United States Court of Appeals
SECOND CIRCUIT

(203) 773-2353

CHAMBERS OF
RALPH K. WINTER
U.S. CIRCUIT JUDGE
55 WHITNEY AVENUE
NEW HAVEN, CT 06510

September 22, 1993

To: **Advisory Committee, Federal Rules of Evidence:**

Hon. Jerry E. Smith	Hon. Fern M. Smith
Hon. Milton I. Shadur	Hon. James T. Turner
Hon. Harold G. Clarke	Prof. Kenneth S. Broun
Gregory P. Joseph, Esq.	James K. Robinson, Esq.
John M. Kobayashi, Esq.	Prof. Margaret A. Berger
Hon. Wayne D. Brazil	Prof. Stephen Saltzburg

From: Ralph K. Winter, Chairman

Re: Agenda for September 30 - October 2 Meeting

The following is the agenda for our meetings on Thursday, September 30 through Saturday, October 2, 1993. The meetings on Thursday and Friday will begin at 8:30 a.m. and adjourn around 5:00 p.m. The Saturday meeting will begin at 8:30 a.m. and adjourn no later than 11:30 a.m.

A memorandum with accompanying materials was sent to you on June 22. You should bring both the memorandum and the materials to the meeting. Additional materials are included with this memorandum and agenda. The agenda is as follows:

1. **Carnegie Commission Report**.

This item was discussed in the June 22 memo, and materials relating to it accompanied that memo.

2. **Rules of Trial Management**.

This item was discussed in the June 22 memo, and materials relating to it accompanied that memo.

3. **Rules of Evidence and Sentencing Proceedings: Rule 1101**.

This item was discussed in the June 22 memo. No accompanying materials were sent.

4. **Updating or Modifying Commentaries**.

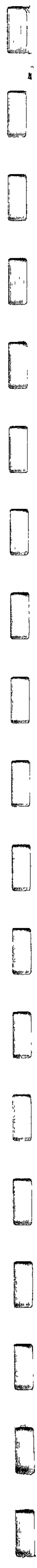
This item was discussed in the June 22 memo. No accompanying materials were sent. Professor Berger's memo on Rule 404 issues, which is included in this package, provides a concrete issue concerning the updating or modifying of Commentaries.

5. **Rule 803(6)**.

This matter was raised in a letter to the Chair from Roger Pauley. That letter is among the materials accompanying this memo and agenda. Whether we should take up the merits of Roger's proposal at this meeting or hold it in abeyance until we address Article VIII is a threshold issue.

6. **Article IV: Rules 401-412**.

This item includes any outstanding policy or drafting issue regarding these rules. Accompanying this memo and agenda are memoranda from Professor Berger on Rules 404, 405, and 407. Also accompanying it is a draft law review article by Professor Reed



of Widener University School of Law that is waiting publication in the Texas Law Review. You will be receiving a draft of another law review article from John Rabiej. That article is by Professor Park of Minnesota Law School and will be published in the Minnesota Law Review.

7. **Other Items of Business**.

Other matters of business will be discussed at this time.

8. **Article VI: Rules 601-615**.

If we get to this item, it will include all policy and drafting issues regarding these rules.

RECEIVED

JUN 28 1993

CHAMBERS OF
JUDGE TURNER

To: THE ADVISORY COMMITTEE ON THE RULES OF EVIDENCE
From: JUDGE WINTER and PROFESSOR BERGER
Re: MEETING OF STANDING COMMITTEE; MISCELLANY; FUTURE AGENDA
Date: JUNE 22, 1993

Section I
New Orleans, LA
EVIDENCE 9/30/93-10/2/93

1. Rule 412

We attended the recent meeting of the Standing Committee on Rules of Practice and Procedure which met on June 17-19. The Committee approved in somewhat different format most of the substance of Rule 412 as drafted by us. The version of Rule 412 and Committee Note that is to be submitted to the Judicial Conference is at Supplement A. The principal issue raised by the Standing Committee was whether the rule would prevent the prosecution from offering pattern evidence. The resultant draft thus provides for the admission of evidence of specific instances of sexual behavior by the victim with respect to the accused when offered by the prosecution. See subsection (b)(1)(B). The Standing Committee also adopted the view that pattern evidence offered by a plaintiff in a civil case must meet the balancing test of subsection (b)(2).

2. Carnegie Commission Report

The Standing Committee adopted a recommendation of its Subcommittee on Long-Range Planning that the Evidence Committee review the Carnegie Commission Report on Science and Technology in Judicial Decision Making. The recommendation of the Standing Committee's Long-Range Planning Subcommittee and the Carnegie Commission Report are at Supplement B.

3. Rules of Trial Management

The Standing Committee adopted the recommendation of its

Long-Range Planning Subcommittee that the Evidence Committee coordinate efforts among the Civil Rules Committee, the Criminal Rules Committee, and itself to study the concept of general rules of trial management. This recommendation was prompted both by the interest of the Standing Committee's Chair, Judge Keeton, and adoption by the ABA of Standards of Trial Management. Materials relating to the Long-Range Planning Subcommittee's recommendation and the ABA standards are at Supplement C.

4. Role of Advisory Committees

The Standing Committee also discussed its role and the role of the Advisory Committees with regard to the future. Most of this discussion concerned the workings of the Standing Committee and do not directly concern us. However, a couple of members of the Standing Committee expressed the view that far too many amendments to the various rules are being proposed by the Advisory Committees. Another member indicated to one of us at dinner that there has been considerable apprehension that the Evidence Committee would be a "troublemaker" and that that apprehension caused the delay in the creation of the Committee. None of this, of course, is to suggest that we fail to act when we conscientiously believe amendments should be proposed. We should be ready, however, to demonstrate the basis for our believing that particular amendments are necessary.

5. Expert Testimony

Justice Michael Zimmerman of the Utah Supreme Court (formerly a member of the Civil Rules Committee and a proponent

of amending Fed. R. Evid. 702) has sent Judge Winter a copy of an article in the ABA Journal concerning a "footprint expert" whose "expert" testimony had no basis in science or, apparently, common sense. At the trial court level, however, she appears never to have had her testimony excluded as lacking any basis, a rather scary fact. Because the article attributes the admission of her testimony to the adoption of the Federal Rules of Evidence, we are attaching a copy of the article at Supplement D.

6. Thoughts Regarding Future Agenda

A formal agenda will be sent out in early September. At its recent meeting, the Standing Comittee sent out for public comment provisions regarding "technical" amendments (and certain other matters) to all federal rules. If adopted, these provisions would be added to the Rules of Evidence (and the Appellate, Civil, Criminal and Bankruptcy Rules, as well). We will have to consider these matters soon, probably at our winter meeting. The provisions may be found at Supplement E.

Judge Winter believes that our review should generally proceed Article by Article because amendments to a particular rule may be informed by, or have ramifications for, other parts of an Article. For example, our discussion of Rule 412 raised questions concerning Rule 405. After considering the suggestions received from committee members and some reading of commentators who have called for our creation, Judge Winter has tentatively designated Article IV as the first to be considered, because there are numerous amendments suggested by members of the

Committee and commentators, and there are conflicts among courts as to the interpretation of the various rules in Article IV. Moreover, Congress is considering an amendment with regard to Rule 404 admitting pattern evidence in rape cases and may ask us to give expedited consideration to this issue. Once Article IV has been considered, we will probably take up Article VI. It is possible, however, that the Supreme Court's decision in Daubert may suggest that we consider amendments to Article VII, in which case we might take that up first.

There are other items that should also be considered at the next meeting. First, can we, and should we, propose amendments regarding the Rules of Evidence to govern sentencing proceedings? The Sentencing Commission may well regard that as its exclusive province. It has thus issued the following policy statement:

> §6A1.3. Resolution of Disputed Factors (Policy Statement)
>
> (a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.
>
> (b) The court shall resolve disputed sentencing factors in accordance with Rule 32(a)(1), Fed. R. Crim. P. (effective Nov. 1, 1987), notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence.

COMMENTARY

In pre-guidelines practice, factors relevant to sentencing were often determined in an informal fashion. The informality was to some extent explained by the fact that particular offense and offender characteristics rarely had a highly specific or required sentencing consequence. This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair. Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. See United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. 18 U.S.C. § 3661. Any information may be considered, so long as it has "sufficient indicia of reliability to support its probable accuracy." United States v. Marshall, 519 F. Supp. 751 (D.C. Wis. 1981), aff'd, 719 F.2d 887 (7th Cir. 1983); United States v. Fatico, 579 F.2d 707 (2d Cir. 1978). Reliable hearsay evidence may be considered. Out-of-court declarations by an unidentified informant may be considered "where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means." United States v. Fatico, 579 F.2d at 713. Unreliable allegations shall not be considered. United States v. Weston, 448 F.2d 626 (9th Cir. 1971).

The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.

If sentencing factors are the subject of reasonable dispute, the court should, where appropriate, notify the parties of its tentative findings and afford an opportunity for correction of oversight or error before sentence is imposed.

The sole statutory basis for the Commission's statement that the Rules of Evidence do not apply to sentencing proceedings appears to be 18 U.S.C. § 3661. However, that provision is a rule of relevance and says nothing about exclusionary rules. It thus states:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

If the exclusionary rules are "limitations on information" then Section 3661 commands that nothing may be excluded in a sentencing hearing, and that seems ridiculous.

Our authority, on the other hand, is derived from 28 U.S.C. § 2072, which reads:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Our authority to determine the evidentiary rules for sentencing proceedings thus seems fairly clear. Whether we should depart from the Sentencing Commission's approach is a

different question, however.

Second, some of the commentaries accompanying the Rules of Evidence may have been rendered obsolete by subsequent case law over the last eighteen years. Is there a method of updating or modifying commentary without amending the particular rule? The problem is that revision of the Advisory Committee Notes might be viewed as altering the meaning of the Rule in question without going through a process that includes review by the Supreme Court and a legislative veto by the Congress.

Finally, a number of you expressed a desire to take up privilege issues. Judge Winter has no objection to that but questions whether consideration of rules of privilege should have a high priority. Privilege rules cannot be adopted through the general rulemaking process, i.e., recommendation by the Supreme Court subject to legislative veto by both houses. Rather, they must be affirmatively promulgated by the Congress. <u>See</u> 28 U.S.C. § 2074(b). This creates a substantial danger that when the Committee takes up rules of privilege, it will engage in a lot of heavy lifting without result. We would be happy to hear different views on this question.

SUPPLEMENT A

Rule 412. Admissibility of Alleged Victim's Sexual Behavior or Sexual Predisposition.

(a) Evidence Generally Inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) evidence offered to prove that any alleged victim engaged in other sexual behavior; and

(2) evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions.

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) Procedure to Determine Admissibility.

(1) A party intending to offer evidence under subdivision (b) must:

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

49 (B) serve the motion on all parties and notify
50 the alleged victim or, when appropriate, the alleged
51 victim's guardian or representative.

52

53 (2) Before admitting evidence under this rule the
54 court must conduct a hearing in camera and afford the victim
55 and parties a right to attend and be heard. The motion,
56 related papers, and the record of the hearing must be sealed
57 and remain under seal unless the court orders otherwise.

COMMITTEE NOTE

Rule 412 has been revised to diminish some of the confusion engendered by the original rule and to expand the protection afforded alleged victims of sexual misconduct. Rule 412 applies to both civil and criminal proceedings. The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual sterotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.

Rule 412 seeks to achieve these objectives by barring evidence relating to the alleged victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence or for impeachment, except in designated circumstances in which the probative value of the evidence significantly outweighs possible harm to the victim.

The revised rule applies in all cases involving sexual misconduct without regard to whether the alleged victim or person accused is a party to the litigation. Rule 412 extends to "pattern" witnesses in both criminal and civil cases whose testimony about other instances of sexual misconduct by the person accused is otherwise admissible. When the case does not involve alleged sexual misconduct, evidence relating to a third-party witness' alleged sexual activities is not within the ambit of Rule 412. The witness will, however, be protected by other rules such as Rules 404 and 608, as well as Rule 403.

The terminology "alleged victim" is used because there will frequently be a factual dispute as to whether sexual misconduct occured. It does not connote any requirement that the misconduct be alleged in the pleadings. Rule 412 does not, however, apply unless the person against whom the evidence is offered can reasonably be characterized as a "victim of alleged sexual misconduct." When this is not the case, as for instance in a defamation action involving statements concerning sexual misconduct in which the evidence is offered to show that the alleged defamatory statements were true or did not damage the plaintiff's reputation, neither Rule 404 nor this Rule will operate to bar the evidence; Rule 401 and 403 will continue to control. Rule 412 will, however, apply in a Title VII action in which the plaintiff has alleged sexual harassment.

The reference to a person "accused" is also used in a non-technical sense. There is no requirement that there be a criminal charge pending against the person or even that the misconduct would constitute a criminal offense. Evidence offered to prove allegedly

false prior claims by the victim is not barred by Rule 412. However, this evidence is subject to the requirements of Rule 404.

Subdivision (a). As amended, Rule 412 bars evidence offered to prove the victim's sexual behavior and alleged sexual predisposition. Evidence, which might otherwise be admissible under Rules 402, 404(b), 405, 607, 608, 609, or some other evidence rule, must be excluded if Rule 412 so requires. The word "other" is used to suggest some flexibility in admitting evidence "intrinsic" to the alleged sexual misconduct. Cf. Committee Note to 1991 amendment to Rule 404(b).

Past sexual behavior connotes all activities that involve actual physical conduct, i.e. sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact. See, e.g., United States v. Galloway, 937 F.2d 542 (10th Cir. 1991), cert. denied, 113 S.Ct. 418 (1992) (use of contraceptives inadmissible since use implies sexual activity); United States v. One Feather, 702 F.2d 736 (8th Cir. 1983) (birth of an illegitimate child inadmissible); State v. Carmichael, 727 P.2d 918, 925 (Kan. 1986) (evidence of venereal disease inadmissible). In addition, the word "behavior" should be construed to include activities of the mind, such as fantasies or dreams. See Charles A. Wright & Kenneth A. Graham, Jr., Federal Practice and Procedure, 5384 at p. 548 (1980) ("While there may be some doubt under statutes that require 'conduct,' it would seem that the language of Rule 412 is broad enough to encompass the behavior of the mind.")

The rule has been amended to also exclude all other evidence relating to an alleged victim of sexual misconduct that is offered to prove a sexual predisposition. This amendment is designed to exclude evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder. Admission of such evidence would contravene Rule 412's objectives of shielding the alleged victim from potential embarassment and safeguarding the victim against stereotypical thinking. Consequently, unless the (b)(2) exception is satisfied, evidence such as that relating to the alleged victim's mode of dress, speech, or life style will not be admissible.

The introductory phrase in subdivision (a) was deleted because it lacked clarity and contained no explicit reference to the other provisions of law that were intended to be overriden. The conditional clause, "except as provided in subdivisions (b) and (c)" is intended to make clear that evidence of the types described in subdivision (a) is admissible only under the strictures of those sections.

The reason for extending the rule to all criminal cases is obvious. The strong social policy of protecting a victim's privacy and encouraging victims to come forward to report criminal acts is

not confined to cases that involve a charge of sexual assault. The need to protect the victim is equally great when a defendant is charged with kidnapping, and evidence is offered, either to prove motive or as background, that the defendant sexually assaulted the victim.

The reason for extending Rule 412 to civil cases is equally obvious. The need to protect alleged victims against invasions of privacy, potential embarrassment, and unwarranted sexual sterotyping, and the wish to encourage victims to come forward when they have been sexually molested do not disappear because the context has shifted from a criminal prosecution to a claim for damages or injunctive relief. There is a strong social policy in not only punishing those who engage in sexual misconduct, but in also providing relief to the victim. Thus, Rule 412 applies in any civil case in which a person claims to be the victim of sexual misconduct, such as actions for sexual battery or sexual harassment.

Subdivision (b). Subdivision (b) spells out the specific circumstances in which some evidence may be admissible that would otherwise be barred by the general rule expressed in subdivision (a). As amended, Rule 412 will be virtually unchanged in criminal cases, but will provide protection to any person alleged to be a victim of sexual misconduct regardless of the charge actually brought against an accused. A new exception has been added for civil cases.

In a criminal case, subdivision (b)(1) may submit evidence pursuant to three possible exceptions, provided the evidence also satisfies other requirements for admissibility specified in the Federal Rules of Evidence, including Rule 403. Subdivisions (b)(1)(A) and (b)(1)(B) require proof in the form of specific instances of sexual behavior in recognition of the limited probative value and dubious reliability of evidence of reputation or evidence in the form of an opinion.

Under subdivision (b)(1)(A), evidence of specific instances of sexual behavior with persons other than the person whose sexual misconduct is alleged may be admissible if it is offered to prove that another person was the source of semen, injury or other physical evidence. Where the prosecution has directly or indirectly asserted that the physical evidence originated with the accused, the defendant must be afforded an opportunity to prove that another person was responsible. See United States v. Begay, 937 F.2d 515, 523 n. 10 (10th Cir. 1991). Evidence offered for the specific purpose identified in this subdivison may still be excluded if it does not satisfy Rules 401 or 403. See, e.g., United States v. Azure, 845 F.2d 1503, 1505-06 (8th Cir. 1988) (10 year old victim's injuries indicated recent use of force; court excluded evidence of consensual sexual activities with witness who testified at in camera hearing that he had never hurt victim and

failed to establish recent activities).

Under the exception in subdivision (b)(1)(B), evidence of specific instances of sexual behavior with respect to the person whose sexual misconduct is alleged is admissible if offered to prove consent, or offered by the prosecution. Admissible pursuant to this exception might be evidence of prior instances of sexual activities between the alleged victim and the accused, as well as statements in which the alleged victim expressed an intent to engage in sexual intercourse with the accused, or voiced sexual fantasies involving the specific accused. In a prosecution for child sexual abuse, for example, evidence of uncharged sexual activity between the accused and the alleged victim offered by the prosecution may be admissible pursuant to Rule 404(b) to show a pattern of behavior. Evidence relating to the victim's alleged sexual predisposition is not admissible pursuant to this exception.

Under subdivision (b)(1)(C), evidence of specific instances of conduct may not be excluded if the result would be to deny a criminal defendant the protections afforded by the Constitution. For example, statements in which the victim has expressed an intent to have sex with the first person encountered on a particular occasion might not be excluded without violating the due process right of a rape defendant seeking to prove consent. Recognition of this basic principle was expressed in subdivision (b)(1) of the original rule. The United States Supreme Court has recognized that in various circumstances a defendant may have a right to introduce evidence otherwise precluded by an evidence rule under the Confrontation Clause. See, e.g., Olden v. Kentucky, 488 U.S. 227 (1988) (defendant in rape cases had right to inquire into alleged victim's cohabitation with another man to show bias).

Subdivision (b)(2) governs the admissibility of otherwise proscribed evidence in civil cases. It employs a balancing test rather than the specific exceptions stated in subdivision (b)(1) in recognition of the difficulty of foreseeing future developments in the law. Greater flexibility is needed to accommodate evolving causes of action such as claims for sexual harassment.

The balancing test requires the proponent of the evidence, whether plaintiff or defendant, to convince the court that the probative value of the proffered evidence "substantially outweights the danger of harm to any victim and of unfair prejudice to any party." This test for admitting evidence offered to prove sexual behavior or sexual propensity in civil cases differs in three respects from the general rule governing admissibility set forth in Rule 403. First, it reverses the usual procedure spelled out in Rule 403 by shifting the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence. Second, the standard expressed in subdivision (b)(2) is more stringent than in the original rule; it raises the threshold for admission by requiring that the probative value of

the evidence substantially outweigh the specified dangers. Finally, the Rule 412 test puts "harm to the victim" on the scale in addition to prejudice to the parties.

Evidence of reputation may be received in a civil case only if the alleged victim has put his or her reputation into controversy. The victim may do so without making a specific allegation in a pleading. Cf. Fed.R.Civ.P. 35(a).

Subdivision (c). Amended subdivision (c) is more concise and understandable than the subdivison it replaces. The requirement of a motion before trial is continued in the amended rule, as is the provision that a late motion may be permitted for good cause shown. In deciding whether to permit late filing, the court may take into account the conditions previously included in the rule: namely whether the evidence is newly discovered and could not have been obtained earlier through the existence of due diligence, and whether the issue to which such evidence relates has newly arisen in the case. The rule recognizes that in some instances the circumstances that justify an application to introduce evidence otherise barred by Rule 412 will not become apparent until trial.

The amended rule provides that before admitting evidence that falls within the prohibition of Rule 412(a), the court must hold a hearing in camera at which the alleged victim and any party must be afforded the right to be present and an opportunity to be heard. All papers connected with the motion and any record of a hearing on the motion must be kept and remain under seal during the course of trial and appellate proceedings unless otherwise ordered. This is to assure that the privacy of the alleged victim is preserved in all cases in which the court rules that proffered evidence is not admissible, and in which the hearing refers to matters that are not received, or are received in another form.

The procedures set forth in subdivision (c) do not apply to discovery of a victim's past sexual conduct or predisposition in civil cases, which will be continued to be governed by Fed. R. Civ. P. 26. In order not to undermine the rationale of Rule 412, however, courts should enter appropriate orders pursuant to Fed. R. Civ. P. 26 (c) to protect the victim against unwarranted inquiries and to ensure confidentiality. Courts should presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery. In an action for sexual harassment, for instance, while some evidence of the alleged victim's sexual behavior and/or predisposition in the workplace may perhaps be relevant, non-work place conduct will usually be irrelevant. Cf. Burns v. McGregor, ___F.2d___ (8th Cir. 1993) (posing for a nude magazine outside work hours is irrelevant to isue of unwelcomeness of sexual advances at work). Confidentialty orders should be presumptively granted as well.

One substantive change made in subdivision (c) is the elimination of the following sentence: "Nothwithstanding subdivision (b) of Rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue." On its face, this language would appear to authorize a trial judge to exclude evidence of past sexual conduct between an alleged victim and an accused or a defendant in a civil case based upon the judge's belief that such past acts did not occur. Such an authorization raises questions of invasion of the right to a jury trial under the Sixth and Seventh Amendments. See 1 S. SALTZBURG & M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL, 396-97 (5th ed. 1990).

The Advisory Committee concluded that the amended rule provided adequate protection for all persons claiming to be the victims of sexual misconduct, and that it was inadvisable to continue to include a provision in the rule that has been confusing and that raises substantial constitutional issues.

Action Item #1: The Subcommittee recommends that the Standing Committee request that the new Advisory Committee on the Rules of Evidence review the Report of the Carnegie Commission on Science, Technology, and Government, Science and Technology in Judicial Decision Making -- Creating Opportunities and Meeting Challenges (March 1993). The Advisory Committee should be asked to report back to the Standing Committee with recommendations for rules or procedures, if deemed appropriate. Additionally, the Advisory Committee might suggest how the Standing Committee, in turn, might respond to the Carnegie Commission Report more generally within the context of the committee structure of the Judicial Conference.

The Carnegie Commission on Science, Technology, and Government was formed in 1988 to address the changes needed in organization and decision-making at all levels of government to

deal effectively with the transforming effects of science and technology. The next year the Commission formed a Task Force on Judicial and Regulatory Decision Making. The Task Force participated in the work of the Federal Courts Study Committee and its follow-on efforts culminated in the March Report. For general information on these long-term issues, a copy of the Executive Summary of the Report is attached as Appendix A.

One of the principal findings of the Carnegie Commission Report is "[a] judge has adequate authority under the present Federal Rules of Civil Procedure and of Evidence to manage [science and technology] issues effectively. . . ." p. 36. While this is the most relevant finding related to our task of federal rulemaking, the Subcommittee believes it is appropriate for the Standing Committee to undertake some comprehensive evaluation of the Carnegie Commission Report. The Report has a great deal to say about how the federal courts ought to approach issues of science and technology and the Standing Committee is the entity within the Third Branch that has the chief responsibility for proposing national practices and procedures. The Subcommittee also believes that the Advisory Committee on the Rules of Evidence is the appropriate forum for the initial review of the Carnegie Commission Report as well as any available background papers. Of course, consultation with the other Advisory Committees is appropriate and should be expected prior to the presentation of any proposal for consideration by the Standing Committee.

SUPPLEMENT B

SCIENCE AND TECHNOLOGY IN JUDICIAL DECISION MAKING

CREATING OPPORTUNITIES AND MEETING CHALLENGES

MARCH 1993

A Report of the

CARNEGIE COMMISSION ON SCIENCE, TECHNOLOGY, AND GOVERNMENT

EXECUTIVE SUMMARY

BACKGROUND, FINDINGS, AND RECOMMENDATIONS

The courts' ability to handle complex science-rich cases has recently been called into question, with widespread allegations that the judicial system is increasingly unable to manage and adjudicate science and technology (S&T) issues. Critics have objected that judges cannot make appropriate decisions because they lack technical training, that jurors do not comprehend the complexity of the evidence they are supposed to analyze, and that the expert witnesses on whom the system relies are mercenaries whose biased testimony frequently produces erroneous and inconsistent determinations. If these claims go unanswered, or are not dealt with, confidence in the judiciary will be undermined as the public becomes convinced that the courts as now constituted are incapable of correctly resolving some of the most pressing legal issues of our day. There may be calls to replace the current system with new institutions and procedures that appear to be more suited to the demands of science and technology.

From the beginning of its work, therefore, the Task Force recognized

the importance of obtaining as much information as possible about the handling of S&T issues by our courts. Its focus was primarily on the federal judiciary because of the advantages of studying and interacting with one system rather than fifty, and because many of the most pressing problems raised by science-rich cases are readily apparent in the federal courts, which have often been the forums of choice for toxic tort litigation involving such substances as Agent Orange, asbestos, the Dalkon Shield, and Bendectin. The Task Force has, however, also discussed these issues with state judicial systems through such organizations as the State Justice Institute and the National Center for State Courts.

We hope that the activities of the Task Force will counter the current uneasiness about judicial decision making with regard to scientific and technological issues. Our investigations have shown that, although there are problems with the handling of complex S&T issues, these difficulties are manageable within the present adversarial process. Indeed, many of the criticisms directed at the operation of our court system arise -- quite understandably -- from misperceptions about the differing methodologies and goals of science and law, and from the consequent failure to comprehend the diverse roles and expertise of "judge," "juror," and "scientist."

SCIENTIFIC "FACTS" AND THE JUDICIAL SYSTEM

Scientists view their work as a body of working assumptions, of contingent and sometimes competing claims. Even when core insights are validated over time, the details of these hypotheses are subject to revision and refinement as a result of open criticism within the scientific communities. Scientists regard this gradual evolution of their theories through empirical testing as the pathway to "truth." In the legal system, however, all of the players are forced to make decisions at a particular moment in time, while this scientific process is going on. Given the indeterminacy of science, how can the judicial system make the best use of a scientific "fact"? This question is at the core of the Task Force's efforts.

RECENT DEVELOPMENTS

Recent developments in both law and science have conspired to bring increasingly complex scientific issues before the courts for resolution. In particular, the dramatic growth in toxic torts and environmental litigation has put new pressure on the legal system, which is simultaneously being asked

to adjudicate issues on the cutting edge of science and to develop theories of substantive law. This pressure is intense because of the large numbers of people that are involved and the profound social, economic, and public policy concerns that these new legal claims raise. The research of scientists working at the frontiers of human knowledge has become relevant in routine criminal cases; DNA testing, for example, has brought sophisticated science into the courtroom.

The growing prominence of science in the courtroom has exacerbated criticism of the courts' management and adjudication of S&T issues. Some allege that "junk science" is flooding the courtroom through the testimony of "experts," whose primary qualification is their willingness to testify in support of their client's position. As a result of these and similar concerns, there have been calls to remove certain categories of cases from the judicial system altogether. While some commentators believe that current legal procedures must be overhauled to deal with these abuses, others go even further in suggesting that the courts, dependent as they are on lay judges and juries, are incapable of properly resolving issues that turn on abstruse principles of epidemiology, toxicology, or statistics. Still others claim that the volume of litigation, as for instance in the cases arising from the use of asbestos, threatens the traditional model of individualized decision making. Given our judicial resources, it may be impossible to treat each case separately.

Our examination of the cases leads to the conclusion that, although such dissatisfaction does exist, many of the concerns expressed are greatly exaggerated. On the basis of reported decisions, it does not appear that the federal courts are being inundated with fringe science. Reported cases, of course, represent only the tip of the iceberg. The vast majority of cases terminate without opinion and without a trial, and there are few data available on how problems in handling S&T issues might have had an impact on settlements or discontinued suits. Misperceptions may become reality if settlements are driven by concerns about the courts' ability to reach consistent results. The Task Force's work to date and its recommendations, which seek to improve the system's ability to handle scientific evidence, should lead to better adjudications.

IMPROVING THE SYSTEM: NEW PROCEDURAL AND EVIDENTIARY MECHANISMS, EDUCATION, AND INSTITUTIONAL SUPPORT

Science is entering the courtroom more and more every day, and we believe that the courts' ability to handle S&T issues can be improved. Many of the tools to assist the judiciary already exist — it remains to encourage and assist

judges to use them. Greater understanding of process, both the process of science and the process of managing complex evidence, is key to this endeavor. Accordingly, judicial education and the creation and dissemination of an S&T reference manual for judges are the twin pillars of our process recommendations.

The lack of institutional support for the judiciary must also be addressed when assessing ways to improve the courts' ability to resolve S&T issues. Unique among the branches of government, the judiciary has no ready recourse to outside assistance in its attempts to understand issues of science and technology. The Task Force believes that this situation can be ameliorated by creating more extensive and formal institutional ties between the S&T and judicial communities. These institutional recommendations, designed with the needs of the adversarial system in mind, should encourage increased dialogue between judges and scientists, to help scientists gain an understanding of the legal system and to assist judges in their understanding of the objectives and process of science.

THE FEDERAL JUDICIARY—OPPORTUNITY FOR INNOVATION

This is a particularly opportune moment to undertake an examination of judicial decision making on S&T matters in the federal judiciary and to suggest improvements. A sizable group of judges will undoubtedly be taking office within the year, so it is important to have S&T educational materials ready for incorporation into the initial judicial educational materials those new appointees will receive.

At the same time, new kinds of S&T cases are entering the courts in large numbers before science has adequately explored the issues involved. Recent developments, such as the FDA review of silicone implants, the allegations about repetitive stress injury, and the concern that cellular phones may cause brain tumors underscore the potential for the sudden emergence of new categories of mass tort cases. And any new mass tort boom is likely to fuel further public discontent with the judiciary's role in adjudicating S&T matters. Wisdom counsels action now.

MAJOR FINDINGS OF THE TASK FORCE

The Task Force's efforts to study the courts, which are discussed in more detail below, have yielded some new insights into the judicial system's treatment of S&T issues. In the course of its investigation, the Task Force considered the data that are currently available, reviewed the literature of legal commentators, held discussions with members of the legal and scientific communities, and commissioned new studies. In order to appreciate the rationale for the recommendations which follow, it is useful to review the Task Force's major findings:

LITIGATION PROCESS

- Although disparities abound in the way judges handle S&T issues, there is much less divergence in the actual results of cases. There is no one correct way of handling S&T evidence.
- Federal judges have adequate authority under the present Federal Rules of Civil Procedure and of Evidence to manage S&T issues effectively, and the rules of many state judicial systems are modeled on the federal rules.
- Increased attention to S&T issues at the pretrial stage makes cases more amenable to disposition by summary judgment, facilitates settlement, and leads to more focused, speedier trials.
- Expert testimony can be made more comprehensible to jurors
- Judges and jurors may need information or assistance in handling S&T information that the parties cannot furnish because of insufficient expertise, mismatched resources, or excessive partisanship.
- Trial courts need guidance from appellate courts on the legal standards that control S&T issues.

JUDICIAL EDUCATION

- Because judges have little time available for judicial education, the challenge in designing an educational program is to produce materials on complex S&T issues to which a judge can turn when handling an analogous problem in an upcoming case. Thus, the ease with which judges can gain access to educational materials is as important as the quality of the materials.
- Appellate and trial judges and state and federal judges have differing educational needs that require different educational methods.

SUPPLEMENT C

Action Item #2: The Subcommittee recommends that the Standing Committee request that the Advisory Committee on the Rules of Evidence coordinate a joint effort among the various Advisory Committees to study Judge Keeton's concept of "Rules of Trial Management."

In his memorandum of September 1, 1992, Judge Keeton wrote Judge Pratt (Subcommittee on Numerical and Substantive Integration) and Professor Baker (Subcommittee on Long Range Planning) to suggest the idea of formulating "rules of proof" that would incorporate "rules of evidence" but would go beyond them to include other aspects of trial management. His suggestion was tied to the ABA Standards for Trial Management adopted in February 1992, although Judge Keeton has been an advocate of the approach at least as long as he has been the Chair of the Standing Committee. A copy of his memorandum is attached as Appendix B.

The Subcommittee suggests that the new Advisory Committee on the Rules of Evidence be asked to coordinate a joint effort with the Advisory Committee on the Civil Rules and the Advisory Committee on the Criminal Rules to study this idea and, if it is determined to have merit, to bring forward appropriate recommendations. This is a recommendation for study. The Subcommittee does not endorse or reject the concept of "megarules." The Subcommittee is persuaded, however, that one of the Advisory Committees ought to be designated to take the lead so that the proposal is not left to languish in rules limbo.

■ Science education programs, like all judicial education programs, are most effective if they are interactive, utilizing conversation, dialogue, and debate. Producing good-quality judicial S&T education programs requires the collaboration of lawyers who understand science and scientists who understand the needs of the courts.

■ The financial resources of the state and federal judiciaries are severely limited. While private foundations have funded the development of innovative education programs, they tend to withdraw support once the pilot program is completed. Funding for continuation even of those programs that have proven to be effective is rarely available.

RECOMMENDATIONS

■ **Judges should take an active role in managing the presentation of science and technology issues in litigation whenever appropriate.**

Many tools are available to state and federal judges to manage the presentation of S&T issues in litigation. The judicial reference manual and protocols, which are being developed by the Task Force in collaboration with the Federal Judicial Center, are two key elements of the effort to facilitate greater use of these tools.

The reference manual outlines the wide range of techniques that judges have used to manage S&T issues in litigation. It focuses on process and on the encouragement of judicial control. The manual presents judges with a range of options available to resolve a given issue and refers judges to S&T cases where those options have been used; it does not suggest substantive outcomes on contested science and technology issues.

Using the protocols, which are being developed jointly with members of the S&T community, will enable judges to identify and employ techniques that will permit quicker and more effective rulings on challenges to expert testimony, whether those challenges are based on the qualifications of experts, the validity of the theory on which the expert is relying, the reliability of the data underlying the theory, or the sufficiency of the expert's opinion to sustain a verdict.

In order to ensure that these tools continue to be useful, they must be updated systematically to reflect the most current scientific and legal developments. They will be even more valuable if references to state law are incorporated.

■ **Scientific and technical issues should be integrated into traditional judicial education programs, "modules" should be developed that can be appended to existing programs, and intensive programs should be supported.**

Judicial education programs play an important role in introducing judges to scientific methodology, which is an essential element in reducing misunderstandings about S&T evidence and in increasing judicial willingness to take an active role in managing that evidence. Because of the severe time constraints faced by judges, education about scientific methodology should be integrated into traditional judicial education programs. Existing judicial education programs should be expanded to include S&T "modules." For instance, a videotape could be produced that illustrates DNA analysis. Existing programs devoted exclusively to S&T issues should be identified, and others should be developed. These programs offer the greatest opportunity to give judges extensive, hands-on experience in dealing with the difficult S&T issues they may encounter in court.

■ **Institutional linkages between the judicial and scientific communities should be developed.**

Sustained improvement of judicial decision making on matters of science and technology requires the establishment of institutional ties to encourage greater dialogue and cooperation between the judicial and scientific communities

■ The federal and state judiciaries should create S&T resource centers to provide judges with access to the collective experience of their colleagues in case management techniques for S&T issues and to educate judges on scientific methodology. Each resource center would also act as a clearinghouse for substantive scientific information compiled by the scientific community, monitor the impact of S&T issues on the courts, and serve as a bridge for cooperation with the scientific community. Each resource center should provide empirical data on the impact of S&T issues in various types of cases and use the results of that research to assist in long-range planning for the treatment of S&T issues in the judiciary.

■ The scientific community should create a resource center as a counterpart to the proposed judicial S&T resource centers in order to facilitate cooperation among the professional societies and to explore the benefits of continued interaction between the judicial and scientific communities.

■ A judicial S&T education clearinghouse should be established to collect and distribute curricula and other materials on science education

for judges. An advisory committee of leading experts from various scientific disciplines, judicial educators, and representatives of the judiciary should be established to consider what judges need to know about science. It should also collaborate with academic communities in the fields of law and science to improve S&T programs and materials. The judicial S&T education clearinghouse should "package" high-quality science education programs for easy use and access.

- An independent nongovernmental Science and Justice Council of lawyers, scientists, and others outside the judiciary should be established to monitor changes that may have an impact on the ability of the courts to manage and adjudicate S&T issues; it should also initiate improvements in the courts' access to and understanding of S&T information, including judicial education and communication between the judicial and scientific communities.

A continuing examination of the interaction between science and the courts is essential to efforts to improve judicial decision making concerning S&T issues. An interdisciplinary "Science and Justice Council" similar in mission to the Task Force should be created to continue the initiatives that the Task Force has begun.

Located outside existing institutions, the Council would be able to offer more strategic and long-range criticism and suggestions than existing groups with defined roles. The Science and Justice Council should also monitor changes in law, in science, and in society generally that may have an impact on the ability of courts to handle S&T issues.

Some judges are frustrated by their inability to obtain timely, nonadversarial explanations of the scientific and technical matters at issue in a case. Unlike the judiciary, when faced with unclear S&T information, Congress can consult the Office of Technology Assessment, and the Executive can consult the Office of Science and Technology Policy. The Council should undertake further study on the host of issues raised by the Task Force's proposal to create an institutional support mechanism for the judiciary, the form that such an advisory institution should take, sources of compensation for those providing assessments to the court, and permissible use of the information generated for the court.

Other areas that the Council might explore include data collection and alternatives to judicial resolution. Long-range efforts to improve the quality of judicial decision making with regard to S&T issues are hampered by the lack of adequate data about the incidence and management of scientific issues in the courts. Information is also necessary for appropriate allocation of judicial resources. In addition, little empirical information is currently available about the costs of handling S&T issues. And further study of how the judicial system copes with S&T issues and a comparison with

administrative schemes such as the National Childhood Vaccine Injury Act would provide valuable information about the desirability and feasibility of pursuing the use of alternative forums.

We live in an ever-changing world to which a dynamic judicial system must be responsive. Unless reliable data are obtained so that changes can be anticipated, monitored, and evaluated, the ability of the courts to handle complex scientific and technological issues is compromised. The kinds of cases in which S&T issues occur are often those of the utmost social significance, and the decisions in them have major consequences for many people's lives. The way in which our society in general and the judiciary in particular will respond to the S&T issues of the future is of concern to many different constituencies whose views can best be heard, evaluated, and integrated at meetings of a broad-based heterogeneous group that is free of formal political ties. The Task Force believes, therefore, that it is important that an independent group, like the proposed Science and Justice Council, be created to monitor and develop further the recommendations outlined in this report.

CONCLUSION—A NOTE OF OPTIMISM

Unlike some recent critics, we end our survey of science in the courts on a note of optimism. The Task Force found that numerous innovative, highly motivated, and highly skilled judges and lawyers are working hard to improve judicial decision making with regard to S&T issues. That many problems remain is hardly remarkable, considering the magnitude of the legal and scientific issues that are presented to American courts for resolution. While the difficulty and novelty of the questions these cases pose preclude an instantaneous magical cure, we observe that the legal system is actively pursuing solutions.

Nevertheless, the Task Force believes that the handling of S&T evidence would be improved if more data were available on how the system works, if information about successful innovations were more widely disseminated, if judges were given more educational and institutional support, and if scientists, judges, and lawyers had greater opportunities to communicate with each other. At the moment, the parallel paths of scientists and lawyers usually obey the rules of Euclidian geometry—they do not intersect—even though both disciplines not infrequently ponder the same subjects. And when their paths do cross, the result is often misunderstanding, rather than constructive communication. At the very least, we hope that the Task Force's work will provide a starting point for a more fruitful interaction between the worlds of science and the law.

SUPPLEMENT C

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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WILLIAM TERRELL HODGES
CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

MEMORANDUM

TO: Judge Pratt
Professor Baker

DATE: September 1, 1992

SUBJECT: Providing a Place in a Unified Numbering System for Rules of Trial Management

Attached is a copy of an article by Susan Abbott-Schwartz, Associate Editor of Litigation (A Publication of the ABA Section of Litigation), "ABA Adopts Nine Standards for Trial Management," published in Vol. 17, No. 5, June 1992, p. 11.

Also attached is a copy of "ABA Trial Management Standards," which I obtained from ABA headquarters in Chicago.

As you will recall, I have been interested in the possibility of formulating "rules of proof" that incorporate "rules of evidence" but go beyond them to include other matters trial judges control in practices that are less formal and probably less consistent than rulings on objections to evidence. There is a considerable overlap between the subject matter of "rules of proof" as I have been thinking of them and the ABA "Trial Management Standards."

Might your respective subcommittees consider whether we should be thinking about (1) reserving a place in any unified numbering system for Rules of Trial Management (broadly conceived to include rules of proof, rules about time management, and other things included in the ABA "standards," as well as rules of evidence), and (2) whether and when one or more Advisory Committee(s) should be asked to undertake drafting or a study of part or all of this subject matter?

Will Bryan Garner insist that we call them "Trial Management Rules" to get rid of another prepositional phrase?

Enclosure

Robert E Keeton

cc: Members and Staff of the Standing Committee

ABA Adopts Nine Standards for Trial Management

by Susan Abbott Schwartz
Associate Editor

New Trial Management Standards, supported by the Section of Litigation, focus on the fair and efficient administration of justice in the trial court.

The standards recognize "that trial time is the court's most valuable and scarce resource," says Judge Robert M. Summitt, Chattanooga, TN, Chair of the ABA National Conference of State Trial Judges, which proposed them.

The ABA's adoption of the Trial Management Standards effectively acknowledges that a vast number of lawyers are in favor of more active judicial participation in the trial process. "For a long time, the judges have felt the need to bring time management and control into the courtroom. The passing of these standards shows that the lawyers want it as well," says Summitt.

"I am heartened by the passing of these standards," said Judah Best, Washington, DC, former Section Chair and one of the Section's delegates to the House of Delegates. "They will result in a heightened awareness that the ABA and the Litigation Section encourage our trial judges continuously to seek ways to fulfill their responsibility for the efficient administration of justice in this country."

The nine standards are:

1. *The trial judge has the responsibility to manage the trial proceedings. The judge shall be prepared to preside and take appropriate action to ensure that all parties are prepared to proceed, the trial commences as scheduled, all parties have a fair opportunity to present evidence, and the trial proceeds to conclusion without unnecessary interruption.*

This standard encourages the judge to be a trial manager. It acknowledges the judge's wide exercise of discretion, but encourages direct communication in advance of trial regarding the court's expectations and procedures.

2. *The trial judge and trial counsel should participate in a trial management conference before trial.*

Perhaps the most innovative feature of these standards is the trial management conference. Its purpose is not to settle the case, but to prepare the counsel for trial and the judge to preside. It is suggested the court hold this conference 10 to 20 days before trial to resolve all issues relating directly to the trial itself.

3. *After consultation with counsel, the judge shall set reasonable time limits.*

4. *The trial judge shall arrange the court's docket to start trial as scheduled and provide parties the number of hours set each day for the trial.*

Interestingly, studies have shown there is a discrepancy between the time the court believes it devotes to trial and the hours actually spent. This standard encourages the judge to determine exactly what time he or she will devote to trial alone and to manage his or her court so that the judge may delegate or otherwise manage the caseload.

5. *The judge shall ensure that once trial has begun, momentum is maintained.*

This standard encourages the court to develop protocol and rules to govern the efficient use of time during trial, including such matters as keeping witnesses on call and limiting interruptions in examination.

6. *The judge shall control voir dire.*

This standard does not endorse or reject the common federal system practice where the judge "does it all." Rather, the concept is to manage voir dire effectively and fairly. A divided voir dire approach is gaining popularity in which the judge conducts "standard" questioning and allows counsel to question on issue-oriented matters or for a specific time period. It is believed that some judicial control over the voir dire process results in more focused juror questioning.

7. *The judge's ultimate responsibility to ensure a fair trial shall govern any decision to intervene.*

Arguably, this standard is capable of being misunderstood. It is given that lawyers have discretion in presenting evidence and argument to a jury. However, the trial judge does have a responsibility to ensure a fair trial and the judge should not hesitate to intervene during counsel's presentation when necessary to meet that goal. This standard encourages the court not to act as a referee who sits back and waits until a party requests a ruling, but to participate actively in the trial if, in his or her judgment, it is necessary to promote

8. *Judges shall maintain appropriate decorum and formality of trial proceedings.*

This standard notes the importance of formality and decorum in maintaining the court's ability to exercise authority to control the conduct of spectators, witnesses, parties or counsel.

9. *Judges should be receptive to using technology in managing the trial and the presentation of evidence.*

For additional information about the Trial Management Standards contact Stephen Goldspiel, Staff Director for the National Conference of State Trial Judges, ABA, 750 N. Lake Shore Dr.,

ABA
Trial Management Standards

American Bar Association
Judicial Administration Division

The Court Delay Reduction and Discovery Reform Committee of the National Conference of State Trial Judges

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Produced by the ABA/JAD
National Conference of State Trial Judges

Trial Management Standards

Recommended by
National Conference Of State Trial Judges
American Bar Association
Judicial Administration Division

February, 1992

__ Approved by the House of Delegates of the American Bar Assn.

Introduction

This proposal complements the ABA *Court Delay Reduction Standards* which focus on court management of the pretrial phase. It recognizes that trial time is the court's most valuable and scarce resource, and is premised on the belief that an effective and efficient presentation of admissible evidence and applicable law is the responsibility of both bench and bar.

These proposed *Trial Management Standards* address presenting an "effective" trial without diminishing the fairness or the perceived fairness of the trial. One of the major features or basic premises of this proposal is the concept of a "Trial Management Conference" which is designed to prepare both a judge and attorney to participate in the trial.

These recommendations have been distilled from numerous sources as further discussed in the following preface, but mainly are the reflection of what trial judges have put into practice in courts across the country.

Respectfully submitted,

Phillip R. Roth
Chair 1990-91
National Conference of
State Trial Judges

Preface / Acknowledgement

Chairman Roth has distinctly stated the purpose and importance of these proposed standards. It is difficult to give credit or recognize the many persons who have contributed to this work. For example, the word "effective" was chosen carefully to describe the type of trial that was deemed appropriate by a group of lawyers, judges and educators who developed a course under a grant from the State Justice Institute. Effective connotes quality rather than an approach emphasizing efficiency for the purpose of speeding up the trial process. The title of that course is "*Managing Trials Effectively*" and has been presented both at the National Judicial College and in numerous states by the Institute for Court Management/National Judicial College with proven success. While the materials developed for that course are reflected in the standards, the response and input of judges who participated in those programs have had an equal impact on this work.

The motivation for this project and the other publications and studies in the area of trial management was the work of the National Center for State Courts as reflected in its publication: *On Trial: The Length of Civil and Criminal Trials*. This research for the first time examined what actually was occurring in trial courts and concluded that: "trial length can be shortened without sacrificing fairness by increasing continuity in trial days and by judicial management of each phase of the trial". These standards not only cite the conclusion or opinions of *On Trial* and its principal author Dale Sipes, but draw upon the wisdom of Monterrey, California Superior Court Judge Richard Silver, Dean V. Robert Payant of the National Judicial College, Professor Ernest C. Friesen and Barry Mahoney/Linda Ridge of the National Center for State Courts/Institute for Court Management.

Another resource was the work of the ABA Lawyers Conference Modernizing Trial Techniques Committee which is summarized in an article by Harry J. Zeliff: "Hurry Up and Wait: A Nuts and Bolts Approach to Avoiding Wasted Time in Trial", published in the summer of 1989, *The Trial*. Also the Fall 1990 issue of *The Judges' Journal* discusses trial management from varying viewpoints and explains the importance of judicial management.

As you read the standards, you will note the importance of the judge and attorneys who actually try the case participating in a Trial Management Conference. While numerous persons have contributed ideas to this concept, credit must be given to Professor Ernest C. Friesen, who has published numerous articles addressing the importance of pretrial preparation by both the judge and the lawyer.

The timeliness and the need to adopt these standards is appropriately described by the following excerpt from the conclusion of *On Trial*:

> The time has arrived for judicial management of all phases of trial. Judicial control is the single factor that distinguishes courts in which similar cases are tried more expeditiously than elsewhere. Attorneys desire, and may in the foreseeable future demand more judicial control of the trial process. The following statement is in our judgment a fair reflection of current citizen expectation:
>
> Nobody wants summary justice. That, however, need not be the alternative. The alternative should be reasonable dispatch, without dilatory tactics and self-indulgence by lawyers, and with judges who are able—and want to—keep things moving. Why is that too much to ask for? It ought to be taken for granted.

Our endorsement of trial management by judges rests first upon the demonstrated effectiveness of judicial management in expediting case processing at both the pretrial and trial states and the fact that all steps in the trial process are amenable to some judicial control. The conclusion is further supported by the favorable effect upon time consumed in trial which courts protect trial continuity; define areas of dispute in advance of the trial; conduct the examination of prospective jurors; set reasonable time limits; and prohibit evidence that is repetitive, cumulative, unnecessary, or needlessly lengthy. And greater judicial control does not appear in fact or perception to impair the fairness of trials.

William F. Dressel

Chair Court Delay Reduction Committee
National Conference State Trial Judges

Trial Management Standards

1. Judicial trial management – general principle: the trial judge has the responsibility to manage the trial proceedings. The judge shall be prepared to preside and take appropriate action to ensure that all parties are prepared to proceed, the trial commences as scheduled, all parties have a fair opportunity to present evidence, and the trial proceeds to conclusion without unnecessary interruption.

Commentary: Trial time on a court's docket is its most valuable and scarce resource. It is the *joint* responsibility of bench and bar to use that time wisely and effectively! The objective of "managing" a trial is to effectively and efficiently present to the trier of fact the admissible evidence and applicable law relevant to the issues to be decided. The goal is not simply to reduce the number of trial hours or make a trial move faster, although very often trials do conclude in fewer hours when managed.

A trial is the ultimate event in our system of justice, and certainly is one of the most visible and expensive for all concerned. It is thus important that trial proceedings be conducted without unnecessary delay or disruption and kept focused on the legitimate purpose of the trial. While a trial may be sought for political, economic or unrelated personal reasons, the trial should be maintained as the opportunity for litigants to present evidence upon which the trier of fact decides specific issues. The trial judge is the individual in the best position to see that this occurs. Counsel's role is that of advocate and, while counsel are officers of the court, they do act in an adversary role and often have other objectives or priorities. The time when the judge acted the role of a referee who sat back and waited until someone asked for a ruling is past. The judge is responsible for determining not only the appropriateness but the extent of the evidence presented to the trier of fact. Judges not only have the authority and the responsibility to manage individual trials, but the responsibility to those who desire access to the court to have an opportunity to present their case. Also, the availability of trial time is often a variable that moves a case toward resolution.

