ginsburg, Sotomayor and Stevens, voted together, on average, 71.5 percent of the time in non-unanimous cases, and 85.0 percent of the time when all decisions are considered. The conservative bloc, composed of Chief Justice Roberts and Justices Scalia, Thomas, Alito and Kennedy, voted together, on average, 71.6 percent of the time when there was division, and 84.3 percent of the time in all cases.

Table 6: Voting Blocs on the Court, 2009 Term

Conservative bloc:	**Liberal bloc:**
Alito	Breyer
Kennedy	Ginsburg
Roberts	Sotomayor
Scalia	Stevens
Thomas	
Mean Agreement (all decisions) = 84.3 percent	*Mean Agreement (all decisions) = 85.0 percent*
Mean Agreement (non-unanimous only) = 71.6 percent	*Mean Agreement (non-unanimous only) = 71.5 percent*

Justice Kennedy: Swing Voter?

In terms of the Court's voting blocs, Justice Kennedy has often been characterized as the key "swing vote," (i.e., the one not primarily aligned with either bloc). Indeed, some commentators have, in recent years, referred to the Court as "the Kennedy Court," rather than the Roberts Court, due to Kennedy's inordinate influence as the Court's swing voter.[25] Specific research indicates that Kennedy has predominately aligned himself with the conservatives on the court, but has also had a willingness to veer from his natural bloc in certain case areas, unlike previously defined swing voters.[26]

Yet, as Linda Greenhouse noted recently in the *New York Times*, the characterization of Kennedy as a swing voter may no longer be apt.[27] Certainly, it does not apply to the Court's most recent term, in which Justice Kennedy voted approximately 82 percent with the other members of the conservative bloc in all cases (68 percent in non-unanimous cases) and an average of 73 percent with the members of the liberal bloc (52 percent in non-unanimous cases). However, when the majority consisted of only five justices, Kennedy voted with the other conservatives approximately 63 percent of the time, but voted with the liberals, on average, only 26 percent of the time. The gap between these rates of agreement belies any depiction of Kennedy as a "swing voter."

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[25] Patrick D. Schmidt & David A. Yalof, *The "Swing Voter" Revisited: Justice Anthony Kennedy and the First Amendment Right of Free Speech,* 57 POL. RES. Q. 109, 209-17 (2004).

[26] *Id.*

[27] Linda Greenhouse, *Is the 'Kennedy Court' Over?*, N.Y. TIMES, July 15, 2010, http://opinionator.blogs.nytimes.com/2010/07/15/rethinking-the-kennedy-court/.

The Court's Ideological Spectrum

Using the well-established coding rules associated with the Supreme Court Database, we coded the ideological direction of each of the Court's 2009-2010 decisions.[28] Three of the decisions could not be coded liberal or conservative.[29] One of the decisions, *Skilling v. United States*,[30] contained two holdings cutting in opposite directions, so we coded this case as two decisions.[31] Of the eighty-eight instances that we could code ideologically, forty-five (51 percent) were conservative rulings and forty-three (49 percent) were liberal ones. This ideological balance may well account for the relatively high esteem in which the American public continues to hold the Court.[32]

Figure 1 arrays the justices according to the percentage of liberal votes cast. In terms of individual voting scores, Justice Scalia emerges as the Court's most conservative justice, with a liberal voting score of only 36.4 percent in all cases, and 18.4 percent in non-unanimous cases. At the other extreme, Justice Stevens completed his final term on the Court as the most liberal justice, with a liberal score of 83.7 percent in all cases, and 72.4 percent in non-unanimous decisions.

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[28] HAROLD J. SPAETH ET AL., SUPREME COURT DATABASE CODE BOOK, *available at* http://scdb.wustl.edu (last visited June 1, 2010).

[29] *Mohawk Indus.*, 130 S. Ct. at 599; South Carolina v. North Carolina, 130 S. Ct. 854 (2010); Alabama v. North Carolina, 130 S. Ct. 2295 (2010).

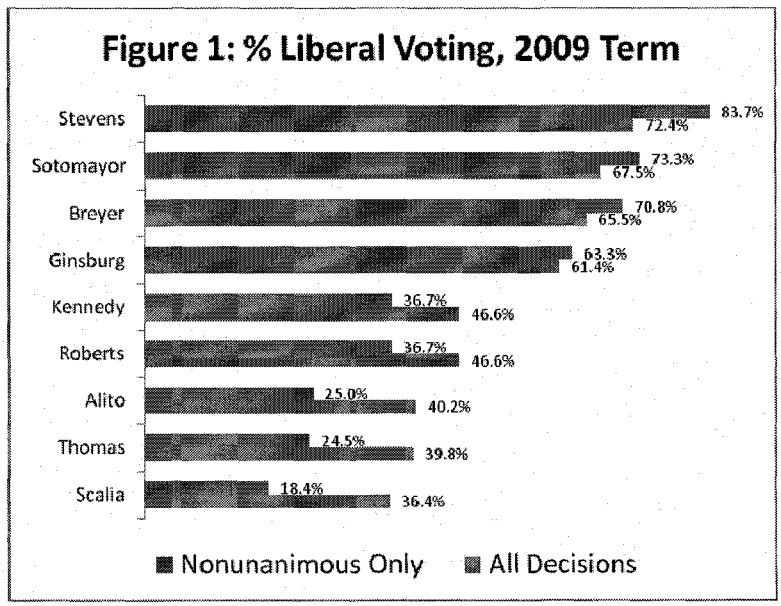
[30] Skilling v. United States, 130 S. Ct. 2896 (2010).

[31] In *Skilling*, the Court rendered a conservative decision on an issue of pretrial publicity, but also produced a liberal ruling on the scope of a federal honest services fraud criminal statute. 18 U.S.C. § 1346 (1988). Skilling v. United States, No. 08-1394, slip op. at 1-2 (U.S. June 24, 2010).

[32] LINDA SAAD, HIGH COURT TO START TERM WITH NEAR DECADE-HIGH APPROVAL, GALLUP (SEPT. 9, 2009), http://www.gallup.com/poll/122858/high-court-start-term-near-decade-high-approval.aspx.

Consistent with our voting bloc analysis, we can easily identify the natural ideological break point between Justices Ginsburg and Kennedy. As show in Figure 1, Justice Ginsburg, the least liberal member of the Court's liberal wing, voted liberal in 63.3 percent of non-unanimous cases; 61.4 percent in all cases. By contrast, Justice Kennedy's liberal voting score is identical to that of Chief Justice Roberts (36.7 percent in non-unanimous cases; 46.6 percent in all cases). Clearly, in terms of bloc voting, Justice Kennedy belongs with the Court's conservatives, at least in the 2009 term.

One should note that the five justices who make up the Court's conservative bloc all vote liberal at a much higher rate in unanimous cases than they do in non-unanimous ones, while the four justices in the liberal bloc do the opposite; they vote liberal at a higher rate in non-unanimous cases than unanimous ones. One might wonder why the Court's conservatives are more likely to vote liberal than the Court's liberals are likely to vote conservative. Is it because the conservatives are more collegial than their liberal colleagues? Was this a one term anomaly? Or does this merely reflect the liberal underpinnings of modern American law? The answers to these questions are beyond the scope of this article, but provide a rich area of exploration for future scholars of judicial behavior.



Justice Sotomayor's First Term

During the battle over Sonia Sotomayor's nomination to the Supreme Court, there was widespread speculation as to where she would fit into the Court's ideological spectrum. The prevailing view was, of course, that she would join the liberal wing of the Court—it was simply a matter of *how* liberal she would rule.

Her behavior during the 2009 Term is consistent with previous findings that freshman justices do not differ from their senior colleagues with respect to joining established voting blocs—as she seems to have settled into the more liberal side of the liberal bloc.[33] The data reveal that Justice Sotomayor voted, on average, 87 percent of the time in all cases with the Court's liberals, and only

[33] *See* Terry Bowen & John M. Scheb, II, *Reassessing the "Freshman Effect": The Voting Bloc Alignment of New Justices on the United States Supreme Court, 1921-90*, 15 POL. BEHAV. 1, 1 (1993) (stating "[f]reshman justices do not differ from their senior colleagues with respect to bloc voting").

approximately 70 percent of the time with the conservatives. When considering all cases in which she voted, she aligned with the term's most liberal justice, Justice Stevens, 83.7 percent[34] of the time in all cases, and 72.4 percent[35] of the time in non-unanimous cases.

Conversely, she voted with the term's most conservative justice, Justice Scalia, only 40.0 percent[36] of the time in non-unanimous cases.

Overall, her liberal voting score in all cases was 67.5 percent[37] and 73.3 percent[38] in non-unanimous cases—making her the Court's second-most liberal justice, behind Stevens.

Conclusion

In summary, our most interesting findings revolve around the vast differences in individual voting behavior in unanimous and non-unanimous cases. This indicates that, even in an era where observers are prone to deriding the politicization of the judicial branch, data indicate that ideology is not the only factor driving judicial decision-making. Certain high-profile cases may be more likely to lead justices to exhibit specific ideological differences, but the majority of cases seem to involve the location of some degree of consensus among ideologically disparate actors. The implication for scholars of the Court is that non-ideological factors, such as interaction with other justices and/or adherence to legal or constitutional doctrine, may be important avenues for further inquiry. We feel that simply referring to unanimous cases as the "easy" ones is inadequate; after all, these cases present legal questions difficult enough that, in many cases, lower courts do not

[34] *See* Figure 1: % Liberal Voting, 2009 Term.
[35] *Id.*
[36] *See* Table 4: Agreement Scores, 2009 Term.
[37] *See* Figure 1: % Liberal Voting, 2009 Term.
[38] *Id.*

achieve consensus. Ultimately, while political scientists have fixated on non-unanimous cases for many decades—in the search for the factors that lead justices to differ—it may be time to offer a more thorough appraisal of unanimous decisions. Future research may well wish to use textual analysis to isolate specific legal or constitutional concepts on which the justices are in agreement in order to locate the reasons why justices may agree, as they do in nearly half of the cases in the 2009 term.

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

Bryan C. Hathorn[1]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[8] The basis of the Federal Rules of Evidence is that only relevant evidence should be admitted. *See* FED. R. EVID. 401 ("Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"); FED. R. EVID. 402 ("All relevant evidence is admissible, except as otherwise provided . . . by these rules . . . ").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

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

Rule 414. Evidence of Similar Crimes in Child Molestation Cases

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. The Prohibition of Trial by Character

a. Common Law History

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 190.

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

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

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

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

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

b. Reasons for the Prohibition

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

1. Legal Rationales

a) Due Process

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b) Equal Protection for Sexual Offenders[65]

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

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

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

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

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

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

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

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

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

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

2. Juror Prejudice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a) Attribution Error and Base Rate Fallacy

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

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

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[85] *Id.* at 738.

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

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

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

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

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

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

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

[91] *Id.* at 238.

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

[93] FED. R. EVID. 801.

[94] FED. R. EVID. 802.

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

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

contest the accuracy of the statements.[97]

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

b) Confirmation Bias

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

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

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

[99] In 1620, Francis Bacon wrote,

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

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

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

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

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

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

[102] *Id.*

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

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

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

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

III. Rationalizations for Federal Rules 413, 414 and 415

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

a. Political Expedience

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

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

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

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

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

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

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

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

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

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

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

[114] *See id. at* 179.

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

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

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

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

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

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

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

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

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

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

Teter, *supra* note 112, at 180.

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

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

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

b. Protection of Victims Unwilling or Unable to Testify

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

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

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

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

[125] *Id.*

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

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

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

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

c. Law and Economics Rationale

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

1. Incentive Model

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

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[129] *Id.*

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

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

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

[133] *Id.* at 1265.

[134] *Id.*

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

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

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

2. Cost Minimization Model

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

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[135] *Id.* at 1266.

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

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

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

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

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

[138] *Id.* at 1481.

[139] *Id.* at 1484.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

d. Prior Conduct is Predictive of Future Behavior

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

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[150] *See infra* Section IV.

[151] *See, e.g.,* Michelson v. United States, 335 U.S. 469, 475-76 (1948); United States v. Guardia, 135 F.3d 1326, 1328 (10th Cir. 1998); United States v. Beechum, 582 F.2d 898, 910 (5th Cir. 1978); Edward J. Imwinkelried, *A Small Contribution to the Debate over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions*, 44 SYRACUSE L. REV. 1125, 1129 (1993).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

e. Doctrine of Chances

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Recidivism of Sexual Offenders

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

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

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

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

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

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

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

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

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

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

[176] *Id.* at 770.

[177] *Id.* at 769.

[178] *Id.* at 770.

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

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

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

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

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

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

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

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

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

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

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

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

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

[187] *Id.*

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

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

a. Burden Shifting

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

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

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

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

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

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

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

b. Adoption of similar rules by the states

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

c. Conviction and Plea Bargain Rates

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

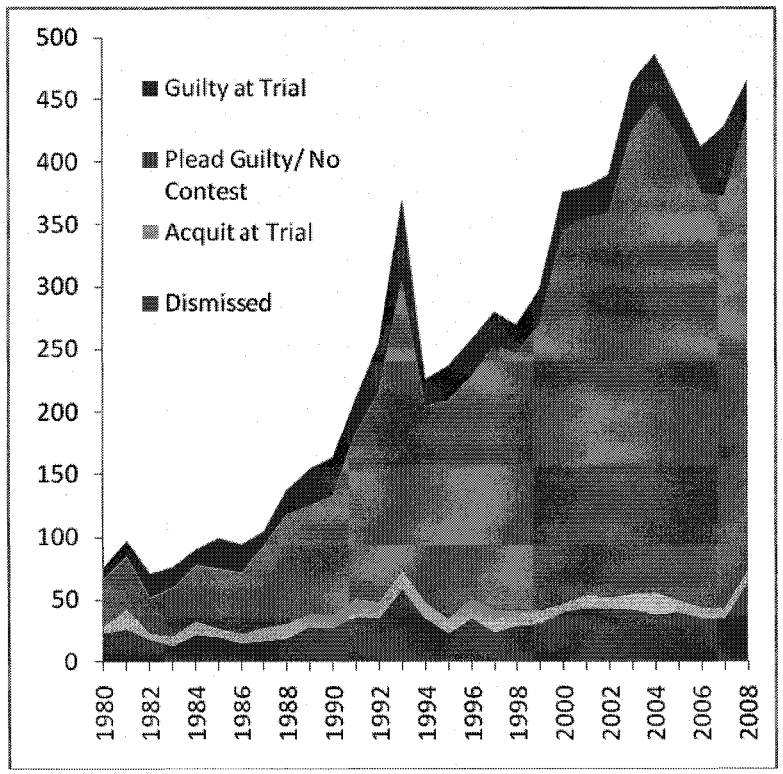

Figure 1.
Total Federal Sexual Assault Cases by Disposition.[223]

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

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

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

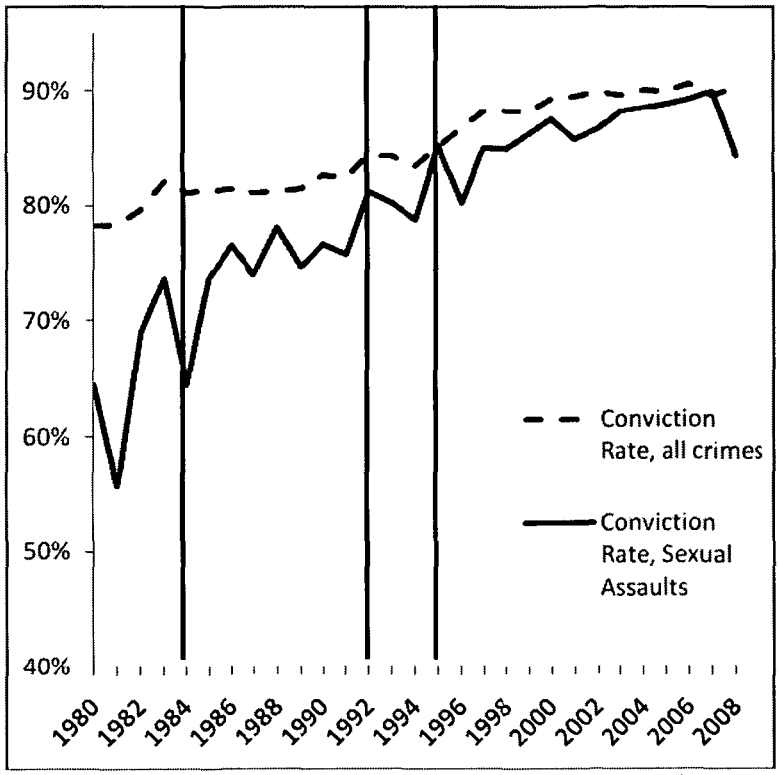

Figure 2. Conviction Rates of Federal Sexual Offenders. The vertical lines represent the passage of the Federal Sentencing Guidelines (1984), the introduction of DNA evidence in federal courts (1992), and the passage of Federal Rules of Evidence 413, 414, and 415 (1995).

