"I WAS ONLY TWELVE—IT DOESN'T COUNT": WHY ADOLESCENT SEX OFFENSES ARE NOT LEGALLY RELEVANT IN PROSECUTIONS OF ADULT SEX OFFENDERS AND WHY MILITARY RULES OF EVIDENCE 413 & 414 SHOULD BE AMENDED ACCORDINGLY

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Misconstruction of the underlying reasons that adolescents engage in crime as well as overestimation of their decision-making capacities trap the criminal [*justice*] *system in a cycle that has little to do with justice* [*and more to do with vengeance*].[1]

I. Introduction

Until 1994, a majority of the country's criminal jurisdictions, to include the federal government, abided by the mantra that individuals should be convicted based solely on evidence pertaining to the acts alleged and not simply because they were bad people. Such was the reason for the existence of Federal Rule of Evidence (FRE) 404(b) and similar state statutes.[2] This almost universally-held belief was dealt a

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[1] Kim Taylor-Thompson, *Children, Crime, and Consequences: Juvenile Justice in America: States of Mind/States of Development* (Children, Crime, and Consequences), 14 STAN. L. & POL'Y REV. 143, 156 (2003).

[2] FED. R. EVID. 404. Rule 404(b) provides in relevant part:

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

significant blow, however, when Congress amended the Federal Rules of Evidence to specifically allow the introduction of "propensity" evidence in cases involving either sexual assault of any kind or sexual molestation of a child.[3]

In accordance with Military Rule of Evidence (MRE) 1102(a), the amendments to FRE 413 and 414 became applicable to the military on 6 January 1996.[4] On 27 May 1998, the President signed Executive Order 13,086, officially amending the MRE by adding MRE 413 and 414.[5] Notwithstanding the flawed rationale behind the amendments, federal courts have consistently rejected constitutional challenges to the rules, both facially and as applied to the individual defendants.

Recently the Court of Appeals for the Armed Forces (CAAF) began chipping away at the inflexibility of these rules, specifically MRE 414. In a series of cases, beginning with *United States v. McDonald*[6] and continuing with *United States v. Berry*,[7] the CAAF has ruled that adolescent sex offenses committed by service members have no legal relevance in later prosecutions of those same service members as adults. These rulings are supported by recent studies in the field of psychology and neurology, which indicate that an adolescent's thought processes are not the same as an adult's, i.e., they do not commit crimes for the same reasons. Relying on the aforementioned studies, the CAAF now seems unwilling to unilaterally accept the general "propensity" arguments proffered by the Rules' proponents in Congress,[8] at least when the evidence concerns adolescent sex offenses. While the CAAF has not declared an outright prohibition against the introduction of such evidence, the requirements the Government must satisfy prior to offering such evidence are so onerous that the CAAF has implicitly created a de facto prohibition against the admission of adolescent sex offenses under

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Id.

[3] *Id.* FED. R. EVID. 413–414; *see infra* notes 9, 10.

[4] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 1102(a) (2008) [hereinafter MCM]. Rule 1102(a) provides: "Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments, unless action to the contrary is taken by the President."

[5] MCM, *supra* note 4, MIL. R. EVID. 1102. Rule 1102(a) states: "Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments, unless action to the contrary is taken by the president."

[6] United States v. McDonald, 59 M.J. 426 (2004).

[7] United States v. Berry, 61 M.J. 91 (2005).

[8] *See* discussion *infra* sec. III.

either MRE 413 or 414. To ensure that the maximum amount of fairness is afforded to military accused, and to eliminate any remaining ambiguity in this area, the time has come to explicitly amend the MRE to reflect the CAAF's implicit intent.

In order to provide a historical backdrop to the issue presented in this paper, Part II will address the reasons Congress originally decided to amend the FRE and the unorthodox methods it used to do so. Part III will review the early challenges to the new rules and discuss the rationale proffered by the courts to preserve the constitutionality of both FRE 413 and 414. Part IV will examine the aforementioned psychological studies as well as studies into the low recidivism rates of adolescents which further support the *McDonald* and *Berry* rulings. Part V will provide an in-depth analysis of the CAAF's reasoning in both *McDonald* and *Berry* and will lay the groundwork for this paper's overall position. Part VI will discuss the high standards of proof now facing government counsel and what affect that will have for future military prosecutions. Lastly, this paper will argue that the time is at hand to amend the MRE to prohibit the admission of evidence concerning single incidents of adolescent sexual misconduct in later adult prosecutions. Part VII provides recommended amendments to both MRE 413 and 414, which should eliminate any confusion that may still exist in this field.

II. History and Purpose of Federal Rules of Evidence 413 & 414

It can hardly be said that FRE 413[9] and 414[10] were the result of years of research in the field of criminology, careful consideration of the effects that the amendments would have on future defendants, or months of intense debate in Congress.[11] Indeed, both rules were added to the

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[9] FED. R. EVID. 413. Rule 413(a) provides in relevant part: "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."

[10] *Id.* FED. R. EVID. 414. Rule 414(a) provides in relevant part: "In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant."

[11] While this article briefly discusses the congressional history of FRE 413 and 414, as well as the reasoning behind the amendments, it is not designed to be a primer on the legislative process. For a more detailed analysis of how and why the present Rules were attached to the Violent Crime Control and Law Enforcement Act of 1994, see Michael S.

Violent Crime Control and Law Enforcement Act of 1994 (Crime Control Act)[12] as "a last minute effort to gain bipartisan support for the Act."[13] All told, a mere twenty minutes of debate took place on the floor of Congress for all three rules—413, 414, and 415.[14] One would think that such sweeping changes to decades of established case law in the field of propensity evidence[15] would mandate at least cursory discussion for one entire day. However, "as one house democrat noted, '[i]t is very difficult to argue against something that would suggest that in some way [Congress is] going to make it easier for child molesters or sexual abusers to walk.'"[16]

Notwithstanding the political wrangling[17] and administrative shortcomings[18] concerning the attachment of the rules to the Crime

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Ellis, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961 (1998).

[12] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified at 42 U.S.C. §§ 13701–14223 (2000)).

[13] Major Francis P. King, *Rules of Evidence 413 and 414: Where Do We Go from Here*, ARMY LAW., Aug. 2000, at 5.

[14] *Id.*

[15] *See* Michelson v. United States, 335 U.S. 469, 475–76 (1948).

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

[16] THE EVIDENCE PROJECT, ART. IV, RELEVANCY AND ITS LIMITS COMMENTARY [hereinafter THE EVIDENCE PROJECT], http://www.wcl.american.edu/pub/journals/evidence/commentary/a4r413c.html (last visited Feb. 11, 2008).

[17] *See* D. Brooks Smith, U.S. Dist. Ct. Judge, W. Dist. Pa., The Federalization of Criminal Law, Address Before Federalist Society's 1997 National Convention, *available at* http://www.fed-soc.org/Publications/practicegroupnewsletters/criminallaw/cl020104.htm (last visited Feb. 11, 2008) ("Suffice it to say that these rules were sponsored in the House by a back-bench member of Congress—better known lately for her TV star quality—and would probably never have seen the light of day, but for the last minute scramble by the Crime Bill's principals to obtain 218 votes for passage in the House. . . .").

[18] Congress specifically circumvented the requirements of the Rules Enabling Act. 28 U.S.C. § 2072 (1994). Under the Rules Enabling Act, a Judicial Reviewing Conference

Control Act, the sponsors' stated purpose in attaching the amendments was clear: to combat the perceived high recidivism rates of persons who commit sex offenses in general and sex offenses against children in particular.[19] The fact that this perception differed greatly from reality was apparently not a major concern of the federal legislature. For example, according to one Bureau of Justice study involving sex offenders released from prisons in fifteen states during 1994, recidivism rates for sex offenders ranged only from 2.5% to 5.3%.[20] While these rates vary slightly depending upon the study, overall recidivism rates for sex offenders are consistently lower than those of the general criminal population.[21] (This disconnect between perception and reality concerning recidivism rates will be discussed in more detail in section IV.) The true reason the Rules were implemented, at least according to the bill's co-sponsor, Senator Robert Dole, was to help the Government obtain convictions it possibly would not be able to obtain otherwise.[22]

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is usually given an opportunity to review "proposed" congressional legislation and assist in the drafting of the eventual law. Instead of allowing the Judicial Reviewing Conference to review the legislation *before* it was passed, Congress instead passed the legislation but delayed enactment in order to allow for Judicial Conference Review. Notwithstanding tremendous opposition to the amendments by the Judicial Reviewing Conference, Congress forwarded the bill to the President for signature without change. *See* Ellis, *supra* note 11, at 969–70.

[19] *See* 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) ("The enactment of this reform is first and foremost a triumph for the public—for women who will not be raped and the children who will not be molested because we have strengthened the legal system's tools for bringing the perpetrators of these atrocious crimes to justice.").

[20] PATRICK A. LANGAN, ET AL., BUREAU OF JUSTICE STATS., RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 (Nov. 2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf.

[21] CENTER FOR SEX OFFENDER MANAGEMENT, MYTHS AND FACTS ABOUT SEX OFFENDERS (Aug. 2000) [hereinafter MYTHS AND FACTS], *available at* http://www.csom.org/pubs/mythsfacts.pdf.

[22] *See* 140 CONG. REC. S10276 (daily ed. Aug. 4, 1994) (statement of Sen. Dole).