The 7th Circuit Court of Appeals in *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081 (certiorari denied by the U.S. Supreme Court) in 1983 on the subject of the trial judge's ability to impose limits on evidence presented for time allowed stated:

> Litigants are not entitled to burden a court with an unending stream of cumulative evidence.... As Wigmore remarked, "it has never been supposed that a party has an absolute right to force upon an unwilling tribunal an unending and superfluous mass of testimony limited only by his own judgment and whim.... The rule should merely declare the trial court empowered to enforce a limit when in its discretion the situation justifies this." Accordingly, Federal Rule of Evidence 403 provides that evidence, although relevant, may be excluded when its probative value is outweighed by such factors as its cumulative nature, or the "undue delay" and "waste of time" it may cause. Whether the evidence will be excluded is a matter within the district court's sound discretion and will not be reversed absent a clear showing of abuse.... The circumstances of each individual case must be weighed by the trial judge, who is in the best position to determine how long it may reasonably take to try the case. (p.1171)

The trial judge, in performing the responsibility of a trial manager, is not only responding to the public's expectations, but to the litigants'. There is no rule or formula that applies to all trials. The judge must exercise discretion addressing the

specific needs or issues of each case which requires consultation with counsel. The judge must know the factual basis of the case, understand the issues to be determined, and be prepared to apply the law. However, while each case may be different, all cases require management in some respects, and certain concepts can be appropriately modified and applied to each case, as discussed herein. It is also important that the judge communicate in advance of trial his or her expectations regarding trial procedures to counsel and consider counsel's expectations and needs in determining how best to manage the trial.

There is no doubt that it is the judge's responsibility to see that all parties receive a "fair" trial. The following excerpts from *On Trial* address *fairness:*

> The major conclusion is that trial length can be shortened without sacrificing fairness by increasing continuity in trial days and by judicial management of each phase of the trial.
>
> Assessing whether fairness suffers on the way to expedite trials is complicated by the fact that fairness in this context is in the eye of the beholder. Unlike the overall pace of litigation, there are no national norms of reasonable time for trial duration.

In this study, we learn that the great majority of judges and attorneys perceive neither lack of fairness nor injustice in those courts where trials are conducted more rapidly than elsewhere. . . The time has arrived for judicial management of all phases of trial. Judicial control is the single factor that distinguishes courts in which similar cases are tried more expeditiously than elsewhere. Attorneys desire, and may in the foreseeable future demand, more judicial control of the trial process. The following statement is in our judgment a fair reflection of current citizen expectation:

> Nobody wants summary justice. That, however, need not be the alternative. The alternative should be reasonable dispatch, without dilatory tactics and self-indulgence by lawyers, and with judges who are able—and want to—keep things moving. Why is that too much to ask for? It ought to be taken for granted. (Edwin Newman "The Law's Delay," San Francisco Chronicle, June 3, 1987).

Our endorsement of trial management by judges rests first upon the demonstrated effectiveness of judicial management in expediting case processing at both the pretrial and trial stages and the fact that all steps in the trial process are amenable to some judicial control. The conclusion is further supported by the favorable effect upon time consumed in trial when courts protect trial continuity; define areas of dispute in advance of the trial; conduct the examination of prospective jurors, set reasonable time limits; and prohibit evidence that is repetitive, cumulative, unnecessary, or needlessly lengthy. And greater judicial control does not appear in fact or perception to impair the fairness of trials.

2. The trial judge and trial counsel should participate in a trial management conference before trial.

Commentary: There is no one agreed upon and preferred method for insuring that a case is ready to be tried. A simple case with two experienced counsel may require nothing more than the setting of a trial date. A more complex case will require a series of conferences or hearings addressing a variety of legal or factual issues as well as lengthy formal conferences. In between these two examples are the bulk of cases whose trial readiness can be addressed through what can best be called a "trial management conference". It is the purpose of the trial management conference to insure that counsel are prepared, but the conference also allows the trial judge to prepare to preside.

Optimally, the trial management conference should be held 10 - 20 days before trial commences. Counsel should have prepared their case for trial by this time, and this conference gives counsel additional incentive to prepare for trial. Given this lead time if problems do arise, court and counsel have the time to fashion appropriate remedies or take steps at the conference to resolve conflicts. It is understood that some judges and lawyers believe there is no need for such a conference in a simple case, which may be true. However, in those cases which are indeed totally prepared for trial, the conference will only take a few minutes and is an opportunity for both the court and counsel to review trial procedures and assure trial readiness.

The order setting a trial management conference shall require counsel to confer before the conference to review the matters that will be

covered and accomplish certain tasks. This reduces the time needed for a conference and allows court and counsel to confirm those subjects not in controversy and address matters requiring the court's attention.

Some have voiced concern that such a conference is not feasible for a master docket, a judge that "rides a circuit" holding trials in various locations, or a court that sets a large number of cases for trial and chooses a "trial date" on the day of trial.

Courts utilizing "master dockets" have adopted procedures for assigning cases to the trial judge in advance of the scheduled trial date, so that a trial management conference can be scheduled and held. Some master docket courts have adopted systems whereby a number of cases are assigned to a particular judge a month ahead of the anticipated trial date to accommodate case and trial management. In those courts that set a number of cases for trial on a particular day, pretrial procedures can help determine which case will go to trial. Often it is a "review" or the setting of a trial management conference that resolves the case. If a "trial case" must be chosen the morning of trial, it is recommended that the trial be scheduled to start later in the morning so that the trial management conference may be held. Circuit riding judges can hold the conference in a convenient location, at a time close to the trial, or (while not preferred) by telephone conference with counsel at the courthouse.

Each jurisdiction has its own form of a document litigants must file to disclose issues, witnesses, exhibits, etc., (pretrial statements, trial readiness certificates or trial disclosure statements), and those documents often set the framework for this conference. It is critical to emphasize that the trial management conference is not a "settlement conference." It is a conference devoted to trial issues. While any opportunity to achieve or encourage a settlement should not be ignored, counsel must understand that negotiation should be consummated before the conference.

"Hurry Up and Wait; a Nuts and Bolts Approach to Avoiding Wasted Time in Trial" by Harry Zeliff published in the Summer, 1989 *The Judges' Journal*, discusses the concept of a trial conference and the subjects to be covered. The following are examples of important matters:

- (1) EXHIBITS: confirm that they have been appropriately marked, each counsel has reviewed, stipulations as to authenticity and admissibility obtained; verify that the exhibits are appropriately organized to be presented at trial; and discuss how they will be used and presented to the jury during trial;
- (2) WITNESSES: review the scheduling of witnesses to insure that there will not be a break in the presentation of testimony; address any legal problems or conflicts with the potential witnesses; review the nature of the testimony to avoid duplication or determine what can be presented by stipulation, offer of proof, etc.;
- (3) ISSUES: determine what issues of law or fact are really in dispute and those which are not a part of the litigation;
- (4) TIME LIMITS: review time needed for each segment of the trial and set such time limits as appropriate after consultation with counsel to allow preparation within limits set;
- (5) PENDING MOTIONS: review all pending motions and make formal rulings as appropriate or defer until trial those which require evidence, etc.;
- (6) JURY INSTRUCTIONS AND VERDICT: review to determine which instructions the parties agree are appropriate; rule on any objection to those which deal with matters of law; and clarify the parties' position on those instructions which will have to be ruled upon after evidence has been received. Judges who have followed this procedure indicate that most of the instructions can be settled at this conference, leaving the trial judge free to concentrate on those which pose questions of fact or law. The same is true for the form of the verdict, leaving only the determination of whether to include or exclude a few issues;
- (7) SPECIAL TRIAL NEEDS: this is the time to determine whether or not an interpreter is needed, how to utilize technology and who will supply the necessary equipment, whether written or video depositions are appropriately edited, whether offers of proof or stipulations to be submitted have been reduced to writing, and determine any issues that need to be addressed in an en camera hearing or special proceeding that need to take place during trial, including how and when such hearings will be held;
- (8) VOIR DIRE: the procedure to be followed during voir dire can be reviewed, along with questions the court will ask and any special

areas that counsel wish to review so court can determine the appropriateness of such questions, etc.; and

- (9) MISCELLANEOUS: while this is not a settlement conference, it is an opportunity to determine the status of settlement negotiations, insuring that all appropriate methods or approaches to resolution have been pursued, and determine whether or not the parties still wish to proceed to a jury trial and obtain a waiver of jury if appropriate, and to verify that the number of hours set for the trial are sufficient.

This conference is the opportunity for the trial judge to discuss with counsel how the judge conducts the trial, particular procedures and expectations regarding counsel's conduct as well as any concerns of counsel regarding potential trial problems. The length of the conference depends on the particular case and the various areas that need to be addressed. Those judges who are fortunate enough to have "law clerks" or other qualified staff can delegate to him or her certain portions of the trial conference (marking of exhibits, review of courtroom and procedures, use of technology in the courtroom, etc.).

A trial management conference is not only for a jury trial. In a trial to the court, in addition to the benefits discussed above, the trial management conference allows the judge to identify the issues to be covered in the court's opinion. Some judges require counsel to submit "verdict forms" or "proposed findings of fact and law" at the conference. This prepares the judge to rule from the bench at the conclusion of the trial in some cases or provides the groundwork for issuing a timely written opinion.

Lastly, it may be helpful to have the judge's "protocol" or statement of trial procedures reduced to writing and provided to counsel before the trial management conference, as this can shorten the conference and give counsel an opportunity to seek clarification.

3. After consultation with counsel the judge shall set reasonable time limits.

Commentary: The purpose of time limits is to set expectations and determine the appropriate time needed for various segments of trial. Time limits allow the court to plan the trial date and allow counsel to plan their presentations. While time limits are often interpreted negatively as a limit on counsel rights, one could substitute "expectations" for "limits" and perhaps avoid the concern. However, trial time is scarce, and time limits are useful in determining how that time is allocated. Further, the judicial system operate on the concept of "time limits". Statutes of limitations define the time period in which a type of action can be brought. Rules of procedure set forth times in which lawyers must file certain documents, and setting the trial involves a time limit as the case is placed on a calendar for a certain number of days.

Many courts already informally impose such limitations by discussing their expectations with counsel or by subtle references to how long it usually takes for a certain presentation and obtaining counsel's agreement.

The *On Trial* research found support for imposing limits on the time allowed for various segments of trial as long as they were based upon the particular case, made in advance of trial to allow for preparation, and sufficiently flexible to allow for exceptional circumstances.

There are a number of appellant decisions analyzing the use of time limits in which the following general statements are made:

- TRIAL LENGTH: The circumstances of each individual case must be weighed by the trial judge, who is in the best position to determine how long it may reasonably take to try the case.... The time limits should be sufficiently flexible to accommodate adjustment if it appears during the trial that the court's initial assessment was too restrictive.
- VOIR DIRE: The trial court may impose reasonable restrictions on the exercise of voir dire examination.... The trial court has broad discretion to determine the scope of voir dire. The trial court should not unreasonably and arbitrarily impose limitations without regard to the time and information reasonably necessary to accomplish the purposes of voir dire. Limitations in terms of *time* or *content* must be reasonable in light of the total circumstances of the case.
- ARGUMENT OF COUNSEL: The trial judge has considerable discretion to set limitations

on arguments in the management of a trial. (1) In a relatively simple prosecution it is not unreasonable for counsel to anticipate that the trial judge will assume, unless advised to the contrary, that an extended closing argument is not required. Obviously it would be preferable for the trial judge to alert counsel as early as possible of any time limitations on closing argument. In the absence of such warning, counsel may be at a disadvantage if unable to change plans instantly, and there fore unable to make as effective an argument to the jury. (2) It is a generally recognized principle of law that the trial court has the power, *in its discretion*, to limit counsel's time for argument. No rule or formula can be applied to all cases. Each case must turn on its own facts. The following factors generally determine the appropriateness of a given time limitation: length of trial, number of witnesses, amount of evidence, number and complexity of issues; instructions, amount involved, gravity of the offense, etc.

Judges are encouraged to review court rules, rules of evidence and case law in their particular state, as it appears that most states have addressed in some form or another the authority or discretion of the trial judge to impose limits. It should be kept in mind that the judge does need information and input from counsel, and the limitation must be reasonable, related to the particular case, and *adjusted to meet circumstances which may arise*. The judge can address concerns as well as protect the record by simply stating in setting time limits that "additional time will be granted if the need arises".

It is also important that the judge "fairly" enforce the limitations and require that all parties comply. Time limits are not a cure-all for lengthy trials but (1) a tool for setting expectations on how a trial will be conducted, (2) emphasize the importance of maintaining momentum, (3) avoid unnecessary and inappropriately long presentations, (4) encourage self-imposed limits on cumulative witnesses or evidence, (5) discourage other "delay", and (6) instills the attitude that the trial will be efficiently presented on the part of both court and counsel.

As discussed in standard six on momentum, it is important that judge and counsel periodically review the progress of the trial to note whether presentations will indeed be made within the limitations set or if there is a need for imposing limitations. During a trial it may be appropriate to set time or subject matter limitations on presentations to address a variety of situations (i.e.: failure of counsel to respond to court orders, repetitive or irrelevant questioning, inappropriate behavior, witness availability problems, etc.).

It is also very useful and appropriate to advise the jury of the time "agreed upon" and set. For example, after the judge concludes his or her voir dire, the court should advise the jury of the amount of time that each counsel will have for questions. A similar approach can be followed before opening or closing statements and other segments of the trial when limitations have been imposed.

4. The trial judge shall arrange the court's docket to start trial as scheduled and provide parties the number of hours set each day for the trial.

Commentary: *On Trial* noted the difficulty of getting a trial started on time. Other matters on the court's docket, getting prospective jurors to the courtroom, obtaining the presence of defendants in custody, addressing last minute "problems" and a variety of other reasons or excuses are often cited. The real problem may be the judge's calendar or unrealistic expectations as to when the court or parties can be ready to start. If the problem rests with another entity (sheriff or local official), then the judges in that circuit or district need to raise the matter with the responsible party. The trial conference, as discussed in these standards, is a good opportunity to anticipate, review and address these potential problems and set the expectations that the trial will begin at the scheduled time. Once the expectations have been set and the case called for trial, the judge must accept his or her responsibility to "deliver" and start the trial on time and provide the appropriate hours.

Judges, counsel and court personnel believe there is usually a minimum of 5 hours devoted each day to a trial. The *On Trial* study revealed that often only 3 to 3 1/2 hours were actually being devoted to trial. There are many reasons for the differences in perception and reality, and these can often only be determined after a judge analyzes how time is actually spent. Judges are urged to keep track of the hours *actually* devoted

to a trial and note events which take time away from a trial. A judge must be cognizant of the various demands on time and willing to monitor what actually occurs if trial time expectations are to be met.

It is important that the judge communicate expectations to court staff as to what will occur during each court day. Court staff can assist the judge in maintaining the desired schedule.

If a court has difficulty in either beginning at a certain time or providing the desired number of hours, the judge needs to review the method of scheduling matters on the calendar. Usually the problem arises when a judge attempts to do too much or does not analyze the types of matters to be handled and adjust the calendar accordingly.

Finally, the responsibility of counsel is not being ignored but the judge must communicate to counsel when court sessions will be held and respond appropriately if counsel fail to comply. While one immediately thinks of imposing sanctions, it is submitted that other "subtle" responses such as having the parties in court and waiting for the "tardy" counsel to arrive will suffice.

5. The judge shall ensure that once trial has begun, momentum is maintained.

Commentary: Standards four and five are related but really address different situations. Standard four stresses starting on time and providing a certain number of hours, whereas maintaining momentum means managing what is done during those hours.

"Momentum" is consistently acknowledged as the most important concept in trial management. It involves and incorporates part or all of each of the standards set forth herein: such matters as having court staff handle or defer requests for conferences with the judge; cooperation by a multi-judge court to take hearings or handle other matters when needed; the clerk's responsibility for the length of recesses, advising the jury to be ready to return to court, getting counsel back in court, and advising the judge that it is time to reconvene.

However, momentum addresses more than these matters. During a trial, a judge should periodically review with counsel the progress of the case, availability of witnesses, etc. While no one likes to inconvenience witnesses, it is often better to have witnesses waiting and available when needed than to have the jury, parties and counsel in court wait. When necessary, witnesses can be taken out of order or parties can even present their cases out of order.

When they begin their questioning, counsel should be instructed and prepared to proceed to conclusion. Excessive requests for time to consult with co-counsel, parties, or other such interruptions should not be tolerated. The court can address such problems through a friendly suggestion or brief side-bar conference, or if need be, at a recess on the record with clear instructions from the court on how to proceed in the future. If at all possible, the court should set recesses at the conclusion of the examination of a witness and advise the jury what will occur when court reconvenes after the recess (i.e., counsel will call new witness, counsel has finished direct examination and opposing counsel will commence their cross, etc.). If the examination is going to carry over after the recess, the court should confirm the next area of questioning and upon reconvening remind the jury where the questioning had ceased, announce the next area of inquiry and instruct counsel to proceed with questions in that area. This prevents counsel from repeating previous questions and once again reminds counsel of what is expected.

Objections by counsel are often a source of interruption, but are a legitimate activity that requires a prompt ruling by the court. Counsel should be aware of the court's requirement that objections be concise and in appropriate legal terms so that the court can summarily rule. It is submitted that there is no need for frequent side-bar conference or recess to argue matters outside the presence of the jury, as counsel often request. If the judge believes he or she is sufficiently informed on the issue, the ruling can be made, giving counsel the opportunity to supplement their record at the next recess.

There should be a designated place in the courtroom for exhibits. Counsel should be requested to obtain the exhibits they need for the upcoming presentations and then return them after they are used. If counsel is going to use a number of exhibits with a witness, they should appropriately arrange all the exhibits and place

them before the witness. This prevents counsel from perpetually pacing up to the witness stand and back each time he wishes to have a witness review an exhibit. It is important that at the trial management conference, the use of exhibits during the trial be reviewed with appropriate instructions to counsel. Large exhibits should be located where the jurors can see them, and instead of taking the time to view individual exhibits during the presentations, the jury can review them during a recess, under direction not to discuss the exhibits among themselves. If counsel has prepared individual packets of exhibits for jurors, the jurors should be told when to pick up the packet and directed to review the specific exhibits and, when finished, close their exhibit books and put them down so as not to distract the jurors during presentation.

6. The judge shall control voir dire.

Commentary: This standard does not endorse or reject the idea that the trial judge should exclusively conduct the voir dire, as is common to federal courts. The trial judge should analyze the purpose of voir dire and determine how best to conduct it. The approach that appears to be finding favor with most courts has the judge conduct a substantial part of the questioning, covering many standard areas of inquiry, while counsel is either granted a certain period of time or allowed to question on certain issues. Many courts at the trial management conference do review with counsel special areas of inquiry, and often counsel will request the court to cover certain subjects, and the court can then decide not only the length but the content of the voir dire. Some judges believe that time limits of 15 to 30 minutes for each side *does* control content and results in "focused" voir dire examinations.

It is the judge's duty to ensure that voir dire does elicit information from the prospective jurors whereby challenges for cause can be identified and ruled upon; and that counsel obtain information to exercise their peremptory challenges. Counsel may have other goals and should be reminded that the purpose of jury selection is to seat the required number of persons to act as fair and impartial jurors. Questioning is appropriate to discover and discuss effects of any bias, prejudice or experience of the proposed jurors. The judge's voir dire should not only develop expectations on the part of jurors but orient them to the trial process and obtain their commitment to follow the instructions of law and court's admonitions.

Judges should also be aware that there are different methods of calling and seating jurors. In a civil case to a jury of six, courts usually call a sufficient number of jurors that after passing for cause each side can exercise its challenges, leaving the appropriate number of jurors (e.g., 14 where each side has 4 challenges). This method has been gaining favor in criminal cases. For example, to pick a 12-person jury for which each side has five pre-emptories, 22 jurors would initially be seated. If any of the jurors are excused for cause, then a replacement juror is brought into the panel. If an alternate is being chosen and additional challenges are granted, then three additional jurors would be seated. At the conclusion of the questioning, the prosecution would exercise the challenge to the first twelve seated, and the thirteenth member would then become a part of the initial twelve, with defense counsel making its challenge. This process would be repeated until the parties either pass twelve or the challenges are exhausted. Following this procedure, one can see how a jury could be picked easily in an hour and a half. It is important that the method, whatever it may be, is discussed prior to trial and a record made, especially if the court agrees or stipulates to a lesser number of jurors or an unusual procedure. A judge should determine what the rules or procedures on this subject are in their particular state or jurisdiction. Some of these rules are mandatory, and others are only suggested. It does appear that unless judges become directly involved and begin controlling the voir dire process that legislatures will legislate control on voir dire, as recently occurred in the state of California. While some judges believe that this is an area of the trial that should be strictly left to counsel's prerogative, it is submitted the Court has a responsibility beyond merely listening to counsel's questions. The court can participate in the voir dire process in a manner that leaves sufficient flexibility and discretion to counsel to pursue relevant areas of questioning.

The use of questionnaires and juror orientation before voir dire have become increasingly popular. Most courts have some form of video or slides to show to prospective jurors before trial. It may also be appropriate for a court to develop a

written introduction for the jury panel to read when it arrives at the courtroom to further orient the prospective jurors as well as to occupy the few minutes that pass between a jury being seated and proceedings beginning.

Questionnaires are usually of two types. One seeking basic information can be sent to all jurors along with a summons to report or filled out as they report for service. The second is a special questionnaire related to a specific trial, one usually involving sensitive issues or a serious criminal case. If these questionnaires are going to be used, it is imperative that they be completely reviewed at the trial management conference and decisions made as to the questions to be included, when the jurors will fill out the questionnaires, and when counsel will have access to the responses. Some courts will review the completed questionnaires with counsel and, upon stipulation, excuse certain jurors. The questionnaires may also be used to determine which jurors may need to be questioned out of the presence of the others. If this type of questionnaire is used, counsel should be required to return their copies to the court with the originals appropriately sealed for any required appellate review and the jurors so advised that their answers will not be disseminated for any other use than in the voir dire process. However, there are some states, such as California, that hold that such questionnaires are a matter of public record and available for inspection. In those jurisdictions, court and counsel should consider drafting questions that have prospective jurors identify areas of concern and not require a juror to put in specific information and then conduct appropriate en camera questioning of jurors who have identified concerns. The court will have to determine how to advise the jury about public disclosures of the information provided. Whether or not the questionnaires promote a better voir dire by eliciting more information or even shorten the process is open to debate. It is one method to consider, depending upon the particular case.

It is important that not only each judge but judges within a district and state evaluate how jury selection occurs and whether or not there can be an agreed upon common system or similar approaches to voir dire.

7. The judge's ultimate responsibility to ensure a fair trial shall govern any decision to intervene.

Commentary: This standard has invoked considerable debate and has the potential to be misunderstood. It is *understood* that counsel have discretion in presenting evidence. The court should defer to counsel's belief as to the type of evidence and manner of presenting evidence to the trier of fact. Likewise, it is agreed that the trial judge does have a responsibility to insure a fair trial and should not hesitate to intervene during counsel's presentation when necessary. It is defining "When Necessary" that fosters debate. It may well be a standard that "speaks for itself" and is not subject to further definition other than in the context of a specific fact situation.

If a judge decides to intervene, he or she should do so in a manner that does not indicate any bias for or against any party or issue in the case.

There are some judges and lawyers who believe that judges should not intervene except in response to an objection by a lawyer. While counsel have the responsibility to object, often strategy considerations, lack of ability, etc., may prevent them from objecting or requesting direction from the court. If one accepts the premise that a judge presides over a trial and is not a referee who sits back and waits until a party requests a ruling, there are situations which call for a judge to intervene, and, after appropriate inquiry, limit counsel's presentation or direct counsel to proceed in a certain way. This is not to imply that a judge should be advising counsel how to try their case or present their evidence; but that the judge does have a role in insuring that both parties receive a "fair trial." Thus, there are those who believe that a judge, after careful consideration should intervene to address inappropriate conduct, repetitive questioning, introduction of unnecessary or unduly repetitive evidence, or other abuses by counsel. It is further submitted that such activity needs to be addressed before the trial judge is faced with a mistrial or several years later receives an appellate decision determining that a party did not receive a fair trial or due process. Of course some appellate courts might find a denial of due process due to the judge's intervention, which makes this is one of the most difficult areas of trial management. However, the responsibility to address inappropriate activity or proceedings

is placed squarely on the shoulders of the trial judge and cannot be ignored!

This is an area in which judges could benefit from appropriate "judicial education." Certainly this subject ought to be placed before a bench-bar committee. If a bench-bar committee does undertake analysis of this area, a good starting point would be the report of the American Bar Association Committee on Professionalism chaired by former ABA President Justin Stanley. Regrettably, this standard may raise more questions than it gives answers or guidance, but it is also an area that a judge must be prepared to address

8. Judges shall maintain appropriate decorum and formality of trial proceedings.

Commentary: Formality lends credibility to the proceedings and emphasizes to counsel and jurors the important functions they perform. This is not to say that humor does not have its place in the courtroom, but to emphasize that the judge may be called on to exercise authority to control the conduct of spectators, witnesses, parties or counsel. There isn't a judge or attorney who, at some time during court proceedings, has not witnessed inappropriate behavior. The judiciary and bar alike are concerned by the "decline in professionalism," and the A.B.A. and individual states alike continue to seek solutions. It has been noted that the "perception of what occurs during the trial" is as important as what actually occurs. Hence the dignity of the proceedings and appropriate behavior on the part of both court and counsel are of paramount importance. Judges should heed how they are perceived and perhaps discuss this matter with other judges, counsel or other individuals within the legal community. The trial management conference, once again, is an appropriate time to review the court's concern, especially if the court has developed "trial procedures or guidelines" that not only cover trial matters but also discuss behavior of counsel. It is submitted that judges do have a responsibility to address counsel's behavior. One only has to read the decision in *Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284 (N.D. Tex. 1988), to understand this concern. Individual judges, districts or states may well wish to adopt the "standards of practice" that this court felt should be observed by attorneys. While all of the "standards of practice" are important, the following specifically apply to this discussion:

(A) In fulfilling his or her primary duty to the client, a lawyer must be ever conscious of the broader duty to the judicial system that serves both attorney and client.

(B) A lawyer owes to the judiciary candor, diligence and utmost respect.

(C) A lawyer owes to opposing counsel a duty of courtesy and cooperation, the observance of which is necessary for the efficient administration of our system of justice and the respect of the public it serves.

(D) A lawyer unquestionably owes to the administration of justice the fundamental duties of personal dignity and professional integrity.

(E) Lawyers should treat each other, the opposing party, the court, and the members of the court staff with courtesy and civility and conduct themselves in a professional manner at all times.

(F) A client has no right to demand that counsel abuse the opposite party or indulge in offensive conduct. A lawyer shall always treat adverse witnesses and suitors with fairness and due consideration.

(G) In adversary proceedings, clients are litigants and though ill feelings may exist between clients, such ill feeling should not influence a lawyer's conduct, attitude, or demeanor towards opposing lawyers.

(H) Lawyers should be punctual in scheduled appearances and recognize that tardiness is demeaning to the lawyer and to the judicial system.

(I) Effective advocacy does not require antagonistic or obnoxious behavior, and members of the bar will adhere to the higher standard of conduct which judges, lawyers, clients, and the public may rightfully expect.

9. Judges should be receptive to using technology in managing the trial and the presentation of evidence.

Commentary: There have been numerous technological advances available to assist court and counsel in the effective and expeditious presentation of evidence. Testimony can be presented by video tape, witnesses can testify by telephone or microwave television hookups, and exhibits can likewise be produced in court through electronic means! Future technology will be able to assist in presenting complicated testimony and hopefully solve many problems of witness availability as we know them today. Computer aided transcript displays testimony on a screen which can be read by a "deaf" party, juror, or witness. Similar equipment can be used to translate testimony into a foreign language or allow a handicapped individual to present testimony. Translators perform "simultaneous translation," which is transmitted to many individuals. The court can often delegate to counsel in advance of trial the responsibility of obtaining the necessary equipment.

There is no doubt the The method or manner of recording trial proceedings will change. Judges should insist that any changes or advances enhance their ability to conduct trial proceedings and give them appropriate flexibility in being able to conduct trial proceedings.

There are judges who are computer literate and use computers in the courtroom to take notes, obtain legal research, and access jury instructions from other courts. In the future more and more judges will be able to use computers and other equipment to advance the purpose of a trial and the role of a judge as a trial manager in ways not imagined at this time.

It is difficult to describe particular equipment, uses or even predict advances that may occur in the future. It is important, however, that as such developments occur, the technology serve the purpose of conducting an effective trial. Evolving technology will require continuous review and exchange of information among judges; and may become one of the most important areas of judicial education.

Another area of concern is "evidence" that is being artificially produced through the use of technology. Judges will have to become informed in order to make decisions as to the reliability or admissibility of this evidence. Thus, while technology may provide some options to solve court problems, there is no doubt it will also create new and different issues for the court to address in the future.

E V I D E N C E

SUPPLEMENT D

Believe It or Not

By Mark Hansen

Louise Robbins had but one claim to fame: She could see things in a footprint that nobody else could see.

Give her a ski boot and a sneaker, for instance, and Robbins contended that she could tell whether the two shoes had ever been worn by the same person.

Show her even a portion of a shoeprint on any surface, Robbins maintained, and she could identify the person who made it.

It might sound amusing, coming as it did from an anthropology professor who once astounded her colleagues by describing a 3.5 million-year-old fossilized footprint in Tanzania as that of a prehistoric woman who was 5½ months pregnant.

It might also be considered harmless, had it remained a subject of academic speculation at the University of North Carolina at Greensboro, where Robbins taught anthropology courses and collected footprints from her students for comparison.

By 1976, however, Robbins had taken her quirky ideas out of the classroom and into the courtroom, where her amazing feet-reading abilities seemed to dazzle juries and made her something of a celebrity on the criminal trial circuit. Newspapers called her a female "Quincy." She was profiled in the *ABA Journal*. Her techniques were even touted in the pages of *Time* magazine.

By her own account, Robbins appeared as an expert, mostly for the prosecution, in more than 20 criminal cases in 11 states and Canada over the next 10 years until a losing battle with brain cancer finally forced her off the witness stand. She died in 1987 at the age of 58. By then, her testimony had helped send at least a dozen people to prison. And it may have put one man on death row.

There's just one catch. Robbins was the only person in the world who claimed to do what she said she did. And her claims have now been thoroughly debunked by the rest of the scientific community.

Melvin Lewis, a John Marshall Law School professor who keeps track of more than 5,000 expert witnesses, dismisses Robbins' work as "complete hogwash."

"It barely rises to the dignity of nonsense," he said.

And FBI agent William Bodziak, one of the world's leading authorities on footprints, said that Robbins' theories were totally unfounded.

"Nobody else has ever dreamed of saying the kinds of things she said," he explained.

Robbins' story, as reported last year by the CBS news program "48 Hours," provides a graphic illustration of how far some prosecutors and defense lawyers are willing to go to find an expert witness to bolster a case. It also shows how easily one self-proclaimed expert with little or no credence in the scientific community can make a mockery out of the criminal justice system.

"It's frightening to me that something like that could go as far as it did," said Lewis, who runs a school-sponsored referral service that puts lawyers in touch with qualified experts. "Her so-called evidence was so grotesquely ridiculous, it's necessary to say to yourself, if that can get in, what can't?"

Today, nearly six years after her death, some of the legal ramifications of Robbins' testimony are still being felt.

Stephen Buckley, who spent three years in an Illinois jail awaiting trial for the 1983 murder of a 10-year-old Chicago-area girl, is suing prosecutors for allegedly violating his civil rights.

Buckley's first trial, in 1985, ended in a hung jury, despite Robbins' testimony that a bootprint left on the victim's kicked-in front door had been made by him. He was freed in 1987, but only because Robbins was then too sick to testify at his retrial.

Dale Johnston is also suing prosecutors after spending six years on Ohio's death row, due at least in part to Robbins, for the 1982 murders of his teen-age stepdaughter and her fiancé.

Robbins testified at Johnston's 1984 trial that a muddy impression in the cornfield where the victims' dismembered bodies were found came from the heel of Johnston's cowboy boot. He was released from prison in 1990 after an appeals court ruled that the boots on which Robbins based her testimony couldn't be used against him.

Yet Buckley and Johnston might consider themselves lucky, in light of what has happened to Vonnie Ray Bullard.

Bullard is still serving a life sentence in a North Carolina prison for the 1981 murder of another man after Robbins testified that a bare footprint outlined in the victim's blood was his. Having exhausted his appeals, based largely on Robbins' testimony, Bullard won't be eligible for parole until the year 2001.

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How much of an expert does an expert witness have to be?

Other experts can match feet with footprints or shoes with shoeprints, provided that the two samples being compared share enough of the same ridge details or random characteristics. But Robbins was alone in claiming that she could tell whether a person made a particular print by examining any other shoes belonging to that individual.

Robbins built her reputation on the theory that footprints, like fingerprints, are unique. It was her contention that, because of individual variations in the way people stand and walk, everyone's foot will leave a distinct impression on any surface, including the inside sole of his or her shoe. Those impressions, she contended, show up as "wear patterns" on the bottom of every shoe.

"Footprints are better indicators for identifying people than fingerprints," Robbins told the *ABA Journal* in July 1985. "With a footprint, you use the entire bottom surface of the foot. With the fingerprint, you only use the tip of the finger."

Robbins' claims were hotly contested from the moment she first set foot in a courtroom. Shortly before her death, a panel of more than 100 forensic experts concluded that her footprint identification techniques didn't work. In hindsight, her theories may seem patently absurd.

In fact, many of her colleagues have been saying as much since 1978, when Robbins joined a scientific expedition at Laetoli, Tanzania, then the site of one of the most important archaeological discoveries ever made. During that expedition, according to her colleagues, Robbins misidentified one set of prehistoric human footprints as belonging to an antelope and concluded that another set of footprints had been made by the prehistoric woman who was 5½ months pregnant. She also claimed to have found fossilized cobwebs that other members of the expedition said did not exist.

Tim White, an anthropology professor at the University of California at Berkeley who was also a member of the expedition, said it was hard enough to determine that the footprints they found were indeed human. But it was impossible to tell if any of the prints had been made by a woman, let alone one who was 5½ months pregnant, he said.

"Her observations were unreliable, she was overly imaginative and she was incredibly suggestible regarding the interpretation of evidence," White said. "She kept saying things that could not be documented, and for very good reason. It was all in her mind."

"It truly reveals her as someone who was willing to go to any extremes to come up with an interesting story," said University of Chicago anthropology professor Russell Tuttle, who has studied Robbins' work and appeared opposite her in court. "She'd say anything anybody wanted her to say."

But that didn't keep Robbins from being qualified as an expert, with no known exceptions, from the time she first testified for the prosecution in the arson trial of a Pennsylvania man in 1976, until her last known appearance in court, once again as a prosecution witness, at the 1986 murder trial of a Chicago man.

In some cases, like Bullard's, her testimony may have been cumulative. In other cases, like Buckley's and Johnston's, it constituted the only physical evidence linking the defendant to the crime.

Prosecutors usually succeeded

William Bodziak says Robbins' ideas were totally unfounded.

ABAJ/LISA BERG

in getting her testimony admitted by portraying Robbins as a pioneer in a new field of science and by putting on testimonials as to her character and credentials from one or two of her peers. One prosecutor noted that it took 400 years for Galileo's theories to win acceptance. Another pointed out that fingerprint evidence also was considered a new science just 80 years ago.

Since Robbins had no competition, her testimony was difficult to refute. But defense lawyers depicted her variously as a fraud, a charlatan, an opportunist and a hired gun. And they presented other experts who testified that there was no scientific basis for any of the claims she made.

By her own admission, Robbins never took or taught a course on shoeprint identification techniques or the wear patterns of shoes. She never conducted a blind test of her abilities, published her findings in a scientific journal or submitted her work to peer review. And she never accounted for such things as manufacturing differences in shoewear construction, dynamic changes in a person's foot or the effect of various surfaces on the quality of a shoeprint.

"She may well have believed what she was saying," said C. Owen Lovejoy, an anthropology professor at Kent State University who testified on behalf of Buckley, "but the scientific basis for her conclusions was completely fraudulent."

Tuttle said he concluded after hearing her testify at a 1983 murder trial in Winnipeg that Robbins was "either a crook or a self-deluded quack."

Robbins didn't always testify for the prosecution and her testimony didn't always win the case for the side that hired her. On the other hand, she was always willing to make a positive identification that nobody else was willing or able to make, and her conclusions consistently supported the case of the side for which she was testifying.

Several lawyers cite her testimony on behalf of the defendant in a North Carolina murder trial in 1985 as one of the most telling examples of her work. Other witnesses had testified that they saw the defendant go into a dry cleaning store where a clerk was murdered and come out a few minutes later. And the state's own experts had matched two bloody shoeprints in the store with the defendant's shoes.

But Robbins testified that the shoeprints had been made by two people other than the defendant, both of whom were wearing the same size shoes as the defendant.

The defendant was subsequently convicted and sentenced to death, but was awaiting resentencing in May as a result of a 1990 ruling by the U.S. Supreme Court holding that North Carolina's capital sentencing scheme was unconstitutional. *McKoy Jr. v. North Carolina*, 110 S. Ct. 1227.

Bodziak never saw those prints. But he did examine the same evidence as Robbins in two cases. And both times, the FBI expert concluded that Robbins was flat out wrong.

In Johnston's case, Robbins and Bodziak both compared three plaster casts of bootprints taken at the scene of the murders with three pairs of cowboy boots belonging to the defendant. Both agreed that two of the prints could not have been made by the defendant's boots.

The third print was unidentifiable to Bodziak, who said he couldn't even determine through computer enhancement if the impression had been made by a boot or a bare foot. Yet Robbins positively identified the print as having come from the left heel of one of Johnston's boots.

"There was nothing there," Bodziak said. "There was no evidence whatsoever of any recognizable portion of a boot. It literally looked like they had poured plaster over a bunch of rocks."

In Buckley's case, Bodziak and Robbins both compared the defendant's boots with the bootprint left on the victim's front door. Robbins said the print was definitely Buckley's. Bodziak says it definitely was not.

"They're different in a lot of ways," Bodziak said of the two samples. "They don't even come close" to matching.

To this day, Robbins still has at least one supporter who backs her work unequivocally.

Thomas Knight, a former Illinois prosecutor who used Robbins as an expert in the case against Buckley, describes her as one of the least controversial experts he has ever encountered. The fact that she alone could do what she did, he says, is a testament to her ability, dedication and hard work.

"I would rank her credibility as a witness and her integrity as a scientist right at the top," he said.

Knight, who now has a private civil practice outside of Chicago, also

Stephen Buckley was freed after spending three years in jail.

ABAJ/DAVID PADWIN

contends that Robbins has been made a scapegoat by a collection of people with ulterior motives, primarily those who hope to discredit her testimony as a means of getting the convictions she helped secure overturned.

Bodziak has his own ax to grind, Knight suggests, because Robbins was able to identify footprints that he couldn't identify, an assertion that the FBI expert flatly denies.

"She was a terrific person who's been terribly maligned by some of the things that have been said about her," Knight said. "I think it's really sad, and I intend to do whatever I can to set the record straight."

"I don't think he has any other choice" but to defend Robbins,

Bodziak responded. "Maybe he really believes her."

Even some of Robbins' once-staunchest defenders now express doubts about the validity of her work.

Ellis Kerley, a retired professor of anthropology at the University of Maryland who used to vouch for Robbins' abilities on the witness stand, today concedes that he was "a little surprised" by some of the things she said in court.

"The question you have to ask in any scientific examination is whether the interpretation has gone beyond the underlying data," he said. "It strikes me that that must be what happened in Louise's case."

Courts have different standards for the admission of scientific evidence. Many state and federal courts still follow the so-called Frye rule, named after a landmark federal appeals court decision in 1923 barring the use of results from an early form of lie detector test against a criminal defendant. *Frye v. U.S.*, 293 F. 1013.

Under the Frye rule, expert testimony must be based on a well-recognized scientific principle or discovery that has "gained general acceptance in the particular field in which it belongs" in order to be admitted.

Since 1975, however, when Congress enacted new rules of evidence, several state and federal courts have liberalized the standards governing the use of expert witnesses. Those rules essentially permit any expert who is qualified in his or her field to testify in a case, as long as the testimony is relevant and it helps the jury understand the evidence or determine the facts.

Critics of the 1975 rules contend that what they call the "let it all in" approach to the admission of expert testimony has allowed the courts to become mired in all sorts of unsubstantiated scientific claims and dubious forms of expertise. They say that judges and juries are too easily swayed by the likes of someone like Robbins, a grandmotherly professor with the right academic credentials, a scientist's demeanor and a matter-of-fact delivery on the witness stand.

But proponents of the more flexible standard argue that much of the evidence needed to prove a scientific claim in court is generally regarded as being on the cutting edge of science. They point out that much of what is universally accepted as science today was once considered to be outside of the scientific mainstream. And they suggest that judges and juries are fully capable of making the distinction between a legitimate scientific claim and an unfounded one.

The appellate record on Robbins is mixed.

In 1980, a California appeals court upheld the conviction of a man whom she linked to the rape, robbery and assault of three elderly women through shoeprints left at the scene of the crimes, finding that Robbins was an expert in her field. *People v. Barker*, 113 C.A.3d 743.

Bullard's conviction also was affirmed in 1984 by the North Carolina Supreme Court. It held that new scientific methods are admissible if they are reliable, which it said was the case with respect to Robbins' techniques. Any rebuttal testimony, the court said, goes to the weight of the evidence, not to its admissibility. *State v. Bullard*, 312 N.C. 129.

Thomas Knight calls Robbins 'a terrific person who's been terribly maligned.'

ABAJ/DAVID PADWIN

Under that standard, which remains in effect, Robbins could still testify in North Carolina if she were alive today, according to Carl Barrington Jr., Bullard's defense lawyer.

But not in Illinois. An appeals court there threw out the conviction of a man on murder, armed robbery, sexual assault and home invasion charges in 1988 on the grounds that Robbins' techniques didn't meet the "general acceptance" test set forth in *Frye*. *People v. Ferguson*, 172 Ill. App. 3d 1.

"While there is arguably a scientific basis in Robbins' theory (i.e., measurement techniques), her theory is not only not generally accepted in her scientific community, but is also not shared with any other member of her field," the court said.

Johnston's conviction also was overturned by an Ohio appeals court in 1986, but not on the basis of Robbins' testimony. The court held that Robbins met the test of admissibility under the state's rules of evidence, which require that expert testimony be "relevant and helpful to the finders of fact." *State v. Johnston*, 1986 WL 8799 (Ohio App.).

The judge at Johnston's second trial suppressed the boots, along with other evidence he found had been illegally obtained, in a ruling that was affirmed by an appeals court in 1990.

Now the U.S. Supreme Court has agreed to enter the debate by taking up the case of *Daubert v. Merrell Dow Pharmaceuticals*, the culmination of a 10-year battle in the federal courts over the admissibility of evidence alleging to show that the anti-nausea drug Bendectin causes birth defects.

The case stems from the dismissal of two federal suits against Merrell Dow, the maker of Bendectin, brought by the parents of two San Diego boys who were born with birth defects. Those suits were dismissed after two California courts refused to allow a jury to hear evidence purportedly linking the mothers' use of the drug during pregnancy with their sons' birth defects.

The narrow issue before the Court in *Daubert* is whether Congress' adoption of the new evidence rules in 1975 supersedes the judicially created Frye rule of 70 years ago. But the Court is widely expected to set a definitive standard for the admission of scientific evidence or, at the very least, clear up some of the confusion and inconsistency that exist now.

Although the decision will apply only to the federal courts, most state courts look to the High Court for guidance.

The Court heard oral arguments in the case on March 30. A ruling is expected by early summer. ■

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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SUPPLEMENT E

Memorandum

TO: Chairmen and Reporters of the Advisory Committees

FROM: Daniel R. Coquillette, Reporter
Mary P. Squiers, Consultant

RE: Federal Rules Amendments Concerning Local Rules and Technical Amendments, Including Committee Notes

DATE: February 5, 1993

At our lunch meeting in Asheville, North Carolina, last month, the Chairmen and Reporters of the Advisory Committees agreed on precise language for rule amendments concerning local rules and technical amendments. The need for uniform committee notes on these rules was also discussed. We have set out the language for the proposed rules below. We have also set out committee notes that we believe accurately reflect the views of those present at the lunch meeting.

It is our understanding that each of the Advisory Committees will consider these rules and notes at their respective winter or spring 1993 meetings.

If you have any questions or comments about this material, please feel free to contact either one of us (Dan: (617) 552-4340: Mary: (617) 552-8851).

Technical and Conforming Amendments

The Judicial Conference of the United States may amend these rules to correct errors in spelling, cross-references, or typography, or to make technical changes needed to conform these rules to statutory changes.

Committee Note

This rule is added to enable the Judicial Conference to make minor technical amendments to these rules without having to burden the Supreme Court and Congress with reviewing such changes. This delegation of authority will relate only to uncontroversial, nonsubstantive matters.

Uniform Numbering of Local Rules

Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

Committee Note

This rule requires that the numbering of local rules conform with any uniform numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform numbering system would make it easier for an increasingly national bar and for litigants to locate a local rule that applies to a particular procedural issue.

Procedure When There is No Controlling Law

A judge may regulate practice in any manner consistent with federal ~~statutes~~ laws, rules, [official forms],* and ~~with~~ local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal ~~statutes~~ laws, rules, [official forms],* or the local district rules unless the alleged violator has actual notice of the requirement.

* Bankruptcy Rules only

Committee Note

This rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with Acts of Congress, with rules adopted under [insert appropriate enabling legislation], [in bankruptcy cases: with Official Forms,] and with the district's local rules.

This rule recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules and the local rules of the court. In the past, some courts have also used internal operating procedures, standing orders, and other internal directives. This can lead to problems. Counsel or litigants may be unaware of various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally, counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, this Rule disapproves imposing any sanction or other disadvantage on a person for noncompliance with such an internal directive, unless the alleged violation has actual notice of the requirement.

There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular judge unless the party or attorney has actual notice of those requirements. Furnishing litigants with a copy outlining the judge's practices--or attaching instructions to a notice setting a case for conference or trial--would suffice to give actual notice, as would an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained.

SECTION II EVID 9/10/93

TO: Members of the Advisory Committee on Federal Rules of Evidence

FROM: Margaret A. Berger, Reporter

RE: Rule 404

DATE: September 21, 1993

I. Organization of discussion. After a brief overview of the scope of the rule, its rationale, and the central criticisms that it has provoked, this memorandum turns to possible amendments to Rule 404 that have been grouped into three categories:

A. Altering the Scope of Rule 404(a). Should the prohibited propensity inference incorporated in Rule 404(a) continue to apply in all criminal and civil cases subject to the three specific exceptions contained in subdivision (a)(1)-(3)? Three possible changes are considered: 1. modifying the propensity rule in cases in which defendant has been charged with a crime of a sexual nature; 2. modifying the rule or the exceptions to the rule in civil cases; 3. eliminating the bar on propensity evidence when defendant seeks to show another person's propensity to commit the crime with which defendant is charged.

B. Making Procedural Changes in Rule 404(b). Discussed are possible changes affecting the second sentence of subdivision (b): 1. altering the standard of proof that now applies to Rule 404(b) evidence as a result of the Supreme Court's decision in Huddleston v. United States, 485 U.S. 681 (1988); 2. clarifying that the issue to which the other crimes evidence is directed must be controverted; 3. miscellaneous changes.

C. Making Plainer the Current Meaning of Rule 404 and the Advisory Committee Note. Should an attempt be made to clarify the language of the rule even if the Committee chooses not to undertake any substantive changes? To what extent, if

any, may the Committee Note be revised if no changes are made in the text of the rule?

II. General Background: The Scope and Rationale of the Rule.

Rule 404(a) restates the traditional propensity rule: evidence of a person's character, whether manifested through convictions, uncharged misconduct, or specific characteristics, is not admissible when it is offered solely so that the fact finder may infer that the person acted in conformity with his or her character on the occasion in question. Character evidence does not fall within the prohibition of Rule 404 if it is offered pursuant to an evidential hypothesis that does not entail drawing a propensity inference. See Rule 404(b). Rule 404 is subject to three exceptions stated in subdivision (a): 1. an accused may, subject to limitations, introduce evidence of good character to show that he could not have committed the charged act, and the prosecution may respond to this evidence; 2. under some circumstances evidence of a victim's character may be introduced; 3. evidence of a witness' character for veracity is at times admissible subject to the rules in Article VI of the Federal Rules.

Rule 404, like the other quasi-privilege rules in Article IV, rests on relevancy and policy considerations: 1. doubt about the probative value of past acts in predicting the future;[1] and 2. concern that prejudice is inevitable once the jury becomes aware that a party has committed similar acts in the past. In criminal cases -- in which the danger of prejudice is most acute -- Rule 404 promotes constitutional objectives. The

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[1] Edward J. Imwinkelreid, The Evolution of the Use of the Doctrine of Chances as Theory of Admissibility for Similar Fact Evidence, Anglo-American Review 73, 76 (1993) ("The psychological literature indicates that character is a relatively poor predictor of conduct.").

evidentiary rule works in tandem with the privilege against self-incrimination to ensure that the accused must be proven guilty. Rule 404 assumes that once a defendant's criminal past becomes known, the jury will either punish him for prior transgressions, or will be distracted from properly assessing the evidence relating to the charged crime.[2]

The chief general criticisms voiced about the propensity rule are: 1. Rule 404(a) exacts too high a price by excluding highly probative evidence of the type on which we act in our every day lives. The strength of this argument varies somewhat depending on the particular act sought to be proved. See discussion infra. 2. Rule 404(a) is ineffectual because jurors undoubtedly draw a propensity inference even when evidence is admitted, as it often is, pursuant to a hypothesis that does not rest on a relationship between character and conduct.[3] Consequently, as the prohibited inference frequently creeps in anyway, the propensity rule is not worth keeping, particularly since it generates more reported cases than any other provision in the Federal Rules of Evidence. 3. Although the propensity rule exists in all Anglo-American jurisdictions, studies of reported opinions indicate a pronounced tendency to avoid the rule's prohibition in particular types of cases, such as those involving sexual misconduct or narcotics prosecutions. Inconsistencies of this sort breed contempt for the law.

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[2] See id. at 73 (empirical studies indicate that trier more likely to find adversely to the defendant once it learns about prior misconduct).

[3] Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases 7 (manuscript dated 6/25/93) ("instructing a jury to follow only the permitted thought-path is like telling someone to ignore every taste in a Hershey bar except the nuts.").

III. Possible Amendments

A. Changing the Scope of Rule 404.

1. Sex Crime Prosecutions.

a. Background. As reported out of committee in May 1993, S.11, the Violence Against Women Act contains a provision directing the Judicial Conference, within 180 days after enactment, to complete a study and make "recommendations for amending Federal Rule of Evidence 404 as it affects the admission of evidence of a defendant's prior sex crimes in cases . . . involving sexual misconduct." As of this writing, no further action has been taken with regard to S.11.

The commentary that follows is not the study mandated by the bill, (see Attachment A) since such a study would obviously be premature at this time. The discussion below does not survey the admissibility of prior similar sexual misconduct under state and federal evidentiary rules, and does not consider all of the specific issues commanded by S.11. Analyses of state practices and the desirability of changing the propensity rule in sex crimes cases are considered in two articles now awaiting publication which are included as Appendix A to provide additional background information. The authors have agreed to make them available to the Committee at this time.

The discussion below focuses on the central question of whether the propensity rule should be modified to permit evidence of a defendant's prior sexual misconduct in a sex crime prosecution. This inquiry, already a topic of considerable debate because of heightened attention to crimes of rape and child sexual abuse, has heated up even more

because of recent events involving celebrities, such as the highly publicized rape trials of William Kennedy Smith and Mike Tyson, and the charges against Woody Allen. Furthermore, legal commentators have long observed that in these kinds of cases some jurisdictions employ special rules to admit propensity evidence, and that courts tend to interpret overly expansively the categories pursuant to which prior acts evidence is admitted on a non-propensity inference.[4] See The Admission of Criminal Histories at Trial, 22 U. Mich. J.L.Ref. 713, 723-24 (1989) (reprint of paper prepared by the Office of Legal Policy, U.S. Dep't of Justice). Most of the relevant decisions have, of course, been rendered in state courts, as relatively few cases of sexual assault or child molestation are heard in federal courts.