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

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

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

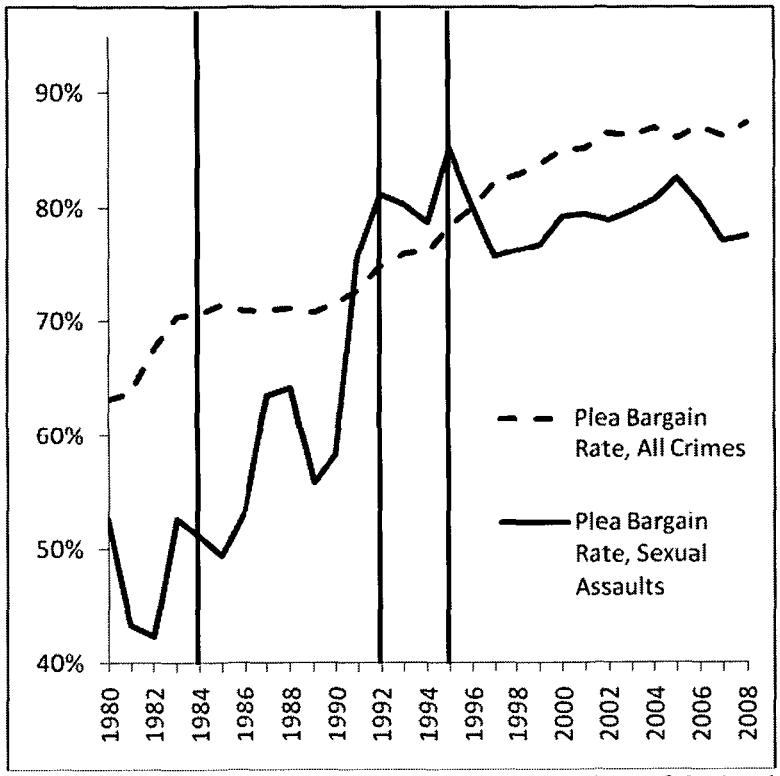

Figure 3. Plea Rates (including *nolo contendre*) of Federal Sexual Offenders. The vertical lines represent the passage of the Federal Sentencing Guidelines (1984), the introduction of DNA evidence in federal courts (1992), and the passage of Federal Rules of Evidence 413, 414, and 415 (1995).

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

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

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

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

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

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

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

VI. Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[232] FED. R. EVID. 802.

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

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

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

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

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

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

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

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

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

FIXING A BROKEN SYSTEM: RECONCILING STATE FORECLOSURE LAW WITH ECONOMIC REALITIES

Yianni D. Lagos[1]

INTRODUCTION

The housing crisis ignited a chain reaction of events that resulted in the U.S. economy cascading to the worst contraction since the Great Depression.[2] In response, not only has the Federal Government proposed and implemented various legislation,[3] but the financial industry has also joined in the effort to find a solution.[4] However, large-scale mortgage restructurings already show signs of failing.[5] These results should not be surprising, because

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[1] Candidate for JD/MBA, June 2011, The Ohio State University.

[2] S&P 500, a measure of the 500 largest U.S. corporations, fell below 700 points on March 2, 2009, the lowest level since 1996. *See* Google Finance, S&P 500 Index, http://www.google.com/finance?q=INDEXSP:.INX.

[3] *See* Michael Corkery, *Mortgage 'Cram-Downs' Loom as Foreclosures Mount*, WALL ST. J., Dec. 31, 2008, at C1 (allowing bankruptcy judges to cram-down first mortgages); Laura Meckler, *Housing Bailout at $275 Billion*, WALL ST. J., Feb. 19, 2009, at A1 (providing funds to refinance and modify loans); Nick Timiraos, *Real-Estate Sector Cheers Tax Credit*, WALL ST. J., Feb. 9, 2009, at A4 (giving tax rebates for first-time home buyers).

[4] *See* Ruth Simon, *Citi to Allow Jobless to Pay Less on Loans,* WALL ST. J., Mar. 3, 2009, at A4 (temporarily reducing mortgage payments for unemployed borrowers); Ruth Simon, *Investors Hit BofA Loan Modification*, WALL ST. J., Nov. 18, 2008, at C1 (engaging in massive restructuring of loans); Meena Thiruvengadam, *Banks Agree to Foreclosure Moratoriums*, WALL ST. J., Feb. 14, 2009, *available at* http://online.wsj.com/article/SB123454524404184109.html (participating in voluntary mortgage moratoriums).

[5] *Loan Modifications Get Reviewed as Borrowers Miss Paying Again: Is Aid Dragging Out the Pain?,* INVESTOR'S BUS. DAILY, Dec. 19, 2008, at A6 (during Q1 and Q2, half of the restructured mortgages were already back in default).

general loan modifications suffer from the problems that created the housing crisis. Namely, mortgage originators did not examine whether the borrower could afford the monthly payments.[6]

The fact that the banking industry largely overlooked what should be the primary consideration before lending—*i.e.*, the ability of the borrower to repay—can be explained by the securitization of loans.[7] David Wiechel,[8] a distinguished practitioner working in the area of foreclosure prevention, explained the complex process of securitization as follows. General Motors Automobile Corporation ("GMAC") makes loans until it runs out of funds. In order to increase profits, GMAC needs to make more loans. To raise the necessary capital to make more loans, GMAC sells off its existing loans in a securitized package. After consistently engaging in this process, GMAC knows a market exists for its loans. Therefore, GMAC lacks the incentive to examine the ability of the borrower to repay.[9]

The consequences of GMAC, along with the majority of lenders, overlooking such risk led to the

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[6] Letter from Warren Buffett to Shareholders (Feb. 27, 2009), at 11, *available at* http://www.berkshirehathaway.com/letters/2008ltr.pdf.

[7] *See generally* Richard J. Rosen, *The Role of Securitization in Mortgage Lending,* CHICAGO FED. LETTER, No. 244, Nov. 2007 *available at* http://www.chicagofed.org/publications/fedletter/cflnovember2007_244.pdf (discussing the procedures and major participants in the mortgage securitization process).

[8] Interview with David Wiechel, former Legal Aid Attorney specializing in foreclosure prevention, in Springfield, OH (Jan. 9, 2009).

[9] Evidence of GMAC's poor loan quality is the recent capital infusion. *See* Brian Wingfield, *GMAC Gets Bailout Funds: The U.S. Government Commits an Additional $6 Billion to Rescue Detroit,* FORBES, *available at* http://www.forbes.com/2008/12/30/gmac-washington-tarp-markets-equity-cx_bw_1230markets01.html.

housing crisis.[10] By the end of 2008, home prices had fallen 23.4 percent from their peak.[11] This burst of the housing bubble took the economy with it, as unemployment has increased.[12] Rising unemployment engenders increased foreclosures.[13] In addition to the unemployment problem, falling property values have pushed more homes underwater.[14] Combining the effect of mortgages being underwater with the fact that many borrowers contributed little or nothing in the way of a down payment significantly reduces a borrower's incentive to pay the mortgage.[15] With less incentive to pay, increased foreclosures have followed. Foreclosures hurt not only the individuals losing their homes but also the community as a whole.[16] For example,

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[10] Alexandra Basak Russell, *What Gave Rise to the Global Financial Crisis?* The University of Iowa Center for International Finance and Development (Mar. 2010), *available at* http://www.uiowa.edu/ifdebook/ebook2/contents/part5-I.shtml.

[11] Sudeep Reddy, *Home Prices Declined at Record Pace in October: S&P/Case-Shiller Data Show Return to 2004 Levels as Tight Credit, Consumers' Wariness Weigh on Sector*, WALL ST. J., Dec. 31, 2008, at A2.

[12] *See* BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS FROM CURRENT POPULATION SURVEY, *available at* http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data_tool=latest_numbers&series_id=LNS14000000.

[13] Buffett, *supra* note 6, at 11.

[14] "Underwater" refers to home values below what is left due on the mortgage. *See* John D. Geanakoplos & Susan P. Koniak, *Matters of Principle*, N.Y. TIMES, Mar. 5, 2009, at A31 (chart showing that mortgagors' chance of default increases as the amount owed goes above the value of the home).

[15] *See* Stephen J. Dubner & Steven D. Levitt, *Payback Time: A Quiet Exchange of Funds Lets a Family Buy a New House and Helps the Seller Get a Good Price. So Why Is It Illegal?*, N.Y. TIMES MAG. (June 10, 2007), *available at* http://www.nytimes.com/2007/06/10/magazine/10wwln-freakonomics-t.html (discussing how many homeowners were able to avoid paying a down payment by using cash-back transactions).

[16] Editorial, *Foreclosures Still Destroying Neighborhoods*, SPRINGFIELD NEWS- SUN, Nov. 30, 2008, at A10.

with this increase in foreclosures, vacancies have been on the rise.[17] Increased vacancies lead to community blight, which affects everyone in the neighborhood through lower housing prices and an increased tax burden.[18]

Despite the devastating effects that foreclosures are inflicting across the country, hope exists for those individuals trying to save their homes. Agnes Spriggs saw her mortgage payments balloon from $800 to $2,300.[19] Her first efforts to refinance were thwarted, as she could not work out a partial payment schedule with the lender.[20] However, with diligent effort and advice from a local housing agency, she worked out an agreement with Chase Bank and reduced her monthly payments to $855.[21] With banks incurring substantial losses when properties are sold at foreclosure auctions and government agencies at all levels providing significant aid, homeowners facing the prospect of foreclosure should not concede to foreclosure sale.[22]

The securitization of loans created another problem that directly affects the adjudication of foreclosures. As explained by David Wiechel,[23] many mortgages lack a lawful mortgagee.[24] During the securitization process,

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[17] *See generally* Haya El Nasser & Paul Overberg, *No One Home: Record 1 in 9 Housing Units Empty. Vacancies Have Ripple Effect*, USA TODAY, Feb. 13, 2009, at A1 (discussing increases in vacancies throughout the country).

[18] Editorial, *supra* note 16, at A10.

[19] Elaine Morris Roberts, *A Foreclosure Story with a Happy Ending: Help is Available from Agencies, Lawyers and Banks, as Agnes Spriggs' Saga Shows*, SPRINGFIELD NEWS-SUN, Nov. 9, 2008, at D1.

[20] *Id.*

[21] *Id.*

[22] *See* Kathleen Pender, *Help is Out There for Homeowners Facing Foreclosure*, THE COLUMBUS DISPATCH, Dec. 14, 2008, at D6.

[23] Interview with David Wiechel, *supra* note 8.

[24] *See In re* Foreclosure Cases, 521 F. Supp. 2d 650, 655 (N.D. Ohio 2007) (the Court made it clear that failure to repeatedly comply with General Order 07-03 will result in immediate dismissal. One

mortgages normally are not transferred directly from the originator to the sponsor of the trust.[25] Instead, the mortgage passes to many intermediate holders, such as an arranger and then a warehouse lender, before finally reaching the sponsor of the trust.[26] The many steps create a trade-off. During each step, the parties can go to the recordation office and endorse the new mortgagee or skip the documentation and forego the expense.

With multiple steps along the way, the expense in filing fees with the recorder's office, as well as paying lawyer's fees, can become material. Hypothetically, if a securitization contains 2,000 loans and costs $500 to legally change title for each loan, the cost reaches $1,000,000 for each transaction. This example illustrates why a mortgage company would choose not to assign mortgagees using the proper procedure. Then, when the sponsor of the trust containing a mortgage forecloses on a property, the sponsor lacks a claim, because no legal mortgagee ownership exists.[27] Even if the sponsor records a transfer after the default with the loan originator, the lien is still unenforceable, because all transactions must be recorded properly.[28] An attorney defending a mortgagor

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requirement of General Order 07-03 is that "the named plaintiff is the owner and holder of the note and mortgage.").

[25] *See* Adam B. Ashcraft & Til Schuermann, *Understanding the Securitization of Subprime Mortgage Credit*, Dec. 17, 2007, at 8, http://www.ny.frb.org/research/economists/ashcraft/subprime.pdf (The arranger aggregates mortgages from different loan originators and then sells those packaged mortgages to a warehouse lender, who proceeds to sell the mortgages in securitized form.).

[26] *Id.*

[27] *See In re Foreclosure Cases*, 521 F. Supp. 2d at 653 ("To show standing, then, in a foreclosure action, the plaintiff must show that it is the holder of the note and the mortgage at the time the complaint was filed.").

[28] *See, e.g.*, MICH. COMP. LAWS § 600.3204 (West Supp. 2010) ("If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale

can prove this flaw by examining the pooling agreement, which is publicly available for all securitizations that would show the sponsor of the trust received the mortgage from another party.[29] Therefore, a significant number of securitized mortgages that make up a large percentage of all mortgages are improper.[30]

Lastly, securitization of mortgages increases the difficulty for borrowers to work out an agreement with lenders for two reasons. First, the party with power to negotiate cannot always be located.[31] Due to the fact that servicing rights to securitized mortgages trade between banks as if they were stocks, the borrower may not know the loan servicer.[32] Second, even if an agreement between the borrower and loan servicer can be reached, the workout agreement must be approved by all the investors.[33]

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under section 3216 evidencing the assignment of the mortgage to the party foreclosing the mortgage.").

[29] *See* Pooling and Servicing Agreement, http://www.sec.gov/Archives/edgar/data/1399057/000088237707001688/d676234_ex4-1.htm (example where the originators are listed but the originators are not a party to the transfers taking place in the pooling agreement).

[30] *See generally* Liz Rappaport & Jon Hilsenrath, *Fed Moves to Free Up Credit for Consumers*, WALL ST. J., Mar. 4, 2009, at A1-A2 (reporting that forty percent of mortgages were securitized before the crisis); Moe Bedard, *The Mers Fifty Million Mortgage Meltdown*, Dec. 30, 2008, http://loanworkout.org/2008/06/the-mers-fifty-million-mortgage-meltdown/ (one example of a shell corporation that securitized a large number of mortgages and then sold those mortgages to trusts that lack proper identification of ownership).

[31] Roberts, *supra* note 19 (one estimate places the number of people in foreclosure who have never talked with their lender at 60 percent).

[32] This author was surprised to see that JP Morgan Chase Bank in Columbus, OH, housed a mortgage-servicing trading room where rights to servicing loans were traded as if they were stocks. In an environment where servicing rights can trade daily, a borrower may not know who is servicing his or her loan.

[33] Melissa B. Jacoby, *Home Ownership Risk Beyond A Subprime Crisis: The Role of Delinquency Management*, 76 FORDHAM L. REV.

Because ownership of the cash flows paid from securitized mortgages is separated into multiple tranches, convincing all investors to agree on a workout agreement can be difficult.[34]

Keeping in mind the present environment of securitized mortgages, this note will examine state foreclosure law. Part I will develop the public policy framework for examining state foreclosure law. Part II will introduce a basic economic cost-benefit analysis of general foreclosure laws. Part III will examine different state foreclosure laws and compare those laws to state foreclosure rates. Part IV will examine recent legislation passed by various states. Part V will discuss two scholarly solutions proposed to improve state foreclosure law. Part VI will summarize many of the proposed solutions and present new ideas by looking at foreclosures from the policy perspective favoring foreclosure prevention and increased participation in foreclosure sale by potential homeowners.

I. POLICY PERSPECTIVE

Foreclosure laws differ from state to state in many respects. Unlike the Uniform Commercial Code ("UCC"), all attempts to unify state law have proven unsuccessful.[35] Many of these differences can be characterized as defaulter-friendly or lender-friendly, as the foreclosure

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2261, 2291 (2008); *see also* Ruth Simon, *Mortgage Investors Call for Changes in Housing Rescue Plan*, WALL ST. J., Mar. 12, 2009, at A3 (despite the severity of the foreclosure crisis, investors cling to their right to reject mortgage modifications).

[34] Jacoby, *supra* note 33, at 2291.

[35] *See* Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1399 (2004) (explaining the Uniform Nonjudicial Foreclosure Act whose framers attempted to unify state foreclosure law).

debate has centered on the trade-off between protecting homeowners and bank investments.[36] Both seem to be of equal concern in today's economy, with foreclosures occurring at a rapid pace and billions of dollars of government bail-out money flowing to the banking industry.[37] Although the traditional debate may be useful, many scholars have recognized the inadequacies of examining foreclosure from such a narrow perspective.[38]

A general policy approach should be used when examining state foreclosure law, but exactly what policies should be used is a difficult question. Public policy regarding foreclosures involves protecting the defaulting homeowner.[39] Home ownership is a worthy goal in and of itself, and in many instances homeowners will best maintain the property.[40] Yet homeowners should be protected only when their interests coincide with the interests of the community. The community cares about avoiding the dilapidation of properties.[41] When a

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[36] *See* Brian M. Heaton, *Hoosier Inhospitality: Examining Excessive Foreclosure Rates in Indiana*, 39 IND. L. REV. 87, 92 (2005) (classifying states as either "creditor-friendly" or "lender-friendly"); Karen M. Pence, *Foreclosing on Opportunity: State Laws and Mortgage Credit*, 88.1 REV. ECON. & STATISTICS, 177, 177 (2006) (characterizing some states as "defaulter-friendly").

[37] *Show Me the TARP Money*, ProPublica, http://www.propublica.org/special/show-me-the-tarp-money (listing 455 institutions that have received TARP funds).

[38] Prentiss Cox, *Foreclosure Reform Amid Mortgage Lending Turmoil: A Public Purpose Approach*, 45 HOUS. L. REV. 683, 723 (promoting the use of a housing policy approach to examine state foreclosure laws); Jacoby, *supra* note 33, at 2263 (emphasizing the importance of mortgage-delinquency management by looking at multiple policy perspectives, but not altogether abandoning the lender-borrower model).

[39] Cox, *supra* note 38, at 723-24.

[40] *Id.* at 727 (properties will be better maintained by a defaulting homeowner than if left vacant).

[41] Home ownership provides many community benefits, but all of the benefits of home ownership assume that the homeowner is not in

defaulting borrower wishes to remain in his home and is willing to pay all he can afford to remain in the home, state laws should increase the chances for homeowners to maintain ownership. However, in many instances, a long period between the initial default and a foreclosure sale can lead to property deterioration. A property owner whose home was just foreclosed lacks the incentive to reinvest in the property. Therefore, the community deteriorates with the property, as the defaulting homeowner's interest no longer coincides with the community's interest of property maintenance.

In addition to home ownership and property maintenance, general policy should be concerned with who purchases the property at a foreclosure sale. Three potential buyers exist for a foreclosed property: an investor, a new resident, or a lender.[42] Public policy favors a new resident. A new resident provides the best source of maintenance for the property, because a new homeowner would likely spend time and money to improve his or her property.[43] Along with property maintenance, home ownership is an important justification underlying a public policy favoring the residential purchaser.[44] Since foreclosed properties are typically purchased at depressed prices, home ownership originating from foreclosure sales would be sustainable home ownership.[45]

Bringing potential homeowners to the foreclosure bidding will also create higher prices at foreclosure sales.