> Ask any prosecutor, and he or she will tell you how important similar-offense evidence can be. In a rape case, for example, disclosure of the fact that the defendant has previously committed other rapes is often crucial, as the jury attempts to assess the credibility of a defense claim that the victim consented and the defendant is being falsely accused. Similar-offense evidence is also critical in child molestation cases. These cases often hinge on the testimony of the child-victims, whose credibility can be readily attacked in the absence of other corroborating evidence. In such cases, it is crucial that all relevant evidence that may shed some light on the credibility of the charge be admitted at trial. [I]t is this

In addition to the unsupported claims of recidivism, other reasons cited for enacting the new rules included:

> (1) the need to admit all possible evidence because there are few witnesses to sexual assaults; (2) the need to rebut defenses of consent in rape cases; (3) the need to corroborate children's testimony in child molestation cases; (4) the fact that victims often do not come forward until they hear that another person has been assaulted; and (5) the danger to the public if a rapist or child molester remains at large.[23]

Notwithstanding the Judicial Conferences Committee's strong objections to the rules,[24] Congress submitted the bill to the President on 12 September 1994 and he signed it into law the next day. After the Crime Control Act became law, MRE 413 and 414 were adopted through Executive Order 13,086 on 27 May 1998.[25] Whether or not Congress was correct in enacting FRE 413 and 414 has been, and continues to be, fertile ground for commentators both for and against the amendments.[26]

> Senator's view that this evidence should be admitted at trial without a protracted legal battle over what is admissible and what is not.

Id.

[23] THE EVIDENCE PROJECT, *supra* note 16.

[24] *See* Memorandum from the Administrative Office of the United States Courts to Standing Committee (Dec. 2, 1994) [hereinafter Administrative Office Memorandum] (on file with author) (Reported objections to Congress fell into one of six categories: (1) Congress's circumvention of the Rules Enabling Act; (2) constitutional concerns; (3) insufficient data on the actual propensity of sex offenders to recidivate; (4) unfairness of the rules; (5) lack of necessity, because FRE 404 and 405 could be amended accordingly; and (6) negative impact on Native Americans.).

[25] MCM, *supra* note 4, app. 25, at A25-40 to A25-42.

[26] *See, e.g.*, Tamara Larsen, Comment, *Sexual Assault is Unique: Why Evidence of Other Crimes Should be Admissible in Sexual Assault and Child Molestation Cases*, 29 HAMLINE L. REV. 177 (2006); R. Wade King, Comment, *Federal Rules of Evidence 413 and 414: By Answering the Public's Call for Increased Protection from Sexual Predators, Did Congress Move Too Far Toward Encouraging Conviction Based on Character Rather Than Guilt?*, 31 TEX. TECH L. REV. 1167 (2004); 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 Acts*, 34 U. BALT. L. REV. 103 (2004); 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 (1999); Joseph A. Aluise, Note, *Evidence of Prior Misconduct in Sexual Assault and Child Molestation*

Other than a few superficial changes,[27] the President incorporated FRE 413 and 414 into the Manual for Courts-Martial on 27 May 1998.[28]

III. Treatment of FRE 413/414 in Federal, State, and Military Courts

Since their implementation, attacks against FRE 413 and 414, at least in the federal civilian sector, have been based in large part on the alleged unconstitutionality of the statute, both on its face and as applied to the individual defendants. To date, the Supreme Court has not specifically ruled on the constitutionality of FRE 413 and 414, or for that matter, even addressed the constitutional concerns raised not only by the individual defendants but by the Judicial Conference Committee prior to enactment of the rules.[29] As such, all of the substantive analysis of the constitutionality of the statute has been undertaken by the courts in the federal circuit. Of those, the Eight and Tenth Circuits have taken the lead in setting the de facto standard of analysis. Constitutional attacks on FRE 413 and 414 have generally rested on two arguments: violations of the defendants' rights to equal protection and due process.[30]

A. Supreme Court and Federal Circuits

In one of the first cases to challenge the constitutionality of the new rules, the Tenth Circuit wasted little time in rejecting the equal protection argument as it pertained to FRE 414, and arguably by inference to FRE 413, going so far as to call the argument "meritless."[31] While some

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Proceedings: Did Congress Err in Passing Federal Rule of Evidence 413, 414, and 415?, 14 J.L. & POL. 153 (1998).

[27] Federal Rule of Evidence 415 was rejected in its entirety because it applied only to civil proceedings. Rules 413 and 414 were wholly incorporated except for changing the notice requirement from fifteen days to five days; adding definitional sections in (e), (f), and (g), and adding the phrase "without consent" to paragraph (d)(1) to specifically exclude the introduction of evidence of sodomy and adultery. MCM, *supra* note 4, MIL. R. EVID. 413–414, at A22-37 (analysis).

[28] MCM, *supra* note 4, at A25-30 (U.S. Historical Executive Orders).

[29] *See* Administrative Office Memorandum, *supra* note 24 (The Judicial Conference's Advisory Committee on Evidence Rules actually recommended against implementation of Rules 413–415 out of "concern that the enacted rules may work to diminish significantly the policies established by long standing rules and case law guarding against undue prejudice to persons accused in criminal cases . . . .").

[30] King, *supra* note 13, at 7 (citing United States v. Castillo, 140 F.3d 874 (10th Cir. 1998); United States v. Enjady, 134 F.3d 1427 (10th Cir. 1998)).

[31] United States v. McHorse, 179 F.3d 889, 897 (10th Cir. 1999).

commentators have noted the disproportionate number of Native Americans that have been convicted based on evidence introduced only because of the amendments to the Federal Rules of Evidence, the courts have yet to be swayed by the statistical impact on Native American defendants. Instead, courts have relied on the general principle that a statute "is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose."[32] Absent a discriminatory purpose, the courts apply a rational basis test to the statute and consistently find that the amendments pass constitutional muster with ease.[33]

The more compelling argument is that an individual defendant, as opposed to a class of defendants, is denied the due process of a fair trial when the Government is allowed to introduce not only convictions, but mere *allegations* of past sexual misconduct. The obvious danger is that "when a jury hears evidence of the bad character of a person . . . the jury will render harsh decisions against that person not because the person is responsible in the situation at issue, but simply because she is bad."[34] As with the equal protection argument before it, the Tenth Circuit in *United States v. Enjady*[35] wasted little time holding that FRE 413 does not violate the due process rights of a defendant. While the court conceded that "Rule 413 raises a serious constitutional due process issue,"[36] it nonetheless found the rule to be constitutional based in large part on the application of FRE 403[37] prior to the admission of any evidence under FRE 413.[38] In essence, unless the proffered evidence so unfairly prejudiced the accused that he could not receive a fair trial, the evidence would be admitted without invoking constitutional concerns.

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[32] *Id*. (citing United States v. Easter, 981 F.2d 1549, 1559 (10th Cir. 1992)).
[33] *Id*. ("Congress' objective of enhancing effective prosecution of child sexual abuse is a rational basis for Rule 414(a).").
[34] David P. Leonard, *Perspectives on Proposed Federal Rules of Evidence 413–415: The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305, 312 (1995).
[35] *Enjady*, 134 F.3d at 1433.
[36] *Id*.
[37] FED. R. EVID. 403. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."
[38] *Enjady*, 134 F.3d at 1433 ("Nevertheless, without the safeguards embodied in Rule 403 we would hold the rule unconstitutional.").

Shortly after deciding *Enjady*, the Tenth Circuit addressed FRE 414 and similarly held in *United States v. Castillo* that "Rule 414 does not violate the Due Process Clause."[39] The argument presented in *Castillo* was identical to the one made in *Enjady*—that the "evidence is so prejudicial that it violates the defendant's right to a fair trial," thereby resulting in a due process violation.[40] Not surprisingly, the court's holding in *Castillo* was identical to that of *Enjady*: that the trial court's application of FRE 403 "should always result in the exclusion of evidence that has such a prejudicial effect," thereby eliminating any constitutional concerns. [41] Since those initial decisions, federal courts across the country have applied the same analysis and allowed the Government to consistently admit prior allegations of sexual misconduct against defendants.[42]

1. Treatment of Old Offenses

In addition to the general constitutional arguments, many of the challenges to FRE 413 and 414, especially in the due process arena, have been based on the admission of evidence concerning misconduct that occurred several years in the past.[43] From the initial challenges to FRE 413 and 414, one of the central questions has been, "How old is too old"? Obviously the severity of the prejudice, and the subsequent effect on due process, increases as the age of the uncharged misconduct increases. The older the offense, the more likely that the Government will rely entirely on the testimony of the alleged victim and the less likely the defendant will be able to obtain independent evidence to contradict that testimony. It has not been unusual to find defendants contesting allegations that were decades old and consisted of nothing more than the testimony of the alleged victim, who often was a young child at the time of the offense. The courts, however, have thus far failed to recognize or appreciate the

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[39] United States v. Castillo, 140 F.3d 874 (10th Cir. 1998).
[40] *Id*. at 883.
[41] *Id*.
[42] *See, e.g.*, United States v. Edward, 106 Fed. Appx. 833 (4th Cir. 2004); United States v. Drewry, 365 F.3d 957 (10th Cir. 2004); United States v. Sioux, 362 F.3d 1241 (9th Cir. 2004); United States v. Gabe, 237 F.3d 954 (8th Cir. 2001).
[43] *See, e.g.*, United States v. Drewry, 365 F.3d 957 (twenty-five-year gap between charged offense and allegation of prior sexual misconduct); United States v.Gabe, 237 F.3d 954 (8th Cir. 2001) (twenty-year gap between charged offense and allegation of prior sexual misconduct); United States v. Henry, 115 F.3d 1488 (10th Cir. 1997) (thirty-year gap between charged offense and allegation of prior sexual misconduct).

significance of any gap in time between the charged offense and the prior sexual misconduct.[44]

One such case where the court had to address this issue of possible "staleness" is *United States v. Meachum*.[45] In *Meachum*, the Government wanted to introduce evidence that Meachum had sexually molested his two stepdaughters thirty years prior to the charged offense.[46] The court in *Meachum* looked to the historical notes and legislative history of the statute to come to the conclusion that "there is no time limit beyond which prior sex offenses by a defendant are inadmissible. No time limit is imposed on the uncharged offenses for which evidence may be admitted."[47] Such a finding is not surprising, considering it is verbatim to the sponsor's language during the very limited debate on the amendments.[48] The effect of the courts' findings on potential defendants is clear: regardless of the length of time between offenses, courts will allow admission of the prior allegation if it is probative to the resolution of the charged offense, i.e., similar to the charged offense. While one might be comfortable arguing that multiple sex offenses committed by an adult (even if separated by twenty years or more) demonstrate an inherent level of propensity, that level of comfort should decrease when the earlier sexual misconduct was committed while the accused was an adolescent.