S.6, which has been introduced in Congress and referred to the Judiciary Committee, would add Rules 413, 414, and 415 to the Federal Rules of Evidence. (see Attachment B) These proposed new rules provide that in sexual assault cases, child molestation cases, and civil cases concerning sexual assaults or child molestation, evidence that the party accused of these acts has previously committed a similar act is admissible whenever relevant. In a rape prosecution, for instance, Rule 413 would admit evidence that defendant had committed an uncharged sexual offense as making it more probable that he committed the charged crime.

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[4] The same argument -- that Rule 404(b) is cited to admit other crimes evidence mechanically, without analysis -- has been made with regard to conspiracy cases and narcotics prosecutions. See, e.g., J. Weinstein & M. Berger, Weinstein's Evidence par. 404[09] at pp. 404-58-59 and par. 404[12] at pp. 404-74-404-75. See also the discussion of narcotics prosecutions in United States v. Gordon, 987 F.2d 902 (2d Cir. 1993).

The proposed rules raise a number of serious issues which are discussed below. Some of these objections apply to any modification of the propensity rule in sexual assault cases, but others pertain more particularly to the pending version and could be mitigated.

b. The slippery slope. If the probative value of, and need for, propensity evidence in other criminal cases is of the same magnitude as it is in sexual offense cases, then carving out an exception for sexual offense cases will undermine the continued viability of the propensity rule in general. Although proponents of proposals to admit uncharged acts in sex offense cases argue that this evidence is particularly probative -- that the likelihood of a sexual offender committing another similar crime is remarkably high -- the empirical evidence supporting this conclusion is problematic.[5] Despite anecdotal evidence, the argument does not even seem particularly convincing in the case of certain kinds of sexual offenders such as pedophiles.[6] Furthermore, whether the rate of recidivism for sexual offenders is higher than for certain types of professional criminals is debatable.[7]

If the federal rules are amended to authorize the admission of uncharged sexual

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[5] Blackshaw, Furby & Weinrott, Sexual Offender Recidivism: A Review, 105 Psychological Bulletin, No.1 (1989) (concludes that despite large number of studies of sex offender recidivism we know little about it because of methodological flaws that enable one to "conclude anything one wants.").

[6] Romero & Williams, Recidivism Among Convicted Sex offenders: A Ten Year Follow Up Study, 49 Federal Probation 58, 62 (reported that rearrest rate for sexual assaulters is 10.4% and for pedophiles 6.2%).

[7] Id. (researchers found that non-sex offenders had a consistently higher rearrest rate than sex offenders).

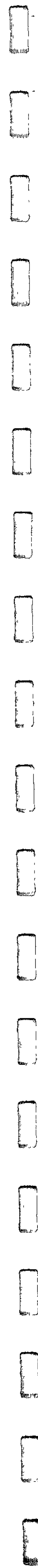
offenses because of their allegedly high probative value, the door will be opened to overturning the propensity rule in other types of cases in which probative value is arguably high. Whether such a fundamental change in American jurisprudence is desirable needs to be considered. Whether the federal system should encourage such a shift by amending Rule 404 to deal with a kind of case rarely found in the federal courts is questionable. It should also be noted that some very recent state decisions have refused to admit uncharged misconduct evidence in sex offense prosecutions. See Getz v. State, 538 A.2d 726 (Del. 1988); State v. Zyback, 93 Ore.App. 218, 761 P.2d 1334 (1988), rev'd on other grounds, 308 Or. 96, 775 P.2d 318 (1989); Lannan v. State, 600 N.E.2d 1334 (1992).

c. The ease with which the uncharged act can be established. In Huddleston v. United States, 485 U.S. 681 (1988), the Supreme Court held that in order for evidence of uncharged offenses to be admissible under Rule 404(b), the trial judge must only find, pursuant to Rule 104(b), that a jury could reasonably conclude by a preponderance of the evidence that the defendant had committed the prior act. This standard may not adequately protect the defendant from evidence that jurors tend to overvalue, particularly if the definition of what constitutes a prior sexual assault is as broad as proposed in S.6. While it may be difficult to prove sexual offenses, it is also difficult to counter false accusations. When an alleged victim is willing to testify, or has made a statement that overcomes hearsay objections, the test of Huddleston is probably met. Of course, if Huddleston is abandoned in favor of a higher standard (see discussion infra), this objection will not apply.

Furthermore, Huddleston should perhaps not apply. The Supreme Court in Huddleston was concerned with non-propensity evidence admitted pursuant to subdivision (b). Evidence of prior sexual misconduct would be admitted as an exception to the propensity prohibition in subdivision (a). The existing exceptions to subdivision (a) offer no guidance about the appropriate burden because Rule 405 allows proof by reputation or opinion only. Presumably, given all the problems with evidence of prior sexual misconduct, one could require a preliminary determination by the court pursuant to Rule 104(a) as a condition to admitting such evidence. Whether a standard higher than the usual preponderance of the evidence should be required would also have to be decided.

Another possible solution would be to limit the use of prior misconduct to instances in which there has been a conviction. This modification would relieve jurors of having to cope with the collateral issue of whether a defendant committed the uncharged act, and defendant of having to mount a defense with regard to uncharged crimes. Of course, such a limitation would cut down enormously on the cases in which evidence of prior sexual misconduct would be usable. It must also be remembered that some acts of sexual misconduct are so unique that they are properly admissible pursuant to Rule 404(b) even under the present rule.

d. The interaction with Rule 412. Although the propensity rule incorporated in Rule 404 is probably not constitutionally required, constitutional difficulties might arise were propensity evidence relating to the defendant's prior sexual conduct proffered in a case in which the prosecution invoked Rule 412 to bar the same



kind of evidence against the complainant. A judge might well find that under these circumstances, the evidence offered against the complainant "is constitutionally required to be admitted" pursuant to Rule 412(b)(1) of the Federal Rules of Evidence.[8] Allowing the prosecution to make use of an evidentiary principle while simultaneously restraining the defendant from introducing probative evidence is constitutionally suspect. Cf. Chambers v. Mississippi, 410 U.S. 284 (1973).

If, in order to avoid constitutional difficulties, judges permit defendants to introduce evidence of complainants' past sexual behavior, the result may well be that which Rule 412 seeks to avoid -- an unwillingness on the part of victims of sexual assaults to bring charges. Aside from undermining the rationale of Rule 412, this outcome would be directly contrary to the objective sought by those who advocate elimination of the propensity rule in sexual misconduct prosecutions in the hope of obtaining more convictions.

2. Civil Cases. By stating without any limitation that "evidence of a person's character or a trait of character is not admissible" to prove propensity, Rule 404(a) makes the prohibition applicable to all cases including civil cases. In contrast, the word "accused" in subdivisions (a)(1) and (a)(2) indicates that the exceptions apply only in criminal cases. This reading of Rule 404(a) is supported by the Advisory Committee Note which states quite clearly that evidence of conduct may not be used for a propensity inference in civil cases and that the exceptions stated in subdivisions (a)(1)

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[8] Our pending amendment to Rule 412 provides in subdivision (b)(1)(C) for the admission in criminal cases of "evidence the exclusion of which would violate the constitutional rights of the defendant."

and (a)(2) do not apply, The Advisory Committee defended its extension of the propensity rule to civil cases because of character evidence's low probative value and tendency to cause prejudice; it was unwilling to extend the defendant's option to introduce evidence of good character for fear of opening the door to psychological evaluations and testing.

Despite the clear mandate of Rule 404(a), an occasional federal court has indicated a willingness to extend the exceptions to a civil case if the conduct at issue is criminal. See, e.g., Bolton v. Tesoro Petroleum Corp., 871 F.2d 1267 (5th Cir.) (civil RICO; evidence admissible in a trial raising quasi-criminal allegations), cert. denied, 110 S.Ct. 83 (1989); Perrin v. Anderson, 784 F.2d 1040, 1044 (10th Cir. 1986) ("Although the literal language of the exception to Rule 404(a) applies only to criminal cases, . . .when the central issue involved in a civil case is in nature criminal the defendant may invoke the exceptions to Rule 404(a)."); Crumpton v. Confederation Life Ins. Co., 672 F.2d 1248, 1253-54 & n. 7 (5th Cir. 1982) (action on accidental death policy where insured had been shot by woman who claimed he raped her; beneficiary allowed to introduce evidence of insured's good character; court affirmed "when evidence would be admissible under Rule 404(a) in a criminal case, we think it should also be admissible in a civil suit where the focus is on essentially criminal aspects, and the evidence is relevant, probative, and not unduly prejudicial;" alternative holding).

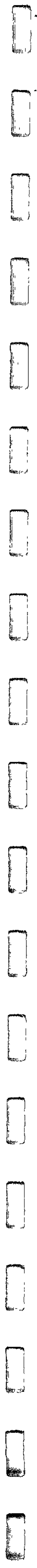
The Committee might wish to reconsider the original Advisory Committee's conclusion, taking into account whether legal developments since 1975 justify a recasting of the propensity rule in civil cases. For instance, does the increased reliance on quasi-

criminal measures such as civil RICO and forfeiture proceedings make a difference, or an increase in intentional tort actions which furnish the closest analogy to criminal misconduct?

A number of the states have revised Rule 404(a) to deal specifically with problems posed by civil cases. See 1 Trial Evidence Committee, Section of Litigation, American Bar Association, Evidence in America: The Federal Rules in the States § 14.2 at pp. 4-5 (1992). The Texas rule broadens the (a)(1) exception to allow proof of good character in all instances involving accusations of moral turpitude whether in a civil or criminal case. and extends the (a)(2) exception to the character of victims of assaultive conduct in civil actions:

> (1) **Character of party accused of conduct involving moral turpitude.** Evidence of a pertinent trait of his character offered by a party accused of conduct involving moral turpitude, or by the accusing party to rebut the same;
> (2) **Character of alleged victim of assaultive conduct.** Evidence of character for violence of the alleged victim of assaultive conduct offered on the issue of self-defense by a party accused of the assaultive conduct or evidence of peaceable character to rebut the same.

3. A Third Party's Propensity. Read literally, Rule 404(a) excludes evidence relating to any person's character when offered for a propensity inference. See United States v. McCourt, 925 F.2d 1229, 1235 (9th Cir. 1991) (rule applies "to any person, and to any proponent"). In a criminal case, when the accused wishes to introduce character evidence to suggest that someone else was the perpetrator of the charged crime, concerns that propensity evidence will undermine defendant's presumption of innocence obviously are inapplicable. Rather, strict utilization of Rule 404 will deprive the accused of exculpatory evidence regardless of its probative value



even though it might engender a reasonable doubt. Few cases have dealt with this issue; sometimes the evidence proffered by defendant is found to satisfy Rule 404(b). See, e.g., United States v. Aboumoussallem, 726 F.2d 906 (2d Cir. 1984) (defendant who claimed that he had been duped into smuggling by his cousins wanted to show that his cousins had duped others; court found that evidence satisfied Rule 404(b) but not Rule 403). Should the propensity bar be removed when an accused seeks to introduce character evidence relating to a third person so that admissibility will be governed by Rules 401 and 403 rather than Rule 404?

B. Amendments to Rule 404(b).

1. Changing the burden of proof. Until the Supreme Court's decision in Huddleston v. United States, 485 U.S. 681 (1988), there was a conflict in the circuits as to the height of the prosecution's burden in proving the other crime, and as to whether Rule 104(a) or (b) applied. The Supreme Court resolved the issue by holding that the trial judge need not make a finding with regard to other crimes evidence; rather, pursuant to Rule 104(b), the court "simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . .by a preponderance of the evidence."

There are critics who argue that the Huddleston standard does not afford the accused sufficient protection. The American Bar Association's Criminal Justice Section has urged abandonment of Huddleston in favor of a clear and convincing standard, and its position has been endorsed by the A.B.A.'s House of Delegates.[9] A number of states

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[9] See E.J. Imwinkelreid, Uncharged Misconduct Evidence § 2:08 (1993 Supplement).

have refused to adopt Huddleston in construing their own versions of Rule 404. See, e.g., State v. Faulker, 314 Md. 630 (1989). The Court of Appeals of Maryland, Standing Committee on Rules of Practice and Procedure has recently stated that it "intends to make no change in Maryland Law." Report at 37 (1993). Minnesota added a sentence to its Rule 404 after Huddleston:

> In a criminal prosecution, such evidence shall not be admitted unless the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence.

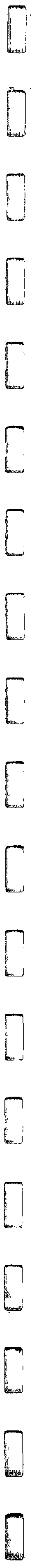
Congress, however, may well wish to retain the status quo. Whether Huddleston should be extended to proof of prior sexual misconduct if such evidence is allowed as an exception to the propensity rule is discussed supra.

2. Clarifying whether the evidence must relate to a disputed issue. The courts are divided about the extent to which a consequential fact must be controverted in order for other crimes evidence to be admissible to prove that fact. A subsidiary issue on which courts disagree is whether the defendant has the right to preclude the prosecution from proffering other crimes evidence by offering to stipulate to the consequential fact to which the evidence is relevant. The Supreme Court by-passed the opportunity to clarify the stipulation issue when it dismissed its writ of certiorari in United States v. Hadley, 918 F.2d 848 (9th Cir. 1990) as improvidently granted. The stipulation issue is extensively discussed in E. Imwinkelreid, supra at §§ 8:10-8:15.

The words "if controverted" do not presently appear in Rule 404, although they do in Rule 407. Consequently, it is arguable that the plain-meaning of Rule 404(b) does not condition the admissibility of other crimes evidence on the defense having created an

actual dispute -- through evidence or other means such as an opening statement -- about the consequential fact to which the evidence is offered. The differences in the circuits is most apparent in connection with the issue of intent. Some courts allow other crimes evidence whenever specific, as compared to general intent, is a required element. See, e.g., United States v. Briscoe, 896 F.2d 1476 (7th Cir.), cert. denied, 111 S.Ct. 173 (1990); United States v. Engelman, 648 F.2d 473, 478 (8th Cir.1981). However, the nature of some crimes is such that no genuine issue of intent exists because of the inference that arises from the criminal act itself. Allowing other crimes evidence in such circumstances invites a propensity inference. See, United States v. Kramer, 955 F.2d 479, 492-93 (7th Cir. 1992) (Cudahy, J. concurring) (criticism of specific intent distinction). Other courts require the issue of intent to be seriously disputed and refuse to allow other crimes evidence when, for example, the defendant claims that he did not commit the charged act. See, e.g., United States v. Figueroa, 618 F.2d 934, 940 (2d Cir. 1980)..

The Supreme Court's opinion in Estelle v. McGuire, 112 S.Ct. 475 (1991), a habeas corpus challenge to a California conviction, contains dictum that provides some ammunition for concluding that the prosecutor is free to introduce other crimes evidence even when the defendant has failed to raise an issue concerning the fact which the evidence seeks to prove. In a prosecution charging defendant with the murder of his infant daughter, the prosecution offered evidence that she was a battered child. The Court of Appeals had ruled that this evidence should have been excluded because defendant did not raise a defense of accidental death. The Supreme Court disagreed:



[T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense. In the federal courts "[a] simple plea of not guilty...puts the prosecution to its proof as to all elements of the crime charged." Matthews v. United States, 485 U.S. 58, 64-65 (1988).

Id. at 475.

Is this an issue we wish to address? For instance, the words "if controverted" could be added to Rule 404(b) after the words "mistake or accident."

Tennessee requires that upon request the judge must hold a hearing outside the jury's presence and at that hearing

The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;

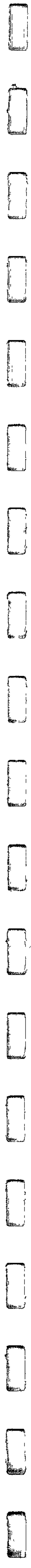
Tenn R. Evid. 404(b)(2).

3. Other suggestions. Should one add a ten year limitation to Rule 404(b) analogous to that contained in Rule 609(b) regarding the use of convictions for impeachment? Should the rule add language aimed at distinguishing between "other" or "extrinsic" acts versus the "same" or "intrinsic" acts. Some recent codifications have attempted to deal with this issue. Louisiana has added the following language at the end of Rule 404(b):

, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

Kentucky has added a second subdivision to Rule 404(b) that deals with this issue somewhat differently:

(2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.



C. Amendments Aimed at Clarification of the Existing Rule. This section considers whether any changes should be made in the text of Rule 404 or the Committee Note to make them more comprehensible even if the Committee does not wish to affect the current meaning of the rule. Since the Committee has never had an opportunity to discuss the costs and benefits of revising rules in the interest of intelligibility, I have proceeded in the following manner. Rather than redrafting Rule 404 before knowing the Committee's views on when clarification is worth the risk of inadvertently creating unanticipated problems, I have instead categorized different kinds of possible changes so that we can consider general principles as well as specific changes. The sample amendments to Rule 404 which are set forth are intended more as illustrations of issues than as recommendations about specific language that should be adopted if the Committee determines to resolve the difficulty in question.

1. Enhancing plain-meaning. Into this category I have slotted possible changes that would make the intended plain-meaning of the rule plainer. Law professors would perhaps agree that the scope of Rule 404, and its interrelationship with Rule 405, often elude the casual reader.

a. Should the rule deal more comprehensively with character? Would lawyers better understand the scope of Rule 404 if the rule dealt with character evidence more comprehensively. Rule 404 prohibits the inferential or circumstantial use of evidence to prove conduct in conformity with character except in three specified circumstances. Subdivision (b) explicitly acknowledges that this general prohibition is inapplicable when evidence is offered to prove something other than character so that no

inference from character to conduct is entailed. The text of Rule 404 does not, however, explicitly state that the rule is equally inapplicable when a person's character is directly relevant without an inference about his or her conduct. Whether this is adequately clear is problematic despite being mentioned in the current Committee Note.

Oregon has changed the title of its Rule 404 to read: Character Evidence: Admissibility. It then adds a new first subdivision:

> (1) **Admissibility generally.** Evidence of a person'scharacter or trait of character is admissible when it is an essential element of a charge, claim or defense.[10]

A more ambitious undertaking would be to redraft Rule 404 to make clearer the difference between inferential and non-inferential use, and to tie the methods of proof more directly to the various ways in which evidence relating to a defendant's character may be used.[11]

b. Is the rule sufficiently clear as to when character evidence is admissible? Advisory Committee Note to Rule 404 (a) states:

> Character questions arise in two fundamentally different ways. (1) Character may itself be an element of a crime, claim, or defense. A situation of this kind is commonly referred to as "character in issue." Illustrations are: the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction, or the competency of the driver in an action for negligently entrusting

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[10] Montana has adopted a similar provision as the last subdivision in Rule 404 but without a change in the caption of the rule to indicate that it is dealing with character evidence in general.

[11] See Glen Weissenberger, Character Evidence Under the Federal Rules: A Puzzle with Missing Pieces, 48 Cincinnati L. Rev. 1, 12 (1979). Professor Weissenberger's proposal which combines Rules 404 and 405 is attached. See Attachment C.

a motor vehicle to an incompetent driver.[12]

The Note further states that allowable methods of proof are dealt with in Rule 405. That rule refers to "cases in which character, or a trait of character of a person is an essential element of a charge, claim or defense." (emphasis added)

Is this language misleading? The formulation of "essential elements" in Rule 405 and the illustrations in the Rule 404 Note about formal "elements" of causes of action, suggest that something more is intended than character being a "fact that is of consequence." See Rule 401. Although reported opinions do not indicate that courts insist on anything other than a showing of relevancy, the departure from the language of Rule 401 may suggest that something more is required of a proponent. The Bar's discomfort with the meaning of an "essential elements" test was apparent when we discussed Rule 412.

If the Committee wishes to make Rule 404's treatment of character evidence more comprehensive by adding a provision that character evidence offered to prove something other than propensity is admissible (see a. supra), the formulation must be coordinated with Rule 405. Consequently, the "essential claims" phrase would have to be retained if Rule 405 is not amended.

c. Is Rule 404's treatment of civil cases adequate? This discussion is concerned with the clarity of the rule with regard to civil cases rather than with its wisdom which is discussed supra. Rule 404 makes two somewhat indirect statements

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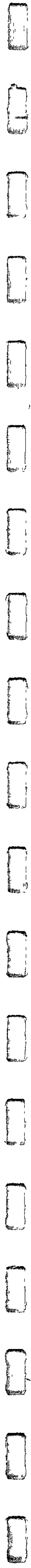
[12] The terminology, "character in issue," is also used in connection with the very different situation codified in subdivision (a)(1) when the accused is allowed to introduce evidence of his good character.



about the inferential use of character evidence in civil cases. The Advisory Committee's intent is clearly expressed in the accompanying Note. By stating without any limitation that "evidence of a person's character or a trait of character is not admissible" to prove propensity, the Rule makes the general prohibition applicable to civil cases. By using the word "accused" in subdivisions (a)(1) and (a)(2), it limits the two exceptional circumstances in which the propensity inference is usable to criminal cases. One could make both of these points explicitly. Adding "in a criminal case" to the exceptions (if that is the desired rule) would eliminate arguments that "accused" means the defendant in a civil case.

d. Is the relationship between subdivision (a) and subdivision (b) sufficiently clear? Is it helpful that the first sentence of subdivision (b) restates the general rule of subdivision (a)? One consequence is that courts at times quote this sentence and cite subdivision (b) when they are they are solely concerned with analyzing the scope of the propensity rule. The case is then classified in annotations, etc. as a Rule 404(b) case. Furthermore, the repetition in (b) perhaps obscures the difference between a propensity and non-propensity inference, and promotes the erroneous impression that subdivision (b) is an exception to subdivision (a).

2. Codifying Supreme Court holdings. There is precedent for amending the Evidence Rules to incorporate Supreme Court holdings; both the Civil and Criminal Rules of Procedure have at times been amended to codify a Supreme Court holding.[13]

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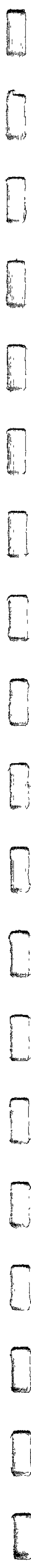
[13] For instance, the work product rule in Fed.R.Civ.P. 26 has its genesis in Hickman v. Taylor, 329 U.S. 495 (1947) and Criminal Rule 26.2 was in part a response to United States v. Nobles, 422 U.S. 225 (1975).

Most evidence courses now teach evidence as a code subject, and the multi-state bar exam is based on the Federal Rules of Evidence. Failing to incorporate a significant decision of the Supreme Court that is essential to understanding and using a particular rule may therefore mislead the advocate who expects to find everything in the Rules. On the other hand, additional codification will make the rules more prolix.

Possible candidates for codification are Huddleston v. United States, 485 U.S. 681 (1988), see supra and Dowling v. United States, 493 U.S. 342 (1990) (evidence of crimes of which defendant has been acquitted may be admitted pursuant to Rule 404(b)). Huddleston is the far more significant opinion since its holding applies in every case in which Rule 404(b) evidence is proffered, and a number of states interpret identical versions of Rule 404 differently. See discussion supra and see 1 Trial Evidence Committee, Section of Litigation, American Bar Association, Evidence in America: The Federal Rules in the States § 14.2 (1992). A sentence with a cross-reference to Rule 104(b) could be added to the end of subdivision (b), or a comment could be added to the Note. The need to codify Dowling is considerably less.

3. Adding cross-references. Rule 404 currently contains cross-references to Rules 607, 608 and 609 in subdivision (a)(3). Subdivision (a)(2) should perhaps state that it is subject to Rule 412 since it clearly is. See Iowa and Texas Rule 412. A cross-reference to Rule 405 might also be desirable to clarify the relationship between Rules 404 and 405. See discussion of Rule 405.

4. Revising the notes. In a previous memorandum I questioned whether we are free to issue new notes if we make no changes in a rule. Assuming that we may make



changes (either in conjunction with amendments to the text of the Rule or otherwise), we need to consider the type of changes we would wish to undertake.

a. Correcting errors. The third paragraph of the Note is clearly wrong in light of Rule 412 in the example it gives of evidence of the character of the victim being admissible on the issue of consent in a rape case.

b. Updating case law developments. The extent to which one should update references in the Committee Note is particularly troublesome with a rule like 404 which has engendered so much commentary both in the courts and legal literature. For instance, an entire treatise is devoted solely to Rule 404(b). Do we want to include references to helpful secondary materials? even if their authors are members of the Evidence Committee?

S. 11 — Violence Against Women Act

611

SEC. 611 REPORT ON FEDERAL RULE OF EVIDENCE 404

(request of full Judiciary Committee)

(a) STUDY. -- Not later than 180 days after the date of enactment of this Act, the Judicial Conference shall complete a study of, and shall submit to Congress, recommendations for amending Federal Rule of Evidence 404 as it affects the admission of evidence of a defendant's prior sex crimes in cases brought pursuant to chapter 109A or other cases involving sexual misconduct.

(b) SPECIFIC ISSUES. -- This study shall include, but is not limited to, consideration of the following issues: (1) a survey of existing law on the introduction of prior similar sex crimes under state and federal evidentiary rules; (2) a recommendation about whether Rule 404 should be amended to introduce evidence of prior sex crimes and, if so, (a) whether such acts could be used to prove the defendant's "propensity" to act therewith and (b) whether prior similar sex crimes should be admitted for purposes other than to show character; (3) a recommendation about whether similar acts, if admitted, should meet a threshold of similarity to the crime charged; (4) a recommendation about whether similar acts, if admitted, should be confined within a certain time period, (e.g. 10 years); and (5) the effect, if any, of the adoption of any proposed changes on the admissibility of evidence under Rule 412, the rape shield law.

ATTACHMENT A

new baby, or an aging parent with a serious medical problem. That worker's presence in the home for the time it takes to get the family through the situation will make a difference not only in the worker's peace of mind during the crisis, but in her or his ability to do their job well for months and years after they return to work.

Mr. President, as much as I have been proud and pleased to support family and medical leave legislation for the past several years, I will be even more happy to see this bill with a public law number assigned to it. Those Members or Congress and organizations who have put in yeomans' service in this effort can then move on to other pressing issues facing American families. Thank you, Mr. President.●

Mrs. BOXER. Mr. President, it has been a long difficult fight, but today we stand a few short steps from victory. We now have a Congress that will pass the Family and Medical Leave Act and a President who has agreed to sign it into law. I am proud to be an original cosponsor of this legislation.

The Family and Medical Leave Act, which provides families with job security at a time when they most need it, is long overdue. No worker should be subject to termination for taking time off to care for a sick child. I believe that not only will this bill institute more humane workplace policies, it will make workers more productive by eliminating the prospect that they would leave to choose between their families and their jobs.

I urge my colleagues to join me in working for fast action on the Family and Medical Leave Act.

By Mr. DOLE (for himself, Mr. THURMOND, Mr. SIMPSON, Mr. MCCAIN, Mr. SPECTER, and Mr. COVERDELL):

S. 6. A bill to prevent and punish sexual violence and domestic violence, to assist ad protect the victims of such crimes, to assist State and local effects, and for other purposes; to the Committee on the Judiciary.

SEXUAL ASSAULT PREVENTION ACT OF 1993

Mr. DOLE. Mr. President, as I stated earlier, I am joined today by several of my Republican colleagues in introducing the Sexual Assault Prevention Act of 1993.

As is my right as Republican leader, I have asked that this bill be designated as "S. 6," symbolizing the fact that this bill is a top priority of Senate Republicans. This legislation is also being introduced in the House by Congresswoman SUSAN MOLINARI of New York.

I first introduced legislation similar to S. 6 in February of 1991—nearly 2 years ago. I reintroduced the legislation last fall. I know that Senator BIDEN is also very interested in this issue, and hope we can work together to write legislation that will protect women from crime in the streets and crime in their own home.

The bill contains three titles. Title I is concerned with violent sex crimes. Subtitle A of title I increases penalties for sexual violence and strengthens the rights and remedies available to victims of sexual violence.

Subtitle B contains changes in rules of evidence, practice, and procedure to facilitate effective prosecution of violent sex offenders, and to prevent abuse of victims and increase the rights of victims.

Subtitle C addresses the problem of sexual assaults at colleges and universities.

Subtitle D contains new justice assistance measures to enhance State and Local efforts against sexual violence.

Title II of the bill concerns domestic violence, stalking, and offenses against the family. It strengthens the Federal response to domestic violence, stalking, and noncompliance with child support obligations in cases with interstate elements, requires reports on a number of issues of importance to protecting the victims of domestic violence, and establishes a new justice assistance program to enhance State and local efforts to combat domestic violence and stalking, and to enforce child support obligations.

Title III of the bill establishes a national task force on violence against women. The task force would carry out a comprehensive examination of violent crime against women and recommend additional reforms and improvements.

I look forward to working with the distinguished chairman of the Judiciary Committee in finding common ground in our legislative proposals, and seeing them adopted into law.

I ask unanimous consent that the text of the bill and any additional statements be printed in the CONGRESSIONAL RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 6

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sexual Assault Prevention Act of 1993".

SEC. 2. TABLE OF CONTENTS.

Sec. 1. Short title.
Sec. 2. Table of contents.

TITLE I—SEXUAL VIOLENCE

SUBTITLE A—PENALTIES AND REMEDIES

Sec. 101. Pre-trial detention in sex offense cases.
Sec. 102. Death penalty for murders committed by sex offenders.
Sec. 103. Increased penalties for recidivist sex offenders.
Sec. 104. Increased penalties for sex offenses against victims below the age of 16.
Sec. 105. Sentencing guidelines increase for sex offenses.
Sec. 106. HIV testing and penalty enhancement in sex offense cases.
Sec. 107. Payment of cost of HIV testing for victims in sex offense cases.
Sec. 108. Increased penalties for drug distribution to pregnant women.
Sec. 109. Extension and strengthening of restitution.
Sec. 110. Enforcement of restitution orders through suspension of federal benefits.
Sec. 111. Civil remedy for victims of sexual violence.

SUBTITLE B—RULES OF EVIDENCE, PRACTICE, AND PROCEDURE

Sec. 121. Admissibility of evidence of similar crimes in sex offense cases.
Sec. 122. Extension and strengthening of rape victim shield law.
Sec. 123. Inadmissibility of evidence to show provocation or invitation by victim in sex offense cases.
Sec. 124. Right of the victim to fair treatment in legal proceedings.
Sec. 125. Right of the victim to an impartial jury.
Sec. 126. Victim's right of allocation in sentencing.
Sec. 127. Victim's right of privacy.

SUBTITLE C—SAFE CAMPUSES

Sec. 131. National baseline study on campus sexual assault.

SUBTITLE D—ASSISTANCE TO STATES AND LOCALITIES

Sec. 141. Sexual violence grant program.
Sec. 142. Supplementary grants for states adopting effective laws relating to sexual violence.

TITLE II—DOMESTIC VIOLENCE, STALKING, AND OFFENSES AGAINST THE FAMILY

Sec. 201. Interstate travel to commit spouse abuse or to violate protective order; interstate stalking.
Sec. 202. Full faith and credit for protective orders.
Sec. 203. Non-compliance with child support obligations in interstate cases.
Sec. 204. Presumption against child custody for spouse abusers.
Sec. 205. Report on battered women's syndrome.
Sec. 206. Report on confidentiality of addresses for victims of domestic violence.
Sec. 207. Report on recordkeeping relating to domestic violence.
Sec. 208. Domestic Violence and family support grant program.

TITLE III—NATIONAL TASK FORCE ON VIOLENCE AGAINST WOMEN

Sec. 301. Establishment.
Sec. 302. Duties of task force.
Sec. 303. Membership.
Sec. 304. Pay.
Sec. 305. Executive director and staff.
Sec. 306. Powers of task force.
Sec. 307. Report.
Sec. 308. Authorization of appropriation.
Sec. 309. Termination.

TITLE I—SEXUAL VIOLENCE

SUBTITLE A—PENALTIES AND REMEDIES

SEC. 101. PRE-TRIAL DETENTION IN SEX OFFENSE CASES.

Section 3156(a)(4) of title 18, United States Code, is amended by striking ", or" at the end of subparagraph (A) and inserting a semicolon, by striking the period at the end of subparagraph (B) and inserting "; or", and by adding after subparagraph (B) the following new subparagraph:

"(C) any felony under chapter 109A or chapter 110 of this title."

SEC. 102. DEATH PENALTY FOR MURDERS COMMITTED BY SEX OFFENDERS.

Title 18 of the United States Code is amended—

(a) by adding the following new section at the end of chapter 51:

"§1118. Capital Punishment for Murders Committed by Sex Offenders

"(a) OFFENSE.—Whoever—

ATTACHMENT B

"(1) causes the death of a person intentionally, knowingly, or through recklessness manifesting extreme indifference to human life; or

"(2) causes the death of a person through the intentional infliction of serious bodily injury;

shall be punished as provided in subsection (c) of this section.

"(b) FEDERAL JURISDICTION.—There is Federal jurisdiction over an offense described in this section if the conduct resulting in death occurs in the course of another offense against the United States.

"(c) PENALTY.—An offense described in this section is a Class A felony. A sentence of death may be imposed for an offense described in this section as provided in subsections (d)–(l), except that a sentence of death may not be imposed on a defendant who was below the age of eighteen at the time of the commission of the crime.

"(d) MITIGATING FACTORS.—In determining whether to recommend a sentence of death, the jury shall consider whether any aspect of the defendant's character, background, or record or any circumstance of the offense that the defendant may proffer as a mitigating factor exists, including the following factors:

"(1) MENTAL CAPACITY.—The defendant's mental capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired.

"(2) DURESS.—The defendant was under unusual and substantial duress.

"(3) PARTICIPATION IN OFFENSE MINOR.—The defendant is punishable as a principal (pursuant to section 2 of this title) in the offense, which was committed by another, but the defendant's participation was relatively minor.

"(e) AGGRAVATING FACTORS.—In determining whether to recommend a sentence of death, the jury shall consider any aggravating factor for which notice has been provided under subsection (f), including the following factors—

"(1) KILLING IN COURSE OF DESIGNATED SEX CRIMES.—The conduct resulting in death occurred in the course of an offense defined in chapter 109A, 110, or 117 of this title.

"(2) KILLING IN CONNECTION WITH SEXUAL ASSAULT OR CHILD MOLESTATION.—The defendant committed a crime of sexual assault or crime of child molestation, as defined in subsection (x), in the course of an offense on which federal jurisdiction is based under subsection (b).

"(3) PRIOR CONVICTION OF SEXUAL ASSAULT OR CHILD MOLESTATION.—The defendant has previously been convicted of a crime of sexual assault or crime of child molestation as defined in subsection (x).

"(f) NOTICE OF INTENT TO SEEK DEATH PENALTY.—If the government intends to seek the death penalty for an offense under this section, the attorney for the government shall file with the court and serve on the defendant a notice of such intent. The notice shall be provided a reasonable time before the trial or acceptance of a guilty plea, or at such later time before trial as the court may permit for good cause. If the court permits a late filing of the notice upon a showing of good cause, the court shall ensure that the defendant has adequate time to prepare for trial. The notice shall set forth the aggravating factor or factors set forth in subsection (e) and any other aggravating factor or factors that the government will seek to prove as the basis for the death penalty. The factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and the victim's family. The court may permit the attorney for the government to amend the notice upon a showing of good cause.

"(g) JUDGE AND JURY AT CAPITAL SENTENCING HEARING.—A hearing to determine whether the death penalty will be imposed for an offense under this section shall be conducted by the judge who presided at trial or accepted a guilty plea, or by another judge if that judge is not available. The hearing shall be conducted before the jury that determined the defendant's guilt if that jury is available. A new jury shall be impaneled for the purpose of the hearing if the defendant pleaded guilty, the trial of guilt was conducted without a jury, the jury that determined the defendant's guilt was discharged for good cause, or reconsideration of the sentence is necessary after the initial imposition of a sentence of death. A jury impaneled under this subsection shall have twelve members unless the parties stipulate to a lesser number at any time before the conclusion of the hearing with the approval of the judge. Upon motion of the defendant, with the approval of the attorney for the government, the hearing shall be carried out before the judge without a jury. If there is no jury, references to "the jury" in this section, where applicable, shall be understood as referring to the judge.

"(h) PROOF OF MITIGATING AND AGGRAVATING FACTORS.—No presentence report shall be prepared if a capital sentencing hearing is held under this section. Any information relevant to the existence of mitigating factors, or to the existence of aggravating factors for which notice has been provided under subsection (f), may be presented by either the government or the defendant. The information presented may include trial transcripts and exhibits. Information presented by the government in support of factors concerning the effect of the offense on the victim and the victim's family may include oral testimony, a victim impact statement that identifies the victim of the offense and the nature and extent of harm and loss suffered by the victim and the victim's family, and other relevant information. Information is admissible regardless of its admissibility under the rules governing the admission of evidence at criminal trials, except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury. The attorney for the government and for the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in that case of imposing a sentence of death. The attorney for the government shall open the argument, the defendant shall be permitted to reply, and the government shall then be permitted to reply in rebuttal.

"(i) FINDINGS OF AGGRAVATING AND MITIGATING FACTORS.—The jury shall return special findings identifying any aggravating factor or factors for which notice has been provided under subsection (f) and which the jury unanimously determines have been established by the government beyond a reasonable doubt. A mitigating factor is established if the defendant has proven its existence by a preponderance of the evidence, and any member of the jury who finds the existence of such a factor may regard it as established for purposes of this section regardless of the number of jurors who concur that the factor has been established.

"(j) FINDING CONCERNING A SENTENCE OF DEATH.—If the jury specially finds under subsection (i) that one or more aggravating factors set forth in subsection (e) exist, and the jury further finds unanimously that there are no mitigating factors or that the aggravating factor or factors specially found under subsection (i) outweigh any mitigating factors, then the jury shall recommend a sentence of death. In any other case, the jury shall not recommend a sentence of death. In any other case, the jury shall not recommend a sentence of death. The jury shall be instructed that it must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factors in its decision, and should make such a recommendation as the information warrants.

"(k) SPECIAL PRECAUTION TO ASSURE AGAINST DISCRIMINATION.—In a hearing held before a jury, the court, before the return of a finding under subsection (j), shall instruct the jury that, in considering whether to recommend a sentence of death, it shall not be influenced by prejudice or bias relating to the race, color, religion, national origin, or sex of the defendant or any victim, and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for such a crime regardless of the race, color, religion, national origin, or sex of the defendant or any victim. The jury, upon the return of a finding under subsection (j), shall also return to the court a certificate, signed by each juror, that the race, color, religion, national origin, or sex of the defendant or any victim did not affect the juror's individual decision and that the individual juror would have recommended the same sentence for such a crime regardless of the race, color, religion, national origin, or sex of the defendant or any victim.

"(l) IMPOSITION OF A SENTENCE OF DEATH.—Upon a recommendation under subsection (j) that a sentence of death be imposed, the court shall sentence the defendant to death. Otherwise the court shall impose a sentence, other than death, that is authorized by law.

"(m) REVIEW OF A SENTENCE OF DEATH.—The defendant may appeal a sentence of death under this section by filing a notice of appeal of the sentence within the time provided for filing a notice of appeal of the judgment of conviction. An appeal of a sentence under this subsection may be consolidated with an appeal of the judgment of conviction and shall have priority over all non-capital matters in the court of appeals. The court of appeals shall review the entire record in the case including the evidence submitted at trial and information submitted during the sentencing hearing, the procedures employed in the sentencing hearing, and the special findings returned under subsection (i). The court of appeals shall uphold the sentence if it determines that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, that the evidence and information support the special findings under subsection (i), and that the proceedings were otherwise free of prejudicial error that was properly preserved for and raised on appeal. In any other case, the court of appeals shall remand the case for reconsideration of the sentence or imposition of another authorized sentence as appropriate, except that the court shall not reverse a sentence of death on the ground that an aggravating factor was not supported by the evidence and information if at least one aggravating factor set forth in subsection (e) which was found to exist remains and the court, on the basis of the evidence submitted at trial and the information submitted at the sentencing hearing, finds no mitigating factor or finds that the remaining aggravating factor or factors which were found to exist outweigh any mitigating factors. The court of appeals shall state in writing the reasons for its disposition of an appeal of a sentence of death under this section.

"(n) IMPLEMENTATION OF SENTENCE OF DEATH.—A person sentenced to death under this section shall be committed to the custody of the Attorney General until exhaus-

tion of the procedures for appeal of the judgment of conviction and review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States Marshal. The Marshal shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed, or in the manner prescribed by the law of another State designated by the court if the law of the State in which the sentence was imposed does not provide for implementation of a sentence of death. The Marshal may use State or local facilities, may use the services of an appropriate State or local official or of a person such an official employs, and shall pay the costs thereof in an amount approved by the Attorney General.

"(o) SPECIAL BAR TO EXECUTION.—A sentence of death shall not be carried out upon a woman while she is pregnant.

"(p) CONSCIENTIOUS OBJECTION TO PARTICIPATION IN EXECUTION.—No employee of any State department of corrections, the Federal Bureau of Prisons, or the United States Marshals Service, and no person providing services to that department, bureau, or service under contract shall be required, as a condition of that employment or contractual obligation, to be in attendance at or to participate in any execution carried out under this section if such participation is contrary to the moral or religious convictions of the employee. For purposes of this subjection, the term 'participate in any execution' includes personal preparation of the condemned individual and the apparatus used for the execution, and supervision of the activities of other personnel in carrying out such activities.

"(q) APPOINTMENT OF COUNSEL FOR INDIGENT CAPITAL DEFENDANTS.—A defendant against whom a sentence of death is sought, or on whom a sentence of death has been imposed, under this section, shall be entitled to appointment of counsel from the commencement of trial proceedings until one of the conditions specified in subsection (v) has occurred, if the defendant is or becomes financially unable to obtain adequate representation. Counsel shall be appointed for trial representation as provided in section 3005 of this title, and at least one counsel so appointed shall continue to represent the defendant until the conclusion of direct review of the judgment, unless replaced by the court with other qualified counsel. Except as otherwise provided in this section, the provisions of section 3006A of this title shall apply to appointments under this section.

"(r) REPRESENTATION AFTER FINALITY OF JUDGMENT.—When a judgment imposing a sentence of death under this section has become final through affirmance by the Supreme Court on direct review, denial of certiori by the Supreme Court on direct review, or expiration of the time for seeking direct review in the court of appeals or the Supreme Court, the government shall promptly notify the court that imposed the sentence. The court, within 10 days of receipt of such notice, shall proceed to make a determination whether the defendant is eligible for appointment of counsel for subsequent proceedings. The court shall issue an order appointing one or more counsel to represent the defendant upon a finding that the defendant is financially unable to obtain adequate representation and wishes to have counsel-appointed or is unable competently to decide whether to accept or reject appointment of counsel. The court shall issue an order denying appointment of counsel upon a finding that the defendant is financially able to obtain adequate representation or that the defendant rejected appointment of counsel with an understanding of the consequences of that decision. Counsel appointed pursuant to this subsection shall be different from the counsel who represented the defendant at trial and on direct review unless the defendant and counsel request a continuation or renewal of the earlier representation.

"(s) STANDARDS FOR COMPETENCE OF COUNSEL.—In relation to a defendant who is entitled to appointment of counsel under subsections (q)–(r), at least one counsel appointed for trial representation must have been admitted to the bar for at least 5 years and have at least three years of experience in the trial of felony cases in the Federal district courts. If new counsel is appointed after judgment, at least one counsel so appointed must have been admitted to the bar for at least 5 years and have at least 3 years of experience in the litigation of felony cases in the Federal courts of appeals or the Supreme Court. The court, for good cause, may appoint counsel who does not meet these standards, but whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration of the seriousness of the penalty and the nature of the litigation.

"(t) CLAIMS OF INEFFECTIVENESS OF COUNSEL IN COLLATERAL PROCEEDINGS.—The ineffectiveness of incompetence of counsel during proceedings on a motion under section 2255 of title 28, United States Code, shall not be a ground for relief from the judgment or sentence in any proceeding. This limitation shall not preclude the appointment of different counsel at any stage of the proceedings.

"(u) TIME FOR COLLATERAL ATTACK ON DEATH SENTENCE.—A motion under section 2255 of title 28, United States Code, attacking a sentence of death under this section, or the conviction on which it is predicated, must be filed within 90 days of the issuance of the order under subsection (r) appointing or denying the appointment of counsel for such proceedings. The court in which the motion is filed, for good cause shown, may extend the time for filing for a period over all non-capital matters in the district court, and in the court of appeals on review of the district court's decision.

"(v) STAY OF EXECUTION.—The execution of a sentence of death under this section shall be stayed in the course of direct review of the judgment and during the litigation of an initial motion in the case under section 2255 of title 28, United States Code. The stay shall run continuously following imposition of the sentence and shall expire if—

"(1) the defendant fails to file a motion under section 2255 of title 28, United States Code, within the time specified in subsection (u), fails to make a timely application for court of appeals review following the denial of such a motion by a district court;

"(2) upon completion of district court and court of appeals review under section 2255 of title 28, United States Code, the Supreme Court disposes of a petition for certiorari in a manner that leaves the capital sentence undisturbed, or the defendant fails to file a timely petition for certiorari; or

"(3) before a district court, in the presence of counsel and after having been advised of the consequences of such a decision, the defendant waives the right to file a motion under section 2255 of title 28, United States Code.

"(w) FINALITY OF THE DECISION ON REVIEW.—If one of the conditions specified in subsection (v) has occurred, no court thereafter shall have the authority to enter a stay of execution or grant relief in the case unless—

"(1) the basis for the stay and request for relief is a claim not presented in earlier proceedings;

"(2) the failure to raise the claim is the result of governmental action in violation of the Constitution or laws of the United States, the result of the Supreme Court's recognition of a new Federal right that is retroactively applicable, or the result of the fact that the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence in time to present the claim in earlier proceedings; and

"(3) the facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the determination of guilt on the offense or offenses for which the death penalty was imposed.

"(x) DEFINITIONS.—For purposes of this section—

"(1) 'crime of sexual assault' means a crime under Federal or State law that involved—

"(A) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

"(B) contact, without consent, between the genitals or anus of the defendant and any part of the body of another person;

"(C) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

"(D) an attempt or conspiracy to engage in any conduct described in paragraphs (A)–(C);

"(2) 'crime of child molestation' means a crime under Federal or State law that involved—

"(A) contact between any part of the defendant's body or an object and the genitals or anus of a child;

"(B) contact between the genitals or anus of the defendant and any part of the body of a child;

"(C) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

"(D) an attempt or conspiracy to engage in any conduct described in paragraphs (A)–(C); and

"(3) 'child' means a person below the age of 14."; and

(b) by adding the following at the end of the table of sections for chapter 51:

"1118. Capital Punishment for Murders Committed by Sex Offenders.".

SEC. 103. INCREASED PENALTIES FOR RECIDIVIST SEX OFFENDERS.—

(a) Section 2245 of title 18, United States Code, is redesignated section 2246.

(b) Chapter 109A of title 18, United States Code, is amended by inserting the following new section after section 2244:

"2245. Penalties for subsequent offenses.

"Any person who violates a provision of this chapter after a prior conviction under a provision of this chapter or the law of a State (as defined in section 513 of this title) for conduct proscribed by this chapter has become final is punishable by a term of imprisonment up to twice that otherwise authorized.".

(c) The table of sections for chapter 109A of title 18, United States Code, is amended by—

(1) striking "2245" and inserting in lieu thereof "2246"; and

(2) inserting the following after the item relating to section 2244:

"2245. Penalties for subsequent offenses.".

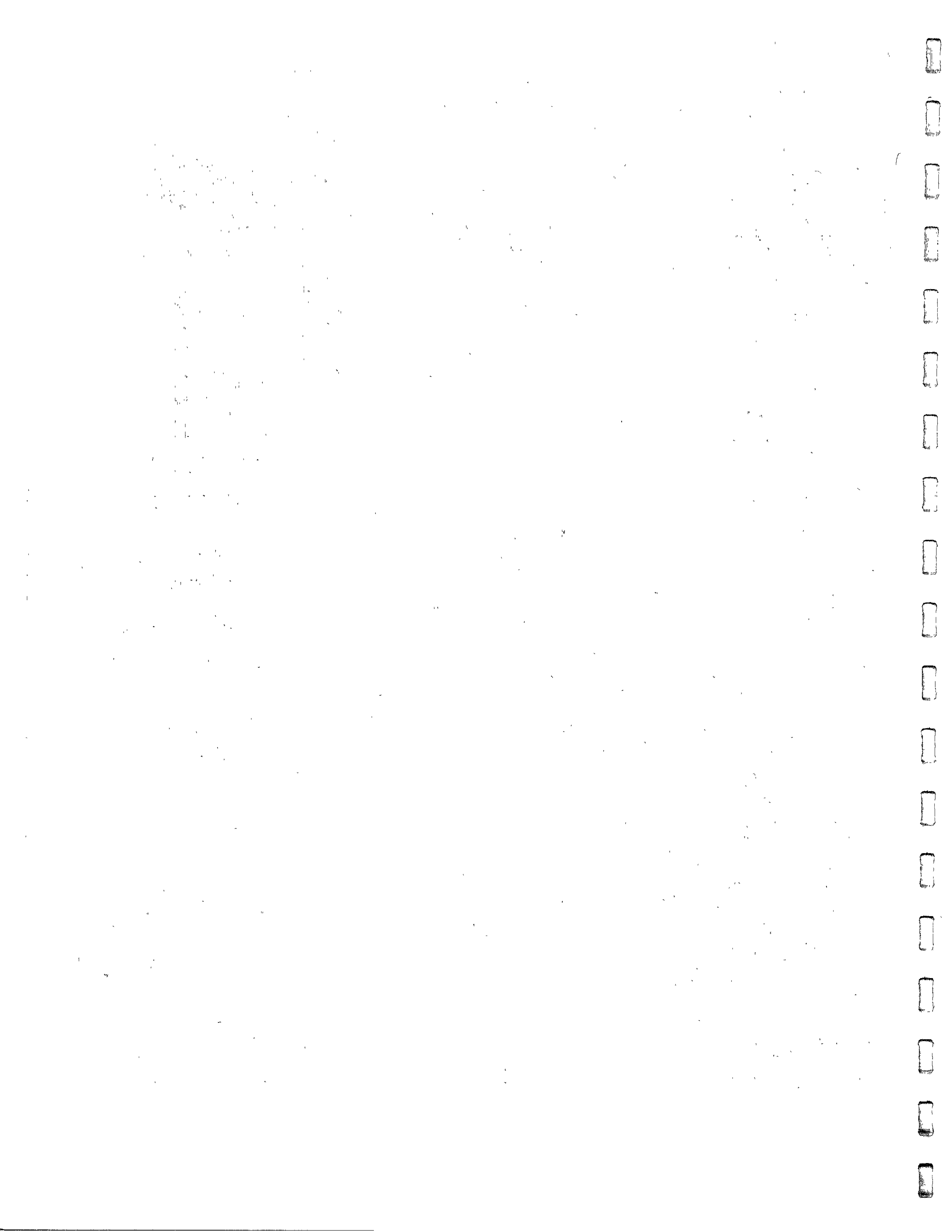
SEC. 104. INCREASED PENALTIES FOR SEX OFFENSES AGAINST VICTIMS BELOW THE AGE OF 16.—

Paragraph (2) of section 2245 of title 18, United States Code, is amended—

(1) in subparagraph (B) by striking "or" after the semicolon;

(2) in subparagraph (C) by striking "; and" and inserting in lieu thereof "; or"; and

(3) by inserting a new subparagraph (D) as follows:



"(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;".

SEC. 105. SENTENCING GUIDELINES INCREASE FOR SEX OFFENSES.

The United States Sentencing Commission shall amend the sentencing guidelines to increase by at least 4 levels the base offense level for an offense under section 2241 (aggravated sexual abuse) or section 2242 (sexual abuse) of title 18, United States Code, and shall consider whether any other changes are warranted in the guidelines provisions applicable to such offenses to ensure realization of the objectives of sentencing. In amending the guidelines in conformity with this section, the Sentencing Commission shall review the appropriateness and adequacy of existing offense characteristics and adjustments applicable to such offenses, taking into account the heinousness of sexual abuse offenses, the severity and duration of the harm caused to victims, and any other relevant factors. In any subsequent amendment to the sentencing guidelines, the Sentencing Commission shall maintain minimum guidelines sentences for the offenses referenced in this section which are at least equal to those required by this section.