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default. Jacoby, *supra* note 33, at 2277 (listing the community benefits of home ownership).

[42] Cox, *supra* note 38, at 729

[43] *See* Jacoby, *supra* note 33, at 2277.

[44] *Id.* at 2276-77 (describing three benefits to home ownership: household wealth-building, positive social-psychological states, and neighborhood and community benefits).

[45] "Putting people into homes, though a desirable goal, shouldn't be our country's primary objective. Keeping them in their homes should be the ambition." Buffett, *supra* note 6, at 12.

In times of decreasing real estate value, an investor will only buy a property at below-market prices in order to make a profit from the property, and many lenders lack the expertise to effectively manage real estate.[46] Consequently, a potential homeowner provides the only source of a fair market bid. These increases in foreclosure prices will alleviate the threat of delinquency judgments and may provide equity to the original homeowner.[47]

Most importantly, increased resident bidder participation will speed the recovery of the economy. Many banks are financially and administratively unable to take on more real estate owned ("REO") because their balance sheets have suffered substantially over the last year and a half.[48] This problem is accelerating as the number of defaulting borrowers increases. Additionally, with the inflow of foreclosures collapsing home prices, the need for foreclosed properties to quickly find their way to homeowners has never been stronger. Thus, business as usual with lenders acquiring the foreclosed properties at uncontested foreclosure auctions may no longer be feasible.

Lastly, banks benefit from the increased foreclosure sale prices. Banks acquiring the foreclosed property take the risk of re-selling at prices below what would have been received at a foreclosure auction and face significant transaction costs associated with the resale of the foreclosed property. For example, WesBanco recently lost substantial sums of money by buying three foreclosed properties and then selling them later at a commercial auction.[49] These properties (which are located at 542 N.

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[46] *See infra* pp. 93-94 (WesBanco selling property at a large loss illustrates their inability to effectively manage real estate).

[47] *See* Cox, *supra* note 38.

[48] Through the FDIC website (www.fdic.gov), one can search thousands of banks and view the non-accrual loans on any bank's balance sheet.

[49] U.S. Department of Housing & Urban Development Settlement Statement on file with the author (hereinafter "Settlement Statement").

Murray Street, 1741 Kentucky Ave., and 329 Fair Streetin Springfield, Ohio) were bought recently from WesBanco at a commercial auction for the gross price of $18,000.[50] The three properties in question were purchased at the foreclosure auction by WesBanco for $15,000, $12,000, and $20,000 for a loss of $19,000.[51] In a foreclosure, the lender does not pay cash for the property. Because the Springfield properties mentioned above were purchased above the minimum bid, it is likely that another bidder was willing to pay close to the final bid.[52]

Along with losing money on the resale of the three properties, WesBanco paid significant transaction costs. First, they owed a total of $1,641.67 in county taxes for the entire year.[53] Second, the broker conducting the auction received a fee of $6,000.[54] Third, the city charged WesBanco $125.19 for a delinquent water bill.[55] Finally, WesBanco owed settlement charges of $72.[56] These transaction costs, combined with the low resale price, resulted in a loss of almost $30,000 for the three properties.[57] If the three properties had sold to another bidder at the foreclosure sale, WesBanco would have avoided this large loss.

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[50] *Id.*

[51] Springfield Clerk of Courts, http://64.56.107.134/pa/pages/CRTVCaseSummary.jsp?case_id=23073901%20&xsl=.

[52] *Id.*

[53] Settlement Statement, *supra* note 49.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] Before the foreclosure crisis, banks were concerned with not writing off losses. This author personally witnessed lenders bidding far above the closest bid to reach the mortgage amount. By bidding the mortgage amount, the bank avoided taking the paper loss. It seems banks have been slow to recognizing the severe economic condition. Banks purchasing foreclosed property below minimum bids is a losing strategy that banks may stop doing in the future.

With lenders, neighborhoods, and economists in agreement, public policy favors a foreclosure policy that creates more potential resident bidders.[58] Thus, foreclosure policy should be focused primarily on homeowners. First, public policy demands protection of the original homeowner. Second, after it is clear that a homeowner does not wish to work out an agreement to remain in the home, public policy should favor laws making it easier for a new homeowner to purchase the property out of foreclosure.

II. ECONOMIC ANALYSIS OF STATE FORECLOSURE LAW

Foreclosure law is so intertwined with the economy that a solid foundation in the economic issues surrounding foreclosure law is necessary before an in-depth analysis can be undertaken. To understand how foreclosure laws affect the economy, one only needs to drive through one of the thousands of streets that have been decimated by foreclosures. Although this section only begins to examine the many effects of foreclosure laws, understanding the basic economic costs and benefits of foreclosure laws is a necessary starting point.

Foreclosure laws can be broken down into three generic groups. The first group of laws lengthens the foreclosure process.[59] A longer period of time between

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[58] Bankers across the country are concerned about changes in foreclosure law, because they fear the lengthening of the foreclosure process. *See* Rick Adamczak, *Ohio Bankers Concerned About Possibility of New Foreclosure Laws*, THE DAILY REPORTER (Franklin County), Feb. 3, 2009, at A1. This concern by bankers is warranted, as they fear policy makers will focus exclusively on borrowers' interest. However, by taking into account the whole community, public policy may favor policies that aid lenders, such as shortening the foreclosure process in many situations.

[59] Both judicial foreclosure and notice statutes, discussed in detail in Part III of this note, lengthen the foreclosure process.

default and sale increases the probability that a borrower will avoid foreclosure sales for three reasons. First, a lengthened foreclosure period provides the borrower with the opportunity to engage in negotiations with the lender and to seek alternatives.[60] Given the current state of securitized mortgages, workouts have become increasingly difficult.[61] Not only is it difficult to find the party with authority to negotiate, but mortgage modification takes time, because the parties must reach an agreement that is "commercially reasonable and sustainable."[62] In essence, the obligation bankers failed to carry out—that is, making sure people had the ability to repay—must be done by the borrower and lender in any workout. Second, a longer foreclosure period increases the costs of foreclosure, making it more likely that lenders will pursue negotiation before initiating foreclosure.[63] By decreasing the cash received from foreclosing on properties, longer foreclosures create an increased incentive for lenders to agree to lower payment terms with the borrower.[64] Third, many individuals lose their homes because of unemployment; more time means an increased chance of finding new employment. With employment, the borrower can resume making mortgage payments and save his home.

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[60] *See* Jacoby, *supra* note 33, at 2272. One alternative to a foreclosure sale is short selling, where the defaulting borrower sells the property below the amount owed on the mortgage with the lender's permission. *Id.*

[61] *Id.* at 2291.

[62] Interview with David Wiechel, *supra* note 8.

[63] Cox, *supra* note 38, at 724 (citing Michael H. Schill, *An Economic Analysis of Mortgagor Protection Laws*, 77 VA. L. REV. 489, 496 (1991)).

[64] The average rule of thumb in the banking industry is a 30 percent loss on the mortgage when the mortgagor defaults and the property is foreclosed. Interview with Sandeep Mawalkar, Risk Management JP Morgan Chase in Columbus, OH (Mar. 6, 2009). By increasing those costs further, a lender would be willing to accept low monthly payments for an extended period of time to avoid such large losses. *Id.*

If a borrower can reach a workout agreement with the lender, the benefits include a homeowner not losing her home, a bank minimizing its losses, one less house on the market, and a reduction in the number of vacant homes.[65] Even if a workout agreement cannot be reached, the borrower can still save his home by taking advantage of various statutory protections and can protect the equity in his home by finding a buyer in the market.[66] Thus, the lengthened foreclosure process increases the probability that borrowers will remain in their homes and that borrowers will protect their interest in the property. If the homeowner avoids foreclosure, the benefits extend to all of the parties concerned.[67]

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[65] The benefit to the homeowner of maintaining ownership is obvious, but the other three benefits may need to be clarified. Lender losses are large in a foreclosure sale. First, because a lender is normally the successful bidder at a foreclosure auction, the costs include time and investment to maintain the property. After many foreclosure sales, the property needs significant repairs just to comply with housing codes. Second, transaction costs associated with buying and selling the property can be high. *See supra* Part I (discussing the losses on three properties sold by WesBanco). Third, another benefit is that there is one less house on the market, which may not appear significant. However, given the present saturation of houses for sale, decreasing the inflow of foreclosed houses on the market will lead to a faster recovery in the housing market. Lastly, vacant buildings have destroyed neighborhoods across the country. *See* Nasser, *supra* note 17.

[66] *See infra* Part III.B (discussing the different forms of redemption rights).

[67] To quantify the benefits of prolonging the foreclosure process, one would multiply the increased probability of a homeowner saving his or her home by the benefits of a homeowner maintaining ownership (individual benefit of maintaining home ownership + neighborhood benefit of reduced chances of a vacant building + community benefit of more homeowners to share the tax burden + lender benefit of reducing losses associated with foreclosure). However, the benefits have not been quantified by empirical studies, which provide an excellent opportunity for economic statisticians to benefit legislatures by engaging in detailed foreclosure research.

However, the benefits of lengthened foreclosure must be weighed against the costs in order to discover the efficient outcome. Although the benefits of a lengthened foreclosure process have not been quantified, there has been substantial research on the costs.[68] The costs that have been measured include the increased expense of the foreclosure process and lower loan amounts for the state as a whole.[69] In addition to these costs, a longer foreclosure period increases the chance for deterioration of the property.[70] Therefore, the costs of a longer foreclosure process include the increased costs to lenders, the reduced access to mortgage lending, and the increased probability of property deterioration.

Unfortunately, weighing the costs with the benefits of a longer foreclosure period is a difficult task. Yet when examining foreclosure laws that lengthen the process, these trade-offs must be at the forefront of the discussion. The efficient foreclosure length occurs when the benefits of a prolonged foreclosure process equal the costs associated with a longer foreclosure process. Given the lack of empirical data, assigning numbers to the benefits and costs would yield unsupported results. However, by looking into different foreclosure laws and their effects, policy makers can strike a fair balance with foreclosure laws.

The second group of foreclosure laws provides the borrower with protection. These "mortgagor protection

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[68] This inability to accurately measure the benefits of lengthened foreclosure may be the cause of a shift to less costly foreclosure procedures. *See* Donald L. Schwartz, Comment, *Power of Sale Foreclosure After* Fuentes, 40 U. CHI. L. REV. 206, 209 (1972).

[69] *Id. See generally* Terrence M. Clauretie & Thomas Herzog, *The Effect of State Foreclosure Laws on Loan Losses: Evidence from the Mortgage Insurance Industry*, 22 J. MONEY, CREDIT & BANKING 221, 231 (1990) (judicial procedure increases foreclosure costs); Pence, *supra* note 36, at 177 (2006) (defaulter-friendly states have loan sizes that are 3 percent to 7 percent smaller).

[70] *See* Cox, *supra* note 38, at 726.

laws" provide the borrower with statutory protections beyond that of the mortgage contract.[71] These protections take the form of rights to redeem ownership of the property and shield the borrower from personal liability.[72] Although there are many forms of redemption rights, the economic analysis for each should remain the same. Similar to a lengthened foreclosure process, redemption rights increase the probability that borrowers will be able to remain in their homes. From the previous discussion, the benefits of that outcome are large. However, not all redemption statutes are equal, and the benefits of different types of redemption statutes should be compared based on the marginal benefits and costs associated with each type of redemption statute.[73] The costs associated with redemption rights also depend on the type, but the general type of costs are consistent. Although some debate exists, redemption rights provide a disincentive to bid at foreclosure auctions.[74] In addition, redemption rights could increase the chance of the property deteriorating, because the defaulting homeowner or the new purchaser delays making improvements to the property.[75]

Along with redemption rights, delinquency rights aim to protect the borrower.[76] Delinquency rights take many forms, but the basic idea is protecting the borrower from personal liability. This protection of the borrower provides the emotional benefit of aiding an individual in

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[71] Michael H. Schill, *An Economic Analysis of Mortgagor Protection Laws*, 77 VA. L. REV. 489, 489 (1991).
[72] *See infra* Part III.B & Part III.D.
[73] *See infra* Part III.B.
[74] James B. Hughes, Jr., *Taking Personal Responsibility: A Different View of Mortgage Anti-Deficiency and Redemption Statutes*, 39 ARIZ. L. REV. 117, 134 (1997) ("The mere possibility of redemption discourages bidders at the foreclosure sale because there is no finality attached to the purchase.").
[75] *Id.* ("[A] potential purchaser would face a disincentive to bid for the property because, for a period, she could not maximize the value of the property by making further investment in it. . . . ").
[76] *See infra* Part III.D.

need; however, no economic justification is available for providing such protection. Conversely, there is a "moral hazard" cost associated with prohibiting deficiency judgments.[77] In addition, due to falling property values across the country, many homeowners have lost all the equity in their homes.[78] With no equity in the home and no concern for a deficiency judgment, a borrower would have no incentive to make her mortgage payments or maintain her property.[79] Thus, the social justification must outweigh the economic costs for delinquency laws to be beneficial.

Finally, the third group of foreclosure laws involves disclosure. Disclosure includes informing both the defaulting borrower during the foreclosure process and potential bidders before the foreclosure sale.[80] More information allows defaulting borrowers to better understand their options.[81] For example, a defaulting homeowner has little hope of maintaining ownership when she does not even communicate with her lender.[82] In addition to aiding borrowers, more disclosure also will improve the foreclosure sale process. Low bidder information negatively impacts participation and sale price

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[77] Schill, *supra* note 71, at 534.

[78] Geanakoplos & Koniak, *supra* note 14.

[79] Schill, *supra* note 71, at 534 ("Once a borrower's equity evaporates because of falling houses prices or accrued, but unpaid, interests and penalties, he no longer has any incentive to maintain the value of the property securing the loan or protect it from waste if he is insulated from personal liability.").

[80] See *infra* Part IV.B.1.

[81] A defaulting borrower will be unable to make life-changing decisions without knowing all of the different options. *See* Avoiding Foreclosure Toolkit, Doing Business with Freddie Mac, *available at* http://www.freddiemac.com/service/msp/avoid_foreclosurekit.html. The easiest way for states to improve the foreclosure process is through forcing lenders to provide crucial information to defaulting homeowners.

[82] Roberts, *supra* note 19 (One estimate places the number of people in foreclosure who have never talked with their lender at 60 percent.).

at foreclosure auctions.[83] Therefore, any increase in bidder information will improve participation and increase sale prices at foreclosure auctions.[84] Both forms of disclosure increase the chance of home ownership, and the costs of such disclosure are minimal. With such a large benefit at almost no cost, increased disclosure provides a positive economic outcome.

III. STATE FORECLOSURE LAWS

The differences in state foreclosure laws demonstrate different ideological preferences. Many of these foreclosure laws can be explained under the traditional policy preferences of lender-friendly or defaulter-friendly.[85] Judicial foreclosure, long redemption periods, lengthy mandatory delays before foreclosure sale, and delinquency restrictions can be classified as defaulter-friendly. The other foreclosure laws can be classified as lender-friendly. However, those preferences mistake the real policy concerns regarding foreclosure laws that are discussed above. Thus, when examining foreclosure law, this note examines the effect of foreclosure laws on reducing foreclosure rates (*i.e.*, keeping borrowers in their homes), and the effect of foreclosure laws on the resale of the property (*i.e.*, putting a subsequent homeowner in foreclosed property).

A. *Judicial vs. Non-Judicial Foreclosure*

The first major difference in state foreclosure laws is judicial vs. non-judicial foreclosure.[86] A judicial

[83] Nelson, *supra* note 35, at 1421 ("[I]t is essential that buyers have adequate information about the property being sold if market price is to be achieved.").
[84] *Id.*
[85] Pence, *supra* note 36, at 177; Heaton, *supra* note 36, at 92.
[86] Clauretie & Herzog, *supra* note 69, at 223.

foreclosure involves the court, while a non-judicial foreclosure, commonly referred to as power of sale, does not involve the court.[87] Since judicial foreclosures typically end in default judgments or with no defense made, the practical consequence of a state having judicial versus non-judicial foreclosures is that judicial foreclosures are generally more costly and take longer to complete.[88] However, characterizing states as either a judicial or non-judicial state can prove difficult. Many state laws that allow non-judicial foreclosure contain rights and incentives that make it more likely for lenders to choose judicial foreclosure over non-judicial foreclosure. For example, South Dakota allows for power by advertisement (non-judicial foreclosure), but gives the borrower the ability to request a foreclosure by action (judicial foreclosure).[89] New York allows for non-judicial foreclosure, but foreclosures are almost exclusively done by civil action (judicial foreclosure).[90] Past studies have ignored these intricacies, but in order to discover any correlation between foreclosure rates and judicial versus non-judicial foreclosure, these unique laws must be categorized in their own group.[91] Therefore, states that permit non-judicial

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[87] Heaton, *supra* note 36, at 91 ("Judicial foreclosure entails court adjudication of a lender-mortgagee initiated foreclosure action. In contrast, non-judicial foreclosure gives the mortgagee the power to sell the mortgaged property to the general public, without court supervision, by placing advertisements.")

[88] A judicial foreclosure proceeding can last just twenty seconds with only two questions posed by the judge: "Are you current on your mortgage and are you living in the home." Michael Corkery, *A Florida Court's 'Rocket Docket' Blasts Through Foreclosure Cases: 2 Questions, 15 Seconds, 45 Days to Get Out; 'What's to Talk About?' Says a Judge*, WALL ST. J., Feb. 18, 2009, at A1.

[89] S.D. CODIFIED LAWS § 21-48-9 (1993).

[90] RML-SRNE NY § 2:19.

[91] Failing to properly identify all states can lead to unsupported assumptions. By only taking into account a handful of states, Heaton

foreclosure but maintain significant exceptions that cause many foreclosures to be performed through the judicial process are classified as mixed foreclosure states.