2. Treatment of Adolescent Offenses

Courts having to deal with the issue of admissibility of prior *adolescent* sexual misconduct have been few and far between. Perhaps that is not surprising, considering the low recidivism rates of sexual offenders mentioned earlier.[49] The lone case identified on the federal

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[44] Temporal proximity is one of the stated factors that the court in *United States v. Guardia* mandated that trial judges consider when conducting a Rule 403 balancing test. 135 F.3d 1326, 1331 (10th Cir. 1998). However, such a consideration in itself has rarely if ever resulted in the exclusion of the proffered evidence.

[45] United States v. Meachum, 115 F.3d 1488 (10th Cir. 1997).

[46] *Id*. at 1490.

[47] *Id*. at 1492.

[48] *See* 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) ("No time limit is imposed on the uncharged offenses for which evidence may be admitted; as a practical matter, evidence of other sex offenses by the defendant is often probative and properly admitted, notwithstanding very substantial lapses of time in relation to the charge offense and offenses.").

[49] MYTHS AND FACTS, *supra* note 21.

level addressing the admissibility of prior adolescent sex offenses is *United States v. Lemay*.[50] The case originated in the Tenth Circuit and, as expected, the court found the evidence to be admissible.[51] The fact that the prior sexual misconduct occurred while the defendant was an adolescent was but a tangential consideration of the court.

The defendant in *Lemay* was a twenty-four year old Native American who was accused of sexually molesting his five and seven year old nephews.[52] At trial, the Government attempted to admit evidence of Lemay's prior juvenile rape conviction, which had occurred eleven years prior to the alleged misconduct.[53] At the time of the prior allegation, Lemay was only twelve years old.[54] The court's analysis of the admission of the prior sexual misconduct under FRE 414 centered on the FRE 403 balancing test and followed a typical pattern with the expected result. The court did, however, recognize that one factor played in favor of Lemay: that he was only twelve years old at the time of the offense.[55] Unfortunately, the court did not expound on the significance of this fact or explain why it played in Lemay's favor. One has to wonder, given the court's acknowledgement of Lemay's adolescent status at the time of the prior misconduct, if the time between offenses had been greater than eleven years, would the court have ruled differently? In the end, however, the court relied, as with most of the cases involving FRE 413 and 414, on the similarities between the charged offense and the prior sexual misconduct. As the court stated, "[t]he relevance of the prior act evidence was in the details."[56] This is a consistent theme in all courts' FRE 413 and 414 analyses: the more similarity between the charged offense and the prior sexual misconduct, the greater the probative value and the lower the danger of unfair prejudice under FRE 403.

B. State Court Application

Unlike defendants prosecuted in the federal courts, defendants prosecuted in state jurisdictions are subject to the provisions of the federal rules only to the extent that those rules have been adopted and

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[50] United States v. Lemay, 260 F.3d 1018 (10th Cir. 2001).
[51] *Id*. at 1031.
[52] *Id*. at 1022.
[53] *Id*.
[54] *Id*. at 1022–23.
[55] *Id*. at 1029.
[56] *Id*.

promulgated within each state. Fortunately (at least from the individual defendant's perspective), not all states have taken the congressional hint[57] to model and conform their state rules of evidence to the federal rules. State jurisdictions generally fall into one of three categories: (1) those that have accepted the premise of FRE 413 and 414 and modeled or amended their state rules accordingly; (2) those that follow the strict provisions of FRE 404(b)[58] but provide for either a judicially or legislatively created "lustful disposition" exception; and, (3) those that have rejected FRE 413 and 414 and continue to follow a strict 404(b) analysis in determining whether to admit previous acts of sexual misconduct.

1. States that Have Enacted Legislation Similar to FRE 413/414

In addition to the previously-cited justifications for the implementation of FRE 413 and 414,[59] it was also the hope of the federal legislature that the states would take the hint from their federal counterpart and implement identical rules of evidence at the state level.[60] The FRE have limited reach, usually applying only to exclusive federal jurisdictions such as tribal reservations or military installations, or in cases implicating the Commerce Clause.[61] Therefore, since most prosecutions are conducted at the state level, the full force and effect of the rules which Congress envisioned would only come to fruition if the states followed Congress's lead.

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[57] *See* 140 CONG. REC. S10,276 (daily ed. Aug. 4, 1994) (statement of Sen. Dole)

> Mr. President, I am aware that even if my proposal became law, it would affect only Federal cases. State cases would still be governed by State rules of evidence. Nonetheless, the Federal Government has a leadership role to play in this area. Once the Federal rules are amended, it's possible—perhaps even likely—that the States may follow suit and amend their own rules of evidence as well.

Id.

[58] FED. R. EVID. 404.

[59] *See* discussion *supra* sec. II.

[60] 140 CONG. REC. S10,276 (statement of Sen. Dole).

[61] U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

States that have accepted Congress's rationale, and followed its lead, have generally done so in one of two ways: by enacting separate but similar rules of evidence that encompass FRE 413 or 414,[62] or by simply modifying their existing rule 404(b) to provide an exception to the usual exclusion of propensity evidence.[63] States which fall into the latter category include Alaska, Arizona, California, Colorado, Florida, Illinois, Missouri, Texas, and Wisconsin. Interestingly, not a single state that has accepted Congress's invitation to amend its respective rules of evidence has adopted FRE 413 or 414 in its entirety. Instead, these states have only modified their existing rules of evidence. The states that have been

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[62] *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 38.37 (2006) which states in part:

> Sec. 2. Notwithstanding Rules 404 and 405, Texas Rules of Evidence, evidence of other crimes, wrongs, or acts committed by the defendant against the child who is the victim of the alleged offense shall be admitted for its bearing on relevant matters, including:
>
> (1) the state of mind of the defendant and the child; and
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> (2) the previous and subsequent relationship between the defendant and the child.

Id.

[63] *See, e.g.*, ALASKA R. EVID. 404(b) which states in part:

> (2) In a prosecution for a crime involving a physical or sexual assault or abuse of a minor, evidence of other acts by the defendant toward the same or another child is admissible if admission of the evidence is not precluded by another rule of evidence and if the prior offenses
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> (i) occurred within the 10 years preceding the date of the offense charged;
>
> (ii) are similar to the offense charged; and
>
> (iii) were committed upon persons similar to the prosecuting witness.
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> (3) In a prosecution for a crime of sexual assault in any degree, evidence of other sexual assaults or attempted sexual assaults by the defendant against the same or another person is admissible if the defendant relies on a defense of consent. In a prosecution for a crime of attempt to commit sexual assault in any degree, evidence of other sexual assaults or attempted sexual assaults by the defendant against the same or another person is admissible.

Id.

minimally willing to expand their propensity rules have generally followed the original suggestion of the Rules Advisory Committee (which Congress summarily ignored) by amending their respective Rule 404(b) to achieve the desired affect.[64] Regardless of the method employed, however, two things are clear: (1) state court decisions from these jurisdictions are identical to those at the federal level, and (2) there is a complete absence of cases involving the admission of evidence concerning adolescent sex offenses.

Perhaps the lack of cases involving the admission of evidence concerning adolescent sex offenses is best explained by the existence of the states' equivalent to FRE 609.[65] While this explanation is completely theoretical, it should be remembered that, "[u]ntil recently, state laws and judicial norms were established with the understanding that the preservation of the privacy of juveniles adjudicated in the juvenile court

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[64] The Rules Conference Committee had originally recommended that Congress simply amend FRE 404 to encompass the desired effect of the proposed Rules 413–415. The suggested amendment to FRE 404 read in part:

> (a) *Character evidence generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (4) Character in sexual misconduct cases. If otherwise admissible under these rules, in a criminal case in which the accused is charged with sexual assault or child molestation, or in a civil case in which a claim is predicated on a party's alleged commission of sexual assault or child molestation, evidence of another act or sexual assault or child molestation, or evidence to rebut such proof or inference there from.
>
> (b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show conformity therewith except as provided in subdivision (a).

Id.

[65] FED. R. EVID. 609. Rule 609(d) provides in relevant part:

> Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence." *Id.* Military Rule of Evidence 609(d) is identical to its federal counterpart other than substituting "military judge" for "the court.

Id.

is a critical component of the youth's rehabilitation."[66] As such, many states also followed a practice of either automatically, or through application, sealing juvenile court records, thereby preventing the Government from using those offenses in a later criminal prosecution. [67] And the existence of FRE 609, and similar state statutes,[68] indicates, at least to a degree, the recognition that adults should not be branded for life because of adolescent indiscretions. Recently, however, "courts on both the Federal and State levels have held that there is no constitutional confidentiality right for an alleged or adjudicated delinquent"[69] offense. Additionally, the implementation of FRE 413 and 414 seems to indicate, at least at the federal level, that the legislature is no longer willing to give juvenile offenders the benefit of the doubt.[70]

2. Lustful Disposition States

Certain states, while choosing not to amend their rules of evidence to specifically allow for sexual propensity evidence, have nonetheless allowed for the admission of such evidence under the Common Law exception of "lustful disposition." While most states apply the exception through judicial application some states have created a legislative

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[66] OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE JUSTICE REFORM INITIATIVES IN THE STATES 1994–1996, JUVENILE PROCEEDINGS AND RECORDS, http://ojjdp.ncjrs.org/PUBS/reform/ch2_i.html (last visited Feb. 22, 2008).