SEC. 106. HIV TESTING AND PENALTY ENHANCEMENT IN SEXUAL OFFENSE CASES.

(a) Chapter 109A of title 18, United States Code, is amended by inserting at the end the following new section:

"§ 2247. Testing for Human Immunodeficiency Virus; Disclosure of Test Results to Victim; Effect on Penalty

"(a) TESTING AT TIME OF PRE-TRIAL RELEASE DETERMINATION.—In a case in which a person is charged with an offense under this chapter, a judicial officer issuing an order pursuant to section 3142(a) of this title shall include in the order a requirement that a test for the human immunodeficiency virus be performed upon the person, and that follow-up tests for the virus be performed six months and twelve months following the date of the initial test, unless the judicial officer determines that the conduct of the person created no risk of transmission of the virus to the victim, and so states in the order. The order shall direct that the initial test be performed within 24 hours, or as soon thereafter as feasible. The person shall not be released from custody until the test is performed.

"(b) TESTING AT LATER TIME.—If a person charged with an offense under this chapter was not tested for the human immunodeficiency virus pursuant to subsection (a), the court may at a later time direct that such a test be performed upon the person, and that follow-up tests be performed six months and twelve months following the date of the initial test, if it appears to the court that the conduct of the person may have risked transmission of the virus to the victim. A testing requirement under this subsection may be imposed at any time while the charge is pending, or following conviction at any time prior to the person's completion of service of the sentence.

"(c) TERMINATION OF TESTING REQUIREMENT.—A requirement of follow-up testing imposed under this section shall be canceled if any test is positive for the virus or the person obtains an acquittal on, or dismissal of, all charges under this chapter.

"(d) DISCLOSURE OF TEST RESULTS.—The results of any test for the human immunodeficiency virus performed pursuant to an order under this section shall be provided to the judicial officer or court. The judicial officer or court shall ensure that the results are disclosed to the victim (or to the victim's parent or legal guardian, as appropriate), the attorney for the Government, and the person tested.

"(e) EFFECT ON PENALTY.—The United States Sentencing Commission shall amend existing guidelines for sentences for offenses under this chapter to enhance the sentence if the offender knew or had reason to know that he was infected with the human immunodeficiency virus, except where the offender did not engage or attempt to engage in conduct creating a risk of transmission of the virus to the victim.".

"(b) CLERICAL AMENDMENT.—The table of sections for chapter 109A of title 18, United States Code, is amended by inserting at the end thereof the following new item:

"2247. Testing for Human Immunodeficiency Virus; Disclosure of Test Results to Victim; Effect on Penalty".

SEC. 107. PAYMENT OF COST OF HIV TESTING FOR VICTIMS IN SEX OFFENSE CASES.

Section 503(c)(7) of the Victims' Rights and Restitution Act of 1990 is amended by inserting before the period at the end thereof the following: ", the cost of up to two tests of the victim for the human immunodeficiency virus during the twelve months following the assault, and the cost of a counseling session by a medically trained professional on the accuracy of such tests and the risk of transmission of the human immunodeficiency virus to the victim as the result of the assault".

SEC. 108. INCREASED PENALTIES FOR DRUG DISTRIBUTION TO PREGNANT WOMEN.

Section 405 of the Controlled Substances Act (21 U.S.C. 859) is amended by inserting ", or to a woman while she is pregnant," after "to a person under twenty-one years of age" in subsection (a) and subsection (b).

SEC. 109. EXTENSION AND STRENGTHENING OF RESTITUTION.

Secton 3663 of title 18, United States Code, is amended—

(1) in subsection (b), by inserting "or an offense under chapter 109A or chapter 110" after "an offense resulting in bodily injury to a victim" in paragraph (2);

(2) in subsection (b), by striking "and" at the end of paragraph (3), by redesignating paragraph (4) as paragraph (5), and by inserting after paragraph (4) the following new paragraph:

"(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense; and"; and

(3) in subsection (d), by inserting at the end the following: "However, the court shall issue an order requiring restitution of the full amount of the victim's losses and expenses for which restitution is authorized under this section in imposing sentence for an offense under chapter 109A or chapter 110 unless the government and the victim do not request such restitution.".

SEC. 110. ENFORCEMENT OF RESTITUTION ORDERS THROUGH SUSPENSION OF FEDERAL BENEFITS.

Section 3663 of title 18, United States Code, is amended—

(1) by redesignating subsections (g) and (h) as subsections (h) and (i), respectively; and

(2) by inserting after subsection (f) the following new subsection:

"(g)(1) If the defendant is delinquent in making restitution in accordance with any schedule of payments or any requirement of immediate payment imposed under this section, the court may, after a hearing, suspend the defendant's eligibility for all Federal benefits until such time as the defendant demonstrates to the court good-faith efforts to return to such schedule.

"(2) For purposes of this subsection—

"(A) the term 'Federal benefits'—

"(i) means any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or appropriated funds of the United States; and

"(ii) does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility; and

"(B) the term 'veterans benefit' means all benefits provided to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States.".

SEC. 111. CIVIL REMEDY FOR VICTIMS OF SEXUAL VIOLENCE.

(a) CAUSE OF ACTION.—Whoever, in violation of the Constitution or laws of the United States, engages in sexual violence against another, shall be liable to the injured party in an action under this section. The relief available in such an action shall include compensatory and punitive damages and any appropriate equitable or declaratory relief.

(b) DEFINITION.—For purposes of this section, "sexual violence" means any conduct proscribed by chapter 109A of title 18, United States Code, whether or not the conduct occurs in the special maritime and territorial jurisdiction of the United States or in a Federal prison.

(c) ATTORNEY'S FEES.—The Civil Rights Attorney's Fees Award Act of 1976 (42 U.S.C. 1988) is amended by striking "or" after "Public Law 92-318" and by inserting after "1964" the following: ", or section 111 of the Sexual Assault Prevention Act of 1993,".

SUBTITLE B—RULES OF EVIDENCE, PRACTICE, AND PROCEDURE

SEC. 121. ADMISSIBILITY OF EVIDENCE OF SIMILAR CRIMES IN SEX OFFENSE CASES.

The Federal Rules of Evidence are amended by adding after Rule 412 the following new rules:

"Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

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

"(b) In a case in which the government intends to offer evidence under this Rule, the attorney for the government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This Rule shall not be construed to limit the admission or consideration of evidence under any other Rule.

"(d) For purposes of this Rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

"(1) any conduct proscribed by chapter 109A of title 18, United States Code;

"(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

"(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

"(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

"(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

"Rule 414. Evidence of Similar Crimes in Child Molestation Cases

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

"(b) In a case in which the government intends to offer evidence under this Rule, the attorney for the government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This Rule shall not be construed to limit the admission or consideration of evidence under any other Rule.

"(d) For purposes of this Rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

"(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

"(2) any conduct proscribed by chapter 110 of title 18, United States Code;

"(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

"(4) contact between the genitals or anus of the defendant and any part of the body of a child;

"(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

"(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

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

"(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these Rules.

"(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This Rule shall not be construed to limit the admission or consideration of evidence under any other Rule."

SEC. 122. EXTENSION AND STRENGTHENING OF RAPE VICTIM SHIELD LAW.

(a) AMENDMENTS TO RAPE VICTIM SHIELD LAW.—Rule 412 of the Federal Rules of Evidence is amended—

(1) in subdivisions (a) and (b), by striking "criminal case" and inserting "criminal or civil case";

(2) in subdivisions (a) and (b), by striking "an offense under chapter 109A of title 18, United States Code," and inserting "an offense or civil wrong involving conduct proscribed by chapter 109A of title 18, United States Code, whether or not the conduct occurred in the special maritime and territorial jurisdiction of the United States or in a Federal prison,";

(3) in subdivision (a), by striking "victim of such offense" and inserting "victim of such conduct";

(4) in subdivision (c)—

(A) by striking in paragraph (1) "the person accused of committing an offense under chapter 109A of title 18, United States Code" and inserting "the accused"; and

(B) by inserting at the end of paragraph (3) the following: "An order admitting evidence under this paragraph shall explain the reasoning leading to the finding of relevance, and the basis of the finding that the probative value of the evidence outweighs the danger of unfair prejudice notwithstanding the potential of the evidence to humiliate and embarrass the alleged victim and to result in unfair or biased inferences."; and

(5) in subdivision (d), by striking "an offense under chapter 109A of title 18, United States Code" and inserting "the conduct proscribed by chapter 109A of title 18, United States Code,".

(b) INTERLOCUTORY APPEAL.—Section 3731 of title 18, United States Code, is amended by inserting after the second paragraph the following:

"An appeal by the United States before trial shall lie to a court of appeals from an order of a district court admitting evidence of an alleged victim's past sexual behavior in a criminal case in which the defendant is charged with an offense involving conduct proscribed by chapter 109A of title 18, United States Code, whether or not the conduct occurred in the special maritime and territorial jurisdiction of the United States or in a Federal prison.".

SEC. 123. INADMISSIBILITY OF EVIDENCE TO SHOW PROVOCATION OR INVITATION BY VICTIM IN SEX OFFENSE CASES.

The Federal Rules of Evidence are amended by adding after Rule 415 (as added by section 121 of this Act) the following:

"Rule 416. Inadmissibility of evidence to show invitation or provocation by victim in sexual abuse cases

"In a criminal case in which a person is accused of an offense involving conduct proscribed by chapter 109A of title 18, United States Code, whether or not the conduct occurred in the special maritime and territorial jurisdiction of the United States or in a Federal prison, evidence is not admissible to show that the alleged victim invited or provoked the commission of the offense. This Rule does not limit the admission of evidence of consent by the alleged victim if the issue of consent is relevant to liability and the evidence is otherwise admissible under these Rules.".

SEC. 124. RIGHT OF THE VICTIM TO FAIR TREATMENT IN LEGAL PROCEEDINGS.

The following rules, to be known as the Rules of Professional Conduct for Lawyers in Federal Practice, are enacted as an appendix to title 28, United States Code:

"RULES OF PROFESSIONAL CONDUCT FOR LAWYERS IN FEDERAL PRACTICE

"Rule 1. Scope
"Rule 2. Abuse of Victims and Others Prohibited
"Rule 3. Duty of Enquiry in Relation to Client
"Rule 4. Duty to Expedite Litigation
"Rule 5. Duty to Prevent Commission of Crime

"Rules 1. Scope

"(a) These rules apply to the conduct of lawyers in their representation of clients in relation to proceedings and potential proceedings before federal tribunals.

"(b) For purposes of these rules, 'federal tribunal' and 'tribunal' mean a court of the United States or an agency of the federal government that carries out adjudicatory or quasiadjudicatory functions.

"Rule 2. Abuse of Victims and Others Prohibited

"(a) A lawyer shall not engage in any action or course of conduct for the purpose of increasing the expense of litigation for any person, other than a liability under an order or judgment of a tribunal.

"(b) A lawyer shall not engage in any action or course of conduct that has no substantial purpose other than to distress, harass, embarrass, burden, or inconvenience another person.

"(c) A lawyer shall not offer evidence that the lawyer knows to be false or attempt to discredit evidence that the lawyer knows to be true.

"Rule 3. Duty of Enquiry in Relation to Client

"A laywer shall attempt to elicit from the client a truthful account of the material facts concerning the matters in issue. In representing a client charged with a crime or civil wrong, the duty of enquiry under this rule includes—

(1) "attempting to elicit from the client a materially complete account of the alleged criminal activity or civil wrong if the client acknowledges involvement in the alleged activity or wrong; and

"(2) attempting to elicit from the client the material facts relevant to a defense of alibi if the client denies such involvement.

"Rule 4. Duty to Expedite Litigation

"(a) A lawyer shall seek to bring about the expeditious conduct and conclusion of litigation.

"(b) A lawyer shall not seek a continuance or otherwise attempt to delay or prolong proceedings in the hope or expectation that—

"(1) evidence will become unavailable;

"(2) evidence will become more subject to impeachment or otherwise less useful to another party because of the passage of time; or

"(3) an advantage will be obtained in relation to another party because of the expense, frustration, distress, or other hardship resulting from prolonged or delayed proceedings.

"Rule 5. Duty to Prevent Commission of Crime

"(a) A lawyer may disclose information relating to the representation of a client to the extent necessary to prevent the commission of a crime or other unlawful act.

"(b) A lawyer shall disclose information relating to the representation of a client where disclosure is required by law. A lawyer shall also disclose such information to the extent necessary to prevent—

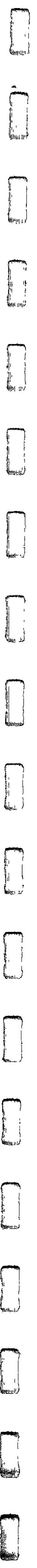
"(1) the commission of a crime involving the use or threatened use of force against another, or a substantial risk of death or serious bodily injury to another; or

"(2) the commission of a crime of sexual assault or child molestation.

"(c) For purposes of this rule, 'crime' means a crime under the law of the United States or the law of a State, and 'unlawful act' means an act in violation of the law of the United States or the law of a State.".

SEC. 125. RIGHT OF THE VICTIM TO AN IMPARTIAL JURY.

Rule 24(b) of the Federal Rules of Criminal Procedure is amended by striking "the Government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges" and inserting "each side is entitled to 6 peremptory challenges."



SEC. 126. VICTIM'S RIGHT OF ALLOCUTION IN SENTENCING.

Rule 32 of the Federal Rules of Criminal Procedure is amended—

(1) by striking "and" at the end of subdivision (a)(1)(B);

(2) by striking the period at the end of subdivision (a)(1)(C) and inserting "; and";

(3) by inserting after subdivision (a)(1)(C) the following:

"(D) if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement and to present any information in relation to the sentence.";

(4) in the penultimate sentence of subdivision (a)(1) by striking "equivalent opportunity" and inserting "opportunity equivalent to that of the defendant's counsel";

(5) in the last sentence of subdivision (a)(1) by inserting "the victim," before ", or the attorney for the Government."; and

(6) by adding at the end the following new subdivision:

"(f) DEFINITIONS.—For purposes of this rule—

"(1) 'crime of violence or sexual abuse' means a crime that involved the use or attempted or threatened use of physical force against the person or property of another, or a crime under chapter 109A of title 18, United States Code; and

"(2) 'victim' means an individual against whom an offense for which a sentence is to be imposed has been committed, but the right of allocution under subdivision (a)(1)(D) may be exercised instead by—

"(A) a parent or legal guardian if the victim is below the age of 18 years or incompetent; or

"(B) one or more family members or relatives designated by the court if the victim is deceased or incapacitated,

if such person or persons are present at the sentencing hearing, regardless of whether the victim is present.".

SEC. 127. VICTIM'S RIGHT OF PRIVACY.

(a) FINDINGS.—The Congress finds that—

(1) the crime of rape is underreported to law enforcement authorities because of its traumatic effect on victims and the stigmatizing nature of the crime;

(2) rape victims may be further victimized by involuntary public disclosure of their identities;

(3) rape victims should be encouraged to come forward and report the crime without fear of being revictimized through involuntary public disclosure of their identities; and

(4) any interest of the public in knowing the identity of a rape victim notwithstanding the victim's wishes to the contrary is outweighed by the interest of protecting the privacy of rape victims and encouraging rape victims to report the crime and assist in prosecution.

(b) SENSE OF CONGRESS.—It is the sense of Congress that news media, law enforcement personnel, and other persons should exercise restraint and respect a rape victim's privacy by not disclosing the victim's identity to the general public or facilitating such disclosure without the consent of the victim.

SUBTITLE C—SAFE CAMPUSES

SEC. 131. NATIONAL BASELINE STUDY ON CAMPUS SEXUAL ASSAULT.

(a) STUDY.—The Attorney General shall provide for a national baseline study to examine the scope of the problem of campus sexual assaults and the effectiveness of institutional and legal policies in addressing such crimes and protecting victims. The Attorney General may utilize the Bureau of Justice Statistics, the National Institute of Justice, and the Office for Victims of Crime in carrying out this section.

(b) REPORT.—Based on the study required by subsection (a), the Attorney General shall prepare a report including an analysis of—

(1) the number of reported allegations and estimated number of unreported allegations of campus sexual assaults, and to whom the allegations are reported (including authorities of the educational institution, sexual assault victim service entities, and local criminal authorities);

(2) the number of campus sexual assault allegations reported to authorities of educational institutions which are reported to criminal authorities;

(3) the number of campus sexual assault allegations that result in criminal prosecution in comparison with the number of non-campus sexual assault allegations that result in criminal prosecution;

(4) Federal and State laws or regulations pertaining specifically to campus sexual assaults;

(5) the adequacy of policies and practices of educational institutions in addressing campus sexual assaults and protecting victims, including consideration of—

(A) the security measures in effect at educational institutions, such as utilization of campus police and security guards, control over access to grounds and buildings, supervision of student activities and student living arrangements, control over the consumption of alcohol by students, lighting, and the availability of escort services;

(B) the articulation and communication to students of the institution's policies concerning sexual assaults;

(C) policies and practices that may prevent or discourage the reporting of campus sexual assaults to local criminal authorities, or that may otherwise obstruct justice or interfere with the prosecution of perpetrators of campus sexual assaults;

(D) the nature and availability of victim services for victims of campus sexual assaults;

(E) the ability of educational institutions' disciplinary processes to address allegations of sexual assault adequately and fairly;

(F) measures that are taken to ensure that victims are free of unwanted contact with alleged assailants, and disciplinary sanctions that are imposed when a sexual assault is determined to have occurred; and

(G) the grounds on which educational institutions are subject to lawsuits based on campus sexual assaults, the resolution of these cases, and measures that can be taken to avoid the likelihood of lawsuits and civil liability;

(6) an assessment of the policies and practices of educational institutions that are of greatest effectiveness in addressing campus sexual assaults and protecting victims, including policies and practices relating to the particular issues described in paragraph (5); and

(7) any recommendations the Attorney General may have for reforms to address campus sexual assaults and protect victims more effectively, and any other matters that the Attorney General deems relevant to the subject of the study and report required by this section.

(c) SUBMISSION OF REPORT.—The report required by subsection (b) shall be submitted to the Congress no later than September 1, 1995.

(d) DEFINITION.—For purposes of this section, "campus sexual assaults" includes sexual assaults occurring at institutions of postsecondary education and sexual assaults committed against or by students or employees of such institutions.

(e) AUTHORIZATION OF APPROPRIATION.—There is authorized to be appropriated $200,000 to carry out the study required by this section.

SUBTITLE D—ASSISTANCE TO STATES AND LOCALITIES

SEC. 141. SEXUAL VIOLENCE GRANT PROGRAM.

(a) PURPOSE.—The purpose of this section is to strengthen and improve State and local efforts to prevent and punish sexual violence, and to assist and protect the victims of sexual violence.

(b) AUTHORIZATION OF GRANTS.—The Attorney General, through the Bureau of Justice Assistance, the Office for Victims of Crime, and the Bureau of Justice Statistics, may make grants to support projects and programs relating to sexual violence, including support of—

(1) training and policy development programs for law enforcement officers and prosecutors concerning the investigation and prosecution of sexual violence;

(2) law enforcement and prosecutorial units and teams that target sexual violence;

(3) victim services programs for victims of sexual violence;

(4) educational and informational programs relating to sexual violence;

(5) improved systems for collecting, keeping, and disseminating records and data concerning sexual violence and offenders who engage in sexual violence;

(6) background check systems that enable employers to determine whether employees and applicants for employment have criminal histories involving sexual violence, in relation to employment positions for which a person may be unsuitable on the basis of such a history, such as child care positions and positions involving access to people's homes;

(7) registration systems which require persons convicted of sexual violence to keep law enforcement authorities informed of their addresses or locations;

(8) security measures in parks, public transportation systems, public buildings and facilities, and other public places which reduce the risk that acts of sexual violence will occur in such places;

(9) programs addressing campus sexual assaults, as defined in section 131 of this Act;

(10) programs assisting runaway and homeless children or other persons who have been subjected to or are at risk of sexual violence or sexual exploitation, including sexual exploitation through prostitution or in the production of pornography;

(11) training programs for judges in relation to cases involving sexual violence; and

(12) treatment programs in a correctional setting for offenders who engage in sexual violence, which may include aftercare components, and which shall include an evaluation component to determine the effectiveness of the treatment in reducing recidivism.

(c) FORMULA GRANTS.—Of the amount appropriated in each fiscal year for grants under this section, other than the amount set aside to carry out subsection (d)—

(1) 0.25 percent shall be set aside for each participating State; and

(2) the remainder shall be allocated to the participating States in proportion to their populations;

for the use of State and local governments in the States.

(d) DISCRETIONARY GRANTS.—Of the amount appropriated in each fiscal year, 20 percent shall be set aside in a discretionary fund to provide grants to public and private agencies to further the purposes and objectives set forth in subsections (a) and (b).

(e) APPLICATION FOR FORMULA GRANTS.—To request a grant under subsection (c), the chief executive officer of a State must, in each fiscal year, submit to the Attorney General a plan for addressing sexual violence

in the State, including a specification of the uses to which funds provided under subsection (c) will be put in carrying out the plan. The application must include—

(1) certification that the Federal funding provided will be used to supplement and not supplant State and local funds;

(2) certification that any requirement of State law for review by the State legislature or a designated body, and any requirement of State law for public notice and comment concerning the proposed plan, has been satisfied; and

(3) provisions for fiscal control, management, recordkeeping, and submission of reports in relation to funds provided under this section that are consistent with requirements prescribed for the program.

(f) CONDITIONS ON GRANTS.—

(1) MATCHING FUNDS.—Grants under subsection (c) may be for up to 50 percent of the overall cost of a project or program funded. Discretionary grants under subsection (d) may be for up to 100 percent of the overall cost of a project of program funded.

(2) DURATION OF GRANTS.—Grants under subsection (c) may be provided in relation to a particular project or program for up to an aggregate maximum period of four years.

(3) LIMIT ON ADMINISTRATIVE COSTS.—Not more than 5 percent of a grant under subsection (c) may be used for costs incurred to administer the grant.

(4) PAYMENT OF COST OF FORENSIC MEDICAL EXAMINATIONS.—It is a condition of eligibility for grants under subsection (c) that a State pay the cost of forensic medical examinations for victims of sexual violence.

(5) POLICIES AGAINST CAMPUS SEXUAL ASSAULTS.—For an institution of postsecondary education seeking a grant under subsection (d), it is a condition of eligibility that the institution articulate and communicate to its students a clear policy that sexual violence will not be tolerated by the institution.

(g) EVALUATION.—The National Institute of Justice shall have the authority to carry out evaluations of programs funded under this section. The recipient of any grant under this section may be required to include an evaluation component to determine the effectiveness of the project or program funded that is consistent with guidelines issued by the National Institute of Justice.

(h) COORDINATION.—The Attorney General may utilize the Office of Justice Programs to coordinate the administration of grants under this section. The coordination of grants under this section shall include prescribing consistent program requirements for grantees, allocating functions and the administration of particular grants among the components that participate in the administration of the program under this section, coordinating the program under this section with the Domestic Violence and Family Support Grant Program established by section 208 of this Act, and coordinating the program under this section with other grant programs administered by components of the Department of Justice.

(i) DEFINITION.—For purposes of this section, "sexual violence" includes non-consensual sex offenses and sex offenses involving victims who are not able to give legally effective consent because of age or incompetency.

(j) REPORT.—The Attorney General shall submit an annual report to Congress concerning the operation and effectiveness of the program under this section.

(k) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated, in each of fiscal years 1994, 1995, and 1996, $250,000,000 to carry out this section, and such sums as may be necessary in each fiscal year thereafter.

SEC. 142. SUPPLEMENTARY GRANTS FOR STATES ADOPTING EFFECTIVE LAWS RELATING TO SEXUAL VIOLENCE.

(a) SUPPLEMENTARY GRANTS.—The Attorney General may, in each fiscal year, authorize the award to a State of an aggregate amount of up to $1 million under the Sexual Violence Grant Program established by section 141 of this Act, in addition to any funds that are otherwise authorized under that program. The authority to award additional funding under this section is conditional on certification by the Attorney General that the State has laws relating to sexual violence that exceed or are reasonably comparable to the provisions of federal law (including changes in federal law adopted by this Act) in the following areas:

(1) Authorization of pre-trial detention of defendants in sexual assault cases where prevention of flight or the safety of others cannot be reasonably assured by other means, and denial of release pending appeal for persons convicted of sexual assault offenses who have been sentenced to imprisonment.

(2) Authorization of severe penalties for sexual assault offenses.

(3) Pre-trial testing for the human immunodeficiency virus of persons charged with sexual assault offenses, with disclosure of test results to the victim.

(4) Payment of the cost of medical examinations and the cost of testing for the human immunodeficiency virus for victims of sexual assaults.

(5) According the victim of a sexual assault the right to be present at judicial proceedings in the case.

(6) Protection of victims from inquiry into unrelated sexual behavior in sexual assault cases.

(7) Rules of professional conduct for lawyers that protect victims from unwarranted cross-examination and impeachment, dilatory tactics, and other abuses in sexual assault cases.

(8) Authorization of admission and consideration in sexual assault cases of evidence that the defendant has committed sexual assaults on other occasions.

(9) Authorization of the victim in sexual assault cases to address the court concerning the sentence to be imposed.

(10) Authorization of the award of restitution to victims of sexual assaults as part of a criminal sentence.

(b) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated in each fiscal year such sums as may be necessary to carry out this section.

TITLE II—DOMESTIC VIOLENCE, STALKING, AND OFFENSES AGAINST THE FAMILY

SEC. 201. INTERSTATE TRAVEL TO COMMIT SPOUSE ABUSE OR TO VIOLATE PROTECTIVE ORDER; INTERSTATE STALKING.

(a) OFFENSE.—Part 1 of title 18, United States Code, is amended by inserting after chapter 110 the following:

"CHAPTER 110A—DOMESTIC VIOLENCE AND STALKING

"Sec.

"2261. Domestic violence and stalking.

"2261. Domestic violence and stalking

(a) OFFENSE.—Whoever causes or attempts to cause bodily injury to, engages in sexual abuse against, or violates a protective order in relation to, another shall be punished—

"(1) if death results, by death or by imprisonment for any term of years or for life;

"(2) if permanent disfigurement or life-threatening bodily injury results, by imprisonment for not more than 20 years;

"(3) if serious bodily injury results, or if a firearm, knife, or other dangerous weapon is possessed, carried, or used during the commission of the offense, by imprisonment for not more than 10 years; and

"(4) in any other case, by imprisonment for not more than five years.

If, however, the defendant engages in sexual abuse and the penalty authorized for such conduct under chapter 109A exceeds the penalty which would otherwise be authorized under this subsection, then the penalty authorized for such conduct under chapter 109A shall apply.

"(b) MANDATORY PENALTIES.—A sentence under this section shall include at least three months of imprisonment if the offense involves the infliction of bodily injury on or the commission of sexual abuse against the victim. A sentence under this section shall include at least six months of imprisonment if the offense involves the violation of a protective order and the defendant has previously violated a protective order in relation to the same victim.

"(c) JURISDICTION.—There is Federal jurisdiction to prosecute an offense under this section if the defendant traveled in interstate or foreign commerce, or transported or caused another to move in interstate or foreign commerce, with the intention of committing or in furtherance of committing the offense, and—

"(1) the victim was a spouse or former spouse of the defendant, was cohabiting with or had cohabited with the defendant, or had a child in common with the defendant; or

"(2) the defendant on two or more occasions—

"(A) has caused or attempted or threatened to cause death or serious bodily injury to or engaged in sexual abuse in relation to the victim; or

"(B) has engaged in any conduct that caused or was intended to cause apprehension by the victim that the victim would be subjected to death, serious bodily injury, or sexual abuse.

"(d) DEFINITIONS.—For purposes of this section—

"(1) 'protective order' means an order issued by a court of a State prohibiting or limiting violence against, harassment of, contact or communication with, or physical proximity to another person;

"(2) 'sexual abuse' means any conduct proscribed by chapter 109A of this title, whether or not the conduct occurs in the special maritime and territorial jurisdiction of the United States or in a Federal prison;

"(3) 'serious bodily injury' and 'bodily injury' have the meanings given in section 1365(g); and

"(4) 'State' has the meaning given in section 513(c)(5).".

"(b) CLERICAL AMENDMENT.—The analysis for Part 1 of title 18, United States Code, is amended by inserting after the item for chapter 110 the following:

"110A. Domestic violence and offenses against the family .... 2261",

"(c) MANDATORY RESTITUTION.—Section 3663 of title 18, United States Code, as amended by section 109 of this Act, is further amended by striking "or chapter 110" and inserting ", chapter 110, or section 2261" in each of subsection (b)(2) and subsection (d).

"(d) INTERIM PROTECTION.—Section 3156(a)(4)(C) of title 18, United States Code, as added by section 101 of this Act, is amended by striking "or chapter 110" and inserting ", chapter 110, or section 2261".

"(e) DEATH PENALTY PROCEDURES.—Section 1118 of title 18, United States Code, as enacted by section 102 of this Act, is amended in paragraph (1) of subsection (e) by inserting "or section 2261" after "117".

SEC. 202. FULL FAITH AND CREDIT FOR PROTECTIVE ORDERS.

"(a) REQUIREMENT OF FULL FAITH AND CREDIT.—Chapter 110A of title 18, United States Code, as enacted by section 201, is amended by adding at the end the following:

"§ 2262. Full Faith and Credit for Protective Orders

"(a) A protective order issued by a court of a State shall have the same full faith and credit in a court in another State that it would have in a court of the State in which issued, and shall be enforced by the courts of any State if it were issued in that State.

"(b) For purposes of this section—

"(1) 'protective order' means an order prohibiting or limiting violence against, harassment of, contact or communication with, or physical proximity to another person; and

"(2) 'State' has the meaning given in section 513(c)(5).".

(b) CLERICAL AMENDMENT.—The analysis for chapter 110A of title 18, United States Code, as enacted by section 201, is amended by inserting at the end of the following:

"§ 2262. Full Faith and Credit for Protective Orders.".

SEC. 203. NON-COMPLIANCE WITH CHILD SUPPORT OBLIGATIONS IN INTERSTATE CASES.

Chapter 11A of title 18, United States Code, is amended to read as follows:

"CHAPTER 11A—CHILD SUPPORT

"Sec.

"228. Non-compliance with child support obligations.

"§ 228. Non-compliance with child support obligations

"(a) OFFENSE.—Whoever—

"(1) leaves or remains outside a State with intent to avoid payment of a child support obligation; or

"(2) fails to pay a major child support obligation, as defined in subsection (e), with respect to a child who resides in another State, despite having the financial resources to pay the obligation or the ability to acquire such resources through reasonable diligence;

shall be punished as provided in subsection (c).

"(b) PRESUMPTION.—In relation to an offense charged under paragraph (1) of subsection (a), the absence of the defendant from the State for an aggregate period of six months without payment of the child support obligation shall create a rebuttable presumption that the intent existed to avoid payment of the obligation.

"(c) PENALTY.—A person convicted of an offense under this section shall be punished by imprisonment for up to six months, and on a second or subsequent conviction, by imprisonment for up to two years.

"(d) RESTITUTION.—In addition to any restitution that may be ordered pursuant to section 3663, a sentence for an offense under this section shall include an order of restitution in an amount equal to the past due support obligation as it exists at the time of sentencing. Subsections (e)–(i) of section 3663 shall apply to an order of restitution pursuant to this subsection.

"(e) DEFINITIONS.—For purposes of this section—

"(1) 'child support obligation' means an amount determined under a court order or an order of an administrative process pursuant to the law of a State to be due from a person for the support of a child or of a child and the parent with whom the child is living;

"(2) 'major child support obligation' means a child support obligation that has remained unpaid for a period exceeding one year, or that is greater than $5,000;

"(3) 'past due support obligation' means a child support obligation that is unpaid at the time of sentencing for an offense under this section; and

"(4) 'State' has the meaning given in section 513(c)(5).".

SEC. 204. PRESUMPTION AGAINST CHILD CUSTODY FOR SPOUSE ABUSERS.

(a) The Congress finds that—

(1) courts fail to recognize the detrimental effects of having as a custodial parent an individual who physically abuses his or her spouse, insofar as they do not hear or weigh evidence of domestic violence in child custody litigation;

(2) joint custody forced upon hostile parents can create a damaging psychological environment for a child;

(3) physical abuse of a spouse is relevant to the likelihood of child abuse in child custody disputes;

(4) the effects on children of physical abuse of a spouse include—

(A) traumatization and psychological damage to children resulting from observation of the abuse and the climate of violence and fear existing in a home where abuse takes place;

(B) the risk that children may become targets of physical abuse when they attempt to intervene on behalf of an abused parent; and

(C) the negative effects on children of exposure to an inappropriate role model, in that witnessing an aggressive parent may communicate to children that violence is an acceptable means of dealing with others; and

(5) the harm to children from spouse abuse may be compounded by award of exclusive or joint custody to an abuser because further abuse may occur when the abused spouse is forced to have contact with the abuser as a result of the custody arrangement, and because the child or children may be exposed to abuse committed by the abuser against a subsequent spouse or partner.

(b) SENSE OF CONGRESS.—It is the sense of the Congress that, for purposes of determining child custody, evidence establishing that a parent engages in physical abuse of a spouse should create a statutory presumption that is detrimental to the child to be placed in the custody of the abusive spouse.

SEC. 205. REPORT ON BATTERED WOMEN'S SYNDROME.

(a) REPORT.—The Attorney General shall prepare and transmit to the Congress a report on the status of battered women's syndrome as a medical and psychological condition and on its effect in criminal trials. The Attorney General may utilize the National Institute of Justice to obtain information required for the preparation of the report.

(b) COMPONENTS OF REPORT.—The report described in subsection (a) shall include—

(1) a review of medical and psychological views concerning the existence, nature, and effects of battered women's syndrome as a psychological condition;

(2) a compilation of judicial decisions that have admitted or excluded evidence of battered women's syndrome as evidence of guilt or as a defense in criminal trials; and

(3) information on the views of judges, prosecutors, and defense attorneys concerning the effects that evidence of battered women's syndrome may have in criminal trials.

SEC. 206. REPORT ON CONFIDENTIALITY OF ADDRESSES FOR VICTIMS OF DOMESTIC VIOLENCE.

(a) The Attorney General shall conduct a study of the means by which abusive spouses may obtain information concerning the addresses or locations of estranged or former spouses, notwithstanding the desire of the victims to have such information withheld to avoid further exposure to abuse. Based on the study, the Attorney General shall transmit a report to Congress including—

(1) the findings of the study concerning the means by which information concerning the addresses or locations of abused spouses may be obtained by abusers; and

(2) analysis of the feasibility of creating effective means of protecting the confidentiality of information concerning the addresses and locations of abused spouses to protect such persons from exposure to further abuse while preserving access to such information for legitimate purposes.

(b) The Attorney General may utilize the National Institute of Justice and the Office for Victims of Crime in carrying out this section.

SEC. 207. REPORT ON RECORDKEEPING RELATING TO DOMESTIC VIOLENCE.

Not later than 1 year after the date of enactment of this Act, the Attorney General shall complete a study of, and shall submit to Congress a report and recommendations on, problems of recordkeeping of criminal complaints involving domestic violence. The study and report shall examine—

(1) the efforts that have been made by the Department of Justice, including the Federal Bureau of Investigation, to collect statistics on domestic violence; and

(2) the feasibility of requiring that the relationship between an offender and victim be reported in Federal records of crimes of aggravated assault, rape, and other violent crimes.

SEC. 208. DOMESTIC VIOLENCE AND FAMILY SUPPORT GRANT PROGRAM.

(a) PURPOSE.—The purpose of this section is to strengthen and improve State and local efforts to prevent and punish domestic violence and other criminal and unlawful acts that particularly affect women, and to assist and protect the victims of such crimes and acts.

(b) AUTHORIZATION OF GRANTS.—The Attorney General, through the Bureau of Justice Assistance, the Office for Victims of Crime, and the Bureau of Justice Statistics, may make grants to support projects and programs relating to domestic violence and other criminal and unlawful acts that particularly affect women, including support of—

(1) training and policy development programs for law enforcement officers and prosecutors concerning the investigation and prosecution of domestic violence;

(2) law enforcement and prosecutorial units and teams that target domestic violence;

(3) model, innovative, and demonstration law enforcement programs relating to domestic violence that involve pro-arrest and aggressive prosecution policies;

(4) model, innovative, and demonstration programs for the effective utilization and enforcement of protective orders;

(5) programs addressing stalking and persistent menacing;

(6) victim services programs for victims of domestic violence;

(7) shelters that provide services for victims of domestic violence and related programs;

(8) educational and informational programs relating to domestic violence;

(9) resource centers providing information, technical assistance, and training to domestic violence service providers, agencies, and programs;

(10) coalitions of domestic violence service providers, agencies, and programs;

(11) training programs for judges and court personnel in relation to cases involving domestic violence; and

(12) enforcement of child support obligations, including cooperative efforts and arrangements of States to improve enforcement in cases involving interstate elements.

(c) FORMULA GRANTS.—Of the amount appropriated in each fiscal year for grants under this section, other than the amount set aside to carry out subsection (d)—

(1) 0.25 percent shall be set aside for each participating State; and

(2) the remainder shall be allocated to the participating States in proportion to their populations for the use of State and local governments in the States.

(d) DISCRETIONARY GRANTS.—Of the amount appropriated in each fiscal year, 20 percent shall be set aside in a discretionary fund to provide grants to public and private agencies to further the purposes and objectives set forth in subsections (a) and (b).

(e) APPLICATION FOR FORMULA GRANTS.—To request a grant under subsection (c), the chief executive officer of a State must, in each fiscal year, submit to the Attorney General a plan for addressing domestic violence and other criminal and unlawful acts that particularly affect women in the State, including a specification of the uses to which funds provided under subsection (c) will be put in carrying out the plan. The application must include—

(1) certification that the Federal funding provided will be use to supplement and not supplant State and local funds;

(2) certification that any requirement of State law for review by the State legislature of a designated body, and any requirement of State law for public notice and comment concerning the proposed plan, has been satisfied; and

(3) provisions for fiscal control, management, recordkeeping, and submission of reports in relation to funds provided under this section that are consistent with requirements prescribed for the program.

(f) CONDITIONS ON GRANTS.—

(1) MATCHING FUNDS.—Grants under subsection (c) may be for up to 50 percent of the overall cost of a project or program funded. Discretionary grants under subsection (d) may be for up to 100 percent of the overall cost of a project or program funded.

(2) DURATION OF GRANTS.—Grants under subsection (c) may be provided in relation to a particular project or program for up to an aggregate maximum period of four years.

(3) LIMIT ON ADMINISTRATIVE COSTS.—Not more than 5 percent of a grant under subsection (C) may be used for costs incurred to administer the grant.

(g) EVALUATION.—The National Institute of Justice shall have the authority to carry out evaluations of programs funded under this section. The recipient of any grant under this section may be required to include an evaluation component to determine the effectiveness of the project or program funded that is consistent with guidelines issued by the National Institute of Justice.

(h) COORDINATION.—The Attorney General may utilize the Office of Justice Programs to coordinate the administration of grants under this section. The coordination of grants under this section shall include prescribing consistent program requirements for grantees, allocating functions and the administration of particular grants among the components that participate in the administration of the program under this section, coordinating the program under this section with the Sexual Violence Grant Program established by section 141 of this Act, and coordinating the program under this section with other grant programs administered by components of the Department of Justice.

(i) DEFINITION.—For purposes of this section, "domestic violence" includes any act of criminal violence in which the offender and the victim are members of the same household or relatives, or in which the offender and the victim are present or former spouses or cohabitors or have a child in common.

(j) REPORT.—The Attorney General shall submit an annual report to Congress concerning the operation and effectiveness of the program under this section.

(k) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated, in each of fiscal years 1994, 1995, and 1996, $250,000,000 to carry out this section, and such sums as may be necessary in each fiscal year thereafter.

TITLE III—NATIONAL TASK FORCE ON VIOLENCE AGAINST WOMEN

SEC. 301. ESTABLISHMENT.

Not later than 30 days after the date of enactment of this Act, the Attorney General shall establish a task force to be known as the "National Task Force on Violence Against Women" (referred to in this title as the "task force").

SEC. 302. DUTIES OF TASK FORCE.

(a) GENERAL PURPOSE OF TASK FORCE.—The task force shall recommend Federal, State, and local strategies aimed at protecting women against violent crime, punishing persons who commit such crimes, and enhancing the rights of victims of such crimes.

(b) DUTIES OF TASK FORCE.—The task force shall perform such functions as the Attorney General deems appropriate to carry out of the purposes of the task force, including—

(1) considering the reports and recommendations of past Federal and State studies of violent crime, family violence, and the treatment of crime victims, including the Report of the Attorney General to the President on Combating Violent Crime (1992), the Report of the Attorney General's Task Force on Family Violence (1984), the Report of the President's Task Force on Victims of Crime (1982), and the reports and recommendations of the task forces and commissions established by the States of Alabama, Alaska, Arkansas, Hawaii, Idaho, Indiana, Kansas, Louisiana, Michigan, Minnesota, Nebraska, New Mexico, New York, North Carolina, Rhode Island, Virginia, Texas, and Wyoming;

(2) developing strategies for Federal, State, and local law enforcement designed to protect women against violent crime, and to prosecute those responsible for such crime;

(3) evaluating the adequacy of rules of evidence, practice, and procedure to ensure the effective prosecution and conviction of violent offenders against women and to protect victims from abuse in legal proceedings, and making recommendations for the improvement of such rules;

(4) evaluating the adequacy of pre-trial release, sentencing, incarceration, and post-conviction release in relation to violent offenders against women, and making recommendations designed to ensure that such offenders are restrained from causing further harm to the victim and others and receive appropriate punishment, including means of ensuring that the efficacy of criminal sanctions will not be undermined by parole or other early release mechanisms;

(5) assessing the issuance, formulation, and enforcement of protective orders, whether or not related to a criminal proceeding, and making recommendations for the effective use of such orders to protect women from violence;

(6) assessing the problem of stalking and persistent menacing of women, and recommending effective means of response to the problem;

(7) assessing the problem of sexual exploitation of women and youths through prostitution and in the production of pornography, and recommending effective means of response to the problem; and

(8) generally evaluating the treatment of women as victims of violent crime in the criminal justice system, and making recommendations designed to improve such treatment.

SEC. 303. MEMBERSHIP.

(a) IN GENERAL.—The task force shall consist of up to 10 members, who shall be appointed by the Attorney General not later than 60 days after the date of enactment of this Act. The Attorney General shall ensure that the task force includes representatives of State and local law enforcement, the State and local judiciary, and groups dedicated to protecting the rights of victims.

(b) CHAIRMAN.—The Attorney General or the Attorney General's designee shall serve as chairman of the task force.

SEC. 304. PAY.

(a) NO ADDITIONAL COMPENSATION.—Members of the task force who are officers of employees of a governmental agency shall receive no additional compensation by reason of their service on the task force.

(b) PER DIEM.—While away from their homes or regular places of business in the performance of duties for the task force, members of the task force shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under sections 5702 and 5703 of title 5, United States Code.

SEC. 305. EXECUTIVE DIRECTOR AND STAFF.

(a) EXECUTIVE DIRECTOR.—

(1) APPOINTMENT.—The task force shall have an Executive Director who shall be appointed by the Attorney General not later than 30 days after the task force is fully constituted under section 303.

(2) COMPENSATION.—The Executive Director shall be compensated at a rate not to exceed the maximum rate of the basic pay payable under GS-18 of the General Schedule as contained in title 5, United States Code.

(b) STAFF.—With the approval of the task force, the Executive Director may appoint and fix the compensation of such additional personnel as the Executive Director considers necessary to carry out the duties of the task force.

(c) APPLICABILITY OF CIVIL SERVICE LAWS.—The Executive Director and the additional personnel of the task force appointed under subsection (b) may be appointed without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates.

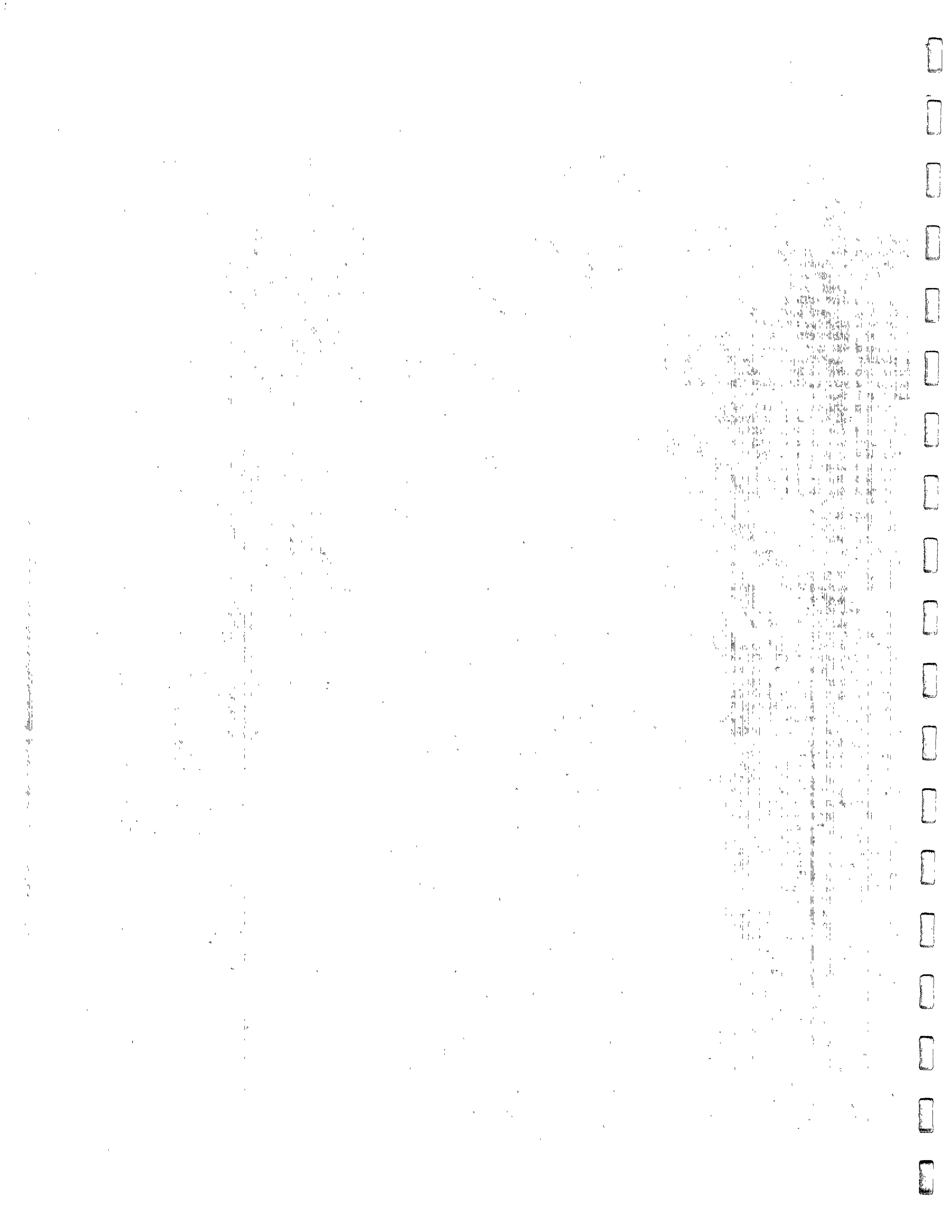
(d) CONSULTANTS.—Subject to such rules as may be prescribed by the task force, the Executive Director may procure temporary intermittent services under section 3109(b) of title 5, United States Code, at rates for individuals not to exceed $200 per day.

SEC. 306. POWERS OF TASK FORCE.

(a) *Hearings*.—For the purpose of carrying out this title, the task force may conduct such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the task force considers appropriate. The task force may administer oaths before the task force.

(b) DELEGATION.—Any member or employee of the task force may, if authorized by the task force, take any action that the task force is authorized to take under this title.

(c) ACCESS TO INFORMATION.—The task force may secure directly from any executive department or agency such information as may be necessary to enable the task force to carry out this title, to the extent access to such information is permitted by law. On request of the Attorney General, the head of such a department or agency shall furnish such permitted information to the task force.



(d) MAIL.—The task force may use the United States mails in the same manner and under the same conditions as other departments and agencies of the United States.

SEC. 307. REPORT.

Not later than 1 year after the date on which the task force is fully constituted under section 303, the Attorney General shall submit a detailed report to the Congress on the findings and recommendations of the task force.

SEC. 308. AUTHORIZATION OF APPROPRIATION.

There is authorized to be appropriated for fiscal year 1994, $500,000 to carry out the purposes of this title.

SEC. 309 TERMINATION.

The task force shall cease to exist 30 days after the date on which the Attorney General's report is submitted under section 307. The Attorney General may extend the life of the task force for a period of not to exceed one year.

Mr. MCCAIN. Mr. President, I am very pleased to again be a cosponsor of the Sexual Assault Prevention Act, and I commend the Republican leader for his zeal and expedience in reintroducing this bill early in this session of Congress.

The phrase "increased crime in America" is no longer met with wide-eyed surprise. There was a time when law-abiding citizens reacted with skepticism at the idea that our Nation could be so riddled with crimes committed in our cities, our streets, and our homes. Now, the American people have become so accustomed to hearing over and over again that crime is on the rise that they no longer respond with surprise, but instead cry out in anger and frustration.

This outrage is especially strong against the cruel, perverse crimes committed against women. One of the most disturbing crimes infecting our society is that of sexual assault and forcible rape. These acts of violent, demented, bald-faced aggression are tantamount to terrorism against women, and the number of forcible rapes in this country is staggering. There were approximately 106,593 rapes reported in 1991, 4 percent higher than that in 1990. In my State of Arizona alone 1,590 rapes were reported.

We cannot, and must not, tolerate violence of this nature. Women in this country are singled out for this kind of violent aggression by criminals who know that our legal system is bogged down with loopholes which only succeed in keeping criminals from serving time behind bars. It is abhorrent to me that women live in fear of rape, and the victims of rape and sexual assault experience the fear and frustration of knowing that their assailant walks the streets freely where law-abiding citizens cannot.

Women in this country face distinct types of crime which need to be addressed specifically. For this reason, I believe that it is imperative that Congress enact the Sexual Assault Prevention Act. This legislation would address the crimes facing women in several ways. First, it authorizes the death penalty for murders committed by sex offenders. Second, the bill would double the maximum penalty for repeat offenders of sexual assaults. Third, it would require the testing of those accused of sexual assaults for the acquired immune deficiency syndrome [AIDS] virus, and disclosing the results of those tests to the victim. Fourth, it authorizes the admission of evidence of prior sexual assault offenses by the defendant in sexual assault trials. Fifth, it designates spousal abuse, including violation of protective orders, and "stalking," as a Federal crime. Finally, the bill would establish a comprehensive grant program to assist State and local efforts to combat sexual violence and domestic violence, and to enforce child support obligations.

Crimes against women are rampant, and this legislation would send a clear, strong message: Those who commit sexual assaults against anyone will be met with swift, stiff penalties.

Mr. President, it is untenable that the greatest democracy in the world should also suffer from this kind of cruel violence. We must use our democratic system as a tool to turn this trend around and make our lives safe again.

By Mr. DOLE (for himself, Mr. MCCONNELL, Mr. PACKWOOD, Mr. LOTT, Mr. GORTON, Mr. THURMOND, Mr. DOMENICI, Mr. LUGAR, Mr. D'AMATO, Mr. SIMPSON, Mr. STEVENS, Mr. NICKLES, and Mr. CHAFEE):

S. 7. A bill to amend the Federal Election Campaign Act of 1971 to reduce special interest influence on elections, to increase competition in politics, to reduce campaign costs, and for other purposes; to the Committee on Rules and Administration.