With mixed foreclosure as a classification, twenty-nine states are classified as non-judicial foreclosure states.[92] Eleven states are judicial foreclosure states.[93] Nine states are not classified as either a judicial or a non-judicial foreclosure state; thus, those states are classified as mixed foreclosure states.[94] Lastly, Vermont is the only state that generally allows strict foreclosures.[95]

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came to the conclusion that non-judicial foreclosures lowered foreclosure rates. Heaton, *supra* note 36, at 97.

[92] Residential Mortgage Lending: State Regulation Database updated January 2009: Alabama: RML-SRSE AL § 2:19; Alaska: RML-SRW AK § 2:19; Arkansas: RML-SRSCN AR § 2:19; Arizona: RML-SRSCN AZ § 2:19; California: RML-SRW CA § 2:19; Colorado: RML-SRSCN CO § 2:19; Georgia: RML-SRSE GA § 2:19; Hawaii: RML-SRW HI § 2:19; Idaho: RML-SRW ID § 2:19; Maryland: RML-SRATL MD § 2:19; Massachusetts: RML-SRNE MA § 2:19; Michigan: RML-SRNCN MI § 2:19; Minnesota: RML-SRNCN MN § 2:19; Mississippi: RML-SRSE MS § 2:19; Missouri: RML-SRSCN MO § 2:19; Montana: RML-SRW MT § 2:19; Nevada: RML-SRW NV § 2:19; New Hampshire: RML-SRNE NH §2:19; North Carolina: RML-SRSE NC § 2:19; Oregon: RML-SRW OR § 2:19; Rhode Island: RML-SRNE RI § 2:19; South Carolina: RML-SRSE SC § 2:19; Tennessee: RML-SRSE TN § 2:19; Texas: RML-SRSCN TX § 2:19; Utah: RML-SRW UT § 2:19; Virginia: RML-SRATL VA § 2:19; Washington: RML-SRW WA § 2:19; West Virginia: RML-SRSE WV § 2:19; Wyoming: RML-SRW WY § 2:19..

[93] Residential Mortgage Lending: State Regulation Database updated January 2009: Connecticut: RML-SRNE CT § 2:19; Delaware: RML-SRATL DE § 2:19; Florida: RML-SRSE FL § 2:19; Illiniois: RML-SRNCN IL § 2:19; Indiana: RML-SRNCN IN § 2:19; Kansas: RML-SRSCN KS § 2:19; Kentucky: RML-SRSE KY § 2:19; Louisiana: RML-SRSCN LA § 2:19; Ohio: RML-SRNCN OH § 2:19; Pennsylvania: RML-SRATL PA § 2:19; Wisconsin: RML-SRNCN WI §2:19.

[94] Residential Mortgage Lending: State Regulation Database updated January 2009: Iowa: RML-SRNCN IA § 2:19; Maine: RML-SRNE ME § 2:19; Nebraska: RML-SRNCN NE § 2:19; New Jersey: RML-STRATL NJ § 2:19; New Mexico: RML-SRSCN NM § 2:19; New

By classifying foreclosure laws into two clear groups of judicial versus non-judicial foreclosure states, comparisons can be made between the effects of these laws on foreclosure rates. As discussed earlier, one of the arguments in favor of lengthening the foreclosure process is to deter lenders from initiating foreclosures.[96] However, a regression analysis shows almost no evidence that the longer judicial foreclosure process decreases the foreclosure rate.[97] When comparing the effects of judicial

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York: RML-SRNE NY § 2:19; North Dakota: RML-SRNCN ND § 2:19; Oklahoma: RML-SRSCN OK § 2:19; South Dakota: RML-SRNCN SD § 2:19.

[95] Residential Mortgage Lending: State Regulation Database updated January 2009: Vermont: RML-SRNE VT § 2:19. Strict foreclosure allows the lender to directly take possession of the property through the foreclosure process. James Geoffrey Durham, *In Defense of Strict Foreclosure: A Legal and Economic Analysis,* 36 S. C. L. REV. 461, 472 (1984□1985). Although historically foreclosures first used this process, strict foreclosure is rarely used today. *Id.* at 472□73. However, contract law allows lenders to gain direct possession of the property through a deal made with the borrower. John D. Hastie, *Conveyances in lieu of Foreclosure*, C516 ALI-ABA 263 (1990).

[96] *See supra* at Part I.

[97] Author applied regression analysis to data of foreclosure rates per household for all fifty states during the last three years. RealtyTrac Staff, *Foreclosure Activity Increases 81 percent in 2008*, RealtyTrac, *available at* http://www.realtytrac.com/content/press-releases/foreclosure-activity-increases-81-percent-in-2008-4551; RealtyTrac, *U.S. Foreclosure Activity Increases 75 Percent in 2007*, RealtyTrac, *available at* http://www.realtytrac.com/content/press-releases/us-foreclosure-activity-increases-75-percent-in-2007-3604; RealtyTrac, *More than 1.2 Million Foreclosure Filings Reported in* 2006, RealtyTrac, *available at* http://www.realtytrac.com/content/press-releases/more-than-12-million-foreclosure-filings-reported-in-2006-2234. This author then compared those rates to whether the state was a judicial or non-judicial foreclosure through use of a dummy variable. A dummy variable just uses 1 or 0 to denote whether a state is a certain type of foreclosure state. To test the validity of the regression model, this author compared unemployment rates with foreclosure rates. Press Release, U.S. Bureau of Labor Statistics, *Civilian Labor Force and Unemployment by State*

versus non-judicial foreclosure on foreclosure rates for each state during the last three years, the regression model yields a correlation coefficient of less than negative 0.00066,[98] which means that the effect of judicial foreclosures on foreclosure rates is negligible.[99] Although regression analysis did not indicate any significant correlation between judicial foreclosures and foreclosure rates, judicial foreclosures may increase a borrower's ability to avoid a foreclosure sale.[100] Unfortunately, little data are available for rates of foreclosure workouts, but the increased opportunity for negotiations in judicial foreclosures makes it likely that judicial foreclosures

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and Selected Area, Seasonally Adjusted (2008), *available at* http://www.bls.gov/news.release/archives/laus_01272009.pdf; Press Release, U.S. Bureau of Labor Statistics, *Civilian Labor Force and Unemployment by State and Selected Area, Seasonally Adjusted* (2008), *available at*

http://www.bls.gov/news.release/archives/laus_01182008.pdf. The results showed with over 99 percent confidence that unemployment rates affect foreclosure rates. In fact, for each 1 percent increase in unemployment, foreclosure rates on average increase almost 0.25 percent. With this evidence of the accuracy of the regression model, the model could be used to test whether judicial foreclosures really decrease foreclosure rates.

[98] A coefficient of negative 0.00066 shows that states with judicial foreclosure compared with a non-judicial foreclosure have 0.00066 percent lower foreclosure rates.

[99] Given the simplicity of this regression model, no firm conclusion on whether judicial foreclosures actually decrease foreclosure rates can be reached. However, by looking at foreclosure rates for each state during the last three years, which translated into 150 samples, one would expect to see more evidence of judicial foreclosures decreasing foreclosure rates if such a relationship existed.

[100] Debra Pogrund Stark, *Foreclosing on the American Dream: An Evaluation of State and Federal Foreclosure Laws,* 51 OKLA. L. REV. 229, 242-43 (1998) (Empirical studies showed that in Illinois two-thirds of borrowers were able to prevent foreclosure sale by using reinstatement rights, redemption rights, workout, or bankruptcy).

positively influence foreclosure workout rates after the foreclosure process begins.[101]

In addition, the regression model showed almost no evidence that mixed foreclosures caused lower foreclosure rates than pure non-judicial foreclosures.[102] Although the results do not provide evidence that mixed foreclosure states are preferred over pure non-judicial states, some mixed foreclosure states provide interesting solutions that benefit from the use of both judicial and non-judicial foreclosure. A law that allows for a power of sale foreclosure to occur, unless a homeowner requests a judicial foreclosure, could lower foreclosure rates.[103] When a borrower files with the court requesting judicial foreclosure, the borrower signals his or her desire to stay in the home. This signal ensures that the borrower is interested in remaining in her home, either through negotiation or prolonging the foreclosure process. With this knowledge, a lender is more likely to be willing to go through the expense of a loan workout.[104]

B. *Redemption Rights*

Another divergence among state foreclosure laws involves redemption rights. Redemption rights provide the borrower with an opportunity to save his property from foreclosure.[105] Redemption rights may be classified into

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[101] *Id.*

[102] The regression model showed that mixed foreclosures compared with judicial foreclosures showed a negative coefficient of 0.003 percent, which means that a state having a mixed foreclosure state instead of a pure non-judicial state causes foreclosure rates to decrease by 0.003 percent.

[103] OKLA. STAT. ANN. tit. 46, § 43 (West 1986); S.D. CODIFIED LAWS § 21-48-9 (1993).

[104] Expenses that occur during a loan workout include the time to negotiate and the costs of reinitiating the foreclosure process if the borrower falls back into default. *See Loan Modifications Get Reviewed, supra* note 5, at A6.

[105] Heaton, *supra* note 36, at 92.

three separate rights. One form of redemption right (hereinafter referred to as "cure") provides the borrower with the ability to save her property from foreclosure by paying all past missed payments, plus interest and expenses, but not including any accelerated payments.[106] Another form of redemption right (hereinafter referred to as "equitable redemption") allows recovery of the borrower's property by paying the full amount of the judgment (*i.e.*, the total amount outstanding on the mortgage) or the total amount of past due payments plus acceleration.[107] The last

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[106] *See, e.g.*, WASH. REV. CODE § 61.24.090 (2008). "(1) At any time prior to the eleventh day before the date set by the trustee for the sale in the recorded notice of sale, or in the event the trustee continues the sale pursuant to RCW 61.24.040(6), at any time prior to the eleventh day before the actual sale, the borrower, grantor, any guarantor, any beneficiary under a subordinate deed of trust, or any person having a subordinate lien or encumbrance of record on the trust property or any part thereof, shall be entitled to cause a discontinuance of the sale proceedings by curing the default or defaults set forth in the notice, which in the case of a default by failure to pay, shall be by paying to the trustee: (a) The entire amount then due under the terms of the deed of trust and the obligation secured thereby, *other than such portion of the principal as would not then be due had no default occurred*, and (b) The expenses actually incurred by the trustee enforcing the terms of the note and deed of trust, including a reasonable trustee's fee, together with the trustee's reasonable attorney's fees, together with costs of recording the notice of discontinuance of notice of trustee's sale." *Id.* (emphasis added)

[107] *See, e.g.*, FLA STAT. § 45.0315 (West 2006). "At any time before the later of the filing of a certificate of sale by the clerk of the court or time specified in the judgment, order, or decree of foreclosure, the mortgagor or the holder of any subordinate interest may cure the mortgagor's indebtedness and prevent a foreclosure sale by paying the amount of moneys specified in the judgment, order, or decree of foreclosure, or if no judgment, order, or decree of foreclosure has been rendered, by tendering the performance due under the security agreement, *including any amounts due because of the exercise of a right to accelerate*, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorney's fees. . . ." *Id.* (emphasis added).

form of redemption right (hereinafter referred to as "post-sale redemption") provides the borrower with the right to recover the property after the foreclosure sale.[108] In many states, this post-sale redemption right permits the borrower to remain on the property[109] and can last from ten days to two years.[110] With these classifications in mind, one can compare the benefits of cure rights to those of equitable redemption, and the benefits of equitable redemption to those of post-sale redemption.

The primary difference between cure redemption and equitable redemption is that equitable redemption imposes more costs on the borrower in order to recover his or her property. Despite this burden, some states allow redemption only by paying the full amount of the judgment or paying late payments plus acceleration.[111] By forcing the borrower to pay the full amount of the mortgage instead of simply curing the past unpaid payments, these states significantly decrease the chances for a borrower to avert foreclosure sale.[112] This clearly detrimental policy to the homeowner finds no justification from any policy perspective. The lender is not substantially disadvantaged from allowing cure rights,[113] and the quality of the property will not suffer from giving a borrower the right to cure instead of the right of equitable redemption. In fact, a borrower will more likely take care of the property until the foreclosure sale if there is a greater chance that she will be able to remove her property from the foreclosure process. Hence, cure rights should be preferred over equitable redemption.

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[108] *See, e.g.*, TENN. CODE ANN. § 66-8-101 (2004) ("Real estate sold for debt shall be redeemable at any time within two (2) years after such sale.").
[109] Cox, *supra* note 38, at 702.
[110] *Id.*
[111] *See, e.g.*, FLA STAT. § 45.0315 (2006).
[112] Cox, *supra* note 38, at 732.
[113] *Id.*

The difference between equitable redemption and post-sale redemption rights is that equitable redemption applies only to pre-foreclosure.[114] The benefits associated with post-sale redemption rights include giving the borrower another chance at saving his or her home and increasing the cost of foreclosure, which might decrease foreclosure rates.[115] However, there is evidence that very few borrowers take advantage of post-sale redemption rights.[116] In addition, a regression analysis study compared nine states offering lengthy post-sale redemption rights of over six months with all other states; this study showed that long redemption rights decreased foreclosure rates only slightly.[117] Conversely, the possible negative effects of redemption rights include lower foreclosure sale prices and the inability of potential homeowners to bid on the property.[118] A potential homeowner would be unlikely to bid on a home with the knowledge that he or she could not inhabit the home for an extended period of time or that the home could be taken from the purchaser for up to two years after the purchase.[119] The successful bidder would be reluctant to invest in the property until the redemption

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[114] Post-sale redemption rights are only available through statute. Hughes, *supra* note 74, at 129□130.

[115] Hughes, *supra* note 74, at 133.

[116] *Id.* at 135.

[117] Residential Mortgage Lending: State Regulation Manual Database updated January 2009: Alabama: RML-SRSE AL § 2:19; Iowa: RML-SRNCN IA § 2:19; Kansas: RML-SRSCN KS § 2:19; Michigan: RML-SRNCN MI § 2:19; Minnesota: RML-SRNCN MN § 2:19; Missouri: RML-SRSCN MO § 2:19; New Mexico: RML-SRSCN NM § 2:19; Tennessee: RML-SRSE TN §2:19; Vermont: RML-SRNCN VT § 2:19.. Similar to the regression model used to analyze judicial for non-judicial foreclosure, this author used dummy variables. When comparing long-redemption states to all other states, the results yield a negative coefficient of 0.0026, which indicates that long-redemption states have a lower foreclosure rate on average by 0.0026 percent.

[118] Hughes, *supra* note 74, at 134.

[119] Nelson & Whitman, *supra* note 35, at 1439.

period ceased.[120] Despite the high cost associated with a long redemption period, long redemption periods only marginally affect the foreclosure rate compared to other states.[121] Therefore, the benefit of slightly higher prospects for home retention seems inadequate to compensate for the costs associated with long post-sale redemption periods.

C. *Notice and Delay Statutes*

State foreclosure laws also differ with respect to notice and delay requirements. These requirements take many different forms and provide borrowers with different protections. As one example of a longer time delay, Maryland forces the lender to wait the later of ninety days after default or forty-five days after notice of intent to foreclose before initiating an action to foreclose.[122] Washington requires that a foreclosure under power of sale take place only after 190 days from default.[123] In addition to a long notice period, Washington requires the lender to provide information to borrowers of their options while in foreclosure.[124] If a lender pursues foreclosure by power of sale in Vermont, there exists a seven-month protection period from service of the complaint; however, the period is shortened with evidence of waste of property.[125] Examples of states with shorter time restraints include Texas, which requires notice of only twenty-one days before the sale of the property,[126] and New Hampshire, which requires notice to be sent to the mortgagor twenty-five days before the sale.[127]

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[120] *Id.*
[121] Clauretie & Herzog, *supra* note 69, at 231.
[122] MD. CODE ANN., REAL PROP. § 7-105.1 (LexisNexis 2010).
[123] WASH. REV. CODE § 61.24.040 (2008).
[124] *Id.*
[125] VT. STAT. ANN. tit. 12, § 4531a (2002).
[126] TEX. PROP. CODE ANN. § 51.002 (West 2007).
[127] N.H. REV. STAT. ANN. § 479:25 (2001).

Finding the point where benefits of an increased delay equal the costs of increased delay is an inexact calculation as every homeowner is different. As a means to better differentiate between homeowners, Pennsylvania increases the notice period for homeowners most likely to benefit. Pennsylvania gives borrowers the right to meet with the lender by providing a sixty-day stay on the foreclosure proceedings.[128] By requiring the borrower to request the meeting, the court only imposes the sixty-day stay when the borrower is genuinely interested in working out the loan. Once the borrower signals his or her interest in retaining the home, the sixty-day stay gives the borrower additional time to negotiate a workout.

Pennsylvania's solution reflects the same goals of the states that allow both judicial and non-judicial foreclosure.[129] By forcing the borrower to act to receive certain protections, these laws separate those homeowners interested in saving their home from those not willing to put forth the effort. As discussed earlier, borrowers are not equal.[130] Therefore, any law that separates borrowers allows state legislatures to set up efficient laws by providing different foreclosure delays. Although this note does not try to calculate the optimal level of foreclosure delay that state legislatures should seek,[131] bifurcating the foreclosure process makes choosing foreclosure periods much easier on legislators.

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[128] Residential Mortgage Lending: State Regulation Database updated January 2009, RML-SRATL PA § 2:19.

[129] *See* sources cited *supra* note 103. By allowing for accelerated foreclosures, unless the borrower complies with a simple requirement, these states streamline the foreclosure process for those not interested in maintaining ownership.

[130] *See supra* Part I (pointing out that the borrower's interest may not coincide with the community's interests).

[131] This is an important question worthy of in-depth research on the empirical benefits and costs of delaying foreclosures.