[67] *See, e.g.*, ARIZ. REV. STAT. § 8-349 (2007); VA. CODE ANN. § 16.1-306 (2007).

[68] *See, e.g.*, ARIZ. R. EVID. 609(d), which states:

> Juvenile adjudications. Evidence of juvenile adjudication is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

Id.

[69] *Id.*

[70] Indeed, at least under FRE 609, there is an absolute prohibition against using any juvenile offense against the accused, and the "witness" must have originally been "adjudicated" (equivalent of being found guilty) in order for the Government to use the offense for impeachment purposes against that individual. Under FRE 413 and 414, the evidence pertains exclusively to the accused and there is no requirement for a prior finding of guilt on any level. As discussed earlier, this often leads to an accused defending against a bare-bones, decades-old allegation.

"lustful disposition" exception.[71] States which utilize this approach in some fashion include Arkansas, Georgia, Louisiana, Maryland, Nebraska, North Carolina, Oregon, Pennsylvania, and West Virginia.[72]

It should be remembered that one of Congress's initial goals was to have individual states enact legislation that mirrored FRE 413 and 414.[73] Ironically, however, states that rejected that suggestion and instead applied their own "lustful disposition" exception actually seem to implement more effectively the congressional intent of FRE 413 and 414, i.e., to punish propensity. For example, in *Cook v. State*,[74] the court held it was not error for the state of Georgia to admit evidence of a prior child sexual assault against the defendant because the prior assault "was appropriate for showing Cook's lustful disposition toward molesting young girls."[75] Similarly, in *State v. Patterson*,[76] the Louisiana appellate court held that the state of Louisiana could introduce evidence of the defendant's prior rape conviction in a subsequent rape case because it was "highly relevant to show the defendant's lustful disposition toward teenage girls [and i]t also shows his propensity to sexually assault teenage girls . . . ."[77] Indeed, like the federal courts before it, the Louisiana appellate court found that the legislature "saw a need to lower the obstacles to admitting propensity evidence in sexual assault cases"[78] and as such readily admitted pure propensity evidence that would have previously been excluded under a strict rule 404(b) analysis.

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[71] *See, e.g.*, LA. CODE EVID. ANN. art. 412.2 (2006), which states in part:

> A. When an accused is charged with a crime involving sexually assaultive behavior, or with acts that constitute a sex offense involving a victim who was under the age of seventeen at the time of the offense, evidence of the accused's commission of another crime, wrong, or act involving sexually assaultive behavior or acts which indicate a lustful disposition toward children may be admissible and may be considered for its bearing on any matter to which it is relevant subject to the balancing test provided in Article 403.

Id.

[72] *See* ARK. RULE EVID. 404 (2006); ORIG. CODE GA. § 24-2-2 (2006); LA. CODE EVID. ANN. art. 412.2 (2006), MD. RULE EVID. 5-404 (2006); R.R.S. NEB. § 27-404 (2006); N.C. GEN. STAT. § 8C-1, RULE 404 (2006); O.R.S. § 40.170, RULE 404 (2006); PA. RULE EVID. 404 (2006).

[73] *Supra* notes 10, 11.

[74] Cook v. State, 276 Ga. App. 803 (Ga. Ct. App. 2005).

[75] *Id*. at 810.

[76] State v. Patterson, 922 So. 2d 1195 (La. Ct. App. 2006).

[77] *Id*. at 1204.

[78] *Id*.

3. Strict 404(b) Interpretation States

As can be seen from the relatively small number of states that have followed Congress's informal dictate, most state legislatures have either never considered or outright refused to enact similar rules pertaining to the admission of propensity evidence. The courts in a majority of states have also refused to rely on exceptions such as "lustful disposition," choosing instead to rely on a strict interpretation of Rule 404(b). This is not to say that "propensity type" evidence which would ordinarily be admitted under FRE 413 or 414 is automatically excluded in these strict interpretation states. On the contrary, in many cases the very same evidence is admitted.[79] In strict interpretation states, however, the Government must still meet the dictates of Rule 404(b) and demonstrate to the court that the proffered evidence is relevant for some purpose other than proving propensity, i.e., to "prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[80]

Examples of admissible "propensity type" evidence even under a strict interpretation of Rule 404(b) can be seen in many of the states that have refused to enact rules similar to FRE 413 and 414. In *State v. Clark*,[81] appellant was charged with performing oral sex on a twelve-year-old boy. At trial, the state of Ohio was allowed to introduce testimony from appellant's stepson that the appellant had similarly molested and raped him years earlier.[82] The court allowed this evidence not for propensity reasons but because it tended to demonstrate the appellant's motive and intent.[83] Similarly, in *People v. Sabin*,[84] the State of Michigan was allowed to introduce evidence that appellant had previously sexually assaulted his former stepdaughter in a case where he was charged with sexually assaulting his thirteen-year-old biological daughter. Because the acts were so similar, the Michigan Supreme Court affirmed the decision of the trial court to admit the testimony under the theory of common plan.[85]

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[79] *See infra* notes 81, 84.
[80] FED. R. EVID. 404.
[81] State v. Clark, 2006 Ohio App. LEXIS 1059 (Ohio Ct. App.).
[82] *Id*. at 1070.
[83] *Id*. at 1072-73.
[84] People v. Sabin, 463 Mich. 43 (Mich. 2000).
[85] *Id*. at 50.

There are, however, an equal number of examples of evidence excluded under Rule 404(b) which would have been admitted in states following a Rule 413, Rule 414, or lustful disposition analysis. In *State v. Mitchell*,[86] appellant was charged with fondling his girlfriend's twelve-year-old daughter. The Government was allowed to admit testimony that appellant had also fondled two of his daughter's friends without identifying a specific exception under Iowa's Rule 404(b).[87] In finding that the trial court had erred in admitting the testimony of his daughter's friends, Iowa's appellate court reasoned that "such testimony spoke to no legitimate fact besides Mitchell's propensity to abuse young girls."[88] Similarly, in *Richmond v. State*,[89] the appellate court held that the trial court erred when it allowed the State of Nevada to admit pure propensity evidence. Like *Mitchell*, the appellant in *Richmond* was charged with sexual misconduct involving a minor female.[90] During trial, the Government was allowed to introduce testimony from a different minor female that appellant had also molested her.[91] The Nevada appellate court held that the district court had abused its discretion, because the evidence "was not relevant under any of the other exceptions to NRS 48.045," the Nevada equivalent to FRE 403.[92] In so holding, the court noted that it had previously "repudiate[d] the legal proposition . . . that evidence showing an accused possesses a propensity for sexual aberration is relevant to the accused's intent."[93]

These cases, and others like them, demonstrate not only how strict construction states require that the dictates of Rule 404(b) be satisfied for any "other acts" evidence, but also how many states are adamant about rejecting the propensity exception created by Congress. It is just as

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[86] State v. Mitchell, 633 N.W.2d 295 (Iowa 2001).
[87] IOWA R. EVID. 404(b) states in relevant part:

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

IOWA R. EVID. 404(b) (2006).
[88] *Mitchell*, 633 N.W.2d at 300.
[89] Richmond v. State, 118 Nev. 924 (Nev. 2002).
[90] *Id*. at 926.
[91] *Id*. at 927.
[92] *Id*. at 934.
[93] *Id*. at 928 (citing Braunstein v. State, 118 Nev. 68 (Nev. 2002)).

important to recognize, however, that the strict-interpretation states' approach to prior sexual misconduct does not create an outright prohibition against "propensity type" evidence. Prior sexual misconduct can still be admitted against an accused; just not for the sole purpose of alleging propensity. These states seem to have accomplished that which Congress could not: striking a balance between the rights of the accused and the rights of society at large.

C. Military Application

Military installations are one of the few places where federal law applies, and as such the military has witnessed its fair share of issues relating to rules 413 and 414. As with the initial challenges in the federal circuit courts,[94] the first challenges to the military application of MRE 413 and 414, [95] were also based on constitutional grounds. In the seminal case for military application of "FRE 413 and 414 type" rules, the CAAF ruled in *United States v. Wright*[96] that MRE 413 (and by necessary implication MRE 414) did not violate either the Due Process or Equal Protection clause of the U.S. Constitution.[97]

To reach this conclusion, the CAAF followed a path similar to its brethren on the federal circuit. As in *Castillo* and *Enjady*, the court in *Wright* immediately looked to the legislative history for the purpose behind the enactment of the rules. Specifically, the CAAF highlighted the testimony of the House proponent, Congresswoman Susan Molinari:

> This includes the defendant's propensity to commit sexual assault . . . and assessment of the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense. In other respects, the general standards of the rules of evidence will continue to apply, including . . . the court's authority under evidence rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect. . . . The practical effect of the new

[94] *See* discussion *supra* sec. III.A.
[95] Military Rules of Evidence 413 and 414 are the military equivalent of FRE 413 and 414. Both rules were adopted with only minor changes. *See supra* notes 9, 10.
[96] United States v. Wright, 53 M.J. 476 (2000).
[97] *Id.* at 483.