COMPREHENSIVE CAMPAIGN FINANCE REFORM ACT

Mr. MCCONNELL. Mr. President, the distinguished Republican leader this morning in his remarks made reference to S. 7, the Republican campaign finance bill.

Mr. President, the Republican leader and I believe that this proposal is clearly in the best interests of the country as we seek to improve how elections are handled in the United States.

Mr. President, in 1992 voter turnout increased. Electoral competition increased. Congressional turnover increased. And campaign spending increased.

Most objective observers would say these are indications of a thriving political system. Less objective participants will twist it to fit their objective—partisan revision of campaign finance laws.

All indications are that campaign finance reform is on a fast-track—seemingly easily achievable. Something for the President and Congress to have to show for the next 100 days.

Keeping in mind that the reverberations of whatever passes likely will extend far beyond 100 days, I urge my colleagues to take great care in putting a final bill together.

Mr. President, we should not pass something that is reform in name only just for the sake of passing something

"Change" and "reform" are terms used rather loosely around here. They are not interchangeable, not synonymous. To change is to alter. To reform is to improve.

Democratic campaign finance bills based on spending limits and taxpayer financing do indeed constitute change. They do not, however, reform. They do not improve the electoral process.

The democratic bills we have seen in the past were good public relations, but lousy legislation. Spending limits have been totally discredited in the Presidential system. Mandatory spending limits are unconstitutional. A taxpayer funded congressional campaign system to provide inducements, or penalties, is not palatable to American taxpayers. In fact, the Presidential Election Campaign Fund is on the verge of bankruptcy, because taxpayers have resoundingly voted no on their annual tax returns.

In the most extensive poll we ever take in this country, every April 15 taxpayers get a chance to vote on how they feel about the public funding of elections. In overwhelming numbers, they are increasingly voting no.

Mr. President, the Democratic campaign finance bills that passed in the last two Congresses were unconstitutional. If the majority goes down that road again and the President signs such a bill into law, then my colleagues can be assured that final disposition will rest with the Supreme Court.

Republicans will not stand by while the first amendment is sacrificed for a facade of reform.

Mr. President, campaign finance reform need not be unconstitutional, partisan, bureaucratic, or taxpayer-funded.

The minority leader and I, joined by Republican colleagues, have today introduced the Comprehensive Campaign Finance Reform Act—the most extensive and effective reform bill before this Congress, bar none.

It bans PAC's, the epitome of special interest influence and a major incumbent protection tool. Our bill bans soft money. All soft money—party, labor, and that spent by tax exempt organizations. It cuts campaign costs. Provides seed money to challengers, paid for not by taxpayers, but by the political parties. It constricts the millionaire's loophole; restricts and regulates independent expenditures; fights election fraud; and restricts gerrymandering.

Real reform. In stark contrast to the Democrats' bill, the Republican bill puts all the campaign money on top of the table where voters can see it. Nothing would have a more cleansing effect on the electoral process.

Mr. President, I ask unanimous consent that at this point in the RECORD S.7 appear in its entirety. I am intro-

PROPOSED AMENDMENTS

Glen Weissenberger, *Character Evidence Under The Federal Rules: A Puzzle with Missing Pieces*, 48 Cincinnati Law Review 1, 12 (1979).

Rule 404

a) **Noninferential use of character evidence; character in issue.** Evidence of a person's character or a trait of a character is admissible when the issue of a person's character is substantially required by a charge, claim or defense such that the person's character or trait of a character is not used as a basis for inferring other facts.

b) **Inferential use of character evidence to prove inferred facts other than conforming conduct.** Evidence of a person's character or a trait of a character is admissible for proving inferred facts other than conduct which conforms to such person's character or trait of character.

c) **Inferential use of character evidence to prove conforming conduct.** Evidence of a person's character or his trait of a character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

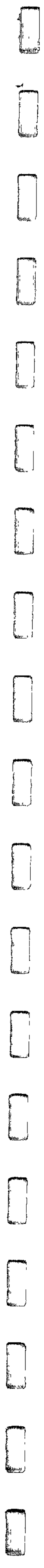
1) **Character of accused.** Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same.

2) **Character of victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

3) **Character of witness.** Evidence of the character of a witness, as provided in rules 607, 608, and 609.

d) **Method of proving character.**

1) Where evidence of character or a trait of character is admissible pursuant to subdivisions (a), (b), (c)(1) or (c)(2) of this rule, proof may be made by testimony as to reputation or



by testimony in the form of opinion. On cross-examination, inquiry is allowed into specific instances of conduct.

2) Where evidence of character or a trait of character is admissible pursuant to subdivision (a) of this rule, proof may also be made of specific instances of the person's conduct.

3) Except as provided in rules 608 and 609, evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. Such evidence may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

U. S. Department of Justice

Criminal Division

SECTION IIIA
EVID 9-10/93

Washington, D.C. 20530

JUN 15 1993

Honorable Ralph K. Winter, Jr.
Audubon Court Building
55 Whitney Avenue
New Haven, Connecticut 06511

Dear Judge Winter:

I am writing on behalf of the Department of Justice to request inclusion on the agenda of the Advisory Committee on the Federal Rules of Evidence at its upcoming meeting of a proposal to create a new Rule of Evidence under which an expert's report of the analysis of a substance, object, or writing would be admissible as a kind of business record, unless either party wished to call the expert.

The proposal, which originated with the Drug Enforcement Agency (DEA), was inspired by a provision in Chapter 33 of the District of Columbia Code relating to controlled substance violations. The DEA is responsible for analyzing all drug evidence seized by the Washington, D.C. Metropolitan Police Department. Because of the nature and volume of the seizures and subsequent prosecutions, DEA encouraged the enactment some years ago of what is now D.C. Code § 33-556, which provides as follows:

> In a proceeding for a violation of this chapter, the official report of chain of custody and of analysis of a controlled substance performed by a chemist charged with an official duty to perform such analysis, when attested to by that chemist and by the officer having legal custody of the report and accompanied by a certificate under seal that the officer has legal custody, shall be admissible in evidence as evidence of the facts stated therein and the results of that analysis. A copy of the certificate must be furnished upon demand by the defendant or his or her attorney in accordance with the rules of the Superior Court of the District of Columbia or, if no demand is made, no later than 5 days prior to trial. In the event that the defendant or his or her attorney subpoenas the chemist for examination, the subpoena shall be without fee or cost and the examination shall be as on cross-examination.

The constitutionality of this provision under the Confrontation Clause has been upheld by the District of Columbia Court of Appeals. See Howard v. United States, 473 A.2d 835 (1984). The court described the provisions of D.C. Code § 33-556 as "within the ambit of the business records exception" to the hearsay rule. 473 A.2d at 838. In discussing whether evidence admitted pursuant to the provision bore sufficient indicia of reliability to satisfy the purpose of the Confrontation Clause, the court noted that identifying a controlled substance is determined by a well recognized chemical procedure and the reports thus produced contain objective facts rather than opinions. Moreover, chemists who conduct such examinations do so routinely, generally have little interest in the outcome of a case, and are under a duty to make accurate reports. Finally, D.C. Code § 33-556 does not preclude the defendant from inquiring into the reliability of the test, since he may subpoena the chemist and subject him to crossexamination.

The same or similar factors are present with respect to other expert examinations such as ballistics and handwriting examinations: recognized standards exist for the analyses which therefore result in reports that contain objectively obtained facts, and such experts normally have no interest in or reason to falsify the outcome of a particular analysis. Most important, the amendment we are suggesting has a provision allowing the defendant in a criminal case to subpoena the expert and subject him or her to cross-examination.

The practical significance of the District of Columbia statute on which our proposal is modeled is that DEA chemists -- unless subpoenaed -- do not have to appear personally in court to testify to the results of their tests of controlled substances, thereby saving not only their time but that of the parties and the courts. No witness is even required to authenticate the report because the D.C. Code provision has been interpreted as "extend[ing] admissibility of a chemist's report from the business records exception to a business records-type subset of the official records exception to the hearsay rule." Giles v. District of Columbia, 548 A.2d 48, 54 (D.C. App. 1988). Thus, in cases where a defendant has no desire to contest the chemist's report, but for tactical reasons does not want to stipulate to its conclusions, the D.C. Code provision sets out an efficient way to introduce the evidence. [1]

The same is true with similar reports of other experts. Frequently in federal trials the results of expert analyses are not contested. Our proposal would allow the introduction, by either side, of the expert's testimony in such a situation without the necessity (but preserving the opportunity) of calling the expert,

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[1] Of course, there may also be situations in which the government does not wish to introduce the evidence by stipulation but would prefer not to take the time to call the chemist.

a saving of time for both the court and the expert. Since the rationale for the amendment does not depend on whether the expert is employed by the government, our proposal would allow such an uncontested introduction in cases of tests by private sector experts as well.

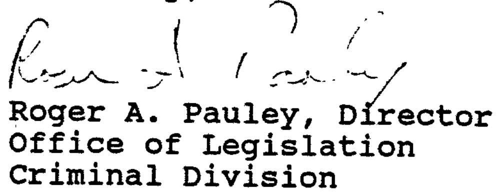
We think that the best way to accomplish this is to amend Rule 803(6) of the Federal Rules of Evidence. Specifically, we recommend that the current Rule 803(6) be redesignated 803(6)(a), and that new subsections (b), (c), and (d) be added as follows:

> (b) An official report of chain of custody and of an analysis of a substance, object, or writing, performed by an expert with an official duty to perform such analysis, shall, when attested to by that expert and by another person (if any) having legal custody of the report, be admissible as evidence of the facts stated therein and the results of that analysis. Authentication of an official report offered under this subsection may be made pursuant to Rule 902.
>
> (c) A report of chain of custody and of an analysis of a substance, object, or writing, performed by an expert who performed such analysis in the course of a regularly conducted business activity, shall, when attested to by that expert and by another person (if any) having custody of the report, be admissible as evidence of the facts stated therein and the results of that analysis.
>
> (d) If a party plans to offer a report pursuant to subsections (b) or (c), a copy of the report shall be furnished to every other party or his attorney not later than five days prior to trial. If the expert is subpoenaed for examination, the expert must be found qualified as such before the introduction of the report. If the expert or custodian is subpoenaed for examination, the subpoena shall be without fee or cost and the examination shall be as on cross-examination.

We note that the final sentence of subsection (b) of our proposal, which states that authentication of such an official report may be accomplished pursuant to Rule 902, is to make clear that such a report, although allowed into evidence under the "business records" exception to the hearsay rule, is to be treated as if it were admitted under exception 8 (public records), and self-authenticated, such as with an official seal, rather than by calling a witness. This is consistent with the court's statement in Giles, quoted above with respect to reports admitted under the D.C. rule, that the rule is really a subset of the official records exception.

Your and the other Committee members' consideration of this matter is deeply appreciated.

Sincerely,



Roger A. Pauley, Director
Office of Legislation
Criminal Division

cc: Margaret A. Berger

Section III B
9-10/93
EVID

TO: Members of the Advisory Committee on Federal Rules of Evidence

FROM: Margaret A. Berger, Reporter

RE: Rule 405

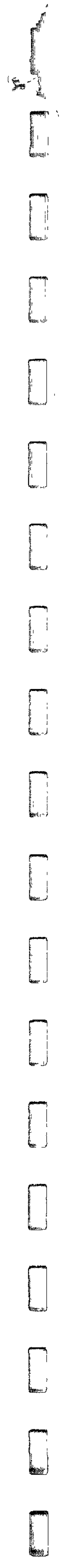
DATE: September 21, 1993

Rule 405 contains a number of ambiguities, some of which are the result of rules changes since its enactment.

1. Relationship to Rule 404. Rule 405's placement after Rule 404 and some of the language in the rule and accompanying note suggest to the casual reader that Rule 405's coverage parallels that of Rule 404 -- that is, that Rule 405 deals with proving the different categories of evidence explicitly made admissible by Rule 404. That of course is not the case. The only evidence specifically treated in Rule 404 to which Rule 405 relates is evidence that falls into the two exceptions stated in subdivisions (a)(1) and (a)(2). Rule 405 also relates to evidence not made inadmissible by Rule 404 -- i.e. character evidence not being used with a propensity inference -- and does not apply to the other crimes evidence treated in Rule 404(b). Suggestions for amending Rule 404 to make the relationship between the two rules clearer are contained in the memorandum on Rule 404 issues.

2. Problems with subdivision (a).

a. The failure to mention Rule 412. Rule 412 currently states in both subdivisions (a) and (b) that opinion and reputation evidence are not admissible "notwithstanding any other provision of law." The Committee's proposed amendment to Rule 412 limits reputation evidence to a civil case and then only "if it has been placed in

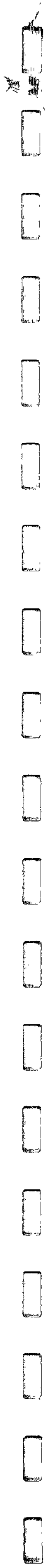


controversy by the alleged victim." The proposed Rule 412(b)(2) exception for evidence of prior sexual behavior between the victim and the accused to prove consent authorizes use of prior sexual behavior for a propensity inference; it is therefore an instance in which it is no longer correct to state, as Rule 405(a) does, that reputation and opinion evidence are always admissible to prove character. Louisiana has recognized this problem by placing "Except as provided in Article 412" at the beginning of Rule 405(a).

b. Reputation and opinion evidence are not admissible with regard to all forms of impeachment. Rule 404(a)(3) states correctly that evidence of a witness' character may be admissible despite the propensity rule as provided in Rules 607, 608 and 609. Certainly reputation and opinion evidence are inapplicable when impeachment proceeds pursuant to Rule 609 -- another instance in which the sweeping statement in Rule 405(a) is not correct.

3. Subdivision (b). Problems with regard to the "essential element" language have already been discussed in connection with Rule 404. See pp. 17-18.

4. The Advisory Committee Note. The Note suggests somewhat tangentially that expert opinion evidence is admissible. Should the note be expanded to explain how the courts have treated this type of evidence, and to discuss Rule 405's interrelationship with Rule 704(b) which bars expert proof with regard to ultimate mental states of an accused. Rule 704(b) was added after the enactment of Rule 405.



TO: Members of the Advisory Committee on Federal Rules of Evidence

FROM: Margaret A. Berger, Reporter

RE: Rule 407

DATE: September 21, 1993

There is a conflict among the circuits as to how Rule 407, which bars evidence of subsequent remedial measures, should be applied in strict liability litigation.[1] The problem arises because the rule provides for exclusion when the evidence is used to prove "negligence or culpable conduct." In deciding whether and how to amend Rule 407 to deal explicitly with strict liability claims, the rule's underlying rationale, the impact of substantive doctrine, and the desirability of uniformity in the federal courts versus conformity with state law all bear on possible choices.

Current law and incentives for forum shopping. Although the majority of the circuits have extended Rule 407 to apply to all strict liability causes of action,[2] the

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[1] Rule 407 provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

[2] Raymond v. Raymond Corp., 958 F.2d 1518, 1522 (1st Cir. 1991); In re Joint Eastern District and Southern District Asbestos Litigation v. Armstrong, 995 F.2d 343, 345 (2d Cir. 1993); Cann v.

Tenth Circuit resolves this issue in terms of state law which is often to the contrary.[3] The positions of the Eighth[4] and Eleventh[5] circuits are not clear, but at least some opinions in those circuits indicate a willingness to admit evidence of some post-accident remedial measures in strict liability actions.

With the exception of the Tenth Circuit, the federal courts have rejected Erie concerns in interpreting Rule 407. They assume that the Supreme Court's opinion in Hanna v. Plummer authorizes federal courts to apply an arguably procedural rule.[6] They classify Rule 407 as dealing with the ascertainment of truth rather than with furthering a forum's substantive tort law policies.[7]

Since a majority of state courts permit the introduction of subsequent remedial

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Ford Motor Company, 658 F.2d 54, 60 (2d Cir. 1981), cert. denied, 456 U.S. 960 (1982); Kelley v. Crown Equipment Co., 970 F.2d 1273, 1275 (3d Cir. 1992); Werner v. Upjohn, 628 F.2d 848 (4th Cir. 1980), cert. denied, 449 U.S. 1080 (1981); Grenada Steel v. Alabama Oxygen Co., 695 F.2d 883 (5th Cir. 1983); Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 232 (6th Cir. 1980); Flaminio v. Honda Motor Company, Ltd., 733 F.2d 463, 469 (7th Cir. 1984); Gauthier v. AMF, Inc., 788 F.2d 634, 636-37 (9th Cir. 1986).

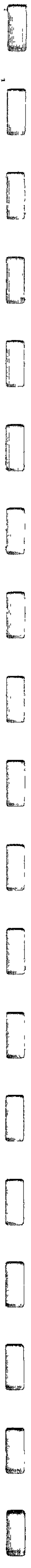
[3] Moe v. Avions Marcel Dassault Brequet Aviation, 727 F.2d 917, 932 (10th Cir. 1984); Herndon v. Seven Bar Flying Service, Inc., 716 F.2d 553 (10th Cir. 1983), cert. denied, 466 U.S. 958 (1984).

[4] Compare DeLuryea v. Winthrop Labs, 697 F.2d 222 (8th Cir. 1982) (bars subsequent remedial measures evidence in a failure to warn case involving a drug) with R.W. Murray Co. v. Shatterproof Glass Corp., 758 F.2d 266 (8th 1985); Unterburger v. Snow Co, 630 F.2d 599, 603 (8th Cir. 1980); Robbins v. Farmers Union Grain Terminal Association, 552 F.2d 788 (8th Cir. 1977) (all assuming that evidence of subsequent remedial measures may be admissible).

[5] Ebanks v. Great Lakes Dredge & Dock Co., 688 F.2d 716 (11th Cir. 1982) (applies Rules 401 and 403).

[6] 380 U.S. 460, 472 (1965).

[7] See the extensive discussion in Flaminio v. Honda Motor Co., 733 F.2d 463 (7th Cir. 1984) (Posner, J.).



measure evidence in strict liability cases,[8] the extension of Rule 407 to strict liability claims frequently affords defendants an incentive to remove to federal court. The split in the circuits may also inspire horizontal forum-shopping by defendants who are within the federal system. Transfers pursuant to 28 U.S.C. §1404 may result as defendants in product liability actions are often amenable to personal jurisdiction in more than one forum. Because circuits other than the Tenth view Rule 407 as procedural, the transferee court will apply its circuit's interpretation of Rule 407 to strict liability claims.

Rationale. Rule 407, like the other special relevancy rules in Article IV, rests on two grounds: that the barred evidence has low probative value with regard to a particular inference, and that public policy dictates exclusion of the evidence. Evidence of post-accident remedial measures offered to prove negligence or culpable conduct is inadmissible partly because of relevancy concerns, but primarily so as not to discourage

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[8] 1 Trial Evidence Committee, Section of Litigation, American Bar Association, Evidence in America: The Federal Rules in the States § 17.5 (1992). The leading case holding that the traditional remedial measure rule should not be applied in strict liability cases is Ault v. International Harvester Co., 528 P.2d 1148 (1974). Some states have reached this result by statute or rule, see e.g., Me. R. Evid. 407 and R.I. R. Evid. 407 (both states allow evidence of subsequent measures in all types of cases); Alaska R. Evid. 407 and Hawaii R. Evid. 407 (specifically providing that evidence is admissible to prove defect in products liability actions) and others by case law interpreting a rule substantially similar to FRE 407, see, e.g., Jeep Corp. v. Murray, 708 P.2d 297 (Nev. 1985); Hallmark v. Allied Product Corporation, 646 P.2d 319 (Ct. App. Ariz. 1982), or by commentary to the rule (see Committee Comment to Colo. R. Evid. 407).

defendants from making repairs after an accident occurred.[9] How these grounds operate in product liability cases is a subject of dispute.

a. Relevancy concerns. Advocates of extending the exclusionary policy of Rule 407 to products liability cases contend that the probative value of the evidence is too low to meet a Rule 403 balancing test: "[C]hanges in design or manufacturing process might be made after an accident for a number of reasons: simply to avoid another injury, as a sort of admission of error, because a better way has been discovered, or to implement an idea or plan conceived before the accident."[10] They further argue that the introduction of evidence of subsequent remedial measures would confuse the jury. In a product liability action, the jury is to determine if the product or design was defective at the time that the product was made and sold, and the jury's

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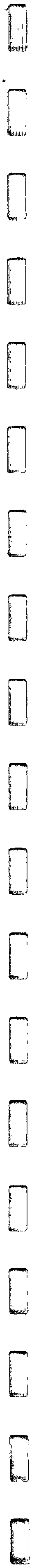
[9] The Advisory Committee Note to Rule 407 provides:

> The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion that "because the world gets wiser as it gets older, therefore it was foolish before." Hart v. Lancashire & Yorkshire Ry. Co., 21 L.T.R. N.S. 261, 263 (1869). Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.

[10] Grenada Steel v. Alabama Oxygen Co., 695 F.2d 883, 888 (5th Cir. 1983).



attention should be directed to this time period.[11]

On the other hand, proponents of admissibility assert that a blanket rule of exclusion is over-inclusive -- that there will be contexts in which the evidence is relevant, and that the issue should be handled pursuant to Rules 401 and 403 rather than by extending Rule 407's scope to product liability actions.[12]

b. Promoting repairs. The majority of federal courts has determined that the reasons for excluding the evidence as proof of negligence apply equally in strict liability actions. These courts reason, whatever legal theory applies, that defendants will be less likely to undertake remedial measures if they know that evidence of their actions will be admitted because of fear that jurors will draw an adverse inference about the cause of the accident. On the other hand, courts that admit this evidence have pointed out that a manufacturer is not likely to forego repairs to avoid liability in one case when the failure to act could expose the manufacturer to liability in many other lawsuits.[13]

c. The inter-relationship with substantive doctrine. A number of courts have resolved the admissibility of subsequent repair evidence by analyzing the differing causes of action that pertain in product liability litigation. The New York state courts, for

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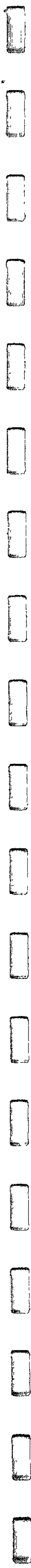
[11] S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 181 (3d ed. 1982). See also Grenada, 695 F.2d at 887.

[12] See discussion in Herndon v. Seven Bat Flying Services, Inc., 716 F.2d 1323, 1327 (10th Cir. 1983).

[13] Herndon v. Seven Bar Flying Service, Inc., 716 F.2d 1323, 1327 (10th Cir. 1983) ("It is unrealistic to think a tort feasor would risk innumerable additional lawsuits by foregoing necessary design changes simply to avoid the possible use of those modifications as evidence by persons who have already been injured.").



instance, have concluded that failure to warn and design defect cases really sound in negligence, and that only manufacturing defect cases rest on a true strict liability analysis in which evidence of subsequent repairs should be admissible.[14] The Eighth Circuit's cases suggest a similar approach.

Some courts have a special rule of admissibility for recall letters sent by manufacturers to owners of their product on the ground that the arguments for admitting this type of evidence are particularly compelling.[15] When the plaintiff seeks recovery because of the very defect that is the subject of the letter, the evidence has considerable probative value as an admission that the product was defective. Further, the policy of encouraging defendants to make repairs is not implicated as a recall order usually issues from a third party or is mandated by statute.[16]

Possible Solutions.

1. The initial question is whether the present situation with regard to Rule 407 has become intolerable? Should the rule be rewritten because it invites vertical and horizontal forum shopping? Should the rule be more responsive to Erie concerns? Do the majority of the circuits reach an inappropriate result by extending the rule to all

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[14] See Cover v. Cohen, 473 N.Y.S.2d 378 (1984); Rainbow v. Albert Elia Bldg. Co., 449 N.Y.S.2d 967 (1982); Caprara v. Chrysler Corp., 436 N.Y.S.2d 251 (1981).

[15] Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978); Farner v. Paccar, Inc., 562 F.2d 518 (8th Cir. 1977).

[16] See, e.g., Farner v. Paccar, Inc., 562 F.2d at 527 (8th Cir. 1977) (it would be unreasonable "to assume that the manufacturers will risk wholesale violation of the National Traffic and Motor Vehicle Safety Act and liability for subsequent injuries caused by defects known by them to exist in order to avoid the possible use of recall evidence as an admission against them.").

strict liability actions? A "yes" answer to any of these questions suggests the need for an amendment.

2. If Rule 407 is revised, should the rule defer to applicable state law?[17] Two arguments favor such a choice. In the first place, some states view the admission of subsequent remedial measures in products liability actions as integral to their substantive policies with regard to these types of actions. If the consequence of admitting evidence of subsequent remedial measures is to tip the scales somewhat in plaintiffs' favor, then this choice should perhaps be honored in diversity litigation. Second, a federal rule that provides incentives for removing actions based on state law to the federal courts may well be undesirable. These reasons lose some of their strength if product liability law is likely to be federalized in the near future, or if the trend in the states is towards greater protection of defendants with regard to Rule 407-type evidence in strict liability actions.[18]

Rule 407 could be amended to require conformity to state law by adding a new second sentence. For example:

> When evidence of subsequent measures is offered in connection with a claim based on strict liability in tort, or breach of warranty, the admissibility of the evidence shall be determined in accordance with State law.

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[17] Three evidentiary rules -- Rule 302 (presumptions); Rule 501 (privileges) and Rule 601 (competency, e.g. the applicability of a Deadman's Act) -- now require a determination in accordance with state law.

[18] The American Law Institute is working on a restatement of product liability law. The Reporter, Aaron Twerski, advised me that the issue of subsequent remedial measures evidence will ultimately be addressed but not before 1995 at the earliest. He has previously recommended extending the subsequent measures exclusion at least to design defect and failure to warn cases.

or

> When evidence of subsequent measures is offered in connection with a products liability claim, the admissibility of the evidence shall be determined in accordance with State law.

or

> When evidence of subsequent measures is offered to prove strict liability, the admissibility of the evidence shall be determined in accordance with the law of the State governing the strict liability claim.

3. If the Committee chooses to opt for federal uniformity rather than conformity to state law, it has three choices: 1) to extend Rule 407 explicitly to all strict liability cases; 2) to make Rule 407 inapplicable to all strict liability cases; or 3) to make Rule 407 selectively applicable in strict liability cases. This choice is obviously dictated by an assessment of the consequences.

a. Exclude all subsequent measure evidence. The easiest rule to apply is to exclude all subsequent measure evidence in all strict liability cases, the current majority approach. The first sentence of Rule 407 could be amended as follows:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove strict liability, negligence or culpable conduct in connection with the event.

(Tenn. R. Evid. 407)

b. Make Rule 407 inapplicable in the strict liability case. On the other hand, the guiding principle of the Federal Rules of Evidence is a disposition in favor of admitting all relevant evidence. In negligence cases, the probative value of subsequent measures evidence as proof of defendant's prior culpability is deemed so low that the policy of liberal admissibility is abandoned lest defendants be deterred from making

essential repairs. The crucial question is whether the probative value of subsequent measures evidence is sufficiently high in strict liability cases when offered to prove the existence of a defect so that the usual general preference for admissibility stated in Rule 401 should apply, subject to case specific exclusion via Rule 403. This solution would make Rule 407 inapplicable to strict liability claims. Admissibility would not, however, always follow because application of the balancing test in Rule 403 might result in exclusion.

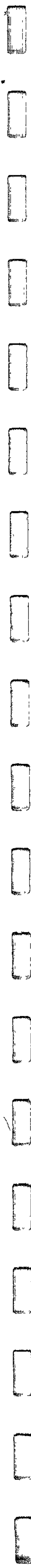
Texas makes Rule 407 inapplicable in strict liability cases by adding a new third sentence to the rule:

> Nothing in this rule shall preclude admissibility in products liability cases based on strict liability.

Iowa reaches this result by adding the underlined language to the second sentence of Rule 407:

> This rule does not require the exclusion of evidence of subsequent measures when offered <u>in connection with [a] claim based on strict liability in tort or breach of warranty or</u> for another purpose, such as proving ownership, control, or feasibility or precautionary measures, if controverted, or impeachment.

c. <u>Selective admissibility</u>. Instead of admitting evidence of subsequent measures on a case-by-case basis when probative value is sufficiently high, the third alternative is to authorize admissibility (subject of course to Rule 403) only in those instances in which probative value is generically high. The two most likely candidates for special treatment are subsequent measures offered to prove a manufacturing defect and evidence of recall letters. In both of these instances the evidence relates to the defect that is at issue.

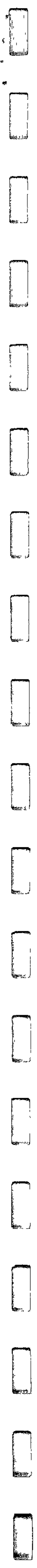


One possible way of making subsequent measures evidence admissible in manufacturing defect cases is to add the following language to the first sentence of Rule 407:

> or to prove that the product was defective in design or that a warning or instruction should have accompanied the product at the time of the manufacture.

Another possibility would be to add to the second sentence:

> such as proving the existence of a defect in a product liability action based on strict liability.



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SECTION IV
EVIDENCE
9-16/93

September 21, 1993

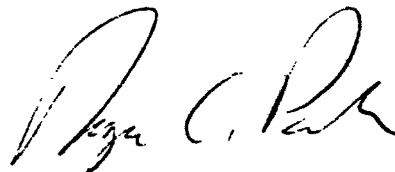
John K. Rabiej
Chief Rules Committee Support Office
Administrative Office of
the United States Courts
Washington, DC 20544

Dear Mr. Rabiej:

Professor Margaret Berger asked me to mail this manuscript to you directly, for distribution to the Committee members.

Thank you.

Yours truly,



Roger C. Park
Fredrikson & Byron
Professor of Law

Enclosure

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September 19, 1993

"OTHER CRIMES" EVIDENCE IN SEX OFFENSE CASES

David P. Bryden* and Roger C. Park**

It is fundamental to American jurisprudence that "a defendant must be tried for what he did, not for who he is."

United States v. Foskey[1]

[B]ehavior science research . . . shows that, by and large, the best way to predict anybody's behavior is, his behavior in the past . . . .

Paul Meehl[2]

A fundamental tenet of Anglo-Saxon criminal jurisprudence is that the prosecution must prove that the accused committed a specific crime, not merely that he is dangerous or wicked. So strong is our attachment to this principle that we carry it a step further: as a rule, courts exclude evidence of the defendant's bad character, even when it is relevant to his guilt of the crime charged.[3]

This rule has come under sharp attack, in Congress and the courts, on the ground that it enables sex offenders to escape punishment. Public awareness of the problem was heightened by the televised trial of William Kennedy Smith. He was accused of

raping a woman whom he met in a bar in Palm Beach. She had gone with him back to the vacation house at which he was staying, and the two went for a walk along the beach. She testified that he took off his clothes, tackled her when she tried to leave, and raped her. He admitted having intercourse but claimed that she consented, and that she started to behave irrationally when he called her by the wrong name. At a pretrial hearing, the prosecution offered testimony by three other women that they had been sexually assaulted by Smith.[4] The trial judge excluded the evidence under Florida law, and Smith was ultimately acquitted.[5]

Although there is a division of authority on the issue, exclusion of evidence about Smith's alleged prior crimes was consistent with Florida law and with the law of many, but not all, jurisdictions.[6]

The same issue often arises in "stranger rape" cases, where the defendant claims that he was misidentified by the victim and the prosecution seeks to introduce evidence that he committed other rapes. Here too the uncharged misconduct evidence is sometimes excluded as contrary to the rule against character evidence,[7] though some courts have been more ready to admit the evidence than they are in consent defense cases.[8]

A third type of case involves child sex abuse. Again, there is no defense of consent. The defendant may or may not have been

an acquaintance of the alleged victim. The defense may claim that no sexual abuse occurred, or that it was committed by another person. The prosecution offers evidence that on other occasions the accused molested the same child or other children. Courts often admit this type of evidence, though there are still a number of cases excluding it.[9]

Congress is now considering legislation that would allow the prosecution to introduce evidence of the accused's other crimes in most prosecutions for sex offenses.[10] Meanwhile, the courts are wrestling with the same issue.

This article will reconsider the rule against evidence of uncharged misconduct by the accused, as it pertains to sex offenses. Although we will focus primarily on rape, much of the analysis will also have implications for child abuse cases. We will begin by examining traditional exceptions to the rule, and the circumstances in which those exceptions have been applied to sex crimes. We will then consider whether the rule should be discarded. In the last section of the article, we will evaluate the alternative of retaining the rule but creating a general or limited exception for sex offenses.

I. THE STATE OF THE LAW: UNCHARGED MISCONDUCT EVIDENCE IN SEX OFFENSE CASES

The rule against character evidence prohibits the reception of evidence in whatever form (opinion, reputation, or specific acts) to show that a person has a trait of character, if the evidence is offered for the further purpose of showing action in conformity with that trait. This rule, broadly speaking, forbids the introduction of evidence that a defendant now charged with one sex offense has also committed sex offenses on other occasions. However, there are several exceptions that can apply to sex offense evidence. Evidence that the defendant committed sex offenses other than the one charged may become admissible to impeach a defense witness or to rebut defense evidence. It may fall outside the character evidence ban altogether because it is offered to show motive, plan, intent or identity. Moreover, in some jurisdictions a "depraved instinct" exception to the character evidence ban applies in child molestation cases. We will start by examining these various theories of admissibility.

A. Uncharged Misconduct Offered as Character Evidence to Impeach Defense Testimony or Rebut Defense Evidence

Impeachment of defendant with prior convictions. When a defendant has been convicted of another sex crime, some courts allow the prosection to introduce evidence of the conviction in order to impeach the defendant's testimony. The theory is that the prior misconduct shows that the defendant is the sort of person who would lie on the witness stand, not that it shows that

he is the type of person who would commit rape. Accordingly, the defendant is entitled to a limiting instruction telling the jury that it should use the evidence only for its bearing on the defendant's credibility, and not as evidence of guilt.[11]

In most jurisdictions, the trial judge has the authority to prevent the use of other-crime convictions to impeach in situations in which the evidence is likely to be used prejudicially in violation of the instruction. One factor to be considered in deciding whether the prior conviction is prejudicial is the similarity of the other crime to the charged crime. The closer the similarity, the greater the danger that the jurors will give the other crime its common sense weight as evidence of a propensity to commit the charged crime, rather than limiting their use of the evidence to the highly artificial way mandated by the instruction. Thus, similarity is a factor weighing <u>against</u> admissibility when evidence is offered on an impeachment theory, though it weighs <u>in favor</u> of admissibility if offered under the theory, later to be discussed, that it shows a plan or modus operandi. (If one takes this web of doctrine seriously, there is a middle area in which a prior felony is too similar to be offered to impeach, but not similar enough to be offered for substantive purposes, and hence is inadmissible). Thus, one would expect that evidence of a prior rape would often or usually be excluded when offered on an impeachment theory in a rape case, on the ground that there is too much danger that the

jury will draw the natural inference that the evidence shows a tendency to rape, rather than merely drawing the permissible inference that it shows a tendency to lie. Nevertheless, a number of courts have upheld, as within discretion, trial court decisions to admit prior sex crimes to impeach a defendant accused of rape or another sex crime.[12]

This theory of admission verges on being a transparent fiction. It would be hard to find anyone who believes that juries actually follow the limiting instruction, or even understand it. For that matter, it is doubtful that the evidence has much value for its permitted purpose of determining credibility. It may be true that a convicted rapist is generally more likely to lie than a law-abiding person. However, when evidence is offered to impeach a defendant who testifies in his own defense at trial, the proposition that felons have a general propensity to lie is beside the point. If the accused is in fact innocent, he presumably will have no occasion to lie even if he is a dishonest person. If on the other hand he is guilty in fact, but has pleaded not guilty and testified on his own behalf, he presumably will lie about the rape, even if he is a generally truthful person. On either hypothesis, then, his prior conviction is unhelpful to the jury except for the forbidden purpose of determining whether he has a propensity to rape.

To put it another way: If the accused is innocent of the

crime at bar, then prior-conviction impeachment is affirmatively harmful because it makes his denial seem like a lie when it is not. If the accused is guilty, then prior-conviction impeachment still does nothing to illuminate his truthfulness unless one assumes that a guilty person with a clean record would be less likely to lie to save himself. In view of the strong incentive that a person who is guilty of a serious crime has to lie on the stand, it is doubtful that there is much difference between those with clean records and those with prior convictions.[13]

In short, the danger that the jury will use the evidence for the powerful and appealing, but forbidden, inference that the defendant has a tendency to rape outweighs its feeble probative value for the permitted inference that the defendant has a greater-than-average propensity to lie in order to exonerate himself. In any event, instructing a jury to follow only the permitted thought-path is like telling someone to ignore every taste in a Hershey bar except the nuts.[14]

<u>Impeachment of a testifying defendant by cross-examination about sexual misconduct not resulting in conviction.</u> The trial judge has discretion to permit impeachment of a witness by cross-examination about misconduct by the witness that reflects on the witness's truthfulness, even though the misconduct has not resulted in a criminal conviction.[15] The attorney doing the questioning must "take the witness's answer" and cannot introduce

extrinsic evidence of the uncharged misconduct.[16] Under the generally prevalent rule, the trial judge should sustain an objection to the cross-examination if the probative value of the evidence on the issue of truthfulness is substantially outweighed by prejudice, confusion, or waste of time.[17] For the reasons that we have advanced in our discussion of prior convictions, it is hard to imagine uncharged sex offense evidence that would have much value on the issue of whether the defendant, if guilty, would nevertheless try to save himself by false testimony. If one genuinely believes that evidence of uncharged sex offenses is misleading when used as evidence of propensity to commit sex offenses, then the evidence should be excluded because it is likely to be used by the jury as evidence of a propensity to commit sex crimes, not of a propensity to lie.[18]

<u>Rebuttal of defense character evidence and cross-examination of defense character witnesses</u>. Under an exception to the rule against character evidence, the defendant is entitled to offer exculpatory reputation evidence or opinion testimony[19] by character witnesses, but is not entitled to offer evidence of specific acts, such as dates on which he behaved "like a gentleman." If a defendant offers a character witness who gives reputation or opinion testimony leading to an inference that the defendant was peaceable, law-abiding, respectful to women or the like, then the prosecutor can rebut with character witnesses who offer evidence in the form of reputation or opinion to the

contrary. More potently, the prosecutor, with a good faith basis, can cross-examine the defendant's character witness by asking whether the witness had heard that the defendant had committed specific bad acts on other occasions. The ostensible theory that supports allowing this cross-examination is that the evidence impeaches the character witness by showing either that the witness does not really know of the defendant's true reputation or that the witness has an unusual definition of good reputation.[20] Because the adverse impact of this cross-examination would outweigh the benefit to the defendant from the character testimony, we doubt that defense character evidence is often offered in sex offense cases where there is any evidence of other acts of the defendant.

Curative admissibility. When a defendant opens the door by asserting that he has never been involved in similar incidents or by otherwise managing to convey to the jury inadmissible denials of similar conduct, the prosecution is allowed to rebut by offering relevant evidence of uncharged misconduct. The difference between this use of character evidence and that described in the preceding paragraph is that in this case the prosecution is "fighting fire with fire"[21]--combattingthe interjection of inadmissible evidence, as opposed to responding to admissible evidence in a fashion permitted by the rule. (The defense evidence is inadmissible because the exception permitting the defense to offer character evidence only covers reputation

and opinion testimony, not testimony about defendant's conduct.)[22]

State v. Banks[23] illustrates this principle in the context of sex crimes. The defendant in Banks was charged with a sex crime against his daughter, a girl of less than 13 years of age. When questioned by his lawyer about the charges, he responded with broad denials of any sexual conduct with children. For example, he said, "There is no truth to that, I haven't, never in my entire life ever had sex with any child, with any person that was not of legal age and without their consent." He also called a former girlfriend to the stand to testify that his sexual behavior was normal and that she had never known him to engage in sexual conduct with children. The Ohio Court ruled that such testimony opened the door to prosecution evidence about the defendant's sexual misconduct with other children.[24]

B. Uncharged Misconduct Offered to Show Something Other than Character: Rule 404(b) Evidence

The character evidence rule only prohibits a certain type of reasoning about uncharged misconduct--reasoning that involves inferring bad character from bad acts, and then inferring guilt of the crime charged from the bad character.[25] Uncharged misconduct may be admissible, subject to balancing for prejudice, when it is offered for a purpose that does not require character

reasoning. Rule 404(b) gives examples of such purposes: showing knowledge, identity, plan, preparation, opportunity, motive, intent, or absence of mistake or accident.[26]

Occasionally the application of this rule is easy because the uncharged misconduct evidence plainly does not require the trier of fact to make any inference about disposition or propensity. Suppose, for example, that the defendant is accused of growing marijuana in his back yard. He claims that he thought that the plants were just ordinary weeds. To show his knowledge that the plants were marijuana, the prosecutor would be allowed to put in evidence that the defendant had previously been convicted of growing marijuana. The evidence would not be offered to show that the defendant had the character of being a drug dealer, but merely to show that he knew what marijuana looked like. This example does not require us to infer anything at all about any personality disposition of the defendant, although of course there is a considerable likelihood that the jury will do so.[27]

The permissible use of uncharged misconduct evidence under Rule 404(b) usually does, however, involve to some degree an inference about a propensity of the defendant, a tendency to act similarly in similar situations. This is almost always the way the evidence is used when the defendant is charged with sexual assault or child abuse.

Of the exceptions[28] specifically listed in Rule 404(b), only "motive," "intent/absence of mistake," "plan," and "identity" commonly arise in sex crime cases.

1. Motive

"Motive" evidence is evidence about the state of mind or emotion that influenced the defendant to desire the result of the charged crime.[29] Uncharged misconduct evidence can show motive in either of two ways.[30] First, the uncharged misconduct can cause the motive to arise. For example, suppose that the uncharged crime is robbery, and the charged crime is murder. The prosecution's theory is that the defendant murdered the victim because the victim was a witness to the robbery. The robbery gives rise to the motive for the murder. Admission of this uncharged misconduct evidence does not require the trier to infer that the defendant has a violent character, but only that he had a reason to want to commit the crime. Use of uncharged misconduct evidence to show motive is not controversial in this situation.

Sometimes the uncharged misconduct is evidence of a pre-existing motive that caused both the uncharged act and the charged crime. For example, suppose that the defendant is charged with the murder of Mr. X. On a prior occasion, defendant

vandalized Mr. X's car. The vandalism would be admissible on the theory that it manifests hatred for Mr. X, and that the hatred was the motive for the murder.[31]

Commentators have criticized the reception of this second type of motive evidence on the ground that it amounts to propensity evidence.[32] But the evidence does not plainly violate the rule against using character to prove conduct. To say that Jones hates Smith is not necessarily to say that Jones has the character of being a hater. The word "character" carries a connotation of an enduring general propensity, as opposed to a situationally specific emotion.[33]

To be sure, the policy arguments justifying exclusion of the evidence in a typical character evidence case are arguably applicable to this type of case. One might contend, for example, that the evidence will "prejudice" the jury against the defendant. But the genuine probative value of evidence that the defendant hates X is usually much greater than the value of evidence that he is a hater in general.

In child sex abuse cases, evidence that the defendant previously abused the same child is often admitted to show that he was motivated by a lustful desire for that particular child.[34] This use of motive evidence in sex crime cases is analogous to the use of evidence of crimes against the same person in other

contexts, for example the use of vandalism to show the defendant's hatred for Mr. X. Sometimes, however, courts have given the motive concept astonishing breadth in child sex abuse cases. For example, the Supreme Court of Iowa held that evidence of uncharged acts against other adolescent girls was admissible in a sex crime case, on the ground that the evidence showed defendant's motive "to gratify lustful desire by grabbing or fondling young girls."[35] That reasoning has been compared to saying, in a burglary case, that other acts of thievery show a "'desire to satisfy his greedy nature by grabbing other people's belongings.'"[36] In either case there is nothing left of the rule against character reasoning, because it is a trait of character that supplies the motive.

This type of reasoning seems to have greater appeal in child sex abuse cases[37] than in adult rape cases.[38] In either type of case, there is no real need to explain motive. Motive can sometimes be a mystery in a murder case, but not in a sex crime case. Courts that admit the evidence of acts against third paries on a motive theory are really using "motive" as a euphemism for character.

2. Identity

Proof of "identity" is one of the permissible purposes listed in Rule 404(b). An identity issue does not automatically

open the door to evidence of all uncharged misconduct, but it does allow identification of the defendant as the perpetrator by showing that he committed prior crimes using the same modus operandi as the perpetrator of the charged crime.[39] Courts often say that the modus must be like a "signature" or even "unique"[40] but there are many cases where less has been required.[41] For example, in a robbery case, the Arizona Supreme Court admitted prior robberies even though the only similarity noted by the court between the uncharged crimes and the charged crime was that they all involved similar convenience stores.[42]

As a rule, identity will be in dispute in stranger rape cases, but not in acquaintance rape cases.[43] This circumstance has led some courts to hold that modus evidence is not admissible in acquaintance rape consent-defense cases.[44] Sometimes this reasoning results in exclusion even in situations where the uncharged misconduct and the charged acts have very substantial similarities. For example, in People v. Tassell,[45] the California Supreme Court concluded that the trial court erroneously admitted evidence, in a consent-defense case, that the defendant had committed two other rapes.[46] According to the state's evidence, the victim was a waitress who had given the defendant a ride home after she finished work. The defendant forced her to drive to another location and then raped her in her van. There were commonalities between that rape and the uncharged rapes: they all took place in vehicles; they all

involved the use of a similar thumbs-against-windpipe choke hold; and, in one uncharged instance, the perpetrator used the same false first name as that used by the defendant in the charged incident.[47] Holding that the evidence should have been excluded, the court remarked that, "[t]here being no issue of identity, it is immaterial whether the modus operandi of the charged crime was similar to that of the uncharged offenses."[48]

3. Plan

Under Rule 404(b), evidence of uncharged misconduct is also admissible to prove "plan." This result is consistent with the general rule against character evidence. Inferring that someone had a plan is different from inferring that he had a character trait. The concept of "plan," however, has proven to be as protean as the concept of "motive."

The concept can refer to a plan conceived by the defendant in which the commission of the uncharged crime is a means by which the defendant prepares for the commission of another crime, as in Wigmore's example of stealing a key in order to rob a safe.[49] Or it can refer to a pattern of crime, envisioned by the defendant as a coherent whole, in which he achieves an ultimate goal through a series of related crimes. For example, in the movie Kind Hearts and Coronets,[50] Alec Guinness plotted to acquire a title by killing off everyone with a superior claim.

Each of the bizarre killings was different, but each was in pursuit of the same plan. This use of uncharged misconduct evidence to show multi-crime plans whose parts are linked in the planner's mind is not very controversial.[51]

The concept "plan," and its frequent companion "common scheme," have also been used to refer to a pattern of conduct, not envisioned by the defendant as a coherent whole, in which the defendant repeatedly achieved similar results by similar methods.[52] These plans could be called "unlinked" plans--the defendant never pictures all the crimes at once, but rather has a "plan" in the sense of saying to himself, "it worked before, I'll try the same plan again." Some commentators have dubbed this evidence as "spurious plan" evidence and have criticized cases receiving it.[53] In a California acquaintance rape case the court described "common scheme or plan" as merely an unacceptable euphemism for "disposition."[54] Yet this concept of "plan" is a textually plausible interpretation of the rule against character reasoning. The concept of "character" can be construed to refer only to traits manifesting a general propensity, such as a propensity toward violence or dishonesty. Under this interpretation, a situationally specific propensity, such as a propensity to lurk in the back seats of empty cars in a shopping center as a prelude to a sexual assault on the owner,[55] can be considered too specific to be called a trait of character. The probative value of the evidence is, of course, enhanced by the

situational similarity.

Evidence of situationally specific propensities is accepted in other contexts despite the rule against character reasoning. Evidence of "habit"[56] or of "modus operandi" to show identity[57] are examples of evidence that requires propensity reasoning, but that is not considered to be character evidence. So a tolerant attitude toward evidence of unlinked plans does not really break new ground.

In sex crime cases, the "plan" concept is usually used in its broadest sense. One rarely finds linked-plan sex crime cases in which it is possible that the defendant conceived of one continuous plan and carried it out. To be sure, a defendant's initial acts of kissing or fondling a child might be part of an overall plan to have invasive sex.[58] Usually, however, the "plan" rubric is applied to sex crime cases in the unlinked or "spurious" sense. That is, it is applied to cases in which the defendant repeatedly committed the same crime with the same technique and objective, and in that sense followed the same "plan" or "scheme."[59]

The "plan" theory has sometimes been employed to justify admission of evidence of prior rapes in consent defense cases. For example, in People v. Oliphant[60] the Supreme Court of Michigan used an unlinked plan theory to uphold reception of

evidence against a defendant who repeatedly employed an unusual rape scheme. In Oliphant, the defendant met the victim while she was windowshopping. After a friendly chat, they visited several bars.[61] He then took her to an isolated place and raped her.[62] Charged with rape and gross indecency, he entered a defense of consent. At trial, the prosecution was allowed to put in evidence of three prior rapes, including two for which the defendant had previously been tried and acquitted.[63]

The Michigan Supreme Court held that evidence of the prior rapes was properly admitted to show a common plan, under which the defendant orchestrated circumstances so that if his sexual advances met resistance he would rape the woman, but the encounter would appear to be consensual.[64] All four attacks occurred during a five-month period; all involved college-age women; all began with a friendly introductory conversation in public; all involved discussions of race and marijuana; all victims willingly entered the defendant's car; invariably the defendant deviated from the expected route, offering an excuse that did not arouse fear in the victim; the rapes did not involve much force, and the victim's clothing was not ripped; and the defendant took each victim to an unfamiliar place for intercourse.[65] In addition, he intentionally weakened his victims' credibility by the same audacious act of providing them with or insisting that they remember his name, address, college identification card, and license plate number.[66] The victims all

had few bodily injuries and many opportunities to escape during the encounters.[67]

The court concluded that evidence of this plan was relevant to the issue of consent. In the charged crime, the defendant's plan made it appear that an ordinary social encounter that ended in consensual sex simply went sour after the defendant complained about the woman's body odor. In Oliphant, then, the absence of an identity issue did not preclude evidence of a similar modus operandi, but merely caused a change in terminology. Rather than characterizing the case as one in which identity was proven by a similar modus, the Michigan court characterized it as one in which the defendant's consent defense was refuted by showing that the defendant had a "plan [or] scheme . . . to orchestrate the events surrounding the rape . . . so that she could not show nonconsent."[68]

People v. Tassel[69] exemplifies a narrower construction of the concept of "plan." The defendant had committed three rapes, using a similar scheme for each crime. The Supreme Court of California considered and rejected the "plan" theory. It held that there had to be a "'single conception or plot' of which the charged and uncharged crimes are individual manifestations," and that "[a]bsent such a 'grand design,' talk of 'common plan or scheme' is really nothing but the bestowing of a respectable label on a disreputable basis for admissibility -- the

defendant's disposition."[70]

4. Intent/absence of mistake or accident

Many courts liberally admit uncharged misconduct evidence to show intent or absence of mistake or accident. For these purposes, they have required less of a showing of similarity than when evidence is offered to show that the criminal act was committed.[71]

Sometimes intent can be shown with uncharged misconduct evidence in a fashion that doesn't involve any inference of a propensity for misconduct. For example, in a murder case, if the defendant bludgeoned a guard on the way to killing the victim, the uncharged misconduct of assaulting the guard would tend to show that the subsequent murder was premeditated, without the necessity of an inference that the defendant had a general propensity for committing violent or murderous acts.