D. *Deficiency Judgments*

Finally, state foreclosure laws diverge with respect to prohibiting or limiting deficiency judgments. Deficiency judgments occur when the foreclosure sale fails to cover the amount owed on the mortgage.[132] Many states allow for the full amount of deficiency judgments.[133] Other states restrict deficiency judgments to when judicial foreclosure is used,[134] while other states restrict deficiency judgments to the difference between the price sold and the fair market value of the property.[135] A few states completely forbid deficiency judgments when dealing with residential property.[136] These different deficiency judgment limitations do not affect lender incentives to foreclosure or lender losses, because lenders typically do not collect deficiency judgments in the states that do allow them.[137]

Although deficiency judgments may not deter or encourage lenders from foreclosing, deficiency judgments create a perverse incentive to borrowers.[138] As previously discussed, anti-deficiency judgment laws encourage homeowners to walk away from their homes when property

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[132] Cox, *supra* note 38, at 703.

[133] *See* Fed. Land Bank of Wichita v. Cummings, 735 P.2d 1110 (Kan. Ct. App. 1987) (ruling that a creditor cannot be denied a deficiency judgment if the sale is confirmed).

[134] OR. REV. STAT. § 86.990 (2009)

[135] UTAH CODE ANN. § 57-1-32 (2010) ("The court may not render judgment for more than the amount by which the amount of the indebtedness with interest, costs, and expenses of sale, including trustee's and attorney's fees, exceeds the fair market value of the property as of the date of the sale.").

[136] Residential Mortgage Lending: State Regulation Database, RML-SRW CA § 2:19 (California).

[137] Cox, *supra* note 38, at 703. It seems self-evident that a borrower who cannot afford to pay a monthly mortgage payment would also be judgment proof with regards to a lender collecting on the outstanding amount of a deficiency judgment.

[138] *See supra* note 76 and accompanying text.

values drop below mortgage amounts.[139] Along with enticing homeowners to default, anti-deficiency laws take away an important bargaining chip that could be used by lenders. For example, the prospect of a deficiency judgment could persuade a defaulting borrower to turn over ownership of the property to the lender.[140] Even the supposed benefit of protecting the borrower by prohibiting deficiency judgments lacks merit, as lenders rarely pursue deficiencies.[141] Thus, no rationale exists for prohibiting deficiency judgments, while allowing deficiency judgments provides multiple benefits.

IV. RECENT FORECLOSURE LAW CHANGES

Given the severity of the housing crisis, state legislatures have begun to reform state foreclosure law. These reforms fall into two separate categories. First, some states have enacted mortgage moratoriums and other foreclosure delays for a specified period.[142] Second, other states have enacted foreclosure statutes changing substantive aspects of foreclosure law.[143]

A. *Mortgage Moratoriums and Foreclosure Delays*

A mortgage moratorium delays all foreclosures for a specified period. This delay can be the result of two different types of laws. One type of law consists of a true mortgage moratorium, where a state government prohibits

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[139] *See* Geanakoplos & Koniak, *supra* note 14 and accompanying text.

[140] Other uses of the prospect of deficiency judgments as bargaining tools are discussed later. *See infra* Part VI.

[141] *See* Cox, *supra* note 38, at 703.

[142] REAL PROP. ACTS. § 1304 (McKinney 2009); COLO. REV. STAT. § 38-38-108(1)(a) (2010); MD. CODE ANN., REAL PROP. § 7-105.1 (LexisNexis 2010).

[143] CAL. CIV. CODE § 2923.5(a)(1) (2010); GA. CODE ANN. § 44-14-162.2 (2010); N.Y. REAL PROP. ACTS. § 1304 (McKinney 2009); 2007 OH H.B. 138.

foreclosure proceedings from commencing for a certain period.[144] No state has undertaken this option, but some are considering it.[145] The other type delay is when a state government increases the length of time to complete the foreclosure process. The technical effect of lengthening the foreclosure process is a delay of all foreclosures. Many states have chosen this option.

1. *State Law Enactments of Foreclosure Delays*

One state that recently increased the length of the foreclosure process is New York. The New York legislature recently passed a statute stating that foreclosure proceedings cannot commence until ninety days after notice is given to the borrower.[146] Since the enactment of this statute in August, New York has seen a significant reduction in the number of foreclosures. From October to November 2008, foreclosures in New York decreased 31 percent, and foreclosures were down 55 percent for the year.[147] This large decrease is not surprising as many foreclosure proceedings could not be commenced due to the enactment of the statute. Given the temporary effect of the statute, there is a high likelihood that foreclosures will increase in the coming months.[148]

Another state that has lengthened the foreclosure process is Colorado. In order to lengthen the foreclosure

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[144] New York legislators are considering passing a one-year mortgage moratorium. *New York State Legislature to Discuss 1-Year Foreclosure Moratorium*, BANK FORECLOSURES SALES (Mar. 5, 2008), http://www.bankforeclosuressale.com/wp/article-0305156.html.

[145] *Id.*

[146] N.Y. REAL PROP. ACTS. § 1304 (McKinney 2009).

[147] RealtyTrac, *Foreclosure Activity Decreases 7 Percent in November*, REALTYTRAC (Dec. 11, 2008), http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=5543&accnt=64847.

[148] However, the New York statute's purpose goes beyond just creating a mortgage moratorium, as the law permanently delays the foreclosure process. *See supra* Part III.c.

process, Colorado increased the cure period before the foreclosure sale and eliminated the right to redeem after the sale.[149] Before this legislative change, the right to cure lasted between forty-five to sixty days.[150] However, the new statute specifically requires 110 to 125 days between notice and sale.[151] This statute increases the cure time from 110 to 125 days, because the borrower has up until the day before the sale to redeem the property.[152] This trade-off increases the borrower's chances to recover the property by curing, while also giving cleaner title to the buyer of the foreclosed property.[153] The change may have caused a decrease in foreclosures. The bill became effective on July 1, 2007, and from November 2007 to November 2008, Colorado saw a seventeen percent decrease in foreclosures.[154]

Maryland's approach to fixing the foreclosure issue is similar to Colorado's approach. Maryland recently passed an emergency bill to increase the length of the foreclosure process.[155] Maryland increased the length of time after default before a sale can be made to the later of ninety days after the default or forty-five days after notice of intent to foreclose.[156] Because borrowers maintain the

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[149] COLO. REV. STAT. § 38-38-108(1)(a) (2010).

[150] COLO. REV. STAT. § 38-38-103(1)(a)(II) (2007), *amended by* 2007 Colo. Sess. Laws p. 1832.

[151] COLO. REV. STAT. § 38-38-108(1)(a) (2010).

[152] COLO. REV. STAT. § 38-38-108(1)(a) (2010) (giving the borrower until noon on the day before the sale to cure the mortgage).

[153] The successful bidder at foreclosure auctions no longer needs to worry about losing ownership through use of a post-sale redemption right. *See* Hughes, *supra* note 74, at 134.

[154] *Foreclosure Activity Decreases 7 Percent in November*, RealtyTrac, *available at* *http://www.realtytrac.com/content/press-releases/foreclosure-activity-decreases-7-percent-in-november-4478.*

[155] Emergency Bill: Environmental Matters/Judicial Proceedings, Md. H.B. 365.

[156] MD. CODE ANN., REAL PROP. § 7-105.1 (LexisNexis 2010).

right to cure until one day before the sale, increasing the length of time before a foreclosure sale increases the time to cure.[157] As discussed before, this increase in time could increase the number of borrowers who eventually cure the mortgage and maintain possession of their home.[158] However, Maryland's foreclosure rate has increased year to date as of November 2008.

2. *Policy Analysis of Foreclosure Delays*

A true mortgage moratorium and the effects of creating delays of foreclosure law create both negative and positive consequences. The positive consequences include allowing more time for the borrower to explore alternatives to foreclosure and reduce losses to lenders as more borrowers are able to negotiate mortgage loan modifications.[159] The negative consequences include exacerbating the losses in the banking industry, slowing the recapitalization of the banking system, and delaying the correction of the housing market.[160] The problems of the banking industry should not be underestimated, but the possible effects to the housing market show a particular cause for concern. As emphasized in a congressional research report, "evidence from the Great Depression suggests that states that enacted moratoriums provided relief to some homeowners but saw higher costs of credit and fewer loans compared with states that did not."[161] This environment creates a trade-off of temporarily keeping borrowers in their home with the hope that those borrowers can work out a permanent solution versus making it more

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[157] *Id.*

[158] *See supra* note 107 and accompanying text.

[159] Edward Vincent Murphy, CRS Report for Congress, *Economic Analysis of a Mortgage Foreclosure Moratorium*, updated September 12, 2008,
available at http://fpc.state.gov/documents/organization/110095.pdf.

[160] *Id.*

[161] *Id.*

difficult for new potential homeowners to buy a house. By making access to credit more difficult, states could slow the recovery of the housing market. Therefore, enacting a mortgage moratorium requires careful consideration before implementing.[162]

Similar to the mortgage moratorium, the effects of permanently lengthening the foreclosure process creates benefits and costs. The benefits associated with a longer foreclosure process are increased time for a mortgagor to negotiate with the lender or to seek other alternatives, while the costs include increased mortgage costs and dilapidation of property.[163] This trade-off occurs often in the foreclosure process, but the decision of the Colorado legislature seems particularly well thought out.[164] Colorado traded post-sale redemption rights for a longer cure period before foreclosure sale.[165] This statute created an environment where the borrower's opportunity to maintain ownership is increased, while simultaneously making it easier for a potential homeowner to buy the foreclosed property. Curing the missed payments is easier for a homeowner than paying the full cost of the foreclosure sale.[166] Therefore, by giving the homeowner the opportunity to cure the mortgage instead of post-sale redemption, the Colorado legislature increased the chance of a borrower being able to save her home.[167]

Moreover, eliminating post-sale redemption rights promotes increased bidder participation. The discouraging

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[162] This note does not argue for or against a mortgage moratorium. However, as the economy worsens, many states may become increasing interested in a mortgage moratorium to stop the foreclosure problem. Before any legislature considers this option, research should be done on the effect on the banking industry and the economy as a whole.

[163] *See supra* Part II.

[164] *See generally* COLO. REV. STAT. § 38-38-108(1)(a) (2010).

[165] *See id.*

[166] *See supra* note 107 and accompanying text.

[167] *See id.*

effects of post-sale redemption rights on a potential homeowner bidding are greater than the effects of increasing the time between default and foreclosure sale. For example, a potential homeowner will be reluctant to bid on a house to live in when there is a chance that the home could be taken away from him in the next six months. With regard to a longer cure period, the only detriment to a potential homeowner bidding would be the dilapidation of the property, but that problem is just as prevalent with post-sale redemption rights where the original borrower remains in possession.[168] Even without the original borrower living in the home, it seems logical that a potential homeowner will be more reluctant to buy a house when the house could be taken away.[169]

B. *Substantive Changes to State Foreclosure Laws*

In an effort to curb the effects of the foreclosure crisis, state legislatures have also made substantive changes to foreclosure laws. States have passed legislation that aims to improve the knowledge of the defaulting borrower and provide the borrower with a chance to confront the lender, ensure proper mortgage title, increase bidder information, and improve post-foreclosure sale use of the property. Even though changes to foreclosure law were implemented with good intentions, some of these changes have created perverse incentives.

1. *Improving Borrower Knowledge*

In addition to the ninety days provision discussed earlier, the New York legislature passed numerous provisions to aid borrowers and to help prevent future

[168] *See* Hughes, *supra* note 74, at 134.

[169] Post-sale redemption rights also discourage the new owner from investing in the home until the post-sale redemption period has passed. *Id.*

foreclosures.[170] For example, a notice of foreclosure to a defaulting borrower requires specific language giving the homeowner a list of options, including telephone numbers that borrowers can call for further assistance.[171] By increasing the length of time for initiating foreclosures to ninety days and by ensuring that mortgagors know all of their options, the New York legislature created a legal landscape more conducive for borrowers to retain ownership. In addition, the statute created preventative measures requiring no negative amortization and a good faith showing that the mortgagor has the ability to repay.[172] The goal of this provision is to ensure that borrowers will not lose their homes by regulating the making of the mortgage.

Similar to the New York law mandating disclosure of options, a new California law requires lenders to illuminate the borrower's options. The law requires the lender to make contact with the borrower thirty days before filing a default notice in order to explore possible options for avoiding foreclosure, including the right to request a subsequent meeting with the lender that can be by telephone.[173] The statute's goal is to put the borrower and lender in contact. By giving the borrower the power to set up a subsequent meeting, the law gives the homeowner, who has the most to lose in this situation, the opportunity to force a meeting with the lender. Since meeting the lender precedes any negotiations, it is critical for the borrower to have that opportunity.

New York and California are not alone in revamping state foreclosure law. The Ohio General Assembly recently passed a foreclosure bill with three

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[170] N.Y. REAL PROP. ACTS. § 1304 (McKinney 2009).
[171] *See id.*
[172] *See id.*
[173] CAL. CIV. CODE § 2923.5(a)(1) (2010).

provisions affecting pre-foreclosure sale.[174] First, the bill provides Ohio courts with the power to require the mortgagor and mortgagee to appear in person and to participate in mediation.[175] Given the fact that many borrowers do not know who owns their mortgage, this requirement gives borrowers a chance to explain their situation and possibly save their homes through a workout program.[176] A similar statute was recently passed in Georgia that requires that the borrower be notified of the name and contact information of the individual who has full authority to negotiate and modify the loan at issue.[177] These statutory changes are in direct response to the mortgage securitization problem, which makes it difficult to know who really owns the mortgage and who has the power to modify the mortgage.[178]

2. *Mortgage Title Requirements*

Along with the mediation provision, the Ohio legislature passed a bill requiring that a judicial report be prepared and issued by a title insurance company that

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[174] *See generally* 2007 OH H.B. 138.

[175] OHIO REV. CODE. ANN. § 2323.06 (2010). "In an action for the foreclosure of a mortgage, the court may at any stage in the action require the mortgagor and the mortgagee to participate in mediation as the court considers appropriate and may include a stipulation that requires the mortgagor and the mortgagee to appear at the mediation *in person*." *Id.* (emphasis added). Forcing the actual mortgagee to meet with the borrower ensures that a person with the power to negotiate is present. Many defaulting homeowners may never speak to an individual that has the authority to alter the mortgage, which greatly decreases the borrower's chances of avoiding foreclosure sale. Roberts, *supra* note 19.

[176] *See supra* note 31 and accompanying text.

[177] GA. CODE ANN. § 44-14-162.2 (2010) (requiring the notice to "include the name, address, and telephone number of the individual or entity who shall have full authority to negotiate, amend, and modify all terms of the mortgage with the debtor").

[178] *See supra* Introduction.

contains detailed information on the property, the owner, and any lien holders.[179] The effect of this provision is to weed out all lenders without proper identification of their lien. As stated in the introduction of this note, many securitized mortgages lack proper title. Without proper title, foreclosures cannot be executed due to this provision. Not surprisingly, Ohio is not the only state to pass this type of statute. Georgia recently passed a statute that requires foreclosures to be conducted by the holder of the mortgage on public record.[180] Although a statute requiring proof of title to a mortgage seems trivial, it is necessary that states stress the need for proper recordation, given the improper recording of many asset-backed securities.[181]

3. *Increased Bidder Information*

The Ohio legislature did not limit its focus to problems caused only by the securitization of mortgages. The new Ohio foreclosure statute gives the officer who makes the foreclosure sale the option of holding an open house for the foreclosed property if abandoned.[182] This statute grants the officer in charge of foreclosure sales the opportunity to significantly increase the bidding at foreclosure sales.[183] One of the major reasons why properties are not sold at market value in foreclosure auctions is lack of information.[184] Lack of information makes it extremely risky for a one-time bidder to buy at a foreclosure auction, because a person trying to buy a house

[179] OHIO REV. CODE ANN. § 2329.191 (2008).
[180] GA. CODE ANN. § 44-14-161(b) (2010).
[181] *See supra* Introduction.
[182] OHIO REV. CODE. ANN. § 2329.272 (2010).
[183] *See* Nelson, *supra* note 35, at 1422 (discussing the inadequacies of the present auction-based foreclosure sale procedure).
[184] *See supra* note 81 and accompanying text.

for the first time typically cannot afford to buy a lemon.[185] However, a repeat player such as a bank or investor can afford to buy multiple houses at foreclosure auctions, despite knowing that one or two of them may bring a negative return. Therefore, increasing information by allowing all potential bidders to inspect the house increases the chances that a bidder who wants to live in the house will bid, which in turn increases the price paid at a foreclosure auction.

4. *Post-Foreclosure Sale Reforms*

Not surprisingly, given the significant foreclosure problem facing the state, California's legislature made changes affecting foreclosed properties after a sale. California passed a law authorizing civil fines of $1,000 per day for failing to maintain a property with fourteen days notice required to comply with the violation.[186] This law helps to alleviate the problem of deteriorating vacant properties.[187] However, the law also provides a disincentive to buying foreclosed real estate, because the fine of $1,000 per day can add up quickly. Also, the fourteen-day notice seems to be an insufficient amount of time for a homeowner to fix substantial problems with a recently bought home that could have been vacant for a long period of time.[188]

Through the same law, California gave tenants sixty days after the foreclosure sale to vacate a property.[189] Immediate possession provides the successful bidder with

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[185] Lemon commonly refers to used cars. This author uses the term to apply to a property that needs significant repairs or needs to be torn down.

[186] CAL. CIV. CODE § 2923.3(a)(1) (2008).

[187] *See* Cox, *supra* note 38, at 727 (discussing the problem of vacant properties).

[188] Some activities, such as house painting, cannot be done during winter months in many states.

[189] CAL. CIV. CODE § 2923.3(2) (2008).

significant benefits. Such benefits include the assurance that the property will not further deteriorate, the ability to move into the house quickly, and the opportunity to make improvements. However, because this law increases the amount of time it takes for a purchaser at a foreclosure auction to gain possession of the property, the law further dissuades bidders at foreclosure auction.