> rules is to put evidence of uncharged offenses in sexual assault . . . cases on the same footing as other types of relevant evidence that are not subject to a special exclusionary rule. The presumption is in favor of admission.[98]

While the court ultimately acknowledged that unless the new rules were unconstitutional it was bound to follow and apply them, it also made an unsolicited concession that none of the federal circuit courts would: that "the scientific community is divided on the question of recidivism for sexual offenders."[99] This was one of the primary rationales behind the enactment of the rules in the first place. While such a concession was mere dicta in *Wright*, it did represent the first chink in the armor of MRE 413 and 414 applicability. The court's apparent lack of support for the congressional rationale behind the enactment of the new rules[100] would be paramount four years later when it decided *United States v. Berry*.[101]

Notwithstanding the court's apparent unease with the rationale behind the rules, it nonetheless followed the federal circuit's lead. In fact, the CAAF cited to *Mound*,[102] *Castillo*,[103] *Larson*,[104] *LeCompte*,[105] and a majority of the other significant cases decided in each of the federal circuits which had addressed the constitutionality of the new rules.[106] At least as it applied to the due process claim, the CAAF held that so long as the trial court applied an MRE 403 balancing test to the proffered evidence, admission would be constitutionally permissible.[107] As to the equal protection argument, the court wasted little time finding that "the reasoning in *Mound* . . . and *Castillo* . . . provides ample

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[98] *Id*. at 480.
[99] *Id*. at 481.
[100] *Id*. at 486 (Gierke, J., dissenting) (In addition to the aforementioned quote Judge Gierke in his dissent rebuked his fellow justices by pointing out that "[o]ur charter is to interpret and apply Rule 413, not to justify the wisdom of its promulgation.").
[101] United States v. Berry 61 M.J. 91 (2005).
[102] United States v. Mound, 149 F.3d 799 (8th Cir. 1998).
[103] United States v. Castillo, 140 F.3d 874 (10th Cir. 1998).
[104] United States v. Larson, 112 F.3d 600 (2d Cir. 1997).
[105] United States v. LeCompte, 131 F.3d 767 (8th Cir. 1997).
[106] United States v. Wright, 53 M.J. 476, 482 (2000).
[107] *Id*. (The CAAF specifically cited to *Enjady* and *Guardia* for the "factors" that a trial judge must consider when conducting the 403 balancing test. These factors later became known as the "Wright factors".).

justification for rejecting the equal protection claim."[108] Therefore, after *Wright*, all federal courts (absent the U.S. Supreme Court which has yet to address this issue) were of one opinion: so long as the trial judge conducts a Rule 403 balancing test to ensure that the probative value is not substantially outweighed by the potential unfair prejudice to the defendant, the rules are constitutional and the propensity evidence is admissible.

IV. Myth vs. Reality

When it comes to understanding the adolescent sex offender, there are many misconceptions which have led to the nationwide trend of providing less protection to juvenile offenders and making them more responsible for their actions.[109] Some of those misconceptions which are pertinent to this issue are: adolescent sex offenders will become adult sex offenders; adolescent sex offenders require long-term intensive therapy; and adolescent sex offenders are similar in most ways to adult sex offenders.[110] In actuality, "adolescent sex offenders are different from adult sex offenders in that they have lower recidivism rates [than adult sex offenders], engage in fewer abusive behaviors over shorter periods of time, and have less aggressive sexual behavior."[111] Furthermore, adolescent sexual offenders are often successfully treated in short treatment programs, and current studies and literature do not show that adolescent sex offenders naturally progress to adult sex offenders.[112] The importance of such studies is obvious; if adolescent sex offenders can be successfully treated, one cannot logically argue that an individual has a propensity to engage in sexual misconduct as an adult simply because he engaged in similar misconduct as a child.

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[108] *Id*. at 483.

[109] *See* Taylor-Thompson, *supra* note 1, at 145–48 (providing a more detailed discussion on juvenile justice trends).

[110] Bonner et al., *Adolescent Sex Offenders: Common Misconceptions vs. Current Evidence*, NAT'L CENTER ON SEXUAL BEHAVIOR OF YOUTH FACT SHEET, July 2003.

[111] *Id*. (citing A.O. Miranda & C.L. Corcoran, *Comparison of Perpetration Characteristics Between Male Juvenile and Adult Sexual Offenders: Preliminary Results*, SEXUAL ABUSE: J. RESEARCH & TREATMENT 12, 179–88 (2000)).

[112] *Id*. (citing Association for the Treatment of Sexual Abusers (ATSA), *The Effective Legal Management of Juvenile Sex Offenders*, *available at* http://www.atsa.com/pp juvenile.html).

1. Studies Comparing Adolescent Behavior to Adult Behavior

"Adolescence is, by definition, a period of transition during which individuals experience dramatic changes, intellectually, emotionally, and physically."[113] Congress, however, failed to take this into account when it amended the Federal Rules of Evidence to include FRE 413 and 414. By failing to put any limitation on the age of offenses that can potentially be admitted against an accused, Congress implicitly sanctioned the admission of adolescent sex offenses in later adult prosecutions.[114] While such a result may not have been the intent of the legislature, it is the reality of the situation.

One of the main differences between adolescent and adult offenders is that "[a]n adolescent's poor choice to engage in unlawful conduct is different from an adult's poor decision."[115] An adolescent's decision making ability is quite different from an adult's because an adolescent's ability is naturally limited by experience and developmental facts, both of which change and increase with maturity.[116] Because of the growth factors inherent in the maturation process, "a critical development gap exists between adults and adolescents."[117] Recent studies in the field of developmental psychology also suggest that an adolescent's choice about engaging in misconduct is often the "product of cognitive and psychological immaturity."[118] Some researchers even suggest that because of this psychological maturity process, "individuals [should] not be expected to display consistently mature judgment until the age of eighteen, at the earliest."[119] "If youthful choices to offend are based on

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[113] Kim Taylor-Thompson, *supra* note 1, at 156.

[114] It may very well be that none of the amendment's supporters ever envisioned adolescent offenses being admitted several years later in adult prosecutions. In fact, the lack of a bright-line rule concerning temporal proximity of the offenses seems to be judicially created more so than congressionally mandated. Indeed, Sen. Dole was quoted as saying, "If [the sex offense] had not happened for 10 years, it probably would not have any value." Similarly, Sen. Hatch seemed incredulous that anyone would even suggest using an old or adolescent offense under FRE 413 or FRE 414 when he stated, "Does that amount to letting somebody put in some allegation 13 years ago into evidence? Of course not." THE EVIDENCE PROJECT, *supra* note 16.

[115] Kim Taylor-Thompson, *supra* note 1.

[116] *Id.*

[117] *Id.* at 144.

[118] *Id.* at 150 (citing Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 139 (1997)).

[119] Kevin W. Saunders, *A Disconnect Between Law and Neuroscience: Modern Brain Science, Media Influences, and Juvenile Justice*, 2005 UTAH L. REV. 695, 734 (2005)

diminished ability to make decisions, or if the choices (or the values that shape the choices) are strongly driven by transient developmental influences, then the presumption of free will and rational choice is weakened."[120] Such a position makes it hard to justify using adolescent offenses to demonstrate a propensity to engage in similar adult criminal conduct when the adolescent was not psychologically developed to such an extent that he understood the wrongfulness of his conduct.

In addition to psychological studies demonstrating the differences between adults and adolescents, recent studies in the field of neurology indicate that a person's brain is actually "re-wired" during his teenage years.[121] The brain goes through many such stages of development through adolescence and into adulthood. As one researcher stated about the neurological development of an adolescent's brain:

> As the brain develops—in children and, science is now learning, in teenagers—it is this very inhibition machinery that is being fine-tuned . . . . What can we expect of adolescents if that inhibition machinery, the prefrontal cortex, is not yet fully tuned? Children, including teenagers, may simply not be as capable as adults at inhibiting behavior. There is also evidence that this same lesser development of the same region of the brain makes it less likely that children will recognize the consequences of their acts.[122]

Propensity arguments rely upon the premise that an individual will commit similar acts of misconducts for similar reasons, i.e., one commits multiple acts of sexual molestation of a child because he is depraved and enjoys that type of activity. While such a theory stands the test of reason when all of the acts are committed by an adult, what happens to the reliability of the theory if one of the acts was committed when the person was a minor? The above studies would indicate that the theory is potentially flawed because there is, arguably, limited rational correlation between acts committed as a child and acts committed as an adult based

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(quoting Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP. L. REV. 1763, 1778 (1995)).

[120] *Id*. at 737.

[121] *Id*. at 711.

[122] *Id*. at 712 (internal quotations omitted) (citing BARBARA STRAUCH, THE PRIMAL TEEN: WHAT THE NEW DISCOVERIES ABOUT THE TEENAGE BRAIN TELL US ABOUT OUR KIDS (2003)).

on a child's lack of societal experience and the re-wiring of the brain which occurs during adolescence.

2. Studies of Recidivism Rates for Adolescent Sex Offenders

Given the original reasons authored by the congressional proponents of FRE 413 and 414, it should not come as a surprise that scientific data, has become the proverbial white elephant in the middle of the room. One of the major problems is that there is no agreement as to the actual recidivism rate for sex offenders. The reasons for this are many: differences in the definition of recidivism (i.e. arrest versus conviction); use of "reported" crimes versus "unreported" crimes; definition of sex offense (i.e. rape versus indecent exposure); and length of the study are but a few.