Usually, however, the evidence is offered to prove intent by way of proving that the defendant had a propensity to commit the crime. The inference of intent is reached by a necessary inference of propensity. This is true even in some frequently-cited examples of the intent/mistake concept--for example, in cases in which the fact that the defendant previously bought stolen goods is deemed admissible to show that he had guilty

intent when he bought stolen goods on the occasion charged.[72] What the trier is being asked to do is to infer that because the defendant has a continuing propensity to buy stolen goods, he had the forbidden intent on the occasion in question.

Although proof of intent almost always involves proof of propensity, this does not necessarily mean that the rule against character reasoning is wholly extinguished by the exception for evidence to show intent. Many courts, when the evidence is offered to prove intent, require some special degree of similarity between the acts.[73] Thus, intent may not be shown by using, as a bridge from mental state to mental state, the general propensity to be dishonest. The propensity to deal in stolen goods, by contrast, is thought to be narrow enough. In general, the degree of similarity required to permit use of uncharged misconduct evidence to show intent is less than when the ultimate fact sought to be shown is the doing of the criminal act. Perhaps lack of intent should be regarded as a disfavored defense, which is fair game for rebuttal by evidence that would otherwise be excluded.

There is a second limit on using the intent exception as a way around the rule against character reasoning, and it is this limit that is most important in sex crime cases. In order for uncharged misconduct evidence to be admissible to show intent, intent must actually be in issue. Sometimes intent is in issue

in a fairly straightforward fashion in sex crime cases. This is so when the criminal sexual contact is based upon touching the intimate parts of the victim, and the defendant claims that the touching was accidental, or that it was for a nonsexual purpose, such as bathing or giving medical treatment to a child.[74] The prosecutor can then introduce uncharged acts of the defendant to show that he intended to derive sexual gratification from the touching.

In many cases, however, the defendant denies that the act took place and makes no claim about intent. Courts sometimes admit the evidence anyway, especially in child abuse cases. For example, in <u>United States v. Hadley</u>,[75] the defendant, a teacher, was accused of sexually abusing young boys who were his students. After two students, aged 9 and 11, had testified and been impeached on cross-examination, the trial judge admitted the testimony of two young adult men that Hadley had repeatedly molested them while they were minors. Hadley argued that the acts were inadmissible because he did not contend that he lacked intent, but instead denied participation in the acts charged.[76] His counsel had offered not to argue the issue of intent to the jury.[77] Nevertheless, the Ninth Circuit held that the evidence was admissible because it went to criminal intent, and the government had the burden of proving intent whether the defendant relied on that defense or not.[78] There is, however, a conflict on this point, with a number of courts holding that there must be

a significant dispute over the issue before uncharged conduct can be received to show intent.[79]

In adult rape cases, most decisions hold that intent is not in issue.[80] In Wigmore's words,

> Where the charge is of rape, the doing of the act being disputed, it is perhaps still theoretically possible that the intent should be in issue; but practically, if the act is proved, there can be no real question as to intent; and therefore the intent principle has no necessary application.[81]

In the great majority of rape trials, the defense is either alibi (mistaken identity) or consent. If he offers an alibi, the defendant denies committing the act and therefore his mens rea is not an issue; in such a case, the exception for evidence of intent is plainly inapplicable. If the defense is consent, the propriety of evidence of intent is more problematic. In a sense, the consent defense is tantamount to saying "yes, we had intercourse, but I intended to have consensual sex, not to rape." Conceptualized thus, the case is arguably analogous to the paradigmatic cases of counterfeiting and receiving stolen goods, where evidence of prior crimes is commonly admitted to show criminal intent. The pawnbroker says, "Yes, I meant to buy that ring, but I didn't intend to buy a stolen ring"; the rape-

defendant says "Yes, I meant to make love, but I didn't intend to make love to an unwilling partner."

There is some authority that a defendant puts intent in issue when he claims consent as a defense.[82] A Texas Appeals Court, for example, held that a rape defendant who pleads consent necessarily denies that he intended to have sexual intercourse without the consent of the complainant.[83]

The contrary view, that intent is not an issue in the absence of a defense actually based on mistake about consent, also has some support in the case law. In People v. Tassell[84] the California Supreme Court decided that the intent theory was not available to the prosecution in a rape case. The trial court had admitted evidence of other rapes to show a common plan and to corroborate the victim's testimony.[85] The court took the opportunity to discuss many exceptions to the rule against prior crimes evidence. The exception for evidence of intent, said the court, was irrelevant in this case. Intent becomes an issue when the defense is a mistake or accident. Here the defendant undoubtedly intended intercourse; the issue was simply consent.[86] If the trier believed defendant's version, the complaining witness freely consented; if the trier believed her version, defendant forced her to have intercourse with threats and violence. No defense of reasonable mistake was ever suggested.

In most consent-defense cases, the real issue is what the defendant (and the alleged victim) did, not what he or she intended to do. Typically, the testimony does not suggest that he made an innocent mistake, misinterpreting her signals. This problem, though interesting and perhaps common, appears in only a minuscule fraction of the reported cases. It is usually impossible to reconcile the conflicting accounts by supposing that the defendant misunderstood his alleged victim's desires, except in the sense that some rapists may believe that subconsciously "all women want it," or that the victim, by behaving in an adventurous way--say, by visiting his apartment at 2:00 a.m.--was "asking for it." Nearly always, if the defendant's testimony is true then the complaining witness's version must be perjurious, and vice-versa. The defendant, in other words, testifies that "she consented," not that "I thought that she consented" and typically the woman's testimony affords no basis for an inference that the parties misunderstood each other.

5. Other non-character purposes

Rule 404(b) expressly indicates that the purposes listed there are only illustrative by preceding the list of examples with the words "such as."[87] Evidence can be admitted for a purpose not enumerated, so long as that purpose does not involve character reasoning.[88]

Although the list is fairly comprehensive, courts sometimes invent additional labels.[89] For example, one finds statements that evidence of a "pattern" of criminal conduct is admissible. In a 1987 Minnesota case[90] involving rape of an adult, the court upheld the admission of evidence that the defendant had committed two sex crimes against children on the ground that the evidence showed a "pattern" of "opportunistic sexual assault" on "vulnerable" victims.[91] Here the "pattern" is so broad that admitting pattern evidence is indistinguishable from admitting character evidence.[92]

C. Beyond Rule 404(b): Uncharged Misconduct Evidence Offered as Character Evidence under the Lustful Disposition Exception

Some jurisdictions have gone beyond Rule 404(b), and admitted evidence of uncharged misconduct to show "lustful disposition" or "depraved sexual instinct" in cases involving sex crimes against children.[93] Rightly or wrongly, such decisions represent a partial rejection of the rule against character evidence. As Professor Imwinkelreid has said, "In these jurisdictions, intellectual honesty triumphed, and the courts eventually acknowledged that they were recognizing a special exception to the norm prohibiting the use of the defendant's disposition as circumstantial proof of conduct."[94] Other courts

have rejected the "depraved sexual instinct" exception because it violates the prohibition against using character to show conduct, and they have sometimes treated the Federal Rules of Evidence as shutting off the option of admitting evidence on a "lustful disposition" or "depraved sexual instinct" theory.[95]

The leading recent case is State v. Lannan,[96] a decision that abolished Indiana's "depraved sexual instinct" exception to the rule against character evidence.[97] The court noted that the exception had been based on two rationales: First, that there is a high rate of recidivism in child molestation cases, and second, that there is a special need "to level the playing field by bolstering the testimony of a solitary child victim-witness."[98] The Lannan court was willing to accept the proposition that there is a high recidivism rate among sex offenders, but believed it to be no higher than for drug offenders, and hence concluded that sex offenses are not special enough to justify an exception.[99] In its discussion of the bolstering rationale, the opinion noted that sex crimes against children are now thought to be common, and said that the depraved instinct exception had its origins "in an era less jaded than today." The decision that created the exception was a 1930s case in which a Superior Court judge had been charged with child sex abuse. The Lannan court thought that at that time the idea that a man who was a pillar of the community would force himself sexually upon a child "bordered on the preposterous." The court added that, "Sadly, it is our

belief that fifty years later we live in a world where accusations of child molestation no longer appear improbable as a rule. This decaying state of affairs in society ironically undercuts the justification for the depraved sexual instinct exception at a time when the need to prosecute is greater."[100]

Although a few states have abandoned the "depraved sexual instinct" exception, many continue to recognize it in child sex cases, though not in adult rape cases.[101] The judges may feel that a desire for heterosexual intercourse with an adult, even when forced, is not as unusual or depraved as a desire for sex with a child. Even if this dubious proposition were true, it would be an inadequate justification for admission of uncharged misconduct evidence. Murder, after all, is rarer and more depraved than child abuse, but no one suggests that therefore a murder defendant's prior homicides should be routinely admissible.

D. The State of the Law, Concluded

It is hard to generalize about this body of law. In many jurisdictions it is in a state of confusion. However, two general conclusions are warranted. First, there are still plenty of reversals for letting in sex crime evidence. Despite the willingness of some courts to manipulate the Rule 404(b) categories in order to receive evidence of uncharged sex

offenses, the courts do not universally or uniformly treat sex offenses differently from other crimes. Second, courts in a number of states are less likely to admit uncharged misconduct evidence in acquaintance rape cases than in stranger rape or child abuse cases. One finds this result in opinions that reason that in consent defense cases identity is not in issue, so modus evidence is not admissible. These courts tell us that they would decide differently in a stranger rape-alibi defense case.[102] Similarly, in child sex cases in which identity is not in issue, some courts invoke the "depraved sexual instinct" exception, which does not apply to adult rape cases.[103]

II. POSSIBILITIES FOR REFORM

A. Abolition of the Rule Against Character Evidence

The simplest way to resolve the conflicts and ambiguities in this body of law would be to abolish the rule against character evidence, freely admitting testimony about the accused's prior crimes for the purpose of showing criminal propensities. Although wholesale abolition of the rule is not on the immediate legal horizon, one's attitude toward the general rule inevitably influences one's attitude toward piecemeal reform. If one believes that the rule against character reasoning rests on shaky grounds, then

relaxing it piecemeal is easier to accept. Ad hoc exceptions can be viewed as incremental reforms, with the eventual goal of receiving the evidence generally.

Much can be said in favor of abandoning the rule against character evidence. To begin, the character evidence doctrines are extremely complicated and confusing. They produce huge quantities of appellate litigation[104] that seems to do little to dispel the unclarity.

Evidence about past misconduct is the type of information that one would want to have in making judgments in everyday life. If nothing else, the refusal of the law to receive the evidence undermines the legitimacy and acceptability of fact-finding.[105]

The rule excluding uncharged misconduct is contrary to the trend in evidence law toward free proof. There has been a centuries-long movement toward abolition of those exclusionary rules that are based upon the danger of misleading the fact-finder. Evidence scholars and jurists have increasingly come to agree with Bentham that technical rules of evidence designed to protect the fact-finder from misdecision are, at best, more trouble than they are worth.[106]

Yet there are also several arguments in favor of retaining the rule. Support for the rule against character reasoning can be found in the literature on personality theory.[107] Character reasoning makes sense only if human behavior is consistent across situations because of a person's underlying traits of character. Many psychologists are skeptical about "trait theory" and prefer a "situationist" perspective, maintaining that humans react very particularistically to different events, and that character traits do not produce cross-situational stability of behavior.[108] Some of the research relied upon by situationists is interesting and suggestive. For example, research indicates that there is little consistency in deceitful behavior by children--a child may lie at school but not at home, or cheat on an exam but not in sports.[109]

While this research is instructive, situationism is by no means a consensus position. Some scholars support trait theory and reject the situationist position.[110] Others argue for another approach to the study of behavior, interactionism, which emphasizes the need to consider both trait and situation in predicting behavior.[111] Others have maintained that stability can be observed for certain traits, such as aggressiveness.[112]

Even if a defendant's character is an invalid basis for

some superficially plausible inferences it may be a valid basis for others. Heinrich Himmler, for example, disapproved of hunting on the ground that "every animal has a right to live."[113] This startling fact shows that--contrary to what one would expect--he did not possess a general trait of "cruelty toward living creatures." It is a dramatic illustration of the danger of over-generalizing character traits. But it does not follow that Himmler lacked the trait of "cruelty toward Jews" or even the more general trait of "cruelty toward humans."

Even if behavior is strongly influenced by situational considerations, and even if the studies showing this can be generalized to particular offenses, one must still, in supporting exclusion, face the question whether it has been shown that juries are give too much weight to this sort of information. There is support for this proposition in studies of fundamental attribution error--studies that suggest that research subjects tend to attribute too much influence to disposition, and not enough to situation, in assessing causes of human behavior.[114] For example, even if told that a debater had no choice about which side to take in a debate, research subjects tend to believe that the debater is arguing the side that he or she actually believes.[115]

On the other hand, this research is mainly directed toward showing the process by which people make social judgments, not the external validity of judgments about character. Attribution error researchers have tended either to ignore the accuracy question, or to assume, without actual testing, that character attributions are inaccurate.[116] Moreover, some critics have charged that there is a bias in the professional literature in favor of reporting human error--either because it is easier to study, or simply because it makes a better story.[117]

On the whole, personality theory probably does lend some support to the idea that character evidence is prejudicial. But the research has not achieved the level of acceptance that one sees, for example, in eyewitness testimony research, and its generalizability to legal issues is sometimes questionable.

The real danger in admission of character evidence is that the jury will give it more weight than it deserves, either by overestimating its probative value on the crime charged or by concluding that even if the defendant is innocent of the crime charged he is a "bad man" who belongs in jail. At the very least, jurors (and police and prosecutors) who know about the defendant's prior crimes may be insufficiently diligent in trying to resolve gaps and

conflicts in the other evidence about the crime charged.

A fact-finder wants to be able to sleep soundly after finding a defendant guilty or not guilty. Expressed in terms of decision theory, decision-makers will seek to minimize their expected regret over reaching incorrect decisions.[118] They will weigh the regret they expect from a conviction against the regret they expect from an acquittal. Jurors will experience less expected regret over finding the defendant wrongfully guilty if they believe that the defendant committed other crimes.

A subsidiary, but significant, benefit of the rule against propensity evidence is that it limits the scope of the proceedings. It saves time and money by preventing the trial of collateral issues. Moreover, it protects the parties from surprise. The accused should not be forced to defend his whole life without an adequate chance to prepare. While the danger of surprise could be reduced by notice and discovery, these features also add complexity and cost to the system.

The cost of the rule against propensity evidence is that a certain number of criminals go free, and different observers will have different opinions about whether this price is worth paying for the benefits of the rule. For our

part, we are not prepared to scrap the general rule, but are willing to consider novel exceptions on their individual merits.

B. A General Exception for Sex Crimes

Some courts and reformers contend that, although the general rule against uncharged misconduct evidence makes sense, an exception should be created for cases involving sex crimes.

Such a proposal is now pending in Congress, in the form of a bill to amend the Federal Rules of Evidence.[119] This bill would add three new rules. New Rule 413 would provide that when the defendant is accused of an offense of sexual assault, evidence of his commission of another sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant. New Rule 414 would make the same provision for criminal child molestation cases, and new Rule 415 would do so for civil cases involving sexual assault or child molestation. The proposed rules provide for notice to the accused of the nature of the alleged prior misconduct before trial.

Whether Rule 403[120] would still be available to an accused seeking to challenge the admissibility of this

evidence is unclear. The proposed rules do not mention Rule 403, and the text of the bill could be construed to create an exception to Rule 403. Instead of saying that the evidence "may" be admissible, as in Rule 404(b), the language of the proposed rules says that the sexual history evidence "is" admissible and that it may be considered for its bearing "on any matter to which it is relevant." One of the sponsor statements in favor of the bill's predecessor legislation claims, however, that Rule 403 would still be available as a backup.[121]

Assuming that Rule 403 would survive, the new rules would still broaden the admissibility of sexual history evidence. In cases covered by the new rules, the rule against character reasoning would be abolished, and in its place one would have a rule permitting character reasoning, subject to exclusion if the prejudicial effect of the evidence "substantially" outweighs its probative value.

The new rules do not go so far as to make all uncharged sexual misconduct freely admissible in sex offense cases. The uncharged misconduct must itself be a serious offense.[122] Sexual misconduct that does not rise to the level of serious crime would still be subject to the existing Rule 404(b) screening. On the other hand, the rule would have some potentially broad effects. For example, if proposed Rule

414 is read literally and without qualification, evidence that the defendant had previously had consensual intercourse with a 13-year-old girl would be admissible in a subsequent case in which the defendant was accused of sex with a 5-year-old boy.

One question is whether this legislation creates anomalies or inconsistencies. Does the view that such evidence is not unduly prejudicial conflict with the way we treat character evidence in other areas?

The first possible anomaly is in the different treatment of the accused's sexual propensities and those of the alleged victim. Under rape shield legislation, the victim is entitled to protection from revelation of her sexual history, subject to certain exceptions, such as evidence of sexual intimacy with the accused.[123] One might argue, therefore, that since the law excludes the sexual history of the alleged victim, it should also exclude the sexual history of the accused.

This analogy, though superficially cogent, ignores [illegible] types of evidence. To begin with a relatively minor point, the rape shield laws are grounded not only in a desire for accurate verdicts, but also in considerations of extrinsic policy. They are

designed to protect victims from embarrassment in order to encourage them to report rape.[124] The encouragement rationale does not apply to evidence about a defendant's sexual misconduct.

In addition, victims have a legitimate privacy interest in keeping facts about their sexual history secret. No similar purpose is served by suppressing evidence of prior sex offenses of an accused. One who commits a crime is not entitled to keep that fact secret.[125]

The most important distinction is between the probative value of the two types of evidence. Contrary to Wigmore's opinion,[126] a woman's sexual history rarely sheds light on whether she has falsely accused the defendant of rape. The main problem is not that nowadays single women usually are sexually experienced.[127] That fact merely establishes a higher threshold of sexual experience; it does not rebut the argument that relatively unselective women (by today's standards) are relatively prone to consent and that therefore evidence of promiscuity is relevant on the issue of consent. Nor is the problem that "she's still entitled to say 'no.'" That claim, though incontestable, is irrelevant when the issue is whether or not she in fact said no. Likewise, it is fallacious to justify rape shield laws on the ground that "rape is a crime of violence, not of

sex." That proposition, even if wholly accepted, goes to why rather than whether a rape occurred. It is equally misleading to assert that "just because she consented to one man doesn't mean she consented to another."[128] That truism confuses relevance with conclusiveness.

If the issue were simply whether the defendant and a certain woman had voluntary sex on a certain date, there is no escaping the conclusion that it would be relevant--though of course far from conclusive--to know that she has often done so before, with the same man or even with other men. Suppose, for example, that the woman were being tried for burglary and her defense was an alibi: "On that night I was having sex with a fellow I had just met in a bar." In evaluating her story, it would surely be useful--though not conclusive--to know whether she never, sometimes or frequently had done this with other men.

The issue in a consent-defense rape case, however, is not simply the likelihood that the alleged victim had consensual sex on a particular occasion. Rather, the question is whether she consented to sex <u>and</u> then falsely accused the defendant of rape--or instead was raped. On that ultimate issue her promiscuity, however extreme, cuts both ways. On the one hand, it tends, however slightly, to show that she is the sort of person who might well have

consented to casual sex. On the other hand, her failure to accuse her numerous other lovers of rape tends, however slightly, to show that she does not readily make that accusation in a fit of pique or because of pathological delusions. More important, it seems likely that unselective women, though more inclined to consent, are also more likely to be raped, because some men perceive them as more vulnerable ("nobody will believe you") or as less entitled to decline sex, and because they are more likely to live in high-crime areas or to engage in high-risk behavior, or both.[129] For all these reasons, even a prostitute's accusation of rape is just as plausible, all else being equal, as that of a more sexually-restrained woman.

Admittedly, the defendant's prior rapes are not conclusive evidence that he is guilty of the rape charged. Just as a woman may consent to sex with one man but not with another, so a man may force himself upon one woman but not another. But his prior rapes do not cut both ways. We may disagree about their precise significance, but they do have at least some probative value, and it is all on the side of the prosecution. There is, therefore, no inconsistency in admitting evidence of his prior rapes while excluding evidence of her prior consensual sex.

There is, however, another, more truly anomalous effect

of the proposed federal statute. It would create a special rule of free admissibility for sex offenses, while preserving the rule against character evidence for other offenses. Why should the rules about admissibility of prior offenses be more liberal when sex crimes are involved than they are when the charged crime is murder, manslaughter, robbery, drug-dealing or nonsexual assault? In a case in which a defendant is accused of both rape and murder, would one wish to admit a prior rape by the accused without any showing of special similarity, while excluding a prior homicide by the accused unless it is shown to involve a closely similar _modus operandi_?

The available data on recidivism does not support different treatment of sex crimes. It fails to provide a clear answer to the question whether sex crimes are more frequently repeated than other crimes. In a 1989 Bureau of Justice Statistics Report that followed 100,000 prisoners for three years after release, the recidivism rate was _lower_ for sex offenders than for most other categories. According to these figures, 31.9% of released burglars were rearrested for burglary; 24.8% of drug offenders were rearrested for a drug offense; 19.6% of violent robbers were rearrested for robbery. In comparison, 7.7% of rapists were rearrested for rape. (Of the offenses studied, only homicide had a lower recidivism rate--2.8%.)[130] However, there are a number of

reasons for caution in appraising this data. For example, a follow-up period of longer than three years might have yielded a much higher recidivism rate for sex offenders,[131] though of course it might have yielded a higher rate in other categories as well. Other studies of sex offenders with smaller groups and different periods of follow-up have shown both higher and lower recidivism rates for certain populations of sex offenders, but without demonstrating that sex offenders have a consistently higher or lower recidivism rate than other major crime categories studied for the same time period with the same methods.[132]

Some commentators have suggested, plausibly, that studies based on rearrest or reconviction vastly understate the rate of recidivism for sex offenders, because sex offenders may commit hundreds of acts without getting caught,[133] but this may also be true of other criminals, such as purse-snatchers, illegal gamblers, burglars, shoplifters, reckless drivers and drug offenders. Although there is reason to believe that acquaintance rape is a grossly underreported offense,[134] that may be even more true of drug crimes which, being consensual, are notoriously hard to detect.[135]

Even if we were to assume, arguendo, that the recidivism rate for all types of sex crimes is far greater

than for any other crime, it would not follow that evidence of prior sex crimes should be admitted. The genuine probative value of the evidence, however high, may be lower than the value that the jury is likely to assign to it. Perhaps the recidivism rate for stranger rape or child molestation is both high (in comparison with other offenses) and lower than jurors commonly suppose. Conversely, the recidivism rate for some other offense--say, murder--might be low but not as low as jurors suppose. On that hypothesis, the case for admitting a prior sex offense would be weaker than for admitting a prior homicide.

The sponsor statement in support of the proposed amendments to the Federal Rules of Evidence stresses the inherent improbability that a person whose prior acts show him to be a rapist or child molester would have the bad luck to later be the victim of a false accusation.[136] Wouldn't it be an incredible coincidence for that to happen by chance? Our answer is that the plausibility of such a coincidence does not turn on whether sex crimes are involved, but rather upon other factors. One major factor is whether the accusations are independent, so there is no chance that one accusation caused the other. Other factors include the number of separate accusations and of course their similarity.[137] If the defendant is accused of arson, wouldn't it be a bizarre coincidence for him to just happen to have

been independently (but falsely) accused by three unrelated victims of three other acts of arson? If a probabilistic exception is to be made to the rule against character evidence in cases involving multiple accusations, then consistency requires that the exception be applied to all types of cases in which the probative force of multiple accusations is equally great.[138]

By now, the astute reader has undoubtedly detected some ambivalence on the authors' part, both in our attitude toward the character evidence ban and in our attitude toward the proposed exception for sex crimes. Although we ultimately reject wholesale abolition of the rule against character reasoning, we see some merit in the argument for abolition. That being so, we can also see merit in an argument for partial abolition in sex crime cases. One of the frequently heard arguments against receiving such evidence--that it would be inconsistent to reject victim sexual history while admitting the sexual history of the accused--does not withstand careful scrutiny. We do, however, believe that a blanket exception for sex crime cases would be inconsistent with retention of the rule in other types of cases, such as nonsexual assault and robbery. So on balance we believe that the proposed legislation creates an untenable distinction between sex crime cases, as a class, and other types of cases.

We will now turn to our own more limited proposal--that the exclusion of uncharged misconduct be relaxed for acquaintance rape cases.

C. Admitting evidence more freely in acquaintance rape cases

The argument for receiving uncharged misconduct evidence is much stronger in acquaintance rape cases than in stranger rape cases. First, there is a danger in stranger rape cases that does not exist in acquaintance rape cases: that the defendant became a suspect <u>because</u> of prior rapes. The police may have shown the victim photographs of persons thought to have committed prior rapes, or otherwise have focused their investigation on suspected sex offenders. So what appears to be an unbelievable coincidence--that a person who actually committed prior rapes had the misfortune to be falsely accused of a subsequent one--is in fact a fairly plausible scenario, just as it is in the case of, say, a burglary. Since suspicion focused on the defendant in the first place because of the other crime, his chance of being accused, even if innocent, was fairly high.[139] The accusations of the various crimes, in other words, were not wholly independent.

The danger of a false accusation in stranger rape cases

is chiefly due to the problematic nature of identification evidence. For one thing, police sometimes strongly suggest to the victim that certain people in the "mug shot" book are the most likely perpetrators.[140] Even without such prodding, eyewitness identification is a hazardous enterprise. A strong body of social science research demonstrates that such identifications--especially in sudden emergencies--are fraught with all sorts of difficulties and chances for error,[141] and that jurors tend to overrate the ability of witnesses to make identifications.[142] In stranger-rape cases, evidence of prior rapes may distract the jury from the important task of evaluating problematic identification evidence.

Of course, there are ways to guard against these dangers. The defense could be allowed to present evidence that the identification stemmed from the defendant's status as a "usual suspect," and also to present expert testimony about identification flaws. These options, however, multiply the cost and complexity of the proceeding, are not always available as a practical matter, and do not always correct the underlying misapprehensions.[143]

In acquaintance rape cases, the misidentification problem does not arise. Moreover, in the great majority of reported cases, no other honest and legally relevant mistake

is a plausible explanation of the conflicting testimony. Judging by the reported cases, the defendant who alleges consent almost always tells a story that flatly contradicts the alleged victim's account, so that there is no genuine possibility of an honest mistake as to consent. Unless his accuser is lying, the defendant is guilty as charged. Although the possibility of a perjurious accusation always exists, the well-known ordeals of rape complainants, including the embarrassing nature of the crime, a potentially unpleasant investigation, and predictable attacks on the woman's character and vigorous cross examination, must serve as powerful deterrents against baseless charges. It seems highly probable, therefore, that the rate of false accusations of rape is far lower in consent-defense cases than in stranger rape-alibi cases, where the woman may have made an honest misidentification.

The critical question, after all, is whether the prior crimes evidence creates an unacceptable risk that an innocent man will be convicted. The question is not whether such evidence is likely to sway the jury, but whether it will be given more weight then it deserves. In most types of cases, including stranger rapes, this is a serious risk. But in consent-defense rape trials, the risk is relatively low, because of the synergistic effect of the several independent charges. If Patricia accuses Frank of raping her on a date, he may raise a reasonable doubt by pointing

to minor inconsistencies in her story, the absence of bruises, or conduct on her part that is thought to be suggestive of consent, or of a motive for a vendetta against him. If Mary and Jane also accuse him of date rape, Frank may be able to raise similar doubts about each of their individual accounts as well. But if all three accusations are considered together, and there is no reason to suspect collaboration among the women, each of their charges will tend to corroborate the other's, to a much greater degree than they do in cases involving eyewitness identifications that derive from "mugshot books" of rapists or lineups of "known burglars." While it remains conceivable that the defendant is innocent of the crime charged, the danger of an erroneous conviction appears to be less in this type of case than in many types of ordinary criminal cases.[144]

Then too, in acquaintance rape (consent-defense) cases the evidence of prior sexual assaults may be helpful in combatting prejudice against victims. There is strong evidence that jurors are too ready to blame the victim in acquaintance rape cases. The classic Kalven & Zeisel jury study contains data suggesting jurors nullify the law of rape by taking account of legally irrelevant contributory negligence of victims in acquaintance rape cases. Kalven and Zeisel measured the judge-jury disagreement rate (reflecting situations in which the jury acquitted, but the

judge felt that it should have convicted) in different types of cases, including two types of rape cases. In "aggravated" rape cases (stranger rape, or extra violence, or multiple assailants) the disagreement rate was only 12 percent.[145] In "simple" rape cases, it went up to 60 percent.[146] Juries acquitted much more often than judges in the "simple" rape cases--primarily, judges thought, because of jurors' tendency to believe that the victim had brought the event on herself by excessively risky behavior such as hitchhiking or wearing provocative clothing.[147] Evidence that the defendant raped other victims can show the jury that the rape could have occurred without this victim's "contributory" behavior.

The consent-defense rape trials, like the child sex abuse trials, are cases in which there is a need for additional evidence. Since the accused admits the act of intercourse, physical evidence that it occurred is obviously unhelpful. In some cases the complaining witness's version of events may be subject to partial corroboration by physical evidence such as bruises, but such evidence is often inconclusive. Basically, consent-defense cases are swearing matches between the defendant and his accuser.

In an influential article,[148] Professor Dale Nance argued that the organizing principle of evidence law is not,

as Wigmore and Thayer postulated, the desire to control the jury in order to prevent it from making foolish or irrational decisions.[149] Instead, he suggested, the fundamental principle is to encourage the parties to put forward the best evidence that they can feasibly obtain. Although no single foundational principle explains all of evidence law, the Nance hypothesis probably does identify one of the several driving forces behind the rules excluding various sorts of evidence.

Where does the Nance hypothesis lead us if we apply it to rape cases? In stranger rape cases, one might be concerned that admitting uncharged misconduct would have a harmful effect on the development of proof. If the uncharged misconduct rule were relaxed, prosecutorial resources might unwisely be diverted from the search for better evidence to the search for or reliance on uncharged misconduct. There are often other sources of evidence in stranger rape cases. The defendant's alibi might be disproved. The defendant might be connected to the crime by analysis of hair, blood, or semen. Some of these analyses are quite expensive,[150] and might be foregone if the prosecution could have the same chance for a conviction by relying on uncharged misconduct evidence. In acquaintance rape cases, on the other hand, there is little reason to fear that other sources of evidence might be bypassed.

Aside from the testimony of the alleged victim, the uncharged misconduct is likely to be the best evidence available.[151]

The evidentiary problems in consent-defense cases are analogous to the problems faced by the government in prosecutions for receiving stolen goods, a type of case in which prior crimes are usually deemed admissible as evidence of the defendant's criminal intent.[152] Such evidence amounts to propensity evidence, supposedly forbidden by the general rule. But the courts seem to be sympathetic to the difficulties that prosecutors face in proving beyond a reasonable doubt that the recipient of the stolen goods knew that they were stolen. They have created what might loosely be described as a rebuttable presumption of guilty knowledge in cases in which the accused has previously been guilty of receiving stolen goods.

The most obvious difference between the two types of cases is the direct evidence of guilt furnished by the complaining witness in a rape trial. This testimony, while it might be thought to obviate the need for propensity evidence, might also be characterized as creating a stronger guaranty against an erroneous conviction than exists in some of the receiving stolen goods cases.

Despite these considerations, some courts have been less willing to admit prior crimes evidence in consent-defense cases than in stranger-rape and child-molestation cases.[153] The differential treatment of consent-defense cases may be a vestige of bias against date-rape complainants. The fact that the rather fluid categories of Rule 404(b) and its predecessors have proved too narrow to let in evidence in acquaintance rape cases may stem from an attitude that defendants in these types of cases deserve more protection than stranger rapists and child molesters. In some of the consent-defense cases, one hears courts even denying the minimal relevance of the evidence, saying that "the fact that one woman was raped has no tendency to prove that another woman did not consent."[154] While that astounding statement is true so far as it goes, it is a red herring; for certainly the fact that the defendant was willing to use force to obtain sex or humiliate women in one instance has some tendency to indicate that he was willing to do it again. Police, prosecutors, and especially jurors are influenced by extralegal considerations in letting off acquaintance rapists without punishment;[155] it would be surprising if the same attitudes did not influence appellate court judges to some extent. Date rape may get different treatment because of the same attitudes that led to the requirement that rape complaints be corroborated,[156] to the idea that rape complainants should automatically be

subjected to a mental examination,[157] to instructions warning the jury that rape is easy to fabricate and hard to disprove,[158] and to the requirement of "utmost resistance" that once hampered the prosecution of date rape cases.[159] Treating acquaintance rape cases the same way as stranger rape cases for purposes of uncharged misconduct evidence is consistent with the pattern of changes elsewhere in rape law, which now tends to treat acquaintance rape as a crime fully as deserving of punishment as other forms of sexual assault.

At a minimum, then, the different treatment of acquaintance rape cases should be abandoned. Beyond question the justifications for admitting uncharged misconduct in those cases are at least as strong as in stranger rape cases. To the extent that uncharged misconduct evidence is admissible to show identity in stranger rape cases because of similarities between the different sexual assaults, it should also be admissible under the <u>modus operandi</u> exception to show that the man acted with force in acquaintance rape cases. Indeed, it would make sense to admit prior misconduct evidence in consent-defense cases even in circumstances in which it would not be admissible if the defense were alibi.

For similar reasons, prior misconduct evidence ought to

be admissible in some child abuse cases, provided that the current accusation seems to be independent of the other uncharged accusation. But these cases are more problematic than consent-defense rape cases. The youth of the alleged victim magnifies the need for some "other evidence," but also magnifies the danger that admission of that evidence will divert the jury's attention from weaknesses in the prosecution's case. The involvement of other children and of adults--parents and therapists--creates a danger that the child's accusation will not be truly independent of the adults' suspicion, which in turn may have been fueled by rumors of the defendant's alleged prior crimes. When they make their initial accusations, the children probably are unaware that they are commencing a process that will be an ordeal for them; this is one of the reasons why the danger that they are lying is greater than in cases of adult victims.. Moreover, in some cases identification problems make the issues more analogous to stranger rape cases than to consent-defense rapes.

CONCLUSION

The rule against character evidence in criminal cases should be retained. It forces prosecutors and juries to focus on the evidence directly pertaining to the crime

charged, reducing the risk that the defendant will be convicted merely because he is a "bad man." This great virtue of the rule does, however, have a price: by excluding relevant evidence, the rule makes it harder to convict the guilty.

Recognizing this reality, courts have created several exceptions to the rule. Most of these exceptions can be justified on the ground that the character evidence is not being admitted in order to show the defendant's criminal propensities but rather for some ulterior purpose such as establishing his motive. Evidence of prior sex crimes, however, usually cannot be justified in this fashion and therefore should generally be excluded unless a new rationale can be found.

In stranger-rape cases, there is no adequate justification for creating a new exception to the rule against character reasoning. In child abuse cases, and even more so in consent-defense rape cases, on the other hand, strong arguments can be advanced in favor of admitting such propensity evidence.

As a practical matter, probably all of the arguments discussed in this paper are unimportant in comparison with one's substantive attitude toward sex offenses. If one

thinks of rape as a crime that is like other serious felonies--comparable to homicide or nonsexual assault, for example--then one is more likely to accept the idea that the character reasoning rules should be consistent across various crimes. If one regards rape as a society-defining crime--as a systemically harmful crime that promotes a society of male dominance and female oppression--then one might think that the need to increase the conviction rate is greater than the need to maintain consistency across the law of character evidence, or greater than the need to avoid speculative dangers of prejudice in the fact-finding process. As usual, attitudes about substance overwhelm attitudes about process.

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1. 636 F.2d 517, 523 (D.C.Cir. 1980), cited and quoted in **John W. Strong, ed., McCormick on Evidence**, § 190, at 797 n.1 (4th ed. 1992) [hereinafter **McCormick on Evidence**].

2. Paul E. Meehl, Law and the Fireside Inductions (with Postscript):Some Reflections of a Clinical Psychologist, 7 **Behavioral Sci. & L.** 521, 532 (1989).

3. See Fed. R. Evid. 404 and advisory committee's note.

4. In two cases, the women reported that Smith suddenly became aggressive and pinned them down and pawed them, but that they were able to repulse him. A third reported that while she was intoxicated and sleeping on his bed during a party in his apartment, he made sexual advances, and despite the fact that she said no and tried to fight him off, he forced her to have intercourse with him. Larry Tye et al., Alleged Assaults by Smith Described: Accounts by 3 Women are Similar to Charges in Palm Spring Rape Case, **Boston Globe**, July 24, 1991, at 1.

5. See Michael Hedges, Other Women Paint Smith as Violent, 'Not Too Bright', **Wash. Times**, Dec. 7, 1991, at A4 (describing exclusion of evidence); Paul Richter, Jury Acquits Smith of Rape at Kennedy Estate, **L.A. Times**, Dec. 12, 1991, at A1 (describing acquittal).

6. See State v. Saltarelli, 655 P.2d 697, 700-701 (Wash. 1982)(defendant, charged with rape of acquaintance, raised consent defense; held, reversible error to receive evidence of defendant's prior attempted rape of a different woman); People v. Tassell, See infra text accompanying notes 45-48 (error, though harmless, to admit evidence of two prior rapes by defendant charged with acquaintance rape); Reichard v. State, 510 N.E.2d 163, 165 (Ind. 1987)(defendant accused of knife-point rape of woman with whom he had a dating relationship; held, reversible error to receive evidence of "prior alleged rapes perpetrated by him upon various individuals"; court remarks that "the trial court incorrectly categorized rape of an adult woman as depraved sexual conduct"); Lovely v. United States, 169 F.2d 386, 390 (4th Cir. 1948)(Parker, J.)(defendant accused of rape of acquaintance after driving her to remote part of federal base; rape 15 days earlier on same base excluded; court states that fact that one woman was raped had no tendency to prove that another woman did not consent); Brown v. State, 459 N.E. 2d 376, 378-379 (Ind. 1984)(defendant met victim in gas station, drove her to cornfield where he threatened, raped and beat victim; two other victims testified to rapes by defendant in secluded areas after getting or giving him rides in vehicle; held, receiving evidence was reversible error; court indicates that evidence might be admissible were identity in issue, but holds that it is not admissible in case at bar because defense is consent: court also

distinguishes depraved sexual instinct cases involving children). But see State v Crocker, 409 N.W.2d 840 (Minn. 1987)(not error to admit evidence of prior sex crimes against children in case where defendant raises consent defense in response to accusation of rape of adult victim; evidence shows a "pattern" of opportunistic assaults on vulnerable victims).

7. See, e.g., Vaughn v. State, 604 So. 2d 1272, 1273 (Fla. Dist. Ct. App. 1992)(defendant accused of rape of sixty-year-old victim whom he had awakened in her bedroom; evidence of prior rape of prostitute in alley excluded); People v. Sanza, 509 N.Y.S.2d 311, 314-315 (N.Y. App. Div. 1986)(in prosecution for rape-murder in New York state, evidence that accused had raped three victims in Florida inadmissible); White v. Commonwealth, 388 S.E.2d 645, 649 (Va. Ct. App. 1990)(defendant accused of raping woman in women's rest room; evidence that three hours earlier defendant had approached another woman, knife in hand, in another women's rest room inadmissible).

8. Some of the courts that have rejected the evidence in consent-defense cases have indicated in dictum that they would accept it in alibi-defense cases because of its relevance to identity. See People v. Tassell, See infra text accompanying notes 45-48 and 69-70; Brown v. State, 459 N.E. 2d 376, 378-379 (Ind. 1984). Other courts have held prior sex crime evidence admissible in cases in which identity is in issue without making an explicit comparison to consent-defense cases. See, e.g., State v. Hanks, 694 P.2d 407 (Kan. 1985)(defendant accused of raping victim while wearing a ski mask; held, evidence of three other rapes, in which defendant had used threats, violence and had wielded a knife, though not wearing a mask, sufficiently similar to be admitted for the purpose of establishing the rapist's identity); Coleman v. State, 621 P.2d 869, 875 (Alaska 1980) (similarities in race and age of victims, along with similar situs of attack and manner of subduing victim from behind sufficiently like prior rape to allow evidence of that crime to prove identity), cert. denied, 454 U.S. 1090 (1981); Jenkins v. State, 356 S.E.2d 525, 526 (Ga. Ct. App. 1987)(evidence of defendant's prior sexual assault admissible to establish identity for attempted rape charge where there is no dispute that defendant committed prior assault, and both prior assault and charged crime involved sexual assault upon woman who had no prior personal connection with defendant and who frustrated assault by screaming); Copeland v. State, 455 S.2d 951, 954-955 (Ala. Crim. App. 1984)(prior rape and charged rape sufficiently similar to meet admissibility standard for establishing identity where both incidents occurred in the same neighborhood, attacks were late at night, muscular attacker entered homes by breaking window, wore a mask, brandished a weapon, and smelled bad), cert. denied, 455 So.2d 956 (Ala. 1984); Humphrey v. State, 304 S.2d 617, 618 & 622 (Ala. Crim. App. 1974)(similarity linking two rapes and one attempted rape was that the attacker walked unarmed into the victim's bedrooms

to attack them; held, evidence admissible to prove identity). Cf. State v. Mason, 827 P.2d 748 (Kan. 1992)(defendant accused of attempted rape of 89-year-old victim; held, evidence of prior murder of 76-year-old victim, where defendant asked to use the phone to gain entry and strangled victim with sock, was sufficiently similar to charged crime in which person gained entry to home by asking to use the phone and prepared stocking in his hands before fleeing victim's house to be admissible to establish identity).

9. Cases admitting the evidence include: Hall v. State, 419 S.E.2d 503, 505 (Ga. Ct. App. 1992)(in defendant's trial for molestation of his teenage daughter, testimony that 16 years earlier defendant had molested his teenage sister was admissible, even though his sister alleged penetration whereas his daughter did not, and daughter alleged continuing contacts whereas his sister alleged only one incident); State v. Floody, 481 N.W.2d 242, 254 (S.D. 1992)(in prosecution for rape of six-year-old, evidence of other sexual contact between defendant and victim when parents of victim left the house admissible to show plan or course of criminal activity); State v. Miller, 632 P.2d 552, 554-555 (Az. 1981)(evidence of prior molestation of another child victim was admissible to prove identity where victim in charged crime was unable to identify defendant, where both incidents were similar in that they occurred at the same time of day, man bore same description, and both children were fondled in the same way after man broke into residence through a bedroom window).

Cases excluding the evidence include: State v. Winget, 310 P.2d 738, 738-39 (Utah 1957)(defendant was accused of sexual abuse of his eight-year-old daughter; held, reversible error to allow his 17-year-old stepdaughter to testify that she had been abused by him as a child); People v. Ponce de Leon Jones, 335 N.W.2d 465, 466 (Mich. 1983)(the accused was charged with a crime arising from sexual intercourse with his 15-year-old stepdaughter; held, reversible error to admit testimony by his natural daughter and by another stepdaughter of sexual activity with them); Government of Virgin Islands v. Pinney, 967 F.2d 912 (3d Cir. 1992)(in prosecution of 18-year-old defendant for rape of seven-year-old girl, receiving testimony of victim's sister that she had also been raped by accused six years earlier, when she was six, was reversible error); People v. Woltz, 592 N.E.2d 1182 (Ill. App. 3d 1992) (defendant accused of digital penetration and other forcible touching of 12-year-old girl; prior forcible rape of 14-year-old inadmissible); Kelly v. Texas, 828 S.W.2d 162 (Tex. Crim. App. 1992)(defendant charged with sexual assault on nine-year-old girl; reversible error to admit testimony by nine-year-old witness who was friend of complainant about other acts with complainant and about acts with witness); Owens v. State, 827 S.W.2d 911 (Tex. Cr. App. 1992) (reversible error in prosecution for sexual assault of defendant's daughter to admit testimony of the defendant's alleged rape of his older daughter); Bolden v. Alaska, 720 P.2d 957 (Alaska Ct. App.

1986)(defendant accused of sexual conduct with two underage girls, one of them his daughter; held, reversible error to admit evidence of defendant's sexual conduct with other daughters and their underage friends; court notes that identity and intent are not in issue, the only defense being that the acts were not committed).

10. S. 6, 103d Cong., 1st Sess. § 112 (1993).

11. For a typical instruction, see State v. Schwab, 409 N.W.2d 876, 882 (1987)(Randall, J., concurring)(quoting 10 Minnesota Practice, CRIM.JIG, 3.15(1) (1985)):

> In the case of defendant, you must be especially careful to consider any previous conviction only as it may affect his credibility; you must not consider any previous conviction as evidence of guilt of the offense for which he is on trial here.

Judge Randall, concurring specially in Schwab, commented on this instruction as follows:

> Problem: Is it reasonable and fair to assume that a jury will understand there is supposed to be a subtle difference between the questions "Is a defendant guilty?" and, "Is the defendant lying when he says he is not guilty?" My perception and the perception, I believe, shared by the trial bench, prosecutors and defense attorneys who work in the area of criminal trials, is different. In reality, the evidence that the defendant has committed the same crime in the past is so prejudicial (read: substantive and credible) that the jury is apt to believe that he has also committed this one.

Id. at 882.

12. See State v. Trejo, 825 P.2d 1252 (N.M. App. 1991)(held, extrinsic conviction for attempted criminal sexual penetration and kidnapping admissible to impeach defendant accused of same crimes in separate incident with separate victim; court states that defendant's dishonesty is indicated by fact that defendant testified denying offense in prior trial, and was nonetheless convicted), cert. denied 828 P.2d 957 (N.M. 1992); State v. Schwab, 409 N.W.2d at 877-78 (held, not error to deny defendant's motion to exclude prior conviction for intrafamilial sexual abuse in case in which defendant was accused of sexual abuse of his girlfriend's five-year-old son; the prior conviction "has legitimate impeachment value" and trial judge was within discretion in ruling that it would be admissible if defendant testified); People v. Hall, 453 N.E. 2d 1327, 1335-37 (Ill. App. 1983)(held, not error to deny defendant's motion to exclude prior conviction for rape in case in which defendant was accused of

attempted rape, armed robbery, and armed violence; conviction admissible to impeach despite similarity to charged crime); State v. Grubb, 541 N.E.2d 476 (Ohio App. 1988)(held, not abuse of discretion to admit 24-year-old sodomy conviction to "impeach" defendant charged with gross sexual imposition); Jackson v. State, 447 N.W. 2d 430, 434 (Minn. App. 1989)(held, in prosection for criminal sexual contact of 14-year-old girl staying with defendant's family, not error to admit evidence of defendant's prior conviction for sexual abuse of his daughter to impeach the defendant because the jury "had to choose to believe either [the defendant] or [the victim]"). But cf. United States v. Beahm, 664 F.2d 414 (4th Cir. 1981)(Winter, J.)(reversible error to admit prior convictions for sodomy (11 years before trial) and unnatural sexual practices (9.5 years before trial) to impeach defendant accused of child molestation; court bases decision on failure to specify why convictions more probative than prejudicial, but indicates great doubt that convictions could be shown to be admissible).

13. For a persuasive argument on this point, see Richard Friedman, Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and A Proposed Overhaul, 38 **UCLA L. Rev.** 637, 655-64 (1991).

14. For an example of a social science study indicating that the limiting instruction does not work, see Rosell L. Wissler & Michael J. Saks, On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt, 9 **Law & Hum. Behavior** 37 (1985).

15. See, e.g., Fed. R. Evid. 608. Rule 608 codified the common law rule that prevailed in a number of jurisdictions, see 3A **John Henry Wigmore, Evidence in Trial at Common Law**, § 982 (Chadbourn Rev. 1970). Wigmore reports that a minority of courts at common law restricted impeachment evidence to evidence of misconduct that indicated a lack of veracity - "fraud, forgery, perjury, and the like." Other jurisdictions allowed cross-examination as to "any kind of misconduct, as indicating general bad character . . . thus, a robbery or an assault or an adultery may be used, although none of these directly indicates an impairment of the trait of veracity." Id.

16. Fed. R. Evid. 608; 3A **Wigmore**, supra note 15, at §§ 979, 986.

17. Fed. R. Evid. 403.

18. For cases holding that it is error to allow cross-examination on an impeachment theory about prior sex offenses, see State v. Clemmons, 353 S.E.2d 209 (N.C. 1987) (in prosecution for rape, it was error, though harmless, to allow cross-examination of defendant about prior attempted rape of another woman; trial judge's theory that evidence was admissible to

impeach defendant's testimony under Rule 608 was invalid because the evidence was not probative of character for truthfulness or untruthfulness); State v. Scott, 347 S.E.2d 414, 416-18 (N.C. 1986) (in prosecution for child molestation, trial judge committed reversible error by allowing cross-examination of defendant about other acts of sexual misconduct; Rule 608(b) theory fails because evidence is not sufficiently probative of truthfulness); Summerlin v. State, 643 S.W.2d 582 (Ark. Ct. App. 1982) (in prosecution for sexual contact with young boy, cross-examination concerning the defendant's discharge from the Navy for the same type of sexual activity as the charged offense constitutes reversible error; Rule 608 theory of admission fails because evidence not probative of truthfulness).

19. Common law jurisdictions usually allowed reputation testimony, but not opinion testimony. See 3A Wigmore, supra note 15, at § 921; Advisory Committee's Note to Fed. R. Evid. 405(a). The Federal Rules of Evidence allow proof in either form. Fed. R. Evid. 405(a).

20. Michelson v. United States, 335 U.S. 469 (1948). See also Fed. R. Evid. 405(a) advisory committee's note.

21. For a useful discussion of fighting fire with fire, see McCormick on Evidence, supra note 1, § 57, at 229. The authors conclude that in situations in which the adversary made a timely objection to the inadmissible evidence and the inadmissible evidence was damaging, the adversary should be entitled to give answering evidence as a matter of right. The adversary should also be entitled to put in answering evidence as a matter of right in situations in which the inadmissible evidence, or the question asking about it, was so prejudice-arousing that an objection would not have erased the harm. In other situations, they conclude, the trial judge should have discretion whether to allow the answering evidence.

22. See, e.g., Fed. R. Evid. 405(a).

23. 593 N.E.2d 346 (Ohio App. 3d 1991).

24. In the court's words,

> In the case before us, the defendant, in his case-in-chief, interjected the issue of his prior sexual acts into the case. Consequently, as the defendant elected to rely upon the absence of prior acts of sexual misconduct or "perversion" as a defense in his case-in-chief, the state was entitled to introduce testimony in rebuttal to meet the defense interposed by the defendant.

Id. at 219-20.

Accord, State v. Sonnenberg, 344 N.W.2d 95 (Wis. 1984) (in prosecution for child molestation, defendant "opened the door" to cross-examination about his propositioning an adult woman ten days before trial when he testified he never sought sexual satisfaction outside of his marriage); Quimby v. State, 604 So.2d 741 (Miss. 1992)(defendant "blurted out" on direct examination, "I have never abused my daughter or any other child ever in any way, shape, form or fashion"; held, this assertion opened the door to specific act evidence about prior sexual abuse of daughter); Many states would admit the Quimby evidence on grounds that it shows a "motive" arising from lust for the particular victim. See infra text accompanying note 34. See also State v. Anderson, 686 P.2d 193, 204 (Mont. 1984). There, the defendant offered an amalgam of evidence that included opinion testimony as to character, reputation evidence, and broad denials of specific acts. He offered testimony about his reputation for "morality and personal truthfulness"; he offered his wife's testimony that he had "orthodox" sexual mores and that the charges did not comport with her knowledge of him; and he offered his denial of improper sexual conduct with the alleged victims or with anyone else. The Montana Supreme Court approved admission of counter-evidence in the form of testimony by a young girl that she had slept with defendant while defendant was naked.

25. **1A John Henry Wigmore, Evidence in Trials at Common Law**, § 55, at 1160-1161 (Tillers rev. ed. 1983)[hereinafter **Wigmore on Evidence**].