California was not alone in passing laws associated with foreclosed property post-sale. Ohio passed a law that requires the officer who conducted the sale, normally the sheriff, to record the deed conveying title to the property.[190] This requirement helps to prevent the deterioration of abandoned property, because many lenders or investors who buy foreclosed property may not record their deed in order to avoid city laws requiring the property to be maintained. Dilapidated housing lowers the value of all houses in a neighborhood and creates safety concerns for the community.[191] However, many city code violations are served on the new owners of the property the day after a foreclosed property is bought.[192] The city waiting to enforce housing-code violations until after the foreclosure sale places a large cost on an individual wishing to purchase a foreclosed property. Thus, a city must weight the benefits of holding people accountable with the costs of stringent requirements.

5. *Policy Analysis of Recent Substantive Changes to Foreclosure Law*

When examining the recent changes to foreclosure law through the lens of promoting home ownership, one discovers that many of the changes to foreclosure laws are beneficial and long overdue. Improving the knowledge of

[190] OHIO REV. CODE. ANN. § 2323.66 (2008).
[191] *See* Cox, *supra* note 38, at 727.
[192] This author has personally seen housing code officials writing down the names of successful bidders at a foreclosure auction.

borrowers by making sure that they are privy to the alternatives to foreclosure provides important benefits. First, it protects the mortgagor from scams targeting defaulting borrowers who lack knowledge.[193] Second, it ensures that the mortgagor knows her options to protect equity in her home.[194] Third, and most importantly, the buyer knows of the opportunities to engage in negotiations with the mortgagee in order to find a way to maintain ownership.[195] Many laws go a step further by giving the borrower the right to a meeting with the lender, which increases the likelihood of a workout.[196] The appealing characteristic of disclosure statutes is the lack of a negative trade-off. The only cost associated with disclosure is the time it takes the lender to educate the borrower.[197]

Another enacted disclosure statute focuses on educating bidders instead of the homeowner. Many scholars have attempted to explain why foreclosure sales are below market prices.[198] One logical explanation for the low foreclosure price is the lack of information.[199] Allowing potential bidders the opportunity to view the property through an open-house helps to resolve this problem.[200] A potential homeowner would never buy a home on the market without walking through the home, and in the foreclosure auction, that is exactly what a potential bidder needs to do. Therefore, any law that increases the

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[193] *See* Mortgage Foreclosure Rescue Scams, http://www.fraudguides.com/mortgage-foreclosure-rescue-scam.asp.

[194] *See* Jacoby *supra* note 33, at 2272.

[195] A recent study released by the Federal Home Loan Mortgage Corporation found that "57 percent of the nation's late-paying borrowers do not know their lenders may offer alternatives to help them avoid foreclosure." CAL. CIV. CODE § 2923.5 note (e) (2010).

[196] CAL. CIV. CODE § 2923.5(a)(2) (2010).

[197] Educating the borrower should be the type of activity lenders already engage in, but, unfortunately, that is not the case. *Id.*

[198] Nelson, *supra* note 35, at 1422.

[199] *Id.*

[200] OHIO REV. CODE ANN. § 2329.27.2 (2010).

information of potential bidders will encourage increased participation at foreclosure auctions.

Along with disclosure statutes, states have passed laws explicitly requiring proper foreclosure recording.[201] These laws present a difficult problem. Because many mortgages were improperly recorded, many mortgages could be held invalid.[202] Although this outcome keeps many borrowers in their homes, it comes at costs to the financial industry. Given the fragile state of the financial sector, invalidating a significant number of mortgages would have detrimental effects on any state's economy.[203] Hence, giving the borrower a windfall by voiding his mortgage does not appear to lead to the most efficient outcome. Instead, states should promote mortgage modification where the lender still earns returns and the borrower maintains possession.

The last type of foreclosure law modification affects the foreclosed property after the sale. These laws aim at making the buyer of the foreclosed property responsible for the condition of the property.[204] Although the law does not promote home ownership, these laws benefit the community by forcing buyers to maintain the property.[205]

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[201] GA. CODE ANN. § 44-14-160 (2010).

[202] *See* In re Foreclosure Cases, 521 F. Supp. 2d 650, 655 (S.D. Ohio 2008).

[203] Since securitized mortgages made up 40 percent of all mortgages held before the crisis, prohibiting a large part of securitized mortgages would collapse a state's banking industry. *See* Rappaport, *supra* note 30.

[204] CAL. CIV. CODE § 2929.3(a)(1) (2010).

[205] Although one would expect a purchaser at a foreclosure auction to invest in the property, financial institutions lack the ability to efficiently maintain the property. Since financial institutions will not maintain the property, avoiding liability for the property becomes necessary. *See New Laws Provide Protections for Tenants of Foreclosed Properties*, Legal Services NYC, *available at* http://www.legalservicesnyc.org/index.php?option=content&task=view&id=452.

However, the laws create a disincentive to purchase properties at foreclosure auction because of the uncertainty surrounding local building inspector's decisions regarding property conditions. Despite this drawback, property owners should be held accountable for the condition of their property, but state law must be fair by giving buyers of foreclosed properties time to bring the property up to code.[206]

V. SCHOLARLY REFORMS TO STATE FORECLOSURE LAW

Many suggestions have been presented on how to improve state foreclosure law. Hence, an in-depth analysis of all of the scholarly reforms would be overwhelming. Nevertheless, two scholarly articles presented particularly astute observations and recommendations that are worth examining before one can formulate any recommendations. One legal scholar, Prentiss Cox, recommended two reforms to state foreclosure law when examining the law from the housing policy perspective.[207] Furthermore, Grant Nelson and Dale Whitman have argued for implementing the Uniform Nonjudicial Foreclosure Act.[208]

A. *Prentiss Cox*

The two recommendations made by Prentiss Cox include separating the foreclosure process and increasing

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[206] For example, many old houses economically cannot be brought up to current code, and requiring successful bidders to do so will lead to vacant buildings. *See* Mary Kane, *Lenders, Services Fight Anti-Blight and Property Laws*, The Washington Independent (Aug. 2009), *available at* http://washingtonindependent.com/57132/lenders-servicers-fight-anti-blight-and-property-laws.

[207] Cox, *supra* note 38, at 727.

[208] Nelson, *supra* note 35, at 1399.

the notice requirements to homeowners.[209] The foreclosure process generally treats property owned by homeowners and property owned by investors as the same.[210] However, the two property owners act in distinct ways. Cox argues that defaulting investors are in a worse position than any potential buyer to achieve public benefits; therefore, they should not be given preferential treatment.[211] Conversely, the defaulting homeowner should be given every opportunity to retain ownership.[212] Those opportunities include delaying the foreclosure process and creating reinstatement (cure) rights until the foreclosure sale.[213] Although the research is limited, Cox cites a study that discovered evidence that a longer foreclosure process promotes homeowner retention.[214] In addition, Cox argues for the benefits of reinstatement rights by explaining how paying the arrearage due is easier than paying the whole mortgage amount.[215]

Along with the benefits of promoting homeowner retention of foreclosed property, Cox refutes the costs associated with longer foreclosures.[216] However, his complete dismissal of the costs seems unsupported. Cox first dismisses a study that found that higher foreclosure costs decrease loan amounts.[217] Cox dismisses this study

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[209] Cox, *supra* note 38, at 727.

[210] In the present crisis, most of the foreclosure aid has excluded investor owned properties. Kathleen Doler, *Investors Fight Foreclosure on Their Own*, INVESTOR'S BUS. DAILY, Dec. 5, 2008, at A6.

[211] Cox, *supra* note 38, at 729. It appears that policy makers agree that investor-owned real estate does not provide public benefits. *Id.*

[212] Cox, *supra* note 38, at 730.

[213] *Id.* at 730-32.

[214] *See* Stark, *supra* note 100, at 242-43.

[215] Cox, *supra* note 38, at 732.

[216] *Id.* at 735-38.

[217] Pence, *supra* note 36, at 177 (finding that defaulter-friendly states have loan amounts that are 3 percent to 7 percent smaller).

by arguing that lenders will become more careful.[218] However, more careful lenders mean less credit for potential homeowners. Cox then rejects the waste concern caused by a lack of incentive for defaulting homeowners to maintain the property.[219] However, waste frequently occurs in the case of foreclosed properties.[220] By emphasizing the importance of these costs, one can weigh the benefits and costs associated with longer foreclosure periods to discover the most efficient solution.[221]

Cox's second suggestion is to provide better notice to homeowners disclosing all of their options before solicitation by individuals seeking to benefit from the defaulting homeowners predicament.[222] From an earlier analysis, the benefits of disclosure outweigh the costs of providing that notice.[223] Furthermore, the use of plain language, as Cox suggests, ensures that the homeowner understands his options.[224] Cox also appropriately suggests that providing a plain language notice before publication of the foreclosure protects the borrowers from solicitors seeking to take advantage of them.[225] Thus, notice requirements that provide plain language to the borrower are necessary in order for the homeowner to make an informed decision.

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[218] Cox, *supra* note 38, at 736.
[219] *Id.* at 737.
[220] The kitchen sink, bath tub, furnace motor, and copper pipes were removed from the Murray Street property, mentioned in Part I, after the tenant was evicted for non-payment of rent.
[221] *See supra* Part II.
[222] *See* Mortgage Foreclosure Rescue Scams, *supra* note 193 (listing all the different types of foreclosure scams).
[223] *See supra* Part II.
[224] Cox, *supra* note 38, at 740.
[225] *Id.*

B. *Grant Nelson and Dale Whiteman*

Although the Uniform Nonjudicial Foreclosure Act ("UNFA") failed to gain large-scale support, the Act provides many useful suggestions on how to improve state foreclosure law. The most novel and beneficial aspects of the Act involve improving the auction sale process and providing additional alternatives to foreclosed property disposal.[226]

The first part of the UNFA focuses on improving the auction sale process.[227] The central theme in improving the current system is improving bidder information. Bidder information is improved by having access to title information and general property information,[228] and inspecting the collateral.[229] The UNFA requires the lender to provide title evidence to each bidder who requests it.[230] The UNFA also authorizes lenders to make additional information available to bidders, while exculpating lenders from any liability for false information.[231] These provisions aim at putting information, which is already available to lenders, in the hands of bidders as well. Lastly, the UNFA tries to strike a compromise between allowing potential bidders to view the premises and "lien theory."[232] It does so by protecting a residential debtor from deficiency

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[226] Nelson, *supra* note 35, at 1430.

[227] *Id.*

[228] *Id.* at 1434 (general property information includes "appraisals, environmental assessments, surveys, engineering studies, [and] inspection reports").

[229] *Id.* at 1435.

[230] UNIFORM NONJUDICIAL FORECLOSURE ACT § 302(a) (2002). The act even requires the person conducting the auction to have copies of the title evidence at the sale. § 303(c)(7). Since lenders already possess information on the mortgaged property, forcing them to provide that information comes is a low burden. Nelson, *supra* note 35, at 1434.

[231] UNIFORM NONJUDICIAL FORECLOSURE ACT § 302(b)-(c).

[232] Nelson, *supra* note 35, at 1435 ("lien theory" states that the property belongs to the debtor until the foreclosure sale).

judgments if he acts in "good faith."[233] One of the components of good faith requires the debtor to allow bidders reasonable access to the property.[234] There can be no substitute for inspecting the premises, and any way in which a state legislature can provide that option to potential bidders will increase the chances of a potential homeowner bidding at the auction.

Along with increasing the amount of disclosure in the auction sale, the UNFA eliminates the post-foreclosure statutory right of redemption.[235] This post-foreclosure right affects the finality of the foreclosure sale.[236] By ensuring that the successful bidder at the auction will in fact own the property, the law promotes the participation of bidders who desire to inhabit the residence.

Along with improving the auction sale, the UNFA proposes two alternatives to property disposal. First, the UNFA allows foreclosure by negotiated sale.[237] Foreclosure by negotiated sale allows the lender to sell the property through the open market.[238] However, the borrower is empowered to reject any proposed sale.[239] According to Nelson, lenders would use a negotiated sale to reduce transaction costs.[240] Although avoiding transaction costs does provide a benefit, it seems unlikely that a lender would engage in the process of selling the property when

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[233] *Id.* at 1437.

[234] *Id.*

[235] UNIFORM NONJUDICIAL FORECLOSURE ACT § 209 (cutting off all forms of redemption rights after the foreclosure sale has been completed).

[236] *See supra* note 114 (discussing the negative effects of post-foreclosure sale redemption rights).

[237] Nelson, *supra* note 35, at 1440-42 (discussing the different elements of the rules regulating negotiated sale in the UNFA).

[238] UNIFORM NONJUDICIAL FORECLOSURE ACT § 403.

[239] UNIFORM NONJUDICIAL FORECLOSURE ACT § 404.

[240] Transaction costs are reduced by "complet[ing] the process of property disposition in a single step, rather than the two-step procedure usually employed now." Nelson, *supra* note 35, at 1442.

that effort could so easily be wasted by the objection of the borrower.[241]

Second, the Act allows for foreclosure by appraisal.[242] Foreclosure by appraisal allows the lender to give the borrower an appraisal of the property and offer a proposed amount for the property in order to take title.[243] This law allows the lender to streamline the process by taking possession quickly. In many instances, it would be profitable for the lender to pay the borrower to get immediate possession to the premises. For example, if a homeowner plans to simply delay the foreclosure sale in order to get free rent, the property will deteriorate in value. It is likely that the lender will acquire the property at foreclosure sale, and since the lender is incapable of repairing the property efficiently, the lender will be forced to sell the property at a large discount to an investor. This discount is the price that the bank is willing to offer the borrower to get immediate possession. Although this law does not directly promote home ownership, the law allows lenders to preserve the quality of the house, thereby making it easier for a potential homeowner to purchase the property.[244]

VI. BENEFICIAL STATE FORECLOSURE LAW REFORMS

With a solid understanding of the different elements of state foreclosure law, recent changes in state foreclosure law, and scholarly perspectives of foreclosure law, one can

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[241] Given the present state of the housing industry, negotiated sales would not be feasible. There is simply too much housing inventory on the market.

[242] Nelson, *supra* note 35, at 1444.

[243] *Id.*

[244] Although this law does not show up in statute, contract law allows two parties to make such an agreement through use of a "deed in lieu." Ron Lieber, *Thoughts on Walking Away from Your Home Loan*, N.Y. TIMES, Mar. 14, 2009, at B1.

begin to piece together the most beneficial aspects of each. To determine which laws are beneficial, this article gives preference to the goals of promoting homeownership before and after the foreclosure sale. With all this in mind, foreclosure reforms are necessary with two basic changes. First, foreclosure law should not treat everyone equally. Second, foreclosure law must be structured in such a way to bring potential resident bidders into foreclosure auctions.

A. *Foreclosures under the Dual System of Judicial and Non-Judicial Foreclosures*

The basic state foreclosure law debate of judicial versus non-judicial foreclosure shows that there are benefits to both systems. Thus, a system that allows for both would be the most effective.[245] Power of sale foreclosure should proceed unless the borrower complies with a simple requirement, such as filing a request for a judicial foreclosure with the clerk of courts. By mandating that the lender provide the borrower sufficient notice of his right to a judicial foreclosure and by making it easy for the borrower to make such a request, the legislature can ensure that judicial foreclosures will take place whenever the homeowner has the slightest interest in maintaining ownership. This small requirement for the homeowner to receive a judicial foreclosure would easily distinguish those interested in maintaining their homes from those who do not, because those interested in maintaining ownership would be willing to comply with the requirement.[246] Conversely, those with no interest in maintaining ownership deserve no special treatment, and the foreclosure

[245] OKLA. STAT. ANN. tit. 46, § 43 (West 1986); S.D. CODIFIED LAWS § 21-48-9 (1993).

[246] A requirement such as a filing with the court or a letter to the mortgagee would be performed by anyone slightly interested in saving his home.

process should proceed under power of sale.[247] In addition, investors would be unlikely to comply with the provision.[248] A defaulting investor lacks the incentive to save the property and would not go through the expense of fighting the foreclosure in court.

Although there are many options for implementing a law that requires the borrower to request a judicial foreclosure, some details of how such a law would look could be beneficial. First, the law must provide clear notice of the requirements to receive a judicial foreclosure. The law should require the lender to provide the borrower with the form to file with the clerk of the court. Along with making the requirements simple, the notice should provide for a sufficient length of time. The borrower should be given at least one month to follow the steps necessary to get a judicial foreclosure.[249] In addition to notice of the judicial foreclosure, notice should be provided detailing all of the borrower's options.[250] After that period, the law bifurcates into the requirements of judicial foreclosure and non-judicial foreclosure.

If the borrower does not fulfill the requirement to receive a judicial foreclosure, a non-judicial foreclosure shall proceed. Non-judicial foreclosure should still allow the borrower the opportunity to work out or redeem the

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[247] Under the economic analysis presented in Part II, the costs of a borrower not interested in maintaining ownership far exceed the costs. The probability of deterioration of the property is high while the probability of the homeowner avoiding foreclosure is almost zero. Therefore, public policy favors quickly moving on from one homeowner to another homeowner with more incentive to invest time and money into the property.

[248] *See* Cox, *supra* note 38, at 729.

[249] Picking an exact length of time is difficult, but legislatures should ensure that the borrower has at least enough time to comply with the requirement. For example, if the foreclosed party was a truck driver that travels across country, he may not receive the notice until many weeks after it is sent.

[250] *See* Cox, *supra* note 38, at 740.

mortgage; however, that period should be limited to curb property waste. A period of one to two months seems sufficient.[251] This period should be further accelerated in the case of a vacant or dilapidated building with the decision of what constitutes vacant or dilapidated being made by the code enforcement official or equivalent office.[252] Then, publication of the foreclosure sale should take place for a period of two to four weeks with the sale taking place after that period. A period of two to four weeks provides sufficient notice to potential bidders.