In a recently completed study of recidivism rates for sex offenders released from prison in 1994 (the same year as the enactment of FRE 413 and 414), the Bureau of Justice Statistics reported that "[w]ithin 3 years following their release from prison in 1994, 5.3% (517 of the 9,691) of the released sex offenders were rearrested for a sex crime."[123] Similarly, "[w]ithin the first 3 years following release from prison in 1994, 3.3% (141 of 4,295) of released child molesters were rearrested for another sex crime with a child."[124] A 5.3% and 3.3% recidivism rate would not seem to call for the drastic changes to the evidentiary law that Congress implemented. And it should be pointed out that these rates are based on "re-arrest" and not conviction, which could conceivably lower those stated rates. Of course, proponents of the law would probably argue that basing recidivism rates on re-arrest is misleading since most sex offenses against children are drastically under reported.[125] Regardless of the validity of each side's argument, one of the overall conclusions of the study was: "[c]ompared to non-sex offenders released from State prison,

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[123] LANGAN ET AL., *supra* note 20, at 1.
[124] *Id.*
[125] *See, e.g.*, Sherry L. Scott, Comment, *Fairness to the Victim: Federal Rules of Evidence 413 and 414 Admit Propensity Evidence in Sexual Offender Trials*, 35 HOUS. L. REV. 1729, 1741 (citing PAT GILMARTIN, RAPE, INCEST, AND CHILD SEXUAL ABUSE: CONSEQUENCES AND RECOVERY 48–49 (1994)).

sex offenders had a lower overall rearrest rate."[126] Indeed, studies and findings such as this are typical.[127]

The difference between those who argue that the amendments were needed to protect society from a mass of repeat offenders, and those who argue that they were not, basically comes down to interpretation of those statistics. For example, while opponents to the amendments claim the low recidivism rates do not justify congressional action, those in support of using propensity evidence point to those same studies and percentages (i.e., 5.3%) and argue, accurately, that sex offenders are "4 times more likely to be rearrested for a sex crime"[128] than released non-sex offenders.[129] Furthermore, proponents of the rule argue that sex offenses are severely under-reported and that "courts and legislators need to be aware that clinical experience suggests that sex offenders have committed many more offenses than the number for which they have been arrested."[130] At least as far as adult sex offenders are concerned, the data can be interpreted to support whichever position one favors. Luckily, there does not seem to be the same type of disagreement in the area of recidivism for adolescent sex offenders. This, again, probably has to do with the studies showing that most juvenile offenders respond to treatment very favorably.[131]

"According to the Federal Bureau of Investigation, juveniles were arrested for approximately 12.4% of all forcible rapes committed in 2001."[132] This is consistent with other studies suggesting that

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[126] *Id*. at 2.

[127] Joseph A. Aluise, *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 (1998) (Two separate U.S. Dept. of Justice studies showed rearrest rates for convicted rapists varied between 2.9% and 7.7%.).

[128] LANGAN ET AL., *supra* note 20, at 1.

[129] The same can be said for the studies referenced in footnote 110 where "rapists were 10.5 times more likely to be rearrested for rape than were individuals who had been previously convicted of other crimes." Bonner, et al., *supra* note 110.

[130] Tamara Larson, Comment*: Sexual Violence is Unique: Why Evidence of Other Crimes Should be Admissible in Sexual Assault and Child Molestation Cases*, 29 HAMLINE L. REV. 177, 207, (2006) (citing Dean G. Kilpatrick, Christine N. Edmunds & Anne Seymour, *Rape in America: A Report to the Nation* 1 (Nat'l Victim Ctr., Crime Victims Research & Treatment Ctr. 1992)).

[131] Bonner et al., *supra* note 110 (citing Ass'n for the Treatment of Sexual Abusers (ATSA), *The Effective Legal Management of Juvenile Sex Offenders*, *available at* http://www.atsa.com/ppjuvenile.html) (last visited Feb. 6, 2008).

[132] Joel T. Andrade et al., *Juvenile Sex Offenders: A Complex Population*, 51 J. FORENSIC SCI. 1 (Jan. 2006).

adolescents are responsible for one-half of all reported child molestation cases.[133] No one is arguing, however, that adolescents are not engaging in sexual misconduct. The question to be answered is: are they engaging in *repeated* sexual misconduct, during future adolescent years and into adulthood, which would justify the use of propensity evidence? If they aren't, the propensity argument, at least as applied to adolescent sex offenders, becomes a fallacy.

The raw numbers indicate that the recidivism rate for adolescent sex offenders is generally between 5% and 14%.[134] Studies further indicate that this low recidivism[135] rate is due in large part to the success of treatment programs for adolescent sex offenders in reducing or eliminating future sex offenses.[136] The end result is that adolescent sex offenders are fundamentally different from adult sex offenders and the assumption that an adolescent sex offender will naturally become an adult sex offender is not supported by quantifiable evidence.[137] It is this absence of quantifiable evidence that the CAAF cited to in *Wright* that would signal the court's progression to its ultimate ruling in *Berry*.

V. Ripples in the Pond

Four years after *U.S. v. Wright*, the CAAF for the first time specifically addressed, in *United States v. McDonald*, whether prior adolescent sex offenses could be used in the same manner as prior adult sex offenses in military prosecutions. While *McDonald* was decided on the basis of MRE 404(b) and not MRE 413 or 414, it did represent the proverbial "shot across the bow" in military propensity jurisprudence. It also foreshadowed the beginning of the end for the admission of propensity evidence concerning offenses committed by an accused when he was an adolescent.

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[133] JOHN A. HUNTER, UNDERSTANDING JUVENILE SEX OFFENDERS: RESEARCH FINDINGS AND GUIDELINES FOR EFFECTIVE MANAGEMENT AND TREATMENT (2000).
[134] Bonner et al., *supra* note 110.
[135] General recidivism rates have been about 40% historically since 1980. UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, PRISONER RELEASES (June 2001), *available at* http://www.gao.gov/new.items/d01483.pdf.
[136] HUNTER, *supra* note 133.
[137] Bonner et al., *supra* note 110.

A. *United States v. McDonald*

The accused in *McDonald* was charged with various sexual improprieties against his adopted daughter when she was twelve years old.[138] During its case in chief, the Government introduced evidence that twenty years earlier, when the accused was thirteen, the accused had engaged in various sexual improprieties with his stepsister, who was eight at the time.[139] The Government offered this testimony, over defense objection, as evidence of the accused's "intent, plan, and scheme regarding his offenses with" his adopted daughter twenty years later.[140] In overruling the trial court's decision, the CAAF concentrated primarily on the fact that the accused was an adolescent at the time of the uncharged misconduct.[141]

After dispensing with the Government's theories of admissibility concerning plan and scheme, the CAAF turned its attention to the Government's primary theory of admission: intent. The court was unconvinced that an adult's intent to commit a crime (mens rea) could simply be proven by the existence of a similar act committed by that same person when he was an adolescent. Specifically, CAAF stated, "[a]bsent evidence of that 13-year-old adolescent's mental and emotional state, sufficient to permit meaningful comparison with Appellant's state of mind as an adult 20 years later, the military judge's determination or relevance on the issue of intent was fanciful and clearly unreasonable."[142] While not outright articulated, the CAAF's ruling in essence refuted the belief that an adult's intent to engage in one type of misconduct can be demonstrated simply by the commission of similar acts when that person was a child. Yet this is exactly the premise upon which MRE 413 and 414 rests: if you did it once before, you are likely to do it again. The significance of this opinion would not be fully seen until the CAAF was presented with the case of *United States v. Berry*. [143]

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[138] United States v. McDonald, 59 M.J. 426, 427 (2004).
[139] *Id*. at 428.
[140] *Id*.
[141] *Id*. at 430.
[142] *Id*.
[143] United States v. Berry, 61 M.J. 91, 93 (2005).

B. *United States v. Berry*

One year after *McDonald* the CAAF decided *United States v. Berry*, which specifically addressed what type of evidence could be offered under MRE 413. *Berry* represented the first time the CAAF addressed either MRE 413 or 414 since its opinion in *Wright*. As in *McDonald*, the CAAF was called upon to decide whether acts committed as a juvenile could be admitted as substantive evidence to prove that an accused committed similar acts as an adult. This time, the avenue of admission was not MRE 404(b) but instead MRE 413 which, under congressional interpretation, is a rule of inclusion and not a rule of exclusion like Rule 404(b).[144]

The accused in *Berry* was charged with engaging in oral sodomy with another male soldier while that soldier was physically incapacitated due to intoxication.[145] The Government admitted evidence that eight years earlier, when Berry was thirteen, he coerced a six year old boy to engage in oral sodomy with him.[146] The Government's theory of admissibility was that "it is relevant to Sergeant Berry's propensity to sexually assault those who are in a position of vulnerability," (i.e., MRE 413 evidence).[147] Like in *McDonald*, the CAAF's opinion centered on the fact that the uncharged misconduct that the Government wanted to introduce was misconduct committed while the accused was an adolescent. The court first noted that while temporal proximity has never been an overriding consideration for the court in the past,[148] "[a] similar finding is not readily made where a prior incident is between children or adolescents."[149] The court then specifically cited its previous decision in *McDonald* and noted "that there is no evidence suggesting that Berry's mens rea at twenty-one was the same as it was when he was a child of thirteen."[150]

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[144] United States v. Wright, 53 M.J. 476, 482–83 (2000).
[145] *Berry*, 61 M.J. at 93.
[146] *Id.*
[147] *Id.*
[148] *See* United States v. Dewrell, 55 M.J. 131, 137–38 (2001) (finding acts occurring seven to ten years earlier admissible); United States v. Bailey, 55 M.J. 37, 41 (2001) (finding acts occurring three and one-half and ten years earlier admissible).
[149] *Berry*, 61 M.J. at 96.
[150] *Id.*

It is this difference between children and adults that gives the court its greatest pause. The CAAF cited a 2003 law review article in support of this difference:

> Between the ages of twelve and seventeen, adolescents undergo a critical period of transition during which they experience rapid transformations in emotional, intellectual, physical, and social capacities. Even older adolescents, whose raw intellectual capacities may rival those of adults, have less experience on which to draw in making and evaluating choices. In short, adolescents are not simply miniature adults.[151]

It is for this reason alone that the CAAF believes even an otherwise unremarkable eight-year span between offenses can become such a significant gap in time that it would warrant exclusion of the uncharged misconduct. The CAAF further cautioned military judges:

> When projecting on a child the mens rea of an adult or extrapolating an adult mens rea from the acts of a child, military judges must take care to meaningfully analyze the different phases of the accused's development rather than treat those phases as being unaffected by time, experience, and maturity.[152]

As was started in *McDonald*, the CAAF had clearly thrown the gauntlet down in *Berry* as it relates to the Government's ability to use adolescent offenses to demonstrate propensity in adult prosecutions. This stance is in direct contradiction to the rest of the federal judiciary, which has yet to place any limits on the admission of propensity evidence under FRE 413 and 414 other than requiring a Rule 403 balancing test. Such a stance, however, is not unprecedented for the CAAF, especially of late. In the case of *United States v. Martinelli*,[153] the CAAF held that § 2252A of the Child Pornography Prevention Act[154] did not have extra-territorial applicability, thereby placing an untold number of previously obtained military convictions in jeopardy, even though no other federal circuit court or lower service court had

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[151] *Id*. at 97 (quoting Kim Taylor-Thompson, *supra* note 1, at 152–53).
[152] *Id*.
[153] United States v. Martinelli, 62 M.J. 52 (2005).
[154] 18 U.S.C.S. § 2252A (LexisNexis 2008).

previously held so.[155] Clearly, the CAAF has shown that it can be a model for judicial independence, and it has done so again in *McDonald* and *Berry*.