26. See infra note 87.

27. In an article that characterizes practically all 404(b) evidence as propensity evidence, Professor Kuhns characterizes evidence offered to show knowledge as propensity evidence on grounds that it depends on the inference that "a person who has obtained knowledge of some fact has a propensity to retain that knowledge." See Richard B. Kuhns, The Propensity to Misunderstand the Character of Specific Acts Evidence, **66 Iowa L. Rev.** 777, 790 (1981). The evidence does not, however, require that the trier assume that the defendant has an individualized propensity that marks him as different from humanity in general. Use of inferences that the defendant shares the capacities of human beings in general does not raise the dangers of prejudice at which the character evidence rule is aimed. In the context of character evidence discussions, the term "propensity" probably refers to individualized traits rather than capacities, such as memory, that are almost universally shared.

In any event, Professor Kuhns offers two examples of bad acts evidence that even he is willing to concede "arguably [are] not dependent on a propensity inference." They are (1) in a prosecution for murder, the prosecutor offers to prove that

defendant stole the pistol with which the murder was committed; (2) in a prosecution for theft from a liquor store, the prosecutor offers evidence that two hours earlier the defendant held up a filling station in the same neighborhood. Id. at 792.

28. Though evidence experts might prefer to call this latter use an example of evidence that falls outside the rule, rather than an "exception" to the rule, we have for the sake of verbal economy referred to this sort of use as an "exception." See **Charles A. Wright & Kenneth W. Graham, Jr., 22 Federal Practice and Procedure**, § 5240, at 469 (1978) [hereinafter **Wright & Graham**](same usage). In fact, the "exception" language may be a correct characterization, even as a technical matter, of the results reached in much of the case law. For example, the cases in which other crimes evidence is used to show intent are often ones that permit an inference of intent by means of an inference that the defendant had a propensity to commit the crime charged, thus in effect making cases in which intent is in issue an exception to the rule against character reasoning, rather than an example of a use that does not involve character reasoning. See infra text accompanying notes 72-79.

29. For similar definitions of motive, see 22 **Wright & Graham**, supra note 28, § 5240, at 479: "'motive' is . . . an emotion or state of mind that prompts a person to act in a particular way." See also **Wigmore on Evidence**, supra note 25, at § 117; **John Henry Wigmore, The Science of Judicial Proof As Given by Logic, Psychology, and General Experience and Illustrated in Judicial Trials** §69, at 146-47 (3d ed. 1937)[hereinafter **Wigmore, Proof**].

30. See **Edward J. Imwinkelreid, Uncharged Misconduct Evidence**, § 3:15 (1984)[hereinafter **Imwinkelreid**]. Cf. 22 **Wright & Graham**, supra note 28, § 5140 at 481 (1978)("First, the other act can be one that caused the mental state [that provides the motive]; for example, a desire for revenge against witnesses produced by a prior conviction. Second, the other act may be offered as another consequence of the same emotion, as when proof that the defendant stole from his wives is offered to show motive for bigamy.").

31. See, e.g., State v. Green, 652 P.2d 697, 701 (Kan. 1982)(prior assaults on wife admissible to show defendant's motive for murdering her).

32. **Richard O. Lempert & Stephen A. Saltzburg, A Modern Approach to Evidence**, 226 (2d ed. 1982)[hereinafter **Lempert & Saltzburg**].

33. Cf. Wigmore, Proof, supra note 29, at 103:

> Under Character are here included any and every quality or tendency of a person's mind, existing originally or developed from his native substance, and more or less permanent in their existence. Character is thus contrasted with Habit, a quality or tendency later formed from time to time, but not permanent; and with Emotion or Design, a condition having only a temporary existence.

The concept of character as an enduring, cross-situational propensity is consistent with the purposes of the character rule. The danger that the jury will give the conduct too much weight is reduced when the conduct is situationally specific, because situationally specific conduct is in fact more likely to be consistently repeated. See infra text accompanying notes 107-115. The danger of punishing the defendant for the uncharged acts is less severe where the jury is being asked to not to infer a consistent prolonged tendency, but a temporary emotion.

34. See State v. Scott, 828 P.2d 958 (N.M. App. 1991)(evidence of defendant's repeated fondling and sexual intercourse with victim for ten years prior to the charged crime was properly admitted to show defendant's "lewd and lascivious" disposition towards the victim; Padgett v. State, 551 So.2d 1259 (Fla. App. 5th 1989)(evidence of defendant's prior sexual assaults against victim was admissible to show his "lustful attitude" toward the victim); State v. Ferguson, 667 P.2d 68 (Wash. 1983)(evidence of photographs showing that defendant made the child victim put her mouth on his penis was admissible to prove a lustful disposition towards the child).

35. State v. Schlak, 111 N.W.2d 289 (Iowa 1961) (dicta; conviction reversed because trial judge admitted act too remote in time).

36."One wonders whether the Iowa court would have condoned the admission of evidence of other thefts in a trial for theft on the grounds that it showed the defendant's 'desire to satisfy his greedy nature by grabbing other people's belongings.'" **Lempert & Saltzburg**, supra note 32, at 230.

37. See State v. Friedrich, 398 N.W.2d 763, 772 (Wis. 1987)(defendant raised alibi defense in response to charge of sexual contact with 14-year-old niece who was babysitting for his children, claiming he was working at time of charged acts; prior sexual touching of victim and of another young girl admissible to show motive of obtaining sexual gratification, an element of the offense; alternatively, admissible as evidence of plan, because

defendant was involved in a system of criminal activity in seeking sexual gratification from young girls with whom he had a familial or quasi-familial relationship); Elliott v. State, 600 P.2d 1044 (Wyo. 1979)(prior acts of child sex abuse admissible to show "motive"); United States v. Herbert, 35 M.J. 266 (CMA 1992) (defendant charged with crime arising from oral sex with adolescent stepson; held, not abuse of discretion to admit evidence of attempt to fondle one nephew and oral sex with another; though showing of desire for sexual gratification is not element of crime charged, "[e]vidence of a specific state of mind on the part of an accused on occasions prior to charged acts may be admissible to show circumstantially that the charged acts later occurred as an expression of or outlet for this mental state . . . . Here, appellant's nephews testified to his sexual acts or attempted sexual acts with both of them which indicated his peculiar incestual interest for young boy family members.").

38.See, e.g., State v. Saltarelli, 655 P.2d at 700 ("[I]t is by no means clear how an assault on a woman could be a motive or inducement for defendant's rape of a different woman almost five years later . . . . [T]he evidence seems to achieve no more than to show a general propensity to rape, precisely forbidden by ER 404(b)."); People v. Tassell, infra text accompanying notes 69-70 (prior rapes inadmissible; motive theory not pursued). But see Carey v. State, 715 P.2d 244, 249 (Wyo. 1986)(uncharged misconduct held admissible in adult rape case; the court observed, as an alternative ground, that the evidence showed that the defendant had "something within him" that motivated him to use force to achieve sexual gratification), cert. denied, 479 U.S. 882 (1986).

39."[T]he need to prove identity should not be, in itself, a ticket to admission. Almost always, identity is the inference that flows from . . . [other] theories . . . . [L]arger plan, . . . distinctive device, . . . and motive seem to be most often relied upon to show identity." McCormick on Evidence, supra note 1, § 190, at 808.

40."[C]ourts use a variety of terms to describe the uniqueness needed to invoke the modus operandi theory, including 'distinguishing,' 'handiwork,' 'remarkably similar,' 'idiosyncratic,' 'signature quality,' and 'unique.' Myers, infra note 59 at 550 (citing cases).

41.See generally Imwinkelreid, supra note 30, at § 3:13 (discussing cases).

42. State v. Smith, 707 P.2d 289, 297 (Ariz. 1985). Cf. People v. Massey, 196 Cal.App.2d 230, 16 Cal.Rptr. 402 (Dist. Ct. App. 1961) (evidence of similar burglary admitted, though similarities hardly enough to justify analogy to "signature.").

43. Although these generalizations nearly always hold true, the lines between stranger rapes (with an alibi defense) and acquaintance rapes (with a consent defense) are occasionally blurred. For example, in a recent case, the defendant, who claimed to know the victim, entered the victim's apartment surreptitiously, raped her at knife-point, and argued at trial that the sex was consensual because she asked him to use a condom, a contention that the jury sensibly rejected. See **N.Y. Times**, May 15, 1993, at 6; **Houston Chron.**, November 25, 1992, at 19. One can imagine a rapist who was an admitted stranger telling a similar story. It is also conceivable that an "acquaintance" who had met the victim briefly on a prior occasion might, when charged with rape, claim --perhaps plausibly--that he had been misidentified.

44. See, e.g., People v. Tassell, infra text accompanying note 45 (held, prior rape inadmissible in consent defense case; modus evidence not admissible unless identity is in issue); People v. Barbour, 436 N.E.2d 667, 672-73 (Ill. Ct. App. 1982)(modus evidence not admissible in consent defense cases, there being no issue of identity); Velez v. State, 762 P.2d 1297 (Alaska Ct. App. 1988)(error to admit modus evidence in consent defense case, because identity not in issue); United States v. Ferguson, 28 M.J. 104 (C.M.A. 1989)(held, when defendant charged with sexual abuse of one adolescent stepdaughter, testimony of another stepdaughter about similar abuse not admissible to show "modus operandi" because identity of the perpetrator was not in dispute)(alternative holding). But see State v. Willis, 370 N.W.2d 193, 198 (S.D. 1985)(modus evidence admissible in consent defense case as showing intent and plan; prior case holding that modus evidence not admissible because identity not in issue overruled).

45. 679 P.2d 1 (Cal. 1984)(en banc).

46. Id. at 8.

47. Id. at 3.

48. Id. at 8.

49. **Wigmore**, supra note 15, at § 216 at 1883.

50. (EAL/GFD 1949).

51. For a similar example in the case law, see State v. Wallace, 431 A.2d 613 (Me. 1981)(defendant had plan to reconstitute a gun collection previously owned by his father; held, evidence of uncharged burglary in which one gun was recaptured was admissible to show the defendant's involvement in charged burglary in which another was recaptured).

52. "In effect, these courts convert the doctrine into a plan-to-commit-a-series-of-similar-crimes theory." Imwinkelreid, supra note 30, at § 3:23. For example, this approach was used in a case in which prior acts of accepting kickbacks from third parties were admitted to show a "common scheme" to use one's position to acquire kickbacks. See Commonwealth v. Schoening, 396 N.E.2d 1004 (Mass. 1979) (held, evidence that defendant took kickbacks on two other occasions, even if from a different party, is admissible to show motive, plan, common scheme: "[t]he defendant's use of his position to guarantee contracts to particular firms and thus to guarantee kickbacks to himself provided the common or general scheme underlying all three transactions."). But see United States v. O'Connor, 580 F.2d 38, 42 (2d Cir. 1978) (bribes taken from third parties not sufficiently probative of "definite project" of committing present crime).

53. See, Note, Admissibility of Similar Crimes, 1901-51, 18 Brook. L. Rev. 80, 104-05 (1951)(labelling the category "spurious common scheme or plan"); Imwinkelreid, supra note 30, at § 3:23 (noting that "commentators have been almost uniformly critical of the [spurious plan] doctrine" and stating that "[t]heir criticism is well-founded.").

54. People v. Tassell, 679 P.2d 1 (Cal. 1984).

55. See Williams v. State, 110 So.2d 654 (Fla. 1959), cert. denied, 361 U.S. 847 (1959).

56. See Fed. R. Evid. 406.

57. See supra text accompanying notes 39-40.

58. See State v. Paille, 601 So.2d 1321 (Fla. App. 1992) ("[t]he fact that the incidents began with kissing and continued over a period of three months is relevant to prove that Paille planned and intended to lure the victim into sexual activity over time. We believe this is relevance beyond mere propensity.").

59. State v. Friedrich, 398 N.W.2d 763, 772-773 (Wis. 1987)("the defendant was involved in a system of criminal activity in seeking sexual gratification from young girls with whom he had a familial or quasi-familial relationship"); People v. Oliphant, 250 N.W.2d 443, 449 (Mich. 1976)(upholding admission of three uncharged rapes in consent defense case; "[t]he many similarities in all four cases tend to show a plan and scheme to orchestrate the events surrounding the rape of complainant so that she could not show nonconsent and the defendant could thereby escape punishment. Defendant's plan made it appear that an ordinary social encounter which culminated in voluntary sex had simply gone sour at the denouement due to his reference to complainant's unpleasant body odor."). But see But see, People v. Tassell, discussed in text accompanying notes 45-48, supra; Getz v. State, 538 A.2d 726 (Del. 1988)("[t]he evidence of prior sexual contact [between the defendant and his daughter, the victim] in this case, even if it had adhered to the State's proffer, involved two other isolated events within the previous two years depicting no common plan other than multiple instances of sexual gratification."); United States v. Rappaport, 22 MJ 445, 447 (CMA 1986) (psychologist accused of sexual affairs with patients; evidence of uncharged affair with another patient not admissible; "[e]vidence that the accused previously had a similar affair with one of his patients did not tend to establish a plan or overall scheme of which the charged offenses were part.").

Commentators have noted that in sex crime prosecutions some courts often give prosecutors greater latitude under the "spurious" plan rubric than in other kinds of crimes. See James M. H. Gregg, Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses, 6 Ariz. L. Rev. 212, 230 (1965) [hereinafter Gregg]; Imwinkelreid, supra note 30, at § 4:13, n. 4 and accompanying text; John E. B. Myers, Uncharged Misconduct Evidence in Child Abuse Litigation, 1988 Utah L. Rev. 478, 544 n. 220 (citing State v. Bennett, 36 Wash. App. 176, 672 P.2d 772 (1983)(plan to harbor and abuse runaway girls); Scadden v. State, 732 P.2d 1036 (Wyo. 1987)(plan to gain confidence of volleyball team member coached by defendant, then molest them). State v. Moore, 819 P.2d 1143 (Idaho 1991) (defendant charged with sexual abuse of six-to-seven-year-old granddaughter; prior acts of abuse of daughter when age nine-to-thirteen and stepdaughter when age eight and nine admissible; common scheme shown by "a continuing series of alleged similar sexual encounters directed at the young female children living within [the accused's] household.").

60. 399 Mich. 472; 250 N.W.2d 443 (1976). Oliphant subsequently brought a writ of habeas corpus in federal court, claiming a double jeopardy violation because two of the prior crimes had been tried and resulted in acquittals. The Sixth Circuit denied the writ, holding that there was no violation of the

constitutional right to be free from double jeopardy. See Oliphant v. Koehler, 594 F.2d 547 (6th Cir. 1979), cert. denied, 444 U.S. 877 (1979).

61. Oliphant, 594 F.2d at 548.

62. Id.

63. This is not a violation of the Double Jeopardy Clause. See supra note 60.

64. Id. at 552.

65. Id. at 550-552.

66. Id. at 552.

67. Id.

68. Id. at 552. See also State v. Valdez, 534 P.2d 449 (1975)(uncharged rape admissible to show common plan where in both cases appellant acquainted with victim, went to victim's residence on pretence of looking for someone in early-morning hours, and both rapes involved a "sexual tour-de-force").

69. 679 P.2d 1 (Cal. 1984).

70. Id. at 570-71.

71. 22 Wright & Graham, supra note 28, § 5240, at 482 ("Courts seem to be more willing to assume that one mental state will generate another than they are to infer that it will produce action.").

72. See, e.g., Huddleston v. United States, 485 U.S. 681, 683 (1988)(in prosecution for selling stolen goods, evidence of prior "similar acts" admissible to show defendant knew goods he sold were stolen if such evidence is sufficient to allow the jury to find that the defendant committed the act).

73. Wright & Graham, supra note 28, § 5242, at 490-91.

74. See, e.g., State v. Wermerskirchen, 497 N.W.2d 235 (Minn. 1993)(held, where defendant denies act of touching child in intimate parts, jury should be instructed that evidence of

uncharged sexual touching of others is admissible to show intent); United States v. Beahm, 664 F.2d 414 (4th Cir. 1981)(evidence of other child molestation admitted to show intent where defense counsel argued government had burden of showing beyond reasonable doubt that touching not accidental). But cf. People v. Thomas, 573 P.2d 433, 438 (Cal. 1978)(father convicted of abusing daughter testified he was merely rubbing cream on her chest for treatment of a cold; held, even if defendant put his intent in issue, his alleged prior contact with another daughter was too remote to be probative of his "present intent to gratify his passions" through sexual contact with his daughters)(emphasis in the original).

75. 918 F.2d 848 (9th Cir 1990), cert. granted, 112 S. Ct. 1261 (1992), cert. dismissed as improvidently granted, 113 S. Ct. 486 (1992). See also United States v. Bender, 33 M.J. 111 (C.M.A. 1991)(in case where charged crime was fondling and digital penetration of ten-year-old daughter, and element of crime charged was deriving sexual gratification from act, testimony by another young girl that defendant had fondled her on numerous occasions is admissible to show intent and motive, despite lack of defense of that acts were accidental or medicinal).

76. Hadley, 918 F.2d at 851-852.

77. Id at 851.

78. Id. at 852.

79. See United States v. Gamble, 27 M.J. 298, 304 (CMA 1988)(quoting with approval a passage from the Military Rules of Evidence Manual stating that, in case where kind of act accused committed is almost always an intentional act, court should decline to receive uncharged misconduct evidence on issue of intent until after defendant has put in evidence, in order to see whether defendant challenges intent); Thompson v. United States, 546 A.2d 414, 423 (D.C. Ct. App. 1988)("where intent is not controverted in any meaningful sense, evidence of other crimes to prove intent is so prejudicial per se that it is inadmissible as a matter of law")(emphasis in the original); Getz v. State, 538 A.2d 726, 733 (Del. 1988)("The defendant denied any sexual contact with his daughter. While the defendant's plea of not guilty required the State to prove an intentional state of mind as an element of the offense, the plea itself did not present a predicate issue concerning intent sufficient to justify the State in attempting to negate lack of intent as part of its case-in-chief.").

Commentators generally agree that intent ought to actually be in dispute. See, e.g., Lempert & Saltzburg, supra note 32, at

224-25. Kenneth Graham agrees that intent should be in serious dispute, but recognizes that there is authority to the contrary. **Wright & Graham**, supra note 28, at § 5242, at 489.

See also People v. Thomas, 573 P.2d 433, 443 (Cal. 1978)(Clark, J. dissenting)(defendant claimed he was rubbing vaporizing cream on daughter's chest; dissent argued that other daughters should be allowed to testify that they were molested to illuminate defendant's true intent or absence of mistake); State v. Wermerskirchen, 497 N.W.2d 235 (Minn. 1993)(defendant denied sexually touching his eight-year-old daughter, saying he only gave her a hug; testimony from his nieces and twenty-year-old daughter as to similar touching when they were children admissible to show intent).

80. See Susan Estrich, **Real Rape**, 94-95 (1987)(citing cases); State v. Saltarelli, 655 P.2d 697, 700-701 (Wash. 1982)(defendant, charged with rape of acquaintance, raised consent defense; held, reversible error to receive evidence of prior attempted rape of different woman; evidence not admissible on theory that it shows intent). But see United States v. Reynolds, 29 M.J. 105 (CMA 1989)(consent-defense rape case; prosecution evidence indicated that the defendant took his date to his room, showed her a slide show that included music, and then forcibly raped her; "the theory of the defense was that appellant was experienced and successful with women, that he was a romantic, a poet, an amateur 'photojournalist,' and a 'Top Gun' pilot, who would never resort to rape to overcome the will of a woman" and that complainant either consented or misled him into thinking she was consenting; held, evidence of other similar sexual assaults admissible to show "intent, scheme or design" to have intercourse with date whether or not she consented).

81. **Wigmore on Evidence**, supra note 25, at § 357.

82. See, e.g., State v. Gardner, 391 N.E.2d 337, 342 (Ohio 1979)(per curiam); State v. Willis, 370 N.W.2d 193, 198 (S.D. 198)(held, defense of consent "begets the establishment of intent as a material issue" and other crimes evidence may be used to establish intent), rev'g State v. Houghton, 272 N.W.2d 788 (S.D. 1978).

83. Rubio v. State, 607 S.W.2d 498, 501 (Tex. Crim. App. 1980).

84. 679 P.2d 1 (Cal. 1984)(en banc).

85. Id. at 4.

86. Id. at 8.

87.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, <u>such as</u> proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. (Emphasis added).

88. <u>See</u> 22 **Wright & Graham**, <u>supra</u> note 28, at § 5240 (general principle that list is illustrative, not exhaustive); Getz v. State, 538 A.2d 726 (Del. 1988)(same).

89. <u>See</u> 22 **Wright & Graham**, <u>supra</u> note 28, at § 5248 (listing other purposes, such as proof of guilty knowledge through evidence of spoilation).

90. State v Crocker, 409 N.W.2d 840 (Minn. 1987).

91. <u>Id</u>. at 843.

92. Some cases achieve a similar breadth and vagueness by merely reciting a laundry list of permissible purposes without identifying a particular one or explaining why it is in issue. <u>See, e.g.</u>, Rivera v. State, 840 P.2d 933, 941 (Wyo 1992)(repeated preying on teenaged girls who were too intoxicated to consent is admissible to show "intent, motive, plan and identity").

93. <u>See</u> State v. Tobin, 602 A.2d 528 (R.I. 1992)(lewd disposition exception to rule against character evidence recognized in case in which evidence of prior acts involved same victim); State v. Raye, 326 S.E.2d 333, 335 (N.C. App. 1985), <u>review denied</u>, 332 S.E.2d 183 (N.C. 1985)(prior sexual abuse of victim's sister admissible to show intent and "unnatural lust" of defendant-stepfather); Maynard v. State, 513 N.E.2d 641 (Ind. 1987)(in child sex crime case, uncharged child abuse of third party by defendant admissible to show "depraved sexual instinct" as well as defendant's "continuing plan" to exploit and abuse the victim), <u>overruled in relevant part by</u> State v. Lannan, 600 N.E.2d 1334, 1339 (Ind. 1992)(depraved sexual instinct exception no longer recognized in Indiana); State v. Edward Charles L., 398 S.E.2d 123, 131 (W.Va. 1990)(held, in federal rules state, uncharged misconduct evidence admissible to show, inter alia, lustful disposition toward the defendant's children); State v. Lachterman, 812 S.W.2d 759 (Mo. App. 1991)(homosexual sodomy with young boys; prior acts admitted on "depraved sexual instinct" theory), <u>cert. denied</u>, 112 S.Ct. 1666 (1992); State v. Tarrell, 247 N.W. 2d 696, (Wis. 1976)(sexual abuse of child; evidence that defendant had made obscene remark to female child and had masturbated in presence of other young females admissible

as showing defendant's "propensity to act out his sexual desires with young girls"), overruled in part by State v. Fishnick, 378 N.W.2d 272, 277 (Wis. 1985)(language in Tarrell stating that evidence could be received to show sexual propensity is "withdrawn"). See generally, Myers, supra note 59, at 540.

94. Imwinkelreid, supra note 30, at § 4:14, 4-37.

95. See, e.g., Getz v. State, 538 A.2d 726, 733-734 (Del. 1988)("The sexual gratification exception proceeds upon the assumption that a defendant's propensity for satisfying sexual needs is so unique that it is relevant to his guilt. The exception thus equates character disposition with evidence of guilt contrary to the clear prohibition of D.R.E. Rule 404(b).").

96. 600 N.E.2d 1334 (Ind. 1992); accord, Getz v. State, 538 A.2d 726, 733-34 (Del. 1988)(overruling prior case recognizing sexual gratification exception); State v. Fishnick, 378 N.W.2d 272, 277 (Wis. 1985)(withdrawing language in prior case that endorsed use of other crimes evidence to prove sexual propensity).

97. However, the Indiana Legislature recently passed a statute which reinstates an exception for evidence of sex crimes similar to the charged crime. See Ind. House Enrolled Act No. 1342, §2, IC 35-37-4-15 (1993)(to be codified at IND. CODE §15).

98. Lannan, 600 N.E.2d at 1335.

99. Id. at 1336-1337.

100. Id. at 1337.

101. Cases recognizing a form of the lustful disposition exception include: State v. Edward Charles L., 398 S.E.2d 123 (W.Va. 1990)(held, in federal rules state, uncharged misconduct evidence admissible to show lustful disposition toward children); State v. Jerousek, 590 P.2d 1366, 1372-73 (Ariz. 1979)(upholding "the emotional propensity for sexual aberration exception" in child sexual abuse case where act is similar to charged crime, committed shortly before charged crime and involves sexual aberration); State v. Tobin, 602 A.2d 528 (R.I. 1992)(although reversing conviction on other grounds, the court upheld its "lustful disposition" exception, at least in cases involving prior incestuous relations between the defendant and the victim). For cases that decline to apply a recognized lustful disposition exception to adult rape cases, see State v. McFarlin, 517 P.2d 87, 90 (Ariz. 1973)(lustful disposition exception is limited to cases involving sexual aberration; "as one court pointed out, the fact that one woman was raped is not substantial evidence that another did not consent"); State v. Valdez, 534 P.2d 449, 452 (Ariz. Ct. App. 1975) (dictum; lustful disposition exception not available in adult rape case, but evidence admitted on common

plan rationale); Lehiy v. State, 501 N.E.2d 451, 453 (Ind. App. 1987)(in case decided before the Indiana Supreme Court abolished depraved sexual instinct exception, Court of Appeals of Indiana holds that heterosexual rape evidence is not admissible under the exception, although evidence of incest or "sodomy" would be admissible), aff'd, 509 N.E.2d 1116 (Ind. 1987); Reichard v. State, 510 N.E.2d 163 (Ind. 1987)(consent-defense case in which defendant was accused of raping woman, with whom he had had a dating relationship, in her apartment; reversible error for trial judge to admit unspecified "evidence of prior alleged rapes perpetrated by [defendant] upon various individuals"; court states that rape of an adult woman does not fit the then-recognized "depraved sexual instinct" exception because rape of an adult woman is not depraved sexual conduct).

102. See supra note 44 (cases cited); Lovely v. United States, 169 F.2d at 388; Brown v. State, 459 N.E.2d at 379. Of course, there some counter-examples -- jurisdictions where the evidence seems to be admitted equally in both situations, because courts use the "spurious plan" reasoning. See infra note 59 and accompanying text.

103. See supra note 101 and accompanying text.

104. Imwinkelreid, supra note 30, at § 1:04 (LEXIS search reveals over 3,000 cases); Wright & Graham, supra note 28, at § 5239. On our topic of the admissibility of uncharged sex crimes in sex crime cases, there were 95 published appellate opinions in the year 1992 alone.

105. See generally, Charles Nesson, The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts, 98 Harv. L. Rev. 1357 (1985)(arguing that the need to promote public acceptance of verdicts can better explain many evidentiary rules); David P. Leonard, The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence, 58 U. Colo. L. Rev. 1 (1986-87)(same).

106. See William L. Twining, Theories of Evidence: Bentham and Wigmore (1985).

107. See, e.g., Miguel A. Mendez, California's New Law on Character Evidence: Evidence Section 352 and the Impact of Recent Psychological Studies, 31 UCLA L. Rev. 1003 (1984), and Leonard, supra note 105, as examples of commentators who find considerable support for the rule against character reasoning in the psychology literature. For a more permissive view of character evidence based on an interactionist perspective, see Susan M. Davies, Evidence of Character to Prove Conduct: A Reassessment of Relevancy, 27 Crim. L. Bull. 518 (1991).

108. Leonard, supra note 105, at 25-29. See generally Walter Mischel, Personality and Assessment (1968); 1 Hugh Hartshorne and Mark A. May, Studies in the Nature of Character 411-412 (1928) [hereinafter Hartshorne & May].

109. The results of the Hartshorne study show that deceit and honesty are not "unified character traits, but rather specific functions of life situations. Most children will deceive in certain situations and not in others." Hartshorne & May, supra note 108, at 411. See also Peter D. Spear, Steven D. Penrod and Timothy B. Baker, Psychology: Perspectives on Behavior 574-576 (1988).

110. John M. Darley, Sam Glucksberg, and Ronald A. Kinchla, Psychology, 464-65 (5th ed. 1991)(undergraduate textbook published by Prentice-Hall)[hereinafter Darley]; James J. Conley, Longitudinal Stability of Personality Traits: A Multitrait-Multimethod-Multioccasion Analysis, 49 J. Personality & Soc. Psychol. 1266 (1985)("The data of this longitudinal study carried out over five decades strongly indicate that there is a set of personality traits that are generalizable across methods of assessment and are stable throughout adulthood."). See generally David C. Funder & Daniel J. Ozer, Behavior as a Function of the Situation, 44 J. Personality & Soc. Psychol. 107 (1983)[hereinafter Funder & Ozer]; David Crump, How Should We Treat Character Evidence Offered to Prove Conduct?, 58 U. Colo. L. Rev. 282-284 (1987)("social science is by no means monolithic in condemning trait theory.").

111. Darley, supra note 110; Davies, supra note 107.

112. "[T]he evidence essentially shows that some people are indeed apt to act the same way whenever an aggressive opportunity arises. If they are relatively free to do what they want in a given situation, there is a good chance that these individuals will behave in the same manner on many occasions. They will try to hurt someone if they have an underlying aggressive disposition, or they will not attack a target if they have a non-aggressive personality." Leonard Berkowitz, Aggression: Its Causes, Consequences, and Control 128-29 (1993) (emphasis in original).

113. Alan Bullock, Hitler and Stalin: Parallel Lives 654 (1992).

114. See Teree E. Foster, Rule 609(a) in the Civil Context: A Recommendation for Reform, 57 Fordham L. Rev. 1, 33 (1988)("The function of character traits is exaggerated, whereas the function of situational variances as pivotal factors influencing the behavior of others is minimized."); Robert G. Lawson, Credibility and Character: A Different Look at an Interminable Problem, 50 Notre Dame L. Rev. 758, 778 (1975)("It is predictable, therefore, that when jurors receive information

about prior criminal acts of an accused they impute to him a dispositional quality and give inadequate attention to the possibility of situationally oriented explanations for his conduct."). Cf. Robert G. Spector, Rule 609: A Last Plea for Its Withdrawal, 32 **Okla. L. Rev.** 334, 352-53 (1979)("The jury, like any individual, is incapable of segregating [evidence of prior bad acts] to just one trait. It will inevitably use it to form a complete picture of the [defendant]."). Commentators have also pointed out that research subjects also display a tendency to judge character in a reductionist fashion, concentrating on one or two salient personality traits and ignoring complexities. See Mendez, supra note 107.

Perhaps the factor that most induces jurors to overestimate the probative value of character evidence is what psychologists term the "halo effect." In the present context it might be more aptly called the "devil's horns effect." The term refers to the propensity of people to judge others on the basis of one outstanding "good" or "bad" quality. This propensity may stem from a tendency to overestimate the unity of personality -- to see others as consistent, simple beings whose behavior in a given situation is readily predictable." This use of "implicit personality theory" is questioned by Davies, supra note 107, at 528-29, on grounds articulated by Funder--that the social perception research on which it is based was intended to show the process by which social judgments were made, but not the external validity of those social judgments, and that "social perception researchers have tended either to assume that personality assessments are inaccurate, or to ignore the accuracy question altogether." Davies, supra note 107, at 529.

115. In one well-known experiment, for example, subjects were asked to form a judgment about whether a debater favored Fidel Castro. Even if told that the debater had no choice--that the debate team advisor had instructed the debater whether or not to support Castro--the subjects would be more likely to attribute a pro-Castro attitude to the debater if the debate spoke in favor of Castro than if the debater spoke against Castro. See Edward E. Jones, The Rocky Road from Acts to Dispositions, 34 **Am. Psychologist** 107 (1979)(describing Castro experiments).

116. Funder & Ozer, supra note 110; Davies, supra note 107.

117. See David C. Funder, Errors and Mistakes: Evaluating the Accuracy of Social Judgement, 101 **Psychol. Bull.** 75, 75-77 (1987)[hereinafter Funder]. One researcher, who has a relatively optimistic view of the ability of humans to make judgments about dispositions, has gone so far as to complain that:

> Studies of error appear in the literature at a prodigious rate, and are disproportionately likely to be cited (Christensen-Szalanski & Beach, 1984) . . . . (p. 75) [T]he current Zeitgeist emphasizes purported flaws in human judgment to the extent that it might

well be "news" to assert that people can make global judgments of personality with any accuracy at all." (p. 83).

See id.

118. See Lempert & Saltzburg, supra note 32, at 162 (discussion of prejudice in terms of regret matrix of jurors).

119. S. 6, 103d Congress, 1st Session, 1993.

120. Fed. R. Evid. 403 gives the opponent of evidence a basis for challenging it when none of the more specific exclusionary rules applies. It provides that "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."

121. See 137 **Cong. Rec.** E3503-02 (Extension of Remarks, Oct. 22, 1991)(statement of Rep. Molinari)[hereinafter Molinari](referring to Rule 403 as possible basis for exclusion). Cf. Statement by Senator Strom Thurmond, on behalf of 27 sponsors of the Comprehensive Violent Crime Control Act of 1991, inserting a section-by-section analysis of the bill [hereinafter Section-by-Section Analysis] in the Congressional Record. The analysis applicable to proposed Fed. R. Evid. 413-15 is at 137 **Cong. Rec.** S 3192, *S3237-42 (February 13, 1991). The 1991 bill's proposed Rules 413-415 are identical to the 1993 bill's proposed evidence rules, and the sponsors of the 1991 bill overlap with those of the 1993 bill.

122. The proposed rule would apply to evidence that the defendant had previously committed a federal child molestation offense, any other child molestation offense involving anal or genital contact, any offense against an adult for a nonconsensual sex crime involving anal or genital contact, any offense that involves deriving sexual gratification from the infliction of death, bodily injury, or physical pain on another person, and any attempt of conspiracy to engage in the above-described conduct. See S.6, § 121.

123. For a comprehensive review of the provisions of rape shield statutes, see Galvin, Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade, 70 **Minn. L. Rev.** 763 (1986).

In its strongest form, rape shield legislation protects the victim from disclosure of sexual history except in cases where the evidence concerns other sexual acts with the defendant himself, or where the evidence is necessary to show the source of semen or injury. See Fed. R. Evid. 412. Even in these jurisdictions, however, reception of other evidence will

sometimes be constitutionally required, as when the evidence suggests a motive to fabricate a charge of rape. See Olden v. Kentucky, 488 U.S. 227 (1988) (unconstitutional to prevent defendant from cross-examining accuser about fact that she lived with R., when R. saw accuser disembarking from defendant's car after alleged rape, and defense was based on claim that accuser fabricated rape in order to protect relationship with R.); State v. Jalo, 27 Or. App. 845, 557 P.2d 1359 (1976) (unconstitutional to exclude evidence of child complainant's prior sexual conduct when adult defendant claimed that she had falsely accused him because he told her that he was going to inform her parents of her sexual conduct with his son and others).

124. Studies indicate that rape is underreported. See Estrich, supra note 80, at 9; John Monahan & Laurens Walker, Social Frameworks: a New Use of Social Science in Law, 73 Va. L. Rev. 559 (1987).

125. See Section-by-Section Analysis, supra note 120, at S 3241-42.

126. "The character of the woman as to chastity is of considerable probative value in judging the likelihood of consent." John Henry Wigmore, Evidence §62 (3d ed. 1940). However, Wigmore also believed that, "The fact that a woman may have been guilty of illicit intercourse with one man is too slight and uncertain an indicator to warrant the conclusion that she would probably be guilty with any other man who sought such favors of her." Id. at §200.

127. The "evolving mores have made extramarital sex normal" argument has been made by numerous commentators. E.g., Evelyn Sroufe, Evidence Admissibility of the Victim's Past Sexual Behavior Under Washington's Rape Evidence Law -- Wash. Rev. Code §979.150, 52 Wash. L. Rev. 1011, 1032 (1976); If She Consented Once, She Consented Again -- A Legal Fallacy in Forcible Rape Cases, 10 Val. U. L. Rev. 127, 138 (1976); Lisa Van Amburg and Suzanne Rechtin, Rape Evidence Reform in Missouri: A Remedy for the Adverse Impact of Evidentiary Rules on Rape Victims, 22 St. Louis U. L.J. 367, 385 (1978); Vivian Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 Colum. L. Rev. 1, 56 (1977).

128. The claim that prior consent is relevant to whether subsequent consent was given to another man is usually rejected out of hand by authors defending rape shield laws. "One can presume that a woman will freely choose her partners, picking some and rejecting others, in line with highly personal standards not susceptible of generalization." Berger, supra note 126, at

56. The fact remains, however, that if the question is whether X and Y had consensual sex on a certain date, it would be relevant to know that they have often done so with others, just as similar information would be relevant to analogous inquiries such as whether they went fishing with each other on a certain date, or went to church together, or played cards. Whether the evidence, in the context of a rape trial, cuts both ways is a different question, as is the danger that the jury will overvalue the evidence.

129. Although the hypothesis in the text cannot be proved valid with available data, and raises several difficult methodological problems, it is consistent with the data. Two studies indicate that college rape victims have more (voluntary) partners than non-victims, but this may be because of increased post-rape sexual activity (which we think unlikely) or merely because a larger number of dates leads to a larger chance of encountering a rapist, rather than because unselective women are more vulnerable on any single social encounter. See Philip Belcastro, A Comparison of Latent Sexual Behavior Patterns Between Raped and Never Raped Females, 7 Victimology: Int'l J. 224, 225-26 (1982) (raped students had more partners and were more likely to have had heterosexual coitus on their first date); Mary P. Koss, The Hidden Rape Victim: Personality, Attitudinal, and Situational Characteristics, Psychol. Women Q. 193, 201-202 (1985) ("acknowledged rape victims reported significantly more liberal sexual values and a greater number of sexual partners than nonvictimized woman did").

Both rape victims and those with large numbers of sexual partners tend to be younger, and more urban, and poorer than the general population. Kost and Forrest, American Woman's Sexual Behavior and Exposure to Risk of Sexually Transmitted Diseases, 24 Family Plan. Persp. 244-54 (1992) (women most likely to have more than 2 partners are 20-34 years of age, with income below the poverty level, living in urban area). Similarly, rape victims are disproportionately urban, young and poor. Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics (Washington, D.C., U.S. Dept of Justice) 259 (urban), 274 (young), 280 (poor) (1991).

130. Allen J. Beck, Bureau of Justice Statistics, Recidivism of Prisoners released in 1983, at 1 (1989).

131. For scholars who have argued for a longer follow-up period, see Joseph J. Romero and Linda M. Williams, Recidivism Among Convicted Sex Offenders: A 10-Year Followup Study, 49(1) Fed. Probation 58, 63 (1985)(number of sex offenders rearrested for a sex offense 4 years after their release from prison equals the number of sex offenders rearrested for a sex offense within the first year of the follow-up study; the authors concluded that "5 years is minimal as an effective [follow-up] period when

investigating recidivism among sex offenders."); Lita Furby, et. al., Sex Offender Recidivism: A Review, 105 **Psychol. Bull.** 3, 27 (1989)(recommending follow-up periods of "at least a decade."); R.G. Broadhurst and R.A. Maller; The Recidivism of Sex Offenders in the Western Australian Prison Population, 32(1) **Brit. J. Criminology** 54, 72 (1992); David Finkelhor, **A Sourcebook for Child Sex Abuse**, 89, 134-141 (Finkelhor ed. 1986).

132. Furby et al., supra note 130, at 22. See also Finkelhor, supra note 130, at 134. For an example of a study showing a higher recidivism rate, see Marnie E. Rice et al., Sexual Recidivism Among Child Molesters Released From A Maximum Security Psychiatric Institution, 59(3) **J. Consulting & Clinical Psychol.** 381 (1991) (This study tracked extrafamilial child molesters incarcerated in a maximum security psychiatric institution for an average 6.3 year follow-up period; 31% of the subjects were convicted of a new sex offense. However, the authors noted that the nature of their subjects, maximum security inmates, may have inflated their recidivism results). In their comprehensive review of sex offender recidivism studies, Furby et al. noted that "The differences in recidivism across these studies is truly remarkable; clearly by selectively contemplating the various studies, one can conclude anything one wants.'" Furby, supra note 129, at 27 (citation omitted).

133. See, e.g., A. Nicholas Groth, Robert E. Longo and J. Bradley McFadin, Undetected Recidivism among Rapists and Child Molesters, 28(3) **Crime & Delinq.** 450 (1982)(anonymous questionnaire given to convicted and incarcerated rapists and child molesters; on average, the subjects indicated they committed two-to-five times as many sex crimes for which they were not apprehended); **Finkelhor**, supra note 130, at 132 (in analyzing ten studies of child molestation recidivism, the authors noted that these studies "probably gravely understate the amount of subsequent offending committed by the men who were studied. The investigators routinely used as their criteria of recidivism subsequent offenses that came to the attention of the authorities.") (emphasis in the original); Judith V. Becker and John A. Hunter, Jr., Evaluation of Treatment Outcome for Adult Perpetrators of Child Sexual Abuse, 19(1) **Crim. Just. & Behav.** 74, 82 (1992)("undetected crime is quite extensive among sex offenders and . . . official data may reveal only a small percentage of the total sexual offenses committed.").

134. Furby, supra note 130, at 27 (no more than 10% of sex offenses are reported).

135. "'The differences in recidivism across these studies is truly remarkable; clearly by selectively contemplating the various studies, one can conclude anything one wants.'" Furby, supra note 130, at 27 (citation omitted).

136. Section-by-Section Analysis, supra note 120, at S3240 (analysis applicable to predecessor bill, introduced in 1991, with same evidence provisions as 1993 bill).

137. Of these three factors, only similarity is regularly recognized in the case law as a basis for admission of other crimes evidence. If the acts are sufficiently similar, then they may be admitted as showing modus operandi, plan, or "common scheme." See supra text accompanying notes 39-41 and 49-70.

138. If one assumes that the base rate of false accusations in consent defense cases is very low, then a case can be made for treating them differently, especially when there are multiple accusations. This line of reasoning requires an a priori judgment about the likelihood of falsity -- but this sort of judgment is certainly not unprecedented in evidence law, and is simply the reverse side of the a priori judgment (that women lie) on which the corroboration requirement was once based. See 7 **Wigmore on Evidence** § 2062 (Chadbourn Revision 1978) (describing corroboration requirement). However, the argument only applies to consent defense cases. There is no basis for an assumption that the rate of mistaken witness identification is lower in sexual offenses than in nonsexual offenses.

139. See **Lempert & Saltzburg**, supra note 32, at 217 (suggesting that value of other crimes evidence is undermined by danger that defendant was identified because he was one of the "usual suspects" for that type of crime).

140. See Susan Estrich, 95 Yale L.J. 1087, 1088: "Late that night, I sat in the Police Headquarters looking at mug shots....They had four or five to 'really show' me; being 'really shown' a mug shot means exactly what defense attorneys are afraid it means." See also **Lempert & Saltzburg**, supra note 32, at 172-73 (excerpt from Buckout, Eyewitness Testimony, 231 Scientific American 23-31 (1974)(describes police practices that may interfere with accurate identification).

141. See, e.g., **Elizabeth Loftus, Eyewitness Testimony** 142-44 (1979)(unconscious transference can cause witness to identify suspect because witness saw suspect, or photo of suspect, in context other than crime); Platz & Hosch, Cross-Racial Ethnic Eyewitness Identification: A Field Study, 18 **Applied Soc. Psychol.** 972, 981-83 (1988)(difficulty of cross-racial identification); Loftus & Loftus, Some Facts about "Weapon Focus," 11 **L. & Hum. Behav.** 55, 61-62 (1987)("weapon focus" often interferes with identification capacity). See generally **Elizabeth Loftus, Eyewitness Testimony** (1979)(describing these and other problems with eyewitness identification).

142.See e.g., Cutler, Penrod & Stuve, Juror Decision Making in Eyewitness Identification Cases, 12 **Law & Hum. Behav.** 41, 54 (1988); Wells, How Adequate is Human Intuition for Judging Eyewitness Testimony, in **Eyewitness Testimony: Psychological Perspectives**, 271-72 (1984).

143. See **Loftus**, supra note 141, at 273.

144. The distinction between this type of case and that presented by crimes that are subject to the character evidence rule rests partially upon our a priori judgments about the likelihood of false accusations. We believe that false accusations of date rape are quite rare, and therefore that multiple accusations are strongly corroborative of each other. Admittedly, this belief rests upon a generalized judgment about social fact that cannot be proven conclusively with scientific evidence. Cf. Patricia Frazier and Eugene Borgida, Juror Common Understanding and the Admissibility of Rape Trauma Syndrome Evidence in Court, 12 **Law and Hum. Behavior** 106-07 (1988)(assessing sparse data about false rape reports, and concluding either that the rate of false reports is the same or is less frequent than for other categories of crime). Of course, lawmakers must often make choices without waiting for social science, and we believe that we are justified in following our own inductions in the absence of contrary scientific evidence.

145.**Harry Kalven and Hans Zeisel, The American Jury** 253 (1966). [hereinafter **Kalven and Zeisel**].

146.Id.

147.**Kalven and Zeisel** supra note 144, at 249-54.

148.Dale A. Nance, The Best Evidence Principle, 73 **Iowa L. Rev.** 227 (1988).

149. Nance, supra note 147, at 294.

150. Estimates of an experienced sex-crime investigator place the cost of a semen/DNA test at $400 to $800. Telephone interview with Sergeant Martinson, Sex-Crimes Unit, Minneapolis Police Department, Minneapolis, MN (May 20, 1993). See also Comment, Trial by Certainty: Implications of Genetic "DNA Fingerprints," 39 **Emory L. R.** 309, 3xx n.95 (1990)($200 per sample, with samples needed from victim, suspect, and crime scene); Note, The Admissibility of DNA Typing: A New Methodology, 79 **Geo. L. J.** 313 (1990)(private labs charge $325-$490 for DNA tests and $750-$1000 for a day of expert testimony about tests).

151. In some cases the prosecution may be able to offer rape trauma syndrome evidence, but its utility is problematic. See generally State v. Black, 109 Wash. 2d 336, 745 P.2d 12 (1987); State v. Saldana, 324 N.W.2d 227 (Minn. 1982). First, while it tells us about differences between victims who report that they have been raped and nonvictims who report that they have not been raped, it tells us nothing about the characteristics of nonvictims who report that they were raped. A complainant who falsely reports that she was raped after a sexual act might show the same symptoms of trauma that a genuine victim shows -- we simply don't know, because such complainants have not been (and perhaps cannot be) studied. Second, receiving rape trauma syndrome testimony raises questions of fairness because, unless the defense is allowed to conduct an invasive investigation of the victim's private life, the defense normally lacks the ability to develop evidence that the victim did not suffer from rape trauma.

152. See supra note 72 and accompanying text.

153. One finds this result in opinions that reason that in consent defense cases identity is not in issue, so modus evidence is not admissible. These courts tell us that they would decide differently if the case had been a stranger rape alibi defense case. See supra note 44. In some jurisdictions there would be no difference in admissibility, because the evidence of similar modus would be admissible in consent defense cases under some rubric such as plan, common scheme, or "pattern." See supra text accompanying notes 44 and 68.

154. Lovely v. United States, 169 F.2d 386, 390 (4th Cir. 1948)(Parker, J.)(defendant accused of rape of acquaintance after driving her to remote part of federal base; rape 15 days earlier on same base excluded; court states that fact that one woman was raped had no tendency to prove that another woman did not consent); Brown v. State, 459 N.E. 2d 376, 378-379 (Ind. 1984)(defendant met victim in gas station, drove her to cornfield where he threatened, raped and beat victim; two other victims testified to rapes by defendant in secluded areas after getting or giving him rides in vehicle; held, receiving evidence was reversible error; court states that fact that one woman was raped had no tendency to prove that another woman did not consent, citing Lovely case); United States v. Gamble, 27 M.J. 298 (C.M.A. 1988), aff'd 33 M.J. 180 (C.M.A. 1991)(reversible error to admit evidence of prior sexual assault in consent-defense rape case; court states that fact that one woman was sexually assaulted has no tendency to prove another did not consent, citing Lovely case).

155. See Estrich, supra note 80, at 17-20.

156. See supra note 137 (describing corroboration rule applicable in some jurisdictions).

157. 3A Wigmore, supra note 15, at § 924a at 736.

158. Estrich, supra note 80, at 54.

159. Estrich, supra note 80, at 29-30 (describing cases such as Brown v. State, 127 Wis. 193, 106 N.W. 536 (1906), which held, in a case involving neighbors who had known each other all their lives, that screaming, pushing and saying "let me go" was not enough to satisfy the utmost resistance requirement, even if defendant grabbed victim, tripped her, covered her mouth with his hand and told her to shut up). Estrich also asserts that the "utmost resistance" requirement was applied unevenly, a view that is related to her view, supra note 80, at 25, that acquaintance rape is just as frightening as stranger rape. "[O]ne is hard pressed to find a conviction of a stranger, let alone a black stranger, who jumped from the bushes and attacked a virtuous white woman, reversed for lack of resistance, even though the woman reacted exactly as did the women in [acquaintance rape cases.]" Estrich, supra note 80, at 32-37. Other sources have argued that conscious or unconscious racism lies behind the strong differences in the treatment of acquaintance and stranger rape, on grounds that stranger rape more often involves a black man and white woman than does acquaintance rape; but this argument has not been accompanied by any showing that the common law of rape differed in jurisdictions, such as England, that lacked substantial racial minorities.

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Section V Evid: 9-10/93

READING GAOL REVISITED: ADMISSION OF UNCHARGED MISCONDUCT EVIDENCE IN SEX OFFENDER CASES[1]

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In Reading Gaol by Reading Town
There is a pit of shame,
And in it lies a wretched man
Eaten by teeth of flame.

Oscar Wilde, *The Ballad of Reading Gaol*

I. INTRODUCTION.

In 1894, Oscar Wilde commenced a criminal libel prosecution against the Marquis of Queensberry. The Marquis' son, Alfred Douglas, was sexually involved with Wilde. The Marquis threatened to make a public scandal of his son's affair, unless he broke off with Wilde. When Alfred refused to give up Wilde, the Marquis left a post card in the Albermarle Club addressed to "Oscar Wilde posing as a sondomite (*sic*)."[2] Wilde's criminal prosecution blew up in his face when Sir Edward Carson, Queensberry's defense counsel, cross examined Wilde on his prior deviant sexual activities with young, handsome men such as Alfred Douglas.[3] Wilde's counsel withdrew the case during Carson's opening statement for the defense, knowing that Carson would put Wilde's former lovers on the stand.[4]

Queensberry turned the case over to the public prosecutor who indicted Wilde for sodomy. Wilde was convicted and sentenced to two years at hard labor in Reading Gaol, leading Wilde to produce *The Ballad of Reading Gaol*, a thinly disguised autobiographical poem which may have been his masterpiece.[5]

Oscar Wilde was tripped up by an exception to the character evidence rule that permitted proof of Wilde's prior sexual misconduct to prove his predisposition to engage in sodomy. The character evidence rule forbids the prosecution from proving a criminal defendant's bad character. However, exceptions exist which may be used to prove the defendant's bad moral character. One of those exceptions allows the prosecution to prove an accused sex offender's propensity for committing uncharged sexual misconduct. When the state prosecutes someone for a sex offense, the specter of the defendant's uncharged sexual misconduct haunts the trial process, as it did the Oscar Wilde trial. The person accused of a sex offense must expect that any deviant sexual history will be put into evidence by proof of similar uncharged sexual misconduct. The jury will convict the defendant on the basis of predisposition to commit sex crimes.

The American form of criminal prosecution is accusative, not inquisitorial.[6] Since the defendant is

presumed innocent, the defendant will be tried for committing a specific act, not for the defendant's general predisposition to do wrong.[7] The courts have fashioned the character evidence rule that bars the prosecution from proving the defendant's predisposition to do wrong.[8] The courts admit that the trier of fact can reason from proof that the defendant committed one or more similar acts to a conclusion that the defendant is predisposed to commit those same acts.[9] The trier of fact can then deduce from the defendant's proven general predisposition to commit a certain kind of criminal act that the defendant committed the act charged in the indictment.[10] The courts assert that even if the defendant's commission of similar acts is relevant to proving the defendant committed the act charged in the indictment, the probative value of such evidence is substantially outweighed by prejudice to the accused.[11]

The courts are apparently committed to the established method of criminal prosecutions because they perceive that the accusative system of criminal justice is part of the collective moral fabric of the United States.[12] No other type of criminal prosecution is acceptable as a model of a fair trial.