If the borrower does comply with the requirement, judicial foreclosure shall proceed. Going through the judicial process provides much of the time delay necessary for the borrower to explore his options, but any law must provide the borrower the opportunity to meet with the lender. Given the difficulty of locating the individual with the ability to modify the mortgage, mediation needs to be encouraged or even required between the borrower and lender.[253] Either the judge or the borrower should have the ability to require a meeting with a party capable of modifying the mortgage.[254] When such a meeting is requested, an immediate stay of foreclosure proceedings should last until the meeting takes place.[255] With mediation and the delay caused by judicial process, the borrower will be given ample opportunity to find a way to remain in her home. However, as in non-judicial foreclosure, a ruling by

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[251] Again, picking an exact time is difficult; however, the period should be relatively short because the chance for property deterioration is high and the chance for avoiding foreclosure is low for a borrower not willing to request a judicial foreclosure.

[252] The costs of such assessment should be paid by the lender to ensure that any claim of property deterioration or vacancy is legitimate.

[253] OHIO REV. CODE ANN. § 2326.06 (LexisNexis 2008).

[254] CAL. CIV. CODE § 2923.5 (West 2008) (giving the borrower the ability to request a meeting); OHIO REV. CODE ANN. § 2326.06 (LexisNexis 2008) (giving the judge the ability to require mediation).

[255] *See* Residential Mortgage Lending, *supra* note 128.

a housing official declaring the building vacant or dilapidated should accelerate the process in judicial foreclosure.

In addition, the type of redemption right authorized should be a cure right up until the foreclosure sale, which provides the borrower with the greatest likelihood of redemption.[256] The cure rights should consist of all past due payments, any court fees, and attorney's fees.[257] However, attorney's fees should be limited to an amount, such as $500, to avoid any excessive expenses.[258]

The benefits of this divergent treatment come from the economic analysis provided at the beginning of this article.[259] If a homeowner desires to stay in her home, the increased likelihood that the homeowner will in fact stave off foreclosure sale coupled with the benefits of a homeowner maintaining possession lends support to giving the homeowner significant time to explore her options.[260] On the other hand, if a homeowner does not desire to go through the steps necessary to save her home, the decreased likelihood that the homeowner will avoid foreclosure combined with the benefits of home ownership are outweighed by the increased likelihood that the property will not be maintained combined with the costs associated with the waste and deterioration of the property.[261] Since the costs associated with a longer foreclosure period are

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[256] *See supra* Part III.B.

[257] *See, e.g.*, WASH. REV. CODE § 61.24.090 (2008) (example of a foreclosure statute that allows for the right to cure the mortgage without any acceleration of the amount due on the mortgage).

[258] Since attorney fees are only recoverable when the mortgagor reinstates, lenders have the incentive to disproportionately allocate attorney fees to foreclosures that are reinstated. *See* Keith Arnold, *Attorney Fees Can be Included in Costs of Mortgage Reinstatement*, THE DAILY REPORTER (Franklin County, Ohio) Feb. 5, 2009, at A1.

[259] *See supra* Part II.

[260] *See id.*

[261] *See id.*

higher with this group of homeowner,[262] these homeowners should be given a shorter foreclosure period.

B. *Increased Potential Homeowner Participation at Foreclosure Auctions*

In order to entice a greater number of potential residents into the foreclosure bidding process, four things are necessary. First, the potential homeowner must be given a chance to examine the premises. Without actually walking through the home, a potential resident will be reluctant to bid at a foreclosure auction. Second, a potential homeowner must be assured that if he or she is the successful bidder that there are no disputes over the ownership. Disputes over ownership would be caused by faulty title or redemption rights granted to the original borrower. Third, possession of the property must be obtained quickly. Quick possession allows the successful bidder to move into his or her new home and prevents waste that is likely to occur from a former homeowner who just lost ownership through the foreclosure process. Fourth, there must be some assurance that the successful bidder will not be immediately charged with multiple violations from the code enforcement office. Although a new homeowner will likely buy the property with the intention of improving the property, a home that just went through the foreclosure process may take time to improve.[263] Hence, someone buying a property out of foreclosure needs to be given ample time to improve the premises.

With these qualifications to bringing potential residents to the foreclosure bidding process, state legislatures must change many aspects of foreclosure law. There are two options to increasing access to the home for

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[262] *Id.*

[263] Some improvements, such as painting, cannot take place during some months of the year.

potential bidders. First, state legislatures can abolish the whole foreclosure idea of "lien theory."[264] Although such a change may be unfair to the borrower, the state could enact a law in such a way as to protect the borrower and allow for potential bidders to inspect the home.[265] For example, legislation could be enacted to still preserve the borrower's ownership of the property until a week before the sale, and then require the borrower to vacate the premises to allow for an open house of the property the day before the auction. If a state legislature still finds those terms unfair, the law could allow the borrower to trade the right to possess the home before foreclosure sale for an extended period, thereby giving the borrower an increased chance of avoiding foreclosure while also providing potential resident bidders the much needed access to the property before the auction.

This scenario creates a state of limbo as to who owns the property and who is responsible for the property during the days between forcing the borrower to vacate and the foreclosure sale. Although this question creates a legal theory problem, the practical implication of this limbo period is nonexistent. In the present law, the defaulting borrower cannot be held accountable for the property because the loans are uncollectable. For example, when there is a housing code violation, the code enforcement officials will wait to cite the new owner, knowing that the defaulting borrower will not comply and has no reason to comply with the housing code. So for all practical purposes, the property is already in a state of limbo with no one responsible for maintaining the property.

The second way a state legislature can allow potential bidders to view the foreclosed house is by finding ways to work within the present legal system. The UNFA suggests allowing borrowers to exchange avoiding liability

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[264] Nelson, *supra* note 35, at 1435.
[265] *Id.*

through a deficiency judgment for showing the property in foreclosure.[266] For this law to have any effect, deficiency judgments must be allowed against homeowners.[267] However, because deficiency judgments are rarely pursued,[268] this exchange may not incentivize borrowers to let potential bidders inspect their home. Another way to improve bidder access to the home is by allowing a county official to hold an open house for all vacant buildings.[269] Although this law does increase bidder access to a few homes, the majority of homes that are not vacated before the foreclosure sale will still not be viewed by potential bidders. Both these suggestions will increase bidder access to the foreclosed home, but neither will allow potential bidders full access to all foreclosed homes.

In addition to improving access to the home for potential bidders, state foreclosure law needs to ensure that when buying at foreclosure auction the successful bidder receives marketable title. The UNFA suggests that evidence of title should be provided by the lender.[270] Yet, the law allows for evidence of an attorney's opinion.[271] This note suggests requiring the lender to provide title insurance at the lender's expense. Forcing all potential bidders to pay for title insurance, given the fact that many foreclosure sales are cancelled a few days before the sale, is wasteful. Therefore, placing the burden on the lender greatly reduces overall costs. With this title insurance, all doubts about marketable title would be laid to rest before the bidding takes place.

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[266] *Id.* at 1437.
[267] *See supra* Part III.D.
[268] Jason Opland, *Short Sale/Foreclosure Deficiency Judgments – Do Banks Really Sue Homeowners?*, RealTown, *available at* http://www.realtown.com/jasonopland/blog/short-sale-foreclosure-deficiency-judgments-do-thebanks-really-sue-homeowners.
[269] OHIO REV. CODE ANN. § 2329.272 (LexisNexis 2008).
[270] Nelson, *supra* note 35, at 1433.
[271] *Id.*

Along with marketable title, potential homeowners need assurance that the property will not be taken away from them through the use of post-foreclosure statutory redemption. As discussed earlier, the post-sale redemption rights provide no real benefit to the borrower and could be a substantial deterrent for a potential homeowner at the foreclosure sale.[272] Hence, post-foreclosure redemption rights must be abolished to lure potential residents into the bidding process.

Lastly, state foreclosure law needs to be more accommodating to a successful bidder's situation by providing for fast possession and giving the new buyer a moratorium of the housing code violations. When the property is vacant, there should be no delay in giving the successful bidder possession. When the property is not vacant, the law should provide for quick eviction of the homeowner, tenant, or trespasser. Although this may seem harsh, the homeowner, tenant, or trespasser is likely to have had free rent for a long period of time. On the other hand, the successful bidder will want to gain possession of the property and take measures to maintain and improve the premises. To that end of improving the premises, a successful bidder must be given time. Laws that penalize purchasers at foreclosure auction do not take into account the time necessary to make improvements.[273] Therefore, a moratorium of at least three months from building code violations should be provided.

VII. CONCLUSION

The inefficiencies of state foreclosure procedures have been hidden by the success of the banking industry

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[272] *See supra* Part III.B.

[273] As previously discussed, laws that require the property to be fixed within a couple of weeks, in some instances, cannot be achieved. *See supra* Part VI.B.

throughout the last half century. Because foreclosure rates have historically been a small percentage of total assets, lenders were happy to get possession of properties through uncontested foreclosure auctions. Lenders then sold those properties on the open market for a gain or slight loss. However, the present crisis has illuminated the problems of state foreclosure law. Simply put, lenders can no longer afford to take control of more foreclosed properties. Not only are lenders losing money, but housing values cannot be cured until foreclosed properties work their way into the hands of homeowners. Therefore, foreclosure reforms must be made.

These reforms must focus on improving the foreclosure process through the lens of promoting home ownership. This note suggests modifying the foreclosure process in ways that increase bidder participation and the passage of new laws that incorporate the best aspects of both judicial and non-judicial foreclosure. Together, these changes first will help prevent foreclosure sales, and second, streamline the process of getting new homeowners to buy foreclosed properties. The recommendations presented only begin to scratch the surface of possible changes to state foreclosure law, and it is this author's hope that legal scholars will begin to examine state foreclosure laws with the overall economic environment in mind.

YOU'RE SENDING THE WRONG MESSAGE: SEXUAL FAVORITISM AND THE WORKPLACE

Paige I. Bernick[1]

On October 1, 2009, late-night host, David Letterman, admitted on the *Late Night with David Letterman Show* ("*Late Night*"), "I have had sex with women who work for me on this show."[2] Although the employees who engaged in the sexual affairs affirmed that the relationships were consensual, other *Late Night* staff members sustained indirect harm by their actions.

A former female writer for the show, Nell Scovell, published an opinion piece about Letterman's sexual relationships for *Vanity Fair* entitled "Letterman and Me."[3] In 1990, Scovell joined the writing staff as the second female ever hired by *Late Night*.[4] It was her dream job—she moved across the country from Los Angeles to New York to be a part of the team.[5] However, she eventually perceived her working environment as intimidating for a female writer. As Scovell explained:

> Did Dave hit on me? No. Did he pay me enough extra attention that it was noted by

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[1] J.D. Candidate, University of Tennessee College of Law, 2011. A.B., History, Princeton University, 2008. Thank you to Professor Jeffrey Hirsch for his advice and guidance as well as the Tennessee Journal of Law and Policy Board and Staff for their time and energy editing this Policy Note. I would also like to thank my parents for all of their support and encouragement.

[2] Bill Carter, *Letterman Extortion Raises Questions for CBS*, N.Y. TIMES, Oct. 3, 2009, at A1; *see also* Bill Carter, *Letterman Reveal Extortion Attempt Over His Affairs*, N.Y. TIMES, Oct. 2, 2009, at B4.

[3] Nell Scovell, *Letterman and Me*, VANITY FAIR ONLINE, Oct. 27, 2009, http://www.vanityfair.com/hollywood/features/2009/10/david-letterman-200910.

[4] *Id.*

[5] *Id.*

> another writer? Yes. Was I aware of rumors that Dave was having sexual relationships with female staffers? Yes. Was I aware that other high-level male employees were having sexual relationships with female staffers? Yes. Did these female staffers have access to information and wield power disproportionate to their job titles? Yes. Did that create a hostile work environment? Yes. Did I believe these female staffers were benefiting professionally from their personal relationships? Yes. Did that make me feel demeaned? Completely.[6]

Ultimately, Scovell walked away from her dream job within a few months of starting.[7]

Scovell's account is a prime example of sexual favoritism and why it is relevant in today's workplace. Sexual favoritism describes a situation where a supervisor bestows benefits, promotions, or disproportional power to an employee, who he or she is sexually involved.[8] Sexual favoritism primarily affects women in the workplace and places an obstacle for women to obtain respect at their jobs. This Note will address the past and future of sexual favoritism law as well as potential improvements in the law to protect more employees in the workplace. Part I will cover the background of sexual favoritism law; Part II will discuss sexual favoritism law at its current state; and Part III will forecast the future of sexual favoritism law and how it can improve. Ultimately, sexual favoritism law does not

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[6] *Id.*

[7] *Id.*

[8] *See generally* Mary Kate Sheridan, *Just Because It's Sex Doesn't Mean It's Because of Sex: The Need for New Legislation to Target Sexual Favoritism*, 40 COLUM. J. L. & SOC. PROBS. 379, 383-85 (2007).

provide sufficient protection to employees and should expand in order to fulfill its purpose.

I. Background

Title VII of the Civil Rights Act of 1964 prohibits sex discrimination concerning terms, conditions, and privileges of employment.[9] Sex discrimination occurs when an employer differentiates on the basis of sex in making employment decisions, where sex is not a pre-requisite for the job.[10] Sexual harassment is currently a violation of §703 in Title VII, sex discrimination.[11]

The United States Equal Employment Opportunity Commission ("EEOC"), in 29 C.F.R. § 1604.11, set forth guidelines for determining sexual harassment, including unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment.[12]

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[9] *See* 42 U.S.C. § 2000e-2(a)(1) (2006); *see also* Toscano v. Nimmo, 570 F. Supp. 1197, 1198 (D.C. Del. 1983). 42 U.S.C. § 2000e-2(a)(1) states that: "[I]t shall be an unlawful employment practice for an employer . . . to discharge any individual . . . or otherwise to discriminate against any individual with respect to . . . terms, conditions, or privileges of employment because of such individual's . . . sex. . . ."

[10] *See Toscano*, 570 F. Supp. at 1199.

[11] 29 C.F.R. § 1604.11(a) (2009).

[12] 29 C.F.R. § 1604.11(a). The exact language of the code is as follows:

> (a) Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1)

Under the EEOC guidelines, a sexual harassment claim may present either as *quid pro quo* or a hostile work environment.[13] *Quid pro quo* discrimination occurs in two possible situations. First, harassment can occur when a person is subjected to unwelcome sexual advances, requests for sexual favors, and/or other verbal or physical sexual conduct.[14] Second, it can also occur if an employee's submission to sexual conduct is explicitly or implicitly required in an employer's employment decision-making process.[15]

A hostile work environment claim comes from judicial decisions and EEOC policies in the past that hold that an employee retains the right to work in an atmosphere free from discrimination based on intimidation, ridicule, or insult.[16] The sexual harassment must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working

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> submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

[13] 29 C.F.R. § 1604.11(a).

[14] 29 C.F.R. § 1604.11(a); *see generally* Stephen Dacus, Note, Miller v. Department of Corrections: *The Application of Title VII to Consensual, Indirect Employer* Conduct, 59 OKLA. L. REV. 833, 835 (2006).

[15] 29 C.F.R. § 1604.11(a).

[16] *See* Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, as Amended; Adoption of Final Interpretive Guidelines, 45 Fed. Reg. 74676 (Nov. 10, 1980) (to be codified 29 C.F.R. pt. 1604.11); *see also Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1985).

environment."[17] When determining the degree of sexual harassment needed to create an abusive working environment, a totality of the circumstances test is utilized.[18]

Sexual favoritism emerges as a subset of sexual harassment law. Instead of a first-person sexual harassment claim, a supervisor favors one employee or some employees sexually and discriminating against others through that preference, thus creating a third-person claim. The EEOC guidelines provide a cause of action based on sexual favoritism: "Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit."[19]

1. Divergent Views on Sexual Favoritism

In the mid 1980s, two federal cases, *King v. Palmer*[20] and *DeCintio v. Westchester County Medical Center*[21], reached different conclusions on sexual favoritism claims.

In *King*, a female nurse, Mabel King was employed at the District of Columbia Department of Corrections.[22] When King applied for a promotion, her request was rejected because another candidate had already been preselected.[23] The preselected employee was romantically involved with their supervisor, the Chief Medical Officer.[24]

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[17] *Vinson*, 477 U.S. at 67.
[18] *Id.* at 69.
[19] 29 C.F.R. § 1604.11(g).
[20] King v. Palmer, 778 F.2d 878 (D.C. Cir. 1985).
[21] DeCintio v. Westchester County Medical Center, 807 F.2d 304 (2d Cir. 1986).
[22] *King*, 778 F.2d at 879.
[23] *Id.*
[24] *Id.*

King sued the employer for unlawfully denying a promotion and for creating a discriminatory work environment.[25] The District of Columbia Circuit court held "unlawful sex discrimination occurs whenever sex is for no legitimate reason a substantial factor in the discrimination."[26] The court found that King's circumstantial evidence of the employee and supervisor sexual relationship (including long lunches, preferential treatment and physical contact at work[27]) met the burden of persuasion for a Title VII sexual discrimination claim.[28]

However, a few months later, the Second Circuit determined in *DeCintio* "that sexual relationships between coworkers should not be subject to Title VII scrutiny, so long as they are personal, social relationships."[29] In *DeCintio*, seven physical therapists brought a claim against their employer for being disqualified for a promotion to an Assistant Chief position.[30] The supervisor made a requirement that the promoted individual must be registered by the National Board of Respiratory Therapists.[31] However, the only therapist considered for the position with the requisite registration was the supervisor's girlfriend, Jean Guagenti, and she ultimately secured the job.[32]

The dispositive issue in this case examined whether "'discrimination on the basis of sex' encompasses disparate treatment premised not on one's gender, but rather on a romantic relationship between an employer and a person preferentially hired."[33] The court refused to expand the

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[25] *Id.* at 878-79.
[26] *Id.* at 880.
[27] *Id.* at 879.
[28] *Id.* at 882-83.
[29] *DeCintio*, 807 F.2d at 308.
[30] *Id.* at 305.
[31] *Id.*
[32] *Id.*
[33] *Id.* at 306 (quoting 42 U.S.C. §2000e (1982)).

meaning of "sex" for Title VII purposes to include sexual liaisons and sexual attractions after determining that this definition was "overbroad" and "wholly unwarranted."[34]

Thus, a split emerged among district courts on whether to include sexual favoritism claims under Title VII.