VI. Ramifications of Decision

A. What Now?

Notwithstanding the CAAF's decision to "stray from the pack," generally speaking, the CAAF's ruling in *Berry* is consistent with the rationales expressed by other federal courts; it is the *outcome* which is different. The CAAF clearly recognized that "[f]rom strictly a propensity viewpoint, the evidence does show that Berry had participated in similar conduct in the past."[156] The CAAF also underscored the almost universally held opinion that "[t]he length of time between the events alone is generally not enough to make a determination as to the admissibility of the testimony."[157] Indeed, up to this point in the CAAF's analysis, the *Berry* opinion was no different than those from the federal circuits. However, when the temporal proximity between those events constitutes a period of time between adolescence and adulthood, that specific period of time will be considered, at least under the CAAF interpretation, a "notable intervening circumstance" requiring exclusion of the proffered evidence.[158] The question the CAAF left unanswered, however, is what effect *Berry* will have on the future of military jurisprudence as it pertains to the use of adolescent misconduct.

While the CAAF clearly carved out a small exception to MRE 413, it did so for the same reason other federal courts have excluded non-adolescent offenses in other cases: the proffered testimony failed the MRE 403 balancing test.[159] In so doing, however, the CAAF arguably has created an almost unattainable standard for the Government to meet before a military judge will be authorized to admit adolescent offenses

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[155] *See, e.g.*, United States v. Corey, 232 F.3d 1166, 1183 (9th Cir. 2000), United States v. Cream, 58 M.J. 750, (N-M. Ct. Crim. App. 2003). *See generally* Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326, 1342 (2d Cir. 1992).
[156] *Berry*, 61 M.J. at 95.
[157] *Id.* at 96.
[158] *Id.*
[159] *Id.* at 97 (In addition to the temporal proximity factor, the CAAF also found that admission of the evidence in question would be a distraction to the fact-finder and create a mini-trial on a collateral issue.).

for propensity reasons. In future cases, "[w]here a military judge finds that the prior 'sexual assault' acts of a child or adolescent are probative to an act later committed as an adult, such a determination *must be supported in the record by competent evidence*."[160]

The CAAF made clear in *Berry* that, in the court's opinion, children were not simply "miniature adults."[161] It also cautioned military judges to "meaningfully analyze" the "different phases" of development and basically ensure that those phases were not affected by "time, experience, and maturity."[162] Only after the military judge makes such findings is the proffered evidence then admissible. Furthermore, those findings must be "supported in the record by competent evidence."[163] How can the Government ever be expected to meet that threshold for admissibility? The simple answer is, it probably cannot. Conceivably, the only way to satisfy the requirements of *Berry* is for the Government to present medical and/or psychological testimony as a condition precedent to the admission of the uncharged misconduct. Furthermore, the medical and/or psychological evidence presented would have to be specific to the accused's state of mind at the time he engaged in the adolescent misconduct, as well as the time period during which he engaged in the adult misconduct. Obviously, adolescent state of mind evidence will be the most difficult, if not impossible, to obtain. Yet it is precisely this evidence which the CAAF has dictated is most relevant. Only by having the "dated" medical and/or psychological evidence will the court be able to meaningfully compare the adolescent's mental and emotional state to that of the accused's state of mind as an adult.[164] And only by finding a similar state of mind will the proffered propensity evidence be legally relevant, and therefore admissible.

With such a high standard in place, it should be obvious that, whether or not it was the CAAF's intent, the Government will never be able to satisfy its burden. It can and should be argued that the CAAF has created a de facto rule against the admission of adolescent offenses for propensity reasons. For all intents and purposes, adolescent sex offenses are no longer admissible under MRE 413 or 414 to demonstrate an adult's propensity to engage in similar misconduct. Even if one is not

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[160] *Id*. (emphasis added).
[161] *Id*. (quoting Kim Taylor-Thompson, *supra* note 1, at 152–53).
[162] *Id*.
[163] *Id*.
[164] *Id*.

willing to make that conclusion, however, "[c]oupled with . . . the *McDonald* case, it is fair to say that uncharged adolescent sexual misconduct is presumptively inadmissible under the [Military Rules of Evidence]."[165]

B. *United States v. Bare*

The first case to use the aforementioned argument was *United States v. Bare*.[166] *Bare* represented the next step, and to date the only step, in the military application of MRE 414 and the possible use of adolescent offenses. [167] Appellant in *Bare* was charged with several specifications of sexual molestation of both his biological daughter and his stepdaughter.[168] The Government sought to offer testimony from appellant's sister that he had similarly molested her between seventeen and nineteen years earlier.[169] At the time of the allegations, appellant was between the ages of sixteen and nineteen and his sister was between the ages of seven and eleven.[170] At trial, the evidence was offered and admitted under MRE 404(b); however, the Air Force court did not state which exception to MRE 404(b) the Government relied upon. Furthermore, because the Air Force court unilaterally found that the evidence could have been admitted under MRE 414, which is a rule of inclusion, it declined to address appellant's MRE 404(b) argument. In finding that the evidence was admissible under MRE 414, the Air Force court found that the facts of appellant's case were distinguishable from the facts in *Berry*. Specifically, the Air Force court found that the

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[165] Major Christopher W. Behan, *"The Future Ain't What It Used to Be": New Developments in Evidence for the 2005 Term of Court*, ARMY LAW., Apr. 2006, at 10.
[166] United States v. Bare, 63 M.J. 707 (A.F. Ct. Crim. App. 2006).
[167] The granted issue on appeal from the U.S. Air Force Court of Criminal Appeals (Air Force court) was:

> WHETHER IN LIGHT OF *UNITED STATES V. BERRY*, 61 M.J. 91 (C.A.A.F. 2005) AND *UNITED STATES V. MCDONALD*, 59 M.J. 426 (C.A.A.F. 2004), EVIDENCE OF UNCHARGED SEXUAL ACTS BETWEEN APPELLANT, WHEN HE WAS AN ADOLESCENT, AND HIS SISTER WAS IMPROPERLY ADMITTED AND MATERIALLY PREJUDICED APPELLANT.

United States v. Bare, No. 35863, 2006 CAAF LEXIS 1453 (Nov. 22, 2006).
[168] *Bare*, 63 M.J. at 709–710.
[169] *Id.* at 708.
[170] *Id.*

evidence in *Berry* "involved only a single prior incident of sexual misconduct, [whereas] the evidence in this case reflects numerous examples of similar conduct occurring under similar circumstances."[171] In dismissing the appellant's argument that his prior adolescent misconduct was inadmissible after the CAAF's rulings in *McDonald* and *Berry*, the Air Force court found that "[i]n the final analysis, the appellant appears to have sexually molested his vulnerable female relatives whenever the opportunity presented itself [and t]his is the exact sort of behavior contemplated by Mil. R. Evid. 414."[172] The court's decision that the evidence relating to appellant's sister could have nonetheless been admitted under MRE 414 formed the basis of the appeal before the CAAF.

Based on the Air Force court's analysis of the issue in *Bare*, one of four outcomes was possible when the aforementioned issue was appealed to the CAAF. The CAAF could have: (1) affirmed the Air Force court's opinion finding that *Bare* is distinguishable from *Berry* because the appellant in *Bare* was not a true adolescent when he committed his prior offenses; [173] (2) found that the evidence was improperly admitted but that the error was harmless (because of the Government's other incriminating evidence); (3) retreated from its earlier positions taken in *McDonald* and *Berry* in affirming the Air Force court's decision; or (4) reinforced its previous rulings and concluded that the evidence was inadmissible under MRE 414 and could have further spelled out, in detail, exactly what the Government must do prior to offering adolescent sex offenses as propensity evidence under MRE 413 or 414.

In short, the CAAF chose option number one. In affirming the Air Force court's opinion, the CAAF was "persuaded the facts [in Bare's case were] distinguishable from those in *Berry* in several significant

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[171] *Id*. at 712.
[172] *Id.*
[173] Because the appellant in *Bare* engaged in continuous misconduct between the ages of sixteen and nineteen, during oral argument several members of the court were concerned about the age at which an individual should no longer be considered an adolescent, an issue that was not present in *Berry*. Judge Ryan pointed out that the crux of the issue was why Bare should be treated as a child instead of an adult between the ages of sixteen and nineteen. Judge Baker was even more specific when he stated, "One of the issues here as to whether *Berry* is distinguishable or not . . . is whether this appellant should be treated as an adult . . . at the age of 19 or some time before or after; so age is important." Audio recording: Oral Argument, United States v. Bare, Court of Appeals for the Armed Forces (Feb. 28, 2007), *available at* http://www.armfor.uscourts.gov/CourtAudio/20070228.wma.

respects."[174] Of note were the facts that the appellant in *Bare* "was older than Berry at the time the uncharged misconduct occurred" and that the "[a]ppellant was an adult as well as an adolescent" at the time of the uncharged misconduct.[175] Furthermore, the court highlighted the fact that "the alleged incidents [in *Bare*] were not a one-time event, but occurred regularly for a period of about two or three years." [176]

This last acknowledgement by the court is especially important considering that the court specifically relied upon the differences in the mens rea between an adolescent and an adult when it issued its opinion in *Berry*. No such difference, however, could be relied upon or, indeed, even identified in *Bare*. As the Air Force court pointed out, "the abuse [alleged by Bare] was frequent and extended over many years with each" victim.[177] As such, there was not a clear line of demarcation, upon which the court could rely, between the adolescent mens rea and the adult mens rea.