Perhaps the courts are not as committed to the accusative system of criminal justice as they think. In fact, the courts may be permitting inquisitorial

prosecutions while they speak the rhetoric of the accusative system. It may be more important to examine what the courts do with uncharged misconduct evidence than to examine the verbal formulae the courts employ to describe what they do.

This article analyzes only one type of criminal prosecution: sex offenses. The courts are willing to allow the prosecution to prove the defendant's predisposition to commit sex crimes by proof of specific acts of uncharged sexual misconduct.[13] The trier of fact is free to reason from proof of one or more similar acts committed by the defendant to the conclusion that the defendant is predisposed to commit sex crimes. Then, the defendant may be found guilty based, in part, upon prior uncharged sexual misconduct. While this system is not unique to sex crime prosecutions, all the issues surrounding admission of uncharged misconduct in criminal prosecutions are raised in the most sharply defined manner in sex offender cases.

Since 1988, the moral issues raised by proof of uncharged sexual misconduct in sex offender cases have been openly discussed by the Supreme Courts of Delaware, Indiana and Rhode Island. In each state, a sex offender was convicted in part on evidence of uncharged sexual misconduct that proved the sex offender's propensity to commit such misconduct. These defendants were in the same situation as Oscar Wilde was in 1894. Delaware and Indiana chose to

reject a specific exception that admitted uncharged sexual misconduct in sex offender cases to prove the defendant's lustful disposition or predisposition to commit sex crimes. Rhode Island chose to keep that exception. In each case, however, the court chose to set down guidelines for admission of uncharged sexual misconduct in sex offender cases. There is little practical difference in the outcome in each of the three decisions. Uncharged sexual misconduct will be admitted in sex offender cases, given the right conditions showing relevance and probative value.

II. PROFILE OF THREE SEX OFFENDER CASES.

A. DELAWARE.

Charles R. Getz was arrested for allegedly raping his eleven year old daughter. He was tried in Superior Court, Kent County, Delaware. Delaware had adopted the 1973 edition of the Uniform Rules of Evidence in 1980. The State offered two uncharged sexual misconduct incidents between Getz and his daughter to prove Getz' motive, intent, plan and as "proof of sexual interest in his daughter"[14] under Rule 404(b) Delaware Rules of Evidence. Pre-1980 Delaware case law contained no reported opinions supporting admission of similar sexual misconduct to show the defendant's predisposition to commit sex crimes.

The State called Dr. Kuhn, a physician who had examined Getz' daughter about 10 days after the incident for which he

stood trial. Kuhn's medical history notes included the child's story of the two similar episodes of sexual activity with her father. The physician was allowed to put the medical history record into evidence.[15] Next, Getz' daughter, the victim, took the stand and testified to three different episodes of incest or child molesting with her father.[16] Getz claimed he had been "set up" by his ex wife so she could obtain a divorce from him on misconduct grounds to protect her right to remain in the United States. The jury did not believe Getz and found him guilty. He drew a mandatory life sentence for first degree rape.[17] Getz appealed his conviction on the ground that the admission of uncharged sexual misconduct under Rule 404(b) was improper.

The Delaware Supreme Court wrestled with Getz' case. Getz was not charged with a crime requiring proof of specific intent. Mens rea was established by the facts of partial intercourse. Getz raised no defense based on lack of intent, such as insanity. If Getz had a plan to molest his daughter, it was irrelevant because any criminal plan to seduce his daughter proved no more than mens rea, which was already established by the fact of the assault. The State did not have to prove Getz' guilty knowledge, and Getz did not claim he touched his daughter accidentally or by mistake. If mens rea was not at issue, Getz' motive for engaging in sexual conduct with his daughter was also

irrelevant. Getz' identity as the perpetrator of whatever happened was not an issue. The two earlier child molesting incidents were too remote to be part of the same criminal act which led to his arrest. The only logical purpose for proving these two uncharged instances of misconduct was to show the jury that Getz habitually satisfied his sexual desires by molesting his daughter.

The court disposed of the State's unsupported claim that it could offer this evidence as anticipatory impeachment. After examining the commentators' views on Rule 404(b) of the Uniform Rules of Evidence, the Court determined that a majority of jurisdictions considered Rule 404(b) an inclusionary rule admitting specific instances of uncharged misconduct to prove any relevant issue other than the accused's bad character.[18] Although the Court held that Rule 404(b) was not to be used as a laundry list of exceptions to the character evidence rule, the balance of its opinion examined the State's evidence of uncharged misconduct on its "fit" with the laundry list, and found it deficient.

The court found that other states admitted uncharged sexual misconduct in sex offender cases in two ways: by matching the offer of proof to the examples listed in Rule 404(b),[19] or by using a special exception known as the "lustful disposition or sexual propensity exception".[20]

However, the court incorrectly equated the "lustful disposition" exception with the "motive" example listed in Rule 404(b), although Getz' habitual sexual misconduct with his daughter was circumstantial proof his predisposition to commit the crime charged in the indictment.

The court correctly held that Getz' motive was irrelevant to the charge at hand. Readers were assured that Delaware did not recognize a "lustful disposition" exception to the character evidence rule.[21] The court also held that the two prior episodes of fondling and incest were irrelevant to prove a plan or design to commit sexual misconduct, because the uncharged misconduct would only prove Getz' plan to satisfy his sexual desire by using his daughter, which would only establish his intent, and intent was not an issue.[22] The Supreme Court reversed Charles Getz' conviction.

The court then set forth six specific standards to be followed by trial judges in evaluating uncharged misconduct evidence, and mandated a limiting instruction which the trial court would be required to use in future cases.[23]

Getz' habitual criminal sexual behavior was the real issue. If a person who has engaged in sexual misconduct in the past is more likely to commit the same kind of prohibited act than someone who has never done so, given the same circumstances, then proof of similar sexual misconduct

tends to corroborate the victim's version of the crime charged in the indictment because it proved habitual criminal behavior or recidivism. Proof of recidivism is circumstantial proof of guilt.[24] However, the Delaware Supreme Court did not recognize this relationship, which would have been the "corroboration" version of the lustful disposition rule that it rejected.

B. INDIANA.

Until the fall of 1992, Indiana permitted proof that the defendant had committed similar sexual misconduct to show that the defendant had a "depraved sexual instinct"[25] that predisposed the defendant to commit the crime charged. Indiana admitted similar sexual misconduct evidence that occurred before[26] and after[27] the crime charged in the indictment to show depraved sexual instinct in statutory rape,[28] sodomy,[29] indecent liberties,[30] incest[31] and child molesting[32] prosecutions. The type of sexual misconduct did not have to match the incident in the indictment. For example, in *Grey v. State*,[33] the defendant gave a statement to the police confessing to a rape, an earlier child molesting incident with a small child, and an indecent exposure incident occurring several years before the date the defendant was arrested for rape. The court approved of admission of the child molesting and indecent exposure incidents in defendant's rape trial to

prove his lustful disposition.

Lapse of time between incidents of sexual misconduct did not exclude evidence of stale sexual misconduct. The court also allowed the state to prove the defendant molested three other children ten to twenty years before trial, because the court believed the prior incident showed the defendant's depraved sexual instinct at the time of the commission of the incident alleged in the indictment.[34] These situations show that sexual misconduct evidence admitted under the Indiana depraved sexual instinct exception to the character evidence rule was seldom restrained by analysis of the probative value of the uncharged sexual misconduct weighed against prejudice to the defendant.[35]

However, in two 1987 rape cases, the Indiana Supreme Court overturned convictions because the trial court erroneously admitted evidence of other rapes. In *Lehiy v. State*[36] and in *Reichard v. State*,[37] the court held that the State was not permitted to prove the defendant's depraved sexual instinct in rape cases because the elements of rape did not require proof of satisfaction of unnatural sexual desires. The court limited admission of uncharged sexual misconduct in rape cases to similar sexual activity proving plan, design, modus operandi and the like, because depraved sexual instinct is irrelevant to any issue in a

forcible rape case.[38]

In 1992, Indiana abolished the depraved sexual instinct exception to the character evidence rule. Donald Lannan of South Bend was indicted for molesting his fourteen year old female cousin, V.E. On the night of June 17, 1989, V.E. was staying at her grandmother's house. She shared a room with her female cousin, T.W. According to V.E., Lannan came into the bedroom shared by the two females and asked T.W. "to mess around with him". When T.W. refused, Lannan then removed V.E.'s pants and had conventional intercourse with her.[39]

V.E. testified to three additional incidents of sexual intercourse with Lannan after June 17.[40] V.E. also related that in the summer of 1988, she and T.W. had been riding with Lannan in his truck when Lannan stopped the truck and began fondling both of the females.[41] T.W. also testified against Lannan. After reciting the events of June 17, describing how Lannan had fondled her and tried to inveigle her into having sexual intercourse with him before attacking V.E., T.W. also described the fondling incident in the summer of 1988.[42] All four incidents of earlier and later misconduct with V.E. or T.W. were admitted to show Lannan's depraved sexual instincts. He was convicted and appealed on the ground that evidence of other child molesting incidents should have been excluded. The Indiana

Court of Appeals affirmed[43] and the Indiana Supreme granted his petition for transfer.[44]

The defendant asked the Indiana Supreme Court to do away with the depraved sexual instinct rule and to adopt Uniform or Federal Rule of Evidence 404(b) as the sole standard for admission of uncharged misconduct evidence in criminal prosecutions.[45]

The defendant argued that the depraved sexual instinct rule was based on two principles: the alleged higher recidivism rate of sex offenders and the need to bolster or corroborate the testimony of the complaining witness by showing other instances of similar conduct by the defendant.[46] The Supreme Court acknowledged that more than twenty jurisdictions followed some version of the lustful disposition rule, and others stretched the common scheme or plan exception to the character evidence rule in sex offender cases in order to admit uncharged misconduct.[47] It acknowledged that the rationale for allowing greater latitude in sex offender cases was in part based on the court's concern for the victim, not the accused, and represented an attempt to "level the playing field" in sex crime prosecutions to protect the victim and to ensure more convictions.[48] However, the court said these concerns were insufficient to justify the depraved sexual instinct exception to the character evidence rule.

The court agreed that studies of sex offender recidivism rates contradicted each other. It admitted that sex offenders may have a much higher recidivism rate than other offenders.[49] It agreed that juries might not believe child molesting victims' accusations against the defendant because the charges were incredible,[50] but stated that these policy reasons were insufficient to support a specific exception for uncharged misconduct evidence in sex crimes.[51] The court criticized the depraved sexual instinct rule because it allowed the prosecution to put in uncharged misconduct evidence without notice to the defendant, even when the uncharged misconduct occurred many years before the crime charged in the indictment. The court then held that it would adopt Rule 404(b) of the Federal Rules of Evidence as the standard for admitting uncharged misconduct evidence in Indiana.[52]

Turning to Rule 404(b), the court insisted that uncharged sexual misconduct evidence was admissible under Rule 404(b) when the evidence tended to prove a common scheme or plan to commit sex crimes,[53] or as part of the res gestae, such as the attempt to assault T.W.,[54] or to prove identity of the accused or absence of mistake or surprise.[55]

The court then held that the new rule applied to Lannan's case would have resulted in admission of T.W.'s

testimony about Lannan's improper advances on June 17, but would have excluded evidence of the 1988 incident. However, the case against Lannan was one of overwhelming guilt, and the admission of the 1988 episode was harmless error. It affirmed Lannan's conviction.[56]

The court apparently wanted to reassure the public that uncharged sexual misconduct would still be available to the prosecution when the prosecutor could concoct a theory of relevance that did not involve depraved sexual instincts. However, the court could not have rejected admission of the 1988 incident by a probative value versus prejudice analysis, since the 1988 incident did demonstrate the defendant was predisposed to sexual misconduct with V.E. and T.W.

C. RHODE ISLAND.

Rhode Island also admitted uncharged sexual misconduct to prove the defendant's lustful disposition under the lustful disposition exception to the character evidence rule.[57] In 1992, Rhode Island dealt with a challenge to its lustful disposition rule very similar to that raised in *Getz* and *Lannan*. James M. Tobin, Jr. of Providence was charged with second degree sexual assault allegedly committed against defendant's niece "Jill". In May, 1984, when "Jill" was 13, she spent a night in defendant's home while her parents were moving into a new house. The

defendant cornered her in the kitchen and placed his hand on her vagina and put her hand on his penis. "Jill" did not inform her parents nor did she notify any authorities about this incident. At trial, "Jill" testified to three earlier incidents and one later incident of uncharged sexual misconduct with the defendant. On Christmas Eve, 1981, the Tobin family was gathered at her grandmother's house in Johnston. The defendant cornered "Jill" on the staircase, pulled down her pants and placed his hand on her vagina and inserted his index finger in her. Earlier that day, her uncle fondled her while he held her on her knee. In 1976, when "Jill" was only six years old, the defendant and his son allegedly stripped her and the defendant forced his son to have conventional intercourse with her. "Jill" did not inform her parents nor did she notify any authorities about any of these incident when they occurred.

The later incident occurred on Christmas Day, 1985. The defendant and his son were visiting her family. The defendant and his son untied her dress and pinched her buttocks several times in the presence of other family members, who considered the actions "horseplay". All of these uncharged incidents were offered to prove defendant's lewd disposition towards "Jill" and were objected to at trial.[58]

Tobin was convicted on two counts of sexual assault,

and he appealed. His counsel argued that Rhode Island should follow Delaware's example, and reject the lustful disposition rule, because Rhode Island Rule of Evidence 404(b) makes no reference to any lustful disposition exception to the character evidence rule. The Rhode Island Supreme Court found, however, that there was much support for a specific exception for evidence of lustful disposition in sex offender cases in those states that had adopted the Uniform Rules. The lustful disposition exception existed outside the structure of Rule 404.[59]

Although the Rhode Island Supreme Court referred to Justice Walsh's well-crafted *Getz* opinion, it declined to follow Delaware's lead. Carefully setting out the procedural safeguards that it had applied in an earlier decision, the court declined to rule that the lustful disposition rule had been abolished by adoption of Rule 404.[60] Persons charged with sex offenses in Rhode island would have to expect that similar, deviant sexual misconduct would be openly admitted to show the defendant's lustful disposition, or propensity to commit sex offenses of that kind.

D. ANALYSIS.

None of the three decisions discussed above faced up to the moral and social implications of similar uncharged sexual misconduct evidence in sex offender cases. A

structural analysis of the character evidence rule and its policy objectives does not begin to meet the real issues raised by similar misconduct evidence.

For example, the three decisions assumed that prior criminal history was relevant to proof of a particular criminal act charged in the indictment, but did not articulate a reason why relevant evidence leading to conviction ought to be suppressed in sex offender prosecutions. The three defendants may have been habitual sex offenders. For example, Getz twice tried to commit rape on or to molest his daughter before the offense with which he was charged tended to prove that he was a pedophile.[61] Lannan's prior attempts to molest V.E. and T.W. before they reached puberty also tend to establish that Lannan was a pedophile. Tobin's sexual activities with "Jill" over a nine year period from age 6 to 13 indicates that Tobin had the same mental disorder. Police officers and social scientists may have taken action to arrest or to treat these offenders based on these uncharged episodes of pedophilia.

Pedophilia is no excuse for criminal behavior connected with the objects of the mental disorder. However, the diagnostic criteria for the disorder suggest that there is a medical and psychological basis for inferring that a person who has a history of repeated uncharged sexual misconduct

misconduct with children will commit the act again. Assuming that the prosecution can prove that the defendant in a sex offense involving children is a pedophiliac, it is rational to infer that the defendant committed the act charged in the indictment. It is also highly likely that a child's accusations that an adult committed pedophilia on the child is not made up. Such proof corroborates the accuser.

It is difficult to describe and to analyze the torturous history of the law of uncharged sexual misconduct evidence. Before the widespread adoption of the Uniform Rules of Evidence, the courts were unable to provide a convincing reason either to admit or to exclude evidence of similar uncharged misconduct in sex offender cases. Since the advent of the Uniform Rules of Evidence, the courts have no better rationale for admitting or excluding uncharged sexual misconduct evidence. Uniform Rule 404(a) was drafted to exclude proof of the defendant's character for the purpose of showing that the defendant acted in accordance with that character. Rule 404(a) provides for three specific exceptions to the general rule. Rule 404(b), which is a stand-alone rule, authorizes admission of uncharged misconduct to prove any issue other than the defendant's character. Rule 406, which authorizes proof of habit or routine practice does not define habit, nor does it detail

the conditions of admission of habitual behavior.

Recidivism, or habitual criminal conduct is the primary reason why similar uncharged misconduct evidence is relevant in sex offender prosecutions. The sex offender's propensity to commit similar sex crimes has been amply demonstrated by social science.

Proposed new Federal Rules of Evidence 413 through 415 are legislatively inspired attempts to deal with the specific problem of similar uncharged misconduct evidence in sex offender cases. These proposed rules are designed to establish a federal exception to the character evidence rule for similar uncharged misconduct in sex offender cases.[62] These legislative initiatives respond to public pressure to level the playing field for the victim of sex offenses, to increase the conviction rate for sex offenders, and to increase the honesty with which uncharged misconduct evidence is admitted in such prosecutions.[63] At the same time, these proposed amendments to the Federal Rules of Evidence will have far-reaching impact on state courts and on the nature of the criminal trial process in sex offenses.[64]

This article advocates admission of specific instances of similar criminal sexual misconduct to establish that the defendant is an habitual sex offender and guilty of the crime charged in the indictment. After review of pertinent

social scientific literature which supports the logical relevance of such evidence, and a short history of the common law roots of the character evidence and lustful disposition rules, this article will take up the current rationale for admitting uncharged sexual misconduct. Since the current rationale fails to explain why courts allow such evidence or exclude uncharged sexual misconduct, this article proposes admissions guidelines for proof of habitual criminal sexual activity. Although sex offender cases are the focus of this article, an amendment to the Uniform or Federal Rules of Evidence that would permit uncharged sexual misconduct evidence would affect the handling of uncharged misconduct evidence in other forms of criminal prosecution, now ostensibly covered by Rule 404. Habitual criminal misconduct is not confined to sex offenders.

III. THE LOGICAL RELEVANCE OF UNCHARGED MISCONDUCT EVIDENCE IN SEX OFFENDER CASES.

A. RECIDIVISM.

If a person's past criminal behavior is a strong predictor of future, similar criminal behavior, as some evidence commentators have conceded, then an accused's criminal history would be logically relevant to proof of guilt.[65] If an empirical relationship between prior and present criminal sexual misconduct can be established, then

the criminal history of a sex offender, limited to uncharged sexual misconduct evidence will be relevant in sex offender prosecutions.[66]

However, not all sex offenders have the same criminal histories. There is a difference between the typical criminal histories for rapists and that of pedophiles, hebrephiles and exhibitionists.[67] This difference is important to making inferences from prior criminal histories in sex offender cases.

1. Rapists.

Rape is a violent crime. In some American subcultures, violence is a socially approved way of getting what one wants, including control over other persons. One way men can control women is to assault them, to force them to submit to degrading activities, including sexual intimacy against their will.[68] This is the most plausible sociological explanation for a person's motivation to rape. It is drawn from the sex offender studies that include detailed self reported circumstances of each crime committed by the offender.[69]

Other explanations for male rape have been discredited. Criminal sexual psychopaths probably do not exist. Rapists are not usually seriously mentally ill people.[70] Rape is usually not victim precipitated by sexual frustration short of intercourse. Rape is a species of assault and battery

directed at humiliating and degrading its victims.

Rape is usually committed by a single male of the same race as the victim. Normally the assailant works alone, although multiple or gang rapes do occur. Typically, solo intraracial rape occurs between persons who live in the same neighborhood or in an adjacent neighborhood triangle.[71] In many instances the victim and the attacker are acquainted, though rarely intimate friends or former lovers.[72] The victim and the attacker both tend to be adolescents or young adults.[73] Solo rape victims are more likely to use force in resisting an assault than multiple rape victims and more likely to be sexually degraded or badly beaten by an attacker.[74] The most likely place where victim and attacker meet is usually the place where either the victim or the attacker lives.[75] The criminal history profile of those men who commit solo rapes on persons of their own race resemble those of other violent criminals.

Multiple intraracial rapes, involving two or more attackers and a single victim also tend to be neighborhood affairs in which the victim and her attackers are acquainted. The attack scene is the street. The victim seldom resists her attackers.[76]

Interracial rapes tend to be attacks by black men on older white victims in a neighborhood other than the home of

either victim or rapist.[77] The white victim is very unlikely to resist rape by force or flight.[78] The victim is more likely to be beaten or degraded sexually than the victim of an intraracial rape.[79]

A generation or two ago, some writers tried to explain rape as the act of a "sex maniac" who was motivated by unnatural sex drives, i.e., his overcharged libido, to seek out women and force sexual contact with them.[80] This was an oversimplified, incorrect application of Freud's doctrine of the libido. However, it influenced judicial thinking on the admission of uncharged sexual misconduct into relatively modern times.[81] Careful analysis of the criminal histories of rapists in recent years shows that rapists tend to commit assaults, robberies and murders more frequently than rapes.[82]

In the 1950's the recidivism rate for rapists was thought to be fairly low, based on a New Jersey statistical study which defined recidivism as conviction of the same type of crime within two years' time.[83] This over-simplified definition of recidivism ignored two forms of recidivism peculiar to sex offenders: arrests for the same type of criminal activity that did not lead to a conviction and prohibited conduct which was never reported to the police. It also ignored the relationship between rape, assault and battery, mayhem, robbery and murder. The two

recidivism. More recent long term studies of convicted sex offenders demonstrated that rapists were fairly likely to be rearrested for other violent crimes, and infrequently for another rape.[84] Rapists have a 50% recidivism for all types of violent crimes, which is about the standard rate for violent criminals as a whole. Their recidivism rate is much closer to the average recidivism rate than was once supposed.[85] A rapist with at least one prior rape conviction is much more likely to be a recidivist than a first time offender.[86] Rapists confined to penitentiaries and to sex offender treatment centers who participated in self reported recidivism studies reported five times as many uncharged, unreported cases of rape or attempted rape than their official arrest records confirmed.[87] This fact suggests that the low visibility of sex offenders in general and rapists in particular obscures a high recidivism rate for rapists.[88]

The profile data on rapists and the self reported data from sex offenders does not prove that rapists are compulsively driven to rape to satisfy their lust. It is not an indication of deep seated psychological pathology. Those data show the typical rapist to be a vicious man who uses women in a horrible exaggeration of the stereotype of the tough male, to prove his physical prowess and control over others. A rapist's criminal history, like that of any

other violent criminal, may be relevant to circumstantial proof of guilt in a rape prosecution, but relevance alone does not solve the problem of admission of a rapist's criminal history in a rape prosecution.[89]

The defendants in Getz, Lannan and Tobin did not have a rapist's profile. Getz had no prior convictions for violent crime, although he did have a history of violent behavior towards his wives.[90] Lannan also had no history of violent behavior with his two pre-teen cousins. Tobin's nine year pursuit of "Jill" was essentially non-violent.

2. Pedophiles and Incestuous Persons.

a. Pedophiles.

Pedophiles come in two types: heterosexual and homosexual. Heterosexual pedophilia is much more common than homosexual pedophilia. While pedophiliacs are generally speaking more likely to be seriously mentally ill than rapists, few pedophiliacs are anything other than mildly disturbed men.[91] Pedophiliacs have about as high a rearrest rate as exhibitionists, and thus close to the national average for all criminal recidivism.[92] Child molesters are likely to be re arrested for child molesting again and again.[93] Child molesters come in two distinct types: "bad boys" and "dirty old men". The "bad boy" is an adolescent or a man in his early 20's who is unable to handle his own sexual changes and finds sexual gratification

handle his own sexual changes and finds sexual gratification in fondling little girls.[94] The "dirty old man" is likely to be between 30 and 40 years of age. He has a bad marriage and generally has a hard time relating to women above the age of puberty.[95] Consequently, he forms attachments to small children and fondles their genitals or breasts.[96] This type of pedophilia is often associated with game-playing strategies in which the attacker's regression to pre adolescent behavior is marked.[97]

The pedophiles who participated in the inmate population studies of recidivism reported many more pedophiliac acts than their arrest and conviction records showed.[98] The recidivism rate for these individuals may be quite high, and is certainly much higher than was originally thought.[99] Pedophiliacs with prior child molesting convictions are more likely to repeat the act than a first time offender.[100]

Turning to the defendants in our trilogy, all three men had a prior history of pedophilia. Getz' background, if the two prior instances of pedophilia were to be believed, indicated that he may have been a heterosexual pedophile.[101] Lannan, according to V.E.'s and T.W.'s testimony, had attempted to fondle or to have sexual intercourse with both young females repeatedly in 1988 and 1989.[102] Tobin committed at least five separate pedophiliac

acts on "Jill" from 1976 until Christmas, 1985.[103] If these three men were habitual heterosexual pedophiles, then the probability of their commission of future pedophiliac acts on pre-pubescent children was about 50%.

b. Incestuous Men.

An adult who satisfies his sexual urges with females who have passed puberty and not yet reached the age of consent may be a hebrephile (lover of teen agers). Hebrephiles may look to family members for satisfaction, or to other young women. All forms of hebrephiliac sexual activity were once considered statutory rape, but one of the results of the sexual revolution of the 1960's was the gradual disappearance of statutory rape from the list of sex offenses. New comprehensive sexual assault statutes adopted in many jurisdictions over the past twenty years use a classification scheme for prohibited sexual conduct between adults and adolescents, usually some form of sexual assault in a lesser degree than rape.[104] The number of prosecutions of teen aged boys for voluntary sexual activity with teen aged girls under 16 is negligible. Consequently, older recidivism studies on statutory rapists cannot be followed in modern literature. The pioneer New Jersey study done in the 1950's indicated that statutory rapists were unlikely to repeat their offense within two years of conviction.[105]

However, in recent years, incest and child sexual abuse

could theoretically occur between two adults, the type of incest which the courts see at this time is hebrephiliac incest. The victim is usually a teen aged daughter or step daughter. "Child sexual abuse" includes pedophilia, forcible rape of children of both sexes and hebrephilia. The new comprehensive child sexual abuse statutes are modeled on the guidelines put forth by the American Bar Association's Resource Center for Child Advocacy and Protection.[106] These statutes prescribe a detailed, structured series of prohibited acts and corresponding punishments for sexual intercourse between persons 18 or over and adolescents under 16, as well as punishment for sexual activity with anyone who is related within the prohibited degree of consanguinity.[107]

Child sexual abuse and incest have been featured in made for television motion pictures and in Sunday supplement literature since the early 1980's.[108] These accounts describe male sexual intercourse with children, stepchildren, sisters, nieces or cousins, as well as fondling and touching incidents characteristic of pedophilia. Clinical reports on child sexual abusers recount a large number of incidents of intercourse with teen aged boys and girls which went unreported and unpunished, suggesting that child abusers of this type may have a criminal history and recidivism rate closer to that of pedophiles than to rapists.[109]

Men who have voluntary sexual relationships with adolescents generally use their children, stepchildren, younger siblings or girl friend's children as victims. The psychological data on these individuals is similar to that of pedophiles.[110] They never grew up. The incestuous hebrephiliac male is a man in mid life with a poor sexual relationship with his adult sexual partner.[111] He may be a blood relative of the victim, a step parent or a live in boy friend.[112]. The abuser who makes use of his position as a clergyman, camp counselor or school teacher to obtain access to adolescents is a statistical rarity, although such cases receive much publicity.

Getz, Lannan and Tobin committed pedophiliac acts against family members within the second degree of consanguinity. Two committed or attempted to commit sexual intercourse with a close relative. Getz' daughter fit the description of the average incest victim. Getz allegedly committed a single act of hebrephiliac incest. He was charged with first degree rape, which forbade consensual sexual activity with any minor.[113] The record does not show that Getz' daughter resisted or refused her father's advances.[114] V.E. related three instances of consensual sexual intercourse with her cousin, including one incident occurring in her grandmother's house when Lannan and his wife were living with her grandparents.[115] Although Tobin was "Jill's" uncle, he never

attempted to have sexual intercourse with "Jill". His sexual misconduct was limited to frottage[116] and voyeurism.[117]

4. Exhibitionists.

According to the record, none of the three defendants in this trilogy had a history of exhibitionism.[118] Exhibitionists have a higher recidivism rate than any other sexual offenders.[119] Exhibitionists tend to be white males in mid-life, who have had considerable trouble in establishing conventional sexual relationships with women.[120] Most are unmarried or divorced.[121] Exhibitionists tend to be rearrested for exhibitionism if they have ever been arrested in the past.[122]

B. SIMILAR SEXUAL MISCONDUCT IS RELEVANT TO PROOF OF A SEX OFFENDER'S GUILT.

Summarizing the preceding discussion, enough empirical evidence on sex offenders' recidivism rates has been compiled to show that exhibitionists, pedophiles and adolescent child abusers have a 50% recidivism rate for sex offenses, which is much higher than earlier studies indicated. A pedophiliac's probability of future criminal sexual conduct can be predicted from known prior criminal sexual conduct. Therefore, a sex offender's similar sexual misconduct before or after the incident alleged in the indictment is circumstantial proof of

charged misconduct. Therefore, the trier of fact can draw a logical inference that the defendant was an habitual sex offender if the defendant had committed a sufficient number of similar sexual misconduct before.

However, a rapist's probability of future rape is less than 50%, but at or near 50% for all violent crimes, making a rapist's criminal history the basis for predicting future violent conduct not confined to sex offenses. The number of violent criminal acts committed by the defendant in a rape case is relevant to proof of guilt because it proves habitual use of violence. Although a rapist has about a 1 in 4 chance of rearrest for rape, he has a 1 in 2 chance of rearrest for violent crimes in general.[123] Since prior rapes or attempted rapes would prove the rapist's predisposition to violent conduct to get his way, then proof of a history of violent criminal activity would be circumstantially relevant to proof of guilt in a particular case.

However, the national recidivism rate for rearrest within three years for all types of criminals hovers around 65%.[124] Recidivism rates for violent criminals runs around 50%.[125] Therefore, the statistical probabilities of recidivism for burglars, check forgers and credit card thieves is higher than that of rapists, child molesters and exhibitionists. Rapists have a 35% reported recidivism rate. The reported recidivism rates for exhibitionists, pedophiles and adolescent child

abusers is about 30%, but the literature suggests that these kinds of criminal activity are very likely not to be reported and result in an arrest. It is highly likely that the recidivism rate for exhibitionists, pedophilies and adolescent child abusers, defined in terms of commission of similar misconduct within five years of an arrest for a sexual offense is at or above the national average for all violent criminals.

Turning to our three bellwether cases, the *Getz* court had these questions in mind when it dealt with Getz' contention that he was unfairly convicted on the basis of uncharged criminal misconduct. The *Lannan* court conceded the logical relevance of adverse character evidence on the issue of guilt or innocence. The *Lannan* court was less interested in the undue prejudice aroused by admission of similar sexual misbehavior than it was in restructuring the rules guiding admission of character evidence to conform to Rule 404(b).[126] The *Tobin* court, on the other hand, wanted to continue a specific, categorical exception to the character evidence rule for similar criminal misconduct in sex offender prosecutions. It was interested in harmonizing a pre-rules line of authority with the structural limitations of Rule 404(b).[127]

If prior criminal history is relevant to proof of habitual sexual misconduct, then the trier of fact should be able to deduce from proof of habitual behavior that the defendant behaved in accordance with his habits in the case at bar. This

judgment would be derived from a probabilistic chain of logic, which would go to proof of guilt from all the evidence beyond a reasonable doubt. If this hypothesis is correct, then why do the courts erect such formidable barriers to the admission of criminal character evidence as part of the state's case in chief? If admission of criminal character evidence is so poisonous that it cannot be used to establish a prima facie case of guilt, then why do the courts let down the bars in many specific instances, admitting incidents of uncharged sexual misconduct in sex offender cases, on the flimsiest pretexts?

This inquiry must shift from social science and extended case analysis to a review of the origin and development of the rules surrounding admission of uncharged sexual misconduct in sex offender cases.

III. THE DEVELOPMENT OF THE USE OF UNCHARGED SEXUAL MISCONDUCT EVIDENCE IN SEX OFFENDER CASES.

A. THE CHARACTER EVIDENCE RULE.

Since the days of the Glorious Revolution of 1688, English and American courts have refused to permit the prosecution to offer evidence of the defendant's bad moral character to prove the defendant committed the crime charged in the indictment.[128] If the defendant makes an issue of his or her good moral character, the prosecution may then rebut the

defendant's evidence of good moral character with evidence of the defendant's bad moral character.[129] The defendant may not prove his or her good character by proving specific good acts. The defendant may, however, prove good moral character by the defendant's own opinion testimony, or by calling reputational character witnesses. These witnesses are limited to testifying that they are familiar with the defendant's reputation in the community in which the defendant resides, and that the defendant's reputation for moral character is good.[130] The prosecution is then allowed to cross examine the defense character witness on the basis for that testimony. The prosecution may ask the character witness if the witness ever heard of any uncharged misconduct of the defendant, since it is relevant to the basis of the character witness' opinion.[131] The prosecution is also free to call its own reputational character witnesses who will testify that the defendant's reputation for moral character is bad.[132]

If the defendant chooses to testify, the defendant puts his or her credibility at issue, and the prosecution may cross examine the defendant about prior convictions for major felonies and crimes of deception,[133] or upon prior bad actions which did not result in conviction if the prior bad act reflects adversely on the defendant's credibility.[134]

Ordinarily, the prosecution cannot prove the defendant's prior similar uncharged misconduct in its case in chief or in

rebuttal. To do so would violate the rule against proof of the defendant's bad moral character. When the defendant makes an issue of his or her moral character the prosecution can prove his or her bad moral character only through reputational witnesses.[135] However, there are exceptions to the bar against specific similar acts evidence. If the defendant testifies in his or her own behalf, the prosecution may cross examine the defendant on relevant specific instances of uncharged misconduct showing the defendant's lack of truthfulness.[136] The defendant may be cross examined about prior criminal convictions, or independent proof of the defendant's criminal convictions can be submitted by the prosecution to show lack of truthfulness.[137] If the prosecution must prove some intermediate issue such as motive, intent, knowledge, plan or design, the identity of the accused or other related sub issues, the courts allow the prosecution to use specific instances of the defendant's uncharged misconduct to do so, if the probative value of these instances of uncharged misconduct is not substantially outweighed by the inevitable prejudice to the defendant arising from proving the defendant's bad moral character to the jury.[138] The prosecution could also prove the defendant's habitual criminal activity by submitting proof of sufficient similar instances of misconduct to establish a criminal habit.[139] The ritual for admission of uncharged criminal misconduct set out above has

been codified by Rules 404, 405, 406, 608 and 609 of the 1973 edition of the Uniform Rules of Evidence.

The courts of the thirty seven jurisdictions that have adopted the Uniform Rules of Evidence[140] liberally interpret Uniform Rules 404 and 405 to permit admission of prior and later uncharged sexual misconduct with the same victim or other victims against an alleged sex offender. California and New Jersey, which follow similar evidence codes adopted before the 1973 edition of the Uniform Rules of Evidence, also permit admission of uncharged sexual misconduct.[141] The remaining twenty-two states which follow a common law version of the rules expounded in Rules 404 and 405 are likewise willing to permit the prosecution to prove uncharged sexual misconduct against a sex offender.[142] A plurality of states also use a special exception to the character evidence rule just for sex offenders called the "lustful disposition" rule.[143] The courts treat a sex offender's propensity to commit sex crimes as a significant issue in a sex crime case.

There are buried constitutional problems caused by unannounced evidence of similar sexual misconduct. The major commentators calmly accept the use of uncharged sex offenses against persons charged with rape, statutory rape, carnal knowledge, sodomy and indecent liberties as appropriate.[144] Although the notice clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment may be violated

every time the prosecution raises an unannounced case of uncharged misconduct, there are no shock waves of protest by constitutional scholars.[145]

A new kind of criminal trial process is evolving through manipulation of the principles of evidence. The traditional model for Anglo-American criminal trials was accusative. The prosecution was obliged to prove a specific charge under the accusative model, and the judge and jury were equally obliged to acquit the defendant if the prosecution failed to prove the defendant committed a forbidden act on the day charged in the indictment. If the prosecution proved the defendant committed a similar act on another day, the defendant was acquitted because of a fatal variance between indictment and proof. Under the new dispensation, the prosecution is still required to indict the defendant and elect a day and time for commission of the prohibited act, but the prosecution may prove that the defendant is predisposed to commit that type of crime by proving the defendant did similar bad acts on another occasion. Providing the demands of the Bill of Rights for due notice of pending charges and a fair trial can be satisfied, the new dispensation in criminal justice may be accommodated by the Constitution. In the future, criminal defense counsel will have to come to court prepared to defend their client against accusations of similar, uncharged criminal activity, as well as the charges stated in the indictment.

The men who wrote the Constitution and the Bill of Rights feared royal tyranny more than internal criminal aggression. The memories of royal abuse of judicial process through the Court of Star Chamber and the Courts of Vice Admiralty caused them to limit the growth of inquisitorial criminal justice by a constitutional strait jacket. These courts, which followed continental models of criminal justice administration, were very effective in sending criminals to the gibbet.

In the late 18th century, the thirteen original colonies did not have serious problems with criminal aggression. The colonists were troubled by royal tyranny, enforced by royal judges who held deep seated class and religious prejudices against the majority of the colonists. Two hundred years later, the United States has the highest violent crime rate of any western democracy.[146] Criminal aggression against innocent victims is one of the top ten social problems which agitate the public.[147] One in four American family units were crime victims during 1981.[148] Half of the American public is afraid to walk alone at night in their own neighborhood.[149] Americans are more likely to be victims of crime than to be injured in an auto accident.[150] Criminal aggression control absorbs a disproportionate amount of governmental time and money. The prison system is filled with an inordinate amount of repeat offenders.[151] The state is unable to protect citizens from criminal aggression.

Uncontrollable criminal aggression is a formidable threat to the constitutional liberties of all U.S. citizens. The Bill of Rights was designed to restrain executive and judicial tyranny. It made no provision to restrain criminal tyranny. The U.S. Constitution relies on the states to exercise their inherent authority to provide for the health, welfare and safety of their citizens through criminal law and procedure, vigorous police work and efficient courts. However, the states cannot provide effective police protection for their citizens. As the Indiana Supreme Court pointed out in *Lannan*, there is a universal desire to give the victim of criminal violence a greater opportunity to win in court. This desire is sustained by the need to provide freedom from criminal aggression as a condition of a stable social order. Without this freedom, the liberties set forth in the Bill of Rights are so much paper.

At the same time, the courts have to be exceptionally careful not to turn the desire to even the odds between victim and defendant into a crusade against social deviants. Americans have a tendency to launch crusades against undesirable social activity. The outcry against sex offenders from television and newspaper commentators the past decade has elements of a crusade against rapists and child molesters. The opening salvo of an American crusade is usually widespread publicity pointing out the impending end of the world if a particular vice is not immediately eradicated. The next round

consists of legislation making that kind of activity criminal. The third round consists of aggressive prosecution of offenders before tribunals which alter or suspend basic constitutional guaranties of due process in order to increase the number of convictions.

Ultimately, the public tires of the crusade and goes on to a new diversion, leaving the precedential ghost of the crusade behind in "exceptions" to the rules of evidence.

During a crusade, the historical accusatorial process of proof in criminal cases is unconsciously suspended so that inquisitorial methods of proof can be used. Usually, the first rule of evidence to be suspended is the limit on proof of the defendant's bad moral character.[152] Consequently, the courts have a duty to protect the liberty interests enumerated in the Bill of Rights against encroachment or destruction brought on by a commendable effort to stamp out a social abuse.

This double effect raises some serious questions. If inquisitorial justice is deemed expedient during a crusade against crime, why is inquisitorial justice not justified at all times? The Bill of Rights does not legislate an accusative system of criminal justice. If one component of inquisitorial justice is proof of the defendant's habitual criminal activity, then the trier of fact should receive evidence of the defendant's similar habitual criminal conduct, which is circumstantial proof of the crime charged in the

indictment. If the trier of fact does not evaluate the defendant's criminal habit, it may acquit the defendant unjustly, and turn an habitual offender loose to prey on the public. This result would impair each citizen's right to be free from criminal aggression.

In the past decade, a public outcry against rape and child molesting has produced new legislation against sex offenders, and aggressive prosecution of rapists and child molesters. The judicial treatment of evidence brought up in sex crime prosecutions shows a consistent pattern.[153] The defendant's motions in limine to exclude evidence of prior criminal convictions to permit the defendant to testify without cross examination on prior similar convictions are denied. The court relaxes the bar to proof of the defendant's bad moral character by specific bad acts to permit the prosecution to bring up the defendant's similar uncharged acts of misconduct in its case in chief. Few convictions are overturned on appeal because the court allowed the prosecution too much leeway in proving the defendant's uncharged misconduct.[154] Over the years, sex offenders have been the objects of numerous crusades of this type.

IV. DEVELOPMENT OF USE OF UNCHARGED MISCONDUCT AGAINST SEX OFFENDERS.

A. COMMON LAW.

The common law defined rape,[155] bigamy[156] and sodomy[157] as felonies without benefit of clergy. Adultery, fornication, incest and other sexual misconduct were matters of confession and subject to the ecclesiastical courts, not the secular courts.[158] The secular courts also had jurisdiction to try cases of abduction of an heiress[159] and after 1574, of carnal knowledge of a female under the age of ten.[160]

The English were skeptical about accusations of rape or carnal knowledge, preferring to protect the defendant from an unjust conviction for a crime which merited the death penalty, and to push some or all of the blame for the assault off on the victim.[161] The common law required that a rape victim prove she yielded to her attacker under force, either through proof of actual violence worked upon her, or through proof of duress.[162] English law allowed the defendant to prove the victim's consent to sexual intercourse as a complete defense to the crime.[163] Sir Matthew Hale described rape as an "accusation easily made, hard to prove and difficult to defend."[164] The victim's failure to make an immediate outcry and search for her attacker weighed against her and in favor of acquittal.[165]

The Continental view, however, was much different. The Roman law forbade ravishment of any woman of any age.[166] The male involved in sexual activity with a female was presumed guilty of ravishment, and punished accordingly, unless he

cleared himself. The woman's consent was immaterial. Thus, ravishment was a status offense on the Continent. Men were simply not allowed to have sexual relations with women outside of marriage, unless the women were concubines or prostitutes.[167]

The English courts placed great emphasis on corroboration. Corroboration could be had by proof of an immediate hue and cry after the sex offender,[168] by testimony of women who had examined the victim, but not by proof of other sexual assaults pressed by the defendant on the victim.

In sodomy prosecutions, the English abhorrence of buggery led to guarded discussions of the elements of proof of sodomy. Sir William Blackstone, following Sir Matthew Hale, warned the reader against accepting uncorroborated accusations of sodomy.[169]

The English prosecuted very few men for rape, carnal knowledge and sodomy. Few of these men were convicted, and even fewer still were put to death for their sexual crimes.[170] Even though convicted rapists and sodomizers were not allowed benefit of clergy, the King pardoned a great number of offenders or commuted their sentences to transportation.[171] The English attitude toward rape, carnal knowledge and sodomy simply reflected the prejudices of a male dominated society based on class structure. Eighteenth century English literature scoffed at the criminality attached to all

three crimes. Authors such as Fielding presented a favorable portrait of a lusty gentleman who forced himself upon women, particularly of a lower social class.[172] Defoe[173] and Smollett[174] portrayed women who were involved in sexual affairs with men as provocative instigators who invited men to engage in aggressive sexual romps with them.[175]

English laws and English attitudes toward male sex offenders crossed the Atlantic and became part of American colonial law. The colonies dutifully outlawed rape, carnal knowledge and sodomy.[176] In addition, because the English ecclesiastical courts had no jurisdiction in the colonies, some of the colonies passed statutes making crimes out of incest, fornication or adultery.[177] The courts of oyer and terminer and general gaol delivery had jurisdiction over all these sex offenses in most of the colonies.[178] When weighty matters of criminal law and procedure came before these courts, the justices broke out their *Blackstone's Commentaries* or Sir Matthew Hale's *Pleas of the Crown* for advice.

However, the combination of ecclesiastical and common law in the colonies imported an element of criminal procedure and evidence into colonial criminal law not present in the mother country. Under ecclesiastical law, adultery was a status offense which could consist of either an isolated coupling or a continuous liaison, e.g., living in a state of adultery.[179] When the ecclesiastical courts punished men and women for

adultery, it was relevant to prove that they had lived together for some time, and specific instances of sexual activity between the couple were admissible to show the continuing relationship.[180] The same dual status applied to incest.[181] As a result, when the American courts began to punish people for criminal adultery they looked back to ecclesiastical precedent, and allowed proof of uncharged sexual activity between the parties to show their lustful disposition toward one another, and thus prove their sexual misconduct.[182] The Treason Act of 1695 never applied to canon law offenses tried before ecclesiastical courts.

Early American incest prosecutions permitted proof of sexual misconduct between the parties to prove an ongoing relationship between them.[183] By the mid nineteenth century, the rules of evidence about proof of incest were so well settled that a Michigan court could hardly believe that a defendant in an incest case would appeal his conviction based on the admission of several acts of incest between himself and his victim not charged in the indictment.[184]

By the mid nineteenth century, societal attitudes toward women and their sexual role had moved a light year from that of the eighteenth century. Women had been placed upon a literary pedestal where they would remain until the twentieth century. Instead of dwelling on the literary picture of women as seducers and pleasure givers, the nineteenth century wallowed

in romanticism, which alternatively depicted women as weak and spineless victims of men and as creatures of unapproachable virtue, refinement and sensitivity.[185] Sir Matthew Hale's admonition on rape was lost in the popular wave of literary depiction of Victorian women being ravished by villains who deserved the worst sort of punishment. Scientific criminology was also discovered during the mid nineteenth century, generating theories about criminal character and criminal disposition which marvelously suited prosecutors in bringing sex offenders to the bar of justice.[186]

C. THE LUSTFUL DISPOSITION RULE.

At the same time as romanticism changed the literary and popular view of women, women were trying to change their legal and social status. The mid-nineteenth century feminist movement initiated widespread legislative changes in women's legal status. The feminists made allies of the temperance societies in a joint demand for legislation protecting young girls from male sexual advances which they were powerless to resist. In so doing, they reflected the cultural view of women as virtuous maidens to be protected from the grasping hands of sex fiends. Common law carnal knowledge was replaced by the new status offense of statutory rape, which was defined as engaging in sexual intercourse with any female aged 16 or under, without regard to consent.[187]

Statutory rapists were aggressively prosecuted. The

courts began to expand admission of other sexual misconduct in sex offender prosecutions from the old ecclesiastical offenses of adultery and incest to statutory rape[188] and carnal knowledge.[189] The courts also created a special exception to the character evidence rule just for sex offenders called the "lustful disposition rule".[190]

According to the lustful disposition rule, the prosecution in its case in chief could prove the defendant's lustful disposition to commit sex crimes by proof of prior or later instances of sexual misconduct with the same victim or a different victim.[191] The prosecution could do so, whether or not the defendant made an issue of his or her good moral character. The jury was free to draw an inference from proof of the defendant's other sexual misconduct, that the defendant committed the act of sexual misconduct stated in the indictment.[192] The court's own notion of relevance and fair play was the only outside limitation on the use of uncharged sexual misconduct. These specific instances of sexual misconduct did not have to be included in the indictment, and the defendant was entitled to no advance warning that he would be prosecuted by innuendo on those other uncharged acts.[193] The lustful disposition exception to the character evidence rule grew up alongside the uncharged misconduct exception to the character evidence rule. At times the courts used both rationales to admit or to exclude uncharged sexual misconduct

evidence. The confusion which led the *Getz* court to equate "lustful disposition" with "motive" is understandable. In order to untangle the knots, the use of uncharged sexual misconduct evidence in statutory rape, rape, incest, adultery and sodomy cases must be separately studied and analyzed.

B. UNCHARGED SEXUAL MISCONDUCT EVIDENCE FROM THE STANDPOINT OF PARTICULAR SEX OFFENSES.

1. Statutory Rape.

Statutory rape prosecutions in the last half of the nineteenth century resulted in two lines of cases. The first line favored strict compliance with the character evidence rule. Unless the defendant denied committing the criminal sexual act and offered good moral character evidence, the prosecution could not show that the defendant had sexual relations with the victim at other times.[194] These cases held that an accused is not to be tried on any offense other than the one stated in the indictment. Proof of other criminal sexual activity with the victim would violate that rule, and was therefore inadmissible.[195] Consequently, the prosecution could not use uncharged sexual misconduct evidence against the defendant. Alabama, Idaho and Illinois adopted this view before World War I.[196] California, the District of Columbia and New Jersey courts issued conflicting decisions which in part restricted and in part favored the use of uncharged misconduct evidence in statutory rape cases.[197]

However, the majority of jurisdictions followed ecclesiastical precedent and admitted other sexual activity between the victim and the defendant in statutory rape cases to prove the defendant's guilt by showing his predisposition to commit sex offenses.[198] The courts accomplished this result in several ways. A number of courts used the "lustful disposition" exception to the character evidence rule. These courts held that sex offenders were more likely than other criminals to repeat their sex crimes, because of their peculiar criminal personality.[199] Consequently, a criminal history of deviant sexual activities was a much stronger predictor of criminal behavior of the same type than in other kinds of crimes.[200] Therefore, the courts held that the prosecution could offer evidence of prior sexual misconduct between the defendant and the victim in its case in chief because it was highly relevant to proof of later misconduct at the time of the offense charged in the indictment.[201] The courts said that prior sexual activity between defendant and victim was relevant to show a "lustful disposition" to commit sex crimes and therefore admissible.[202]

There were variations on this theme. One jurisdiction, fearing the consequences of such a blatant acknowledgement of trial by propensity, allowed the prosecution to admit uncharged sexual misconduct to prove "a purpose to commit the offense charged."[203] Several jurisdictions decided that uncharged

sexual misconduct could be admitted to "corroborate" the victim's story.[204] To corroborate an event is to confirm the event. The defendant's uncharged sexual misconduct confirmed the defendant's guilt precisely because it proved the defendant's predisposition to satisfy his sexual desires with the victim. The courts which accepted corroboration as sufficient reason for admitting uncharged sexual misconduct evidently viewed the victim's complaint of a second sexual encounter with the defendant as corroboration through proof of the defendant's lust for the victim.[205]

By the roaring 20's, twenty-four American jurisdictions admitted evidence of prior sexual misconduct between defendant and victim in statutory rape cases to prove the defendant's lustful disposition.[206] Some states, such as Texas, were unable to make up their minds whether to adopt a lustful disposition exception to the character evidence rule. *Battles v. State*[207] ratified proof of uncharged sexual misconduct between defendant and victim to show the defendant's lustful disposition, overruling a dozen earlier cases which excluded such evidence.[208] Fourteen years later, the same court excluded evidence of prior sexual misconduct between victim and defendant without reference to *Battles*, on the ground that such evidence merely went to prove the defendant's propensity to satisfy his sexual urge with the victim, an impermissible ground for admission of such evidence.[209] Idaho and New

Jersey also had decisions going both ways on admission of uncharged sexual misconduct to prove the defendant's lustful disposition.[210]

New York's early struggle with the lustful disposition rule reflects the general development of this exception to the character evidence rule. Until the end of the nineteenth century, admission of prior sexual misconduct between victim and defendant in second degree rape (statutory rape) cases was not raised on appeal.[211] In 1887, the Court of Appeals determined that evidence of a prior attempted sexual assault upon the victim by the defendant was admissible to prove the defendant had the guilty intent to commit rape upon the victim at a later date.[212] In 1892, The Appellate Division, First Department, affirmed the conviction of