2. EEOC Policy Guidance Memo Reconciles Divergent Views

On January 12, 1990, the EEOC issued a policy memo concerning its stance on employer liability for sexual favoritism in the workplace.[35] Although the policy memo is non-binding on judicial decisions, it provides a persuasive framework for how to look at sexual favoritism claims in the context of 29 C.F.R. § 1604.11(g).[36] In the policy memo, the EEOC has described three situations of sexual favoritism and what forms are actionable.[37]

First, isolated instances of sexual favoritism are not actionable under Title VII.[38] As the policy memo explains, although a single episode of sexual favoritism toward an employee is unfair, it equally discriminates against men and women because both parties are disadvantaged equally.[39] Isolated sexual favoritism is exemplified in *DeCintio*, where the supervisor's preference for his one girlfriend results in her promotion.[40]

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[34] *DeCintio*, 807 F.2d at 306.

[35] EEOC, N-915.048, POLICY GUIDANCE ON EMPLOYER LIABILITY UNDER TITLE VII FOR SEXUAL FAVORITISM (Jan. 12, 1990), *available at* http://www.eeoc.gov/policy/docs/sexualfavor.html (hereinafter "EEOC Policy Guidance"]. The policy memorandum was approved by present day Supreme Court Justice Clarence Thomas, while he was chairperson of the EEOC.

[36] Dacus, *supra* note 14 at 842.

[37] EEOC Policy Guidance, *supra* note 35.

[38] *Id.*

[39] *Id.*

[40] *DeCintio*, 807 F.2d at 308.

Second, sexual favoritism based on an implicit *quid pro quo* claim may be actionable under Title VII. In this situation, female employees with appropriate qualifications may be overlooked or discriminated against because they do not submit to sexual harassment actions.[41] However, in many situations, employees lack verifiable proof that sexual conduct was a condition for an employment benefit or promotion.[42] For example an employer or supervisor may only express interest in one employee, and only coerce that employee for sexual activity.[43] In that situation, "both women and men who were qualified for but were denied the benefit would have standing to challenge the favoritism on the basis that they were injured as a result of the discrimination leveled against the employee who was coerced."[44]

The EEOC explained the coerced single employee position through *Toscano v. Nimmo*.[45] In *Toscano*, the court found a Title VII claim where sexual favors were a condition for receiving a promotion.[46] Although the employee receiving preferential treatment engaged in a consensual relationship with the supervisor, the fact that the supervisor solicited female employees on the phone, bragged about his sexual relations with subordinates and engaged in sexually suggestive behavior at work provided enough circumstantial evidence that sexual favors were a condition for benefits at the place of employment.[47]

Third, widespread sexual favoritism may create a cause of action for hostile environment harassment.[48] If sexual favoritism extensively pervades in the place of

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[41] EEOC Policy Guidance, *supra* note 35.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Toscano*, 570 F. Supp. at 1199-01.
[46] *Id.* at 1200.
[47] *Id.* at 1200-01.
[48] EEOC Policy Guidance, *supra* note 35.

employment, "both male and female colleagues who do not welcome this conduct can establish a hostile work environment in violation of Title VII regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors."[49] The policy behind the action is to eradicate the implicit message that women are "sexual playthings" and the only way to get ahead in the workplace requires engaging in sexual conduct.[50]

The EEOC presented *Broderick v. Ruder*[51] as the prototype widespread sexual favoritism case.[52] In *Broderick*, a female attorney at the Securities and Exchange Commission brought a sexual discrimination action against her employer.[53] She alleged that two of her supervisors engaged in sexual relationships with their secretaries, who received cash rewards, promotions and other job benefits.[54] In addition, another female staff attorney received a promotion because a supervisor was attracted to her.[55] Finally, during an office party, a drunk supervisor untied her sweater and kissed her as well as another female employee.[56] The court found that the plaintiff had "established a *prima facie* case of sexual harassment because of having to work in a hostile work environment."[57] The court noted that by bestowing preferential treatment upon those who submitted to their sexual advances, the supervisors "undermined plaintiff's motivation and work performance and deprived plaintiff,

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[49] *Id.*
[50] *Id.*
[51] 685 F. Supp. 1269 (D.D.C. 1988).
[52] EEOC Policy Guidance, *supra* note 35.
[53] *Broderick*, 685 F. Supp. at 1270.
[54] *Id.* at 1274.
[55] *Id.*
[56] *Id.* at 1273.
[57] *Id.* at 1278.

and other WRO female employees, of promotions and job opportunities."[58] Although the court in *Broderick* found a hostile work atmosphere, the EEOC recognized this case as an example of an implicit *quid pro quo* case because the sexual favors also represent conditions for promotions.[59]

II. Current State of Sexual Favoritism Law

Although the Supreme Court has yet to hear a case concerning sexual favoritism, federal courts as well as state courts addressed sexual favoritism since the EEOC Policy Guidance issued in 1990. In a 2005 California Supreme Court case, *Miller v. Department of Corrections*,[60] two female employees, Edna Miller and Frances Mackey, filed a California Fair Employment and Housing Act ("FEHA") discrimination suit against their employer based on a sexual favoritism theory.[61] The plaintiffs allege that the Department of Corrections chief deputy warden engaged in sexual relationships with three other subordinate coworkers.[62] These subordinate coworkers received benefits from their relationship with the warden, including one employee's promotion determined by her affair with the warden instead of her qualifications.[63] Plaintiff Miller addressed one of the paramours about her relationship with the warden, and the paramour locked Miller in her office for a couple of hours.[64]

The court found that the plaintiffs presented an actionable claim under FEHA, and concluded that,

> [A]lthough an isolated instance of favoritism

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[58] *Id.*
[59] EEOC Policy Guidance, *supra* note 35.
[60] Miller v. Dep't of Corr., 115 P.3d 77 (Cal. 2005).
[61] *Id.* at 80.
[62] *Id.* at 83.
[63] *Id.* at 81.
[64] *Id.* at 83-84.

> on the part of a supervisor toward a female employee with whom the supervisor is conducting a consensual sexual affair ordinarily would not constitute sexual harassment, when such sexual favoritism in a workplace is sufficiently widespread it may create an actionable hostile work environment in which the demeaning message is conveyed to female employees that they are viewed by management as "sexual playthings" or that the way required for women to get ahead in the workplace is to engage in sexual conduct with their supervisors or the management.[65]

The court upheld the EEOC policies on sexual favoritism, separating a claim for "widespread" sexual favoritism from "isolated" sexual favoritism.

Another 2005 case, *Wilson v. Delta State University*, also addressed sexual favoritism in the workplace.[66] A former male university employee filed suit against the university on a theory of preferential treatment of a paramour.[67] The paramour was promoted to a job that was not publicized to the rest of the community.[68] However, the Fifth Circuit found that "paramour favoritism" is not an unlawful employment practice under Title VII.[69] Unlike *Miller*, this was a case of isolated favoritism, and thus did not rise to the level of "widespread" under the EEOC Policy Guidance.

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[65] *Id.* at 80.
[66] Wilson v. Delta State Univ., 143 Fed. Appx. 611 (5th Cir. 2005).
[67] *Id.* at 612.
[68] *Id.* at 611.
[69] *Id.* at 614.

III. The Future of Sexual Favoritism Law and How to Improve It

1. The Future of Sexual Favoritism Law

The two latest significant sexual favoritism cases, *Miller* and *Wilson*, who have adopted EEOC Policy Guidance, demonstrate that the EEOC recommendations are most likely here to stay.[70]

A line between isolated favoritism and widespread favoritism will remain, because sexual favoritism is based upon sex discrimination.[71] The EEOC Policy Guidance recommends that "[a]n isolated instance of favoritism toward a "paramour" (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders (emphasis added)."[72] In other words, isolated instances of sexual favoritism are based on a preference for a particular person, and therefore the sexes are discriminated against equally. Moreover, current federal case law suggests that isolated instances of sexual favoritism do not give rise to a claim.[73] Thus, the

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[70] *See generally* Maureen S. Binetti, *Romance in the Workplace: When "Love" Becomes Litigation*, 25 HOFSTRA LAB. & EMP. L. J. 153, 157-163 (2007).

[71] *But see* Susan J. Best, Comment, *Sexual Favoritism: A Cause of Action Under a "Sex-Plus" Theory*, 30 N. Ill. U. L. Rev. 211, 231-32 (2009) (discussing the possibility of a sex-plus theory analysis in place of a separation between isolated and widespread sexual favoritism).

[72] EEOC Policy Guidance, *supra* note 35.

[73] *See* Schobert v. Illinois Dep't of Transp., 304 F.3d 725, 733 (7th Cir. 2002) (holding that if favoritism has the same impact on male and female employees at work, then the claims were not cognizable under Title VII); Womack v. Runyon, 147 F.3d 1298, 1301 (11th Cir. 1998) (holding that that a single instance of preferential treatment based on a consensual relationship between a supervisor and an employee was not within the scope of Title VII's protections); Taken v. Okla. Corp. Comm'n, 125 F.3d 1366, 1370 (10th Cir. 1997) (holding that

EEOC Policy Guidance and current law are set in not extending a cause of action to only an isolated instance of sexual favoritism.

Additionally, most courts continue to apply the EEOC Policy Guidance in determining "widespread" sexual favoritism claims. For example, *Miller* reflects the trend of keeping with the EEOC Policy Guidance by advocating that a hostile work environment occurs when the sexual favoritism is widespread, even though the policy was fifteen years old at the time.[74]

However, it remains unclear how many instances of sexual favoritism constitute "widespread." In *Miller*, one supervisor engaged in three affairs with subordinates.[75] In *Broderick*, multiple supervisors were involved in affairs with subordinates.[76] The EEOC Policy Guidance states that one affair is not actionable. Could widespread occur at two supervisors and one employee? Could widespread occur at one supervisor and two employees? The current law's use of "widespread" connotes a large quantity of sexual favors, but offers limited guidance beyond multiple occurrences.

2. How to Improve Sexual Favoritism Law

New legislation may identify objective criteria for a sexual favoritism claim. Title VII protects against discrimination "because of" sex as in gender and not sexual conduct.[77] Under the current sexual favoritism analysis set out by the EEOC Policy Guidance and followed by courts, a third-party employee must prove that the sexual favoritism in a workplace amounted to an implicit *quid pro*

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consensual romantic relationships do not qualify for relief under Title VII because they are not based on any gender differences).

[74] *Miller*, 115 P.3d at 80.

[75] *Id.* at 83.

[76] *Broderick*, 685 F. Supp. at 1273.

[77] 42 U.S.C. § 2000e-2(a)(1) (2006).

quo claim and/or a hostile work environment claim.[78] The current law leaves out isolated instances of sexual favoritism because the favoritism involved discriminates equally between the genders—favoritism based on a consensual romantic relationship. However, circumstances arise creating an isolated instance severe enough to affect the conditions of a workplace. Currently, the law focuses on the quantity of the sexual favoritism rather than the quality. Thus, new legislation, not under the traditional context of Title VII "because of . . . sex"[79] language, would better promote the EEOC's intent to stop adverse affects on employment opportunity based on sexual conduct.[80]

A claim for sexual favoritism should be available to widespread or isolated, coerced or non-coerced conduct. Current sexual favoritism law fails to cover a consensual relationship that may be so outrageous—the paramour receives a promotion, undue responsibilities, preferential treatment, advantages, and the like beyond the paramour's skill, experience or merit—that it may alter the conditions of a coworker's environment.

For example, a secretary of an accounting executive begins an intimate relationship with her boss. The secretary completed a two-year associate's degree, and she entered work force one year ago while employed at her current position for one month. The executive, while engaged in the intimate relationship, appoints the secretary to an entry-level accountant's position, provides her an office, and quadruples her salary. An entry-level accountant position usually requires an individual complete a four-year bachelor's degree program from an accredited university or college and some internship/work experience. The position typically pays only double what the secretaries make. The paramour later receives a promotion to an

[78] EEOC Policy Guidance, *supra* note 35.
[79] 42 U.S.C. § 2000e-2(a)(1) (2006).
[80] EEOC Policy Guidance, *supra* note 35.

executive position within six months. Coworkers perceive the message that an employee must be involved in an intimate relationship with the boss to receive benefits and promotions. The mere existence of one consensual relationship between a supervisor and employee can create hostility in the workplace.[81] Yet under Title VII, a coworker of the paramour cannot recover because the intimate relationship is consensual and not because of gender.

New legislation should focus on qualifying sexual favoritism rather than quantifying instances of favoritism. Designating an extreme isolated instance of sexual favoritism as merely unfair and only three instances of sexual favoritism as widespread is inconsistent with reducing sexual favoritism in the workplace, which adversely affects the employment opportunities of third parties.

A model sexual favoritism law requires legislators to develop a separate statute including the following elements: (1) a cause of action not under Title VII, (2) supervisor favoring a subordinate, (3) because of sexual conduct, (4) which is severe or persuasive as to alter the condition of the employee's employment and create a hostile and/or abusive working environment.

First, the sexual favoritism claim would be independent of Title VII. Although current sexual favoritism law remains subset of sexual harassment under Title VII, sexual harassment limits what conduct amounts to sexual favoritism by excluding isolated instances and not defining widespread. A new law would allow a finder of fact to assess the quality of the sexual favoritism to determine its severity. Additionally, lawmakers should consider making sexual favoritism claim actionable by the

[81] *See* Jennifer Bercovici, Note, *The Workplace Romance and Sexual Favoritism: Creating a Dialogue Between Social Science and the Law of Sexual Harassment*, 16 S. CAL. INTERDISC. L. J. 183, 210 (2006).

EEOC, similar to Title VII, which would help filter cases.

Second, the action must involve a supervisor and a subordinate. The thrust of the sexual favoritism law attempts removal of adverse employment opportunities caused by sexual favoritism in the workplace. Actions such as promotion, benefits, and other intangible rewards are generally presented to employees by supervisors. The claim does not apply to employees at the same level or supervisors who do not give promotions, benefits and the like to paramours.

Third, the claim must include favoritism because of sexual conduct. The finder of fact will not look to see employee discrimination because of their gender, but rather if the employee is being discriminated against because of the sexual conduct between the supervisor and employee. Sexual conduct differentiates favoritism claim from a sexual harassment claim.

Fourth, a claim must establish that the favoritism reaches a severe or persuasive level as to alter the condition of the employee's employment and create a hostile and/or abusive working environment. This language derives from the EEOC Policy Guidance concerning a hostile work environment claim. The fact finder would evaluate the severity of a claim. This can be done through objective and subjective tests similarly used in current sexual harassment analysis.[82]

A reasonable person standard provides an objective test to determine the severity of the favoritism. Thus, an employee must first prove that a reasonable person, in the employee's situation, would perceive the conduct as severe or pervasive as to alter the condition of the employee's employment and create a hostile and/or abusive working environment. The factors for proving severity would include the components from a sexual harassment claim and the EEOC Policy Guidance: implicit message by

[82] *See* Harris v. Forklift Sys., 510 U.S. 17 (1993).

actions of a supervisor, psychological harm, interfering with work, frequency, and behavior. The touchstone factor would be the implicit message that the supervisor's actions convey onto the workplace.

Finally, the fact finder applies the subjective test: whether the employee proved they perceive the conduct as severe or pervasive as to alter the condition of the employee's employment and create a hostile and/or abusive working environment. The employee perception element would use the same factors for considering severity of the sexual favoritism as the reasonable person standard.

However, the reality is that new legislation may not be feasible. In today's society, a majority of the population spends a significant portion of the week at work. The workplace is natural meeting place for potential mates. Romances between colleagues occur and most likely happen at a high rate. Moreover, courts remain reluctant engage in the policing of intimate relationships.[83] Sexual favoritism law may continue as a subset of sexual harassment under Title VII in order to separate out weak claims and reduce the number of claims. Yet, new sexual harassment legislation provides the best option for addressing the genuine issue at stake in a sexual favoritism claim, discrimination based on sexual conduct.

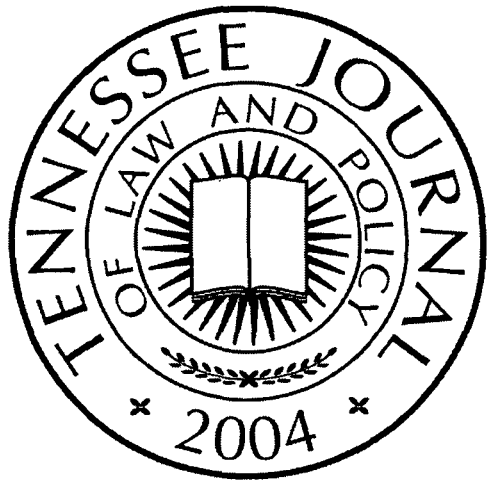
IV. Conclusion

Ideally, the sexual favoritism law requires change in order to give employees who witness severe sexual favoritism in the workplace, either in isolated or widespread scenarios, a claim against the employer. Sexual favoritism law should not function as a subset of sexual harassment under Title VII, because it has more to do with sexual conduct rather than gender. However, the current law may continue unaltered, considering the trend of cases

[83] *DeCintio*, 807 F.2d at 308.

applying the EEOC Policy Guidance.

Nell Scovell's *Late Night* scenario creates a challenge to concentrate on the severity of sexual favoritism when determining if a plaintiff sustained a legitimate claim. She struggled as a female writer in a male dominated division who witnessed subordinates exercise disproportional power, making her feel uncomfortable and eventually forcing her to leave her dream job. A sole act of favoritism may trigger an actionable response, because if the sexual favoritism is severe, the inappropriate behavior still delivers the wrong message to employees. Women, as well as men, should not be subjected to such severe sexual favoritism at work—a place where merit should determine your success instead of sexual appeal.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