One of the fundamental holdings in *Berry* seemed to be that "[w]here a military judge finds that the prior 'sexual assault' acts of a child or adolescent are probative to an act later committed as an adult, such a determination *must be supported in the record by competent evidence*."[178] *Berry* seemed to create an affirmative responsibility on the part of the Government to present evidence demonstrating a similar mens rea between the accused as an adolescent and as an adult before the Government would be allowed to introduce propensity evidence involving alleged adolescent sexual misconduct. The fundamental reasoning of the CAAF in *McDonald* and *Berry* is that propensity evidence is *legally* relevant only if the Government presents competent evidence of the "adolescent's mental and emotional state, sufficient to permit meaningful comparison with"[179] the accused's state of mind many years later. Without a clear line of demarcation in *Bare* between the appellant's adolescent and adult mental state, the question left unanswered is whether the court's opinion in *Bare* reinforces or detracts from the court's previous opinions in *McDonald* and *Berry*. Furthermore, military practitioners still have to ask: "Has the CAAF truly created, in essence, a de facto, per se rule against the admission of

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[174] United States v. Bare, 65 M.J. 35, 37 (2007).
[175] *Id.*
[176] *Id.*
[177] *Bare*, 63 M.J. at 712.
[178] United States v. Berry, 61 M.J. 91, 97 (2005) (emphasis added).
[179] *Id.* at 96 (citing United States v. McDonald, 59 M.J. 426, 430 (2004)).

adolescent sex offenses, and if so, how should the military proceed from here?" Notwithstanding the opinion in *Bare*, the CAAF has created such a rule for some adolescent sex offenses, and the military needs to amend MRE 413 and 414 to explicitly state that which is already an implicit reality.

VII. Argument and Recommendation

Given the above-referenced data, the research into adolescent psychology, and the CAAF's most recent ruling in *Bare*, it can hardly be stated that the CAAF is being unreasonable or has become an example of "judicial activism."[180] If anything, given the number of states that have refused to adopt FRE 413 and 414 and apply a strict interpretation of Rule 404(b) instead, the CAAF's approach is arguably more in line with the majority of jurisdictions than the federal circuit courts. The court's approach is certainly more in line with the rationale behind MRE 609 and the use of adolescent offenses of all kind under that rule. What the CAAF has done is provide balance and a measure of fairness to the application of MRE 413 and 414.

As presently constructed, and as historically applied, MRE 413 and 414 provide no limit to what may be admitted in terms of propensity evidence (assuming that the proffered evidence concerns a prior sex assault or child molestation offense). In order to bring the rule into congruence with the implicit and explicit consequences of the CAAF's decisions, MRE 413 and 414 should be amended to *specifically* exclude the introduction of single incidents of sexual assault and child molestation offenses committed by an accused while an adolescent. The key, as identified and emphasized by the court in *Bare*, is to determine exactly when one crosses that line between adolescence and adulthood. The suggested wording of the amendment to MRE 413 would read as follows:

> (i) Exception. Evidence of a single act of <u>sexual assault</u> (i.e. sexual contact or sexual act) committed by the accused prior to the accused attaining the age of

[180] The theory of judicial behavior that advocates basing decisions not on judicial precedent, but on achieving what the court perceives to be for the public welfare, or what the court determines to be fair and just on the facts before it. Answers.com, http://www.answers.com/topic/judicial-activism (last visited, Feb 11, 2008).

> eighteen, which would ordinarily be admissible under this rule, shall be inadmissible unless such evidence is also admissible under the provisions of Military Rule of Evidence 404(b).[181]

For MRE 414, the wording would be almost identical:

> (i) Exception. Evidence of a single act of child molestation (i.e. sexual contact or sexual act) committed by the accused prior to the accused attaining the age of eighteen, which would ordinarily be admissible under this rule, shall be inadmissible unless such evidence is also admissible under the provisions of Military Rule of Evidence 404(b).

The effect of this amendment would be minimal in application, but necessary nonetheless. In the end, very few cases would actually be affected by the amendment. Indeed, even the court's decision in *Bare* would have remained unchanged, since the appellant was alleged to have engaged in multiple acts of misconduct prior to attaining the age of eighteen. As this article demonstrates, since the enactment of FRE 413 and 414 only three reported cases have addressed the issue of adolescent offenses being used as strict propensity evidence in adult prosecutions: *Lemay*,[182] *Berry*,[183] and now *Bare*.[184] Such a situation is to be expected, however, given the low recidivism rates and "aging out" phenomenon[185]

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[181] MCM, *supra* note 4, MIL. R. EVID. 404. Rule 404(b) provides in relevant part:

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

Id.

[182] United States v. Lemay, 260 F.3d 1018 (10th Cir. 2001).

[183] *Berry*, 61 M.J. 91.

[184] United States v. Bare, 65 M.J. 35, 37 (2007).

[185] Kim Taylor-Thompson, *supra* note 1, at 156 (citing John H. Laub & Robert J. Sampson, *Understanding the Desistance from Crime*, 28 CRIME & JUST. 1 (2001) (proving an overview of qualitative research on desistance from crime); Terrie E. Moffitt, *Adolescent-Limited and Life-Course Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 675–77 (1993); Neal Shover & Carol Y. Thompson, *Age, Differential Expectations, and Crime Desistance*, 30 CRIMINOLOGY 89 (1992) (finding support for direct and indirect effects of age on desistance)).

of adolescent sex offenders discussed earlier.[186] Furthermore, given that current regulations[187] would probably prohibit the accession into the military of individuals that had multiple prior juvenile adjudications involving sex offenses, admission of adolescent sex offenses under MRE 413 and 414 would be reserved to those rare cases of unproven and non-adjudicated accusations—hardly the type of cases where inclusion and veracity of the evidence should be presumed. Additionally, and more importantly, the exclusion would apply only to those situations where there was a single act of adolescent misconduct. Situations like the one in *Bare* would be exempt from the statutory exclusion, because the multiple allegations of adolescent sexual misconduct blur the line between his adolescent mens rea and his adult mens rea.

The proposed amendments would not result in countless future accused service members receiving a "get out of jail free" card through enactment of the amendment, nor would the Government necessarily "lose" convictions it ordinarily would have been able to secure. Even in cases where the proffered evidence is statutorily excluded from admission under MRE 414, the evidence would still be admissible under MRE 404(b) so long as the Government could demonstrate that the purpose for admitting the evidence is something *other than propensity* (and it can meet the foundational requirements outlined in *McDonald* if offered under plan or intent). Furthermore, the amendment would simply memorialize that which has already been implicitly created by the CAAF's rulings in *McDonald* and *Berry* and would create the bright line rule that the CAAF was searching for in *Bare*.

VIII. Conclusion

Voltaire stated, "It is better to risk saving a guilty man than to condemn an innocent one."[188] Such a position is also one of the fundamental building blocks of our criminal justice system, and indeed, our Constitution. Because of misplaced public outcry and ever-present political considerations, Congress forgot these foundations when it enacted FRE 413 and 414. While protection of society arguments may

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[186] *See* discussion *supra* sec. IV.

[187] U.S. DEP'T OF ARMY, REG. 601-210, REGULAR ARMY AND ARMY RESERVE ENLISTMENT PROGRAM para. 4-24(f) (16 May 2005).

[188] Quotes by Voltaire at Find Quotations, http://findquotations.com/quote/by/Voltaire (last visited Feb. 22, 2008).

hold some validity when the issue relates to career sexual predators, that same argument falls to the wayside when the issue relates to adolescent offenders and their offenses.

Recent studies in the fields of psychology and neurology indicate that adolescents engage in misconduct for reasons wholly separate from those of their adult counterparts.[189] In essence, research indicates that an adolescent's intent when he engages in misconduct is affected by a multitude of factors. This begs the question: If the reason, or the intent, or the mens rea, of an adolescent is the not the same as an adult's, how can the courts justify admitting adolescent offenses under a propensity argument? The answer is, they cannot. The propensity argument relies on the theory that individuals who engage in sexual misconduct are "predisposed" to engage in that misconduct. The extension of that argument is that prior sexual offenses "prove" the predisposition. However, if the mens rea of the adolescent offender and the adult offender are not the same due to psychological or neurological considerations, what relevance does the prior adolescent offense have towards that alleged disposition? Again, the answer is none.

Yet the courts have continuously upheld the constitutionality of FRE 413 and 414 and have ignored the medical and statistical evidence before them. "[S]ome of the refusal to recognize the differences between adults and children or adolescents may be the result of . . . judges' unwilling[ness] to accept the psychological evidence"[190] presented, and an inherent skepticism of the psychological research. The CAAF, however, has clearly recognized this problem in the propensity argument as it relates to adolescent offenses, and has decided to take corrective measures. While the CAAF did affirm the Air Force court's holding in *Bare*, it did not retreat from its previous opinions and rationale in either *McDonald* or *Berry*. The time is at hand to eliminate any remaining doubt concerning the admission of adolescent offenses in adult prosecutions and amend the Military Rules accordingly.

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[189] Kim Taylor-Thompson, *supra* note 1 (juvenile misconduct is the "product of cognitive and psychological immaturity" whereas adult misconduct is the product of conscious choice and intent).

[190] Kevin W. Saunders, *A Disconnect Between Law and Neuroscience: Modern Brain Science, Media Influences, and Juvenile Justice*, 2005 UTAH L. REV. 695, 738 (2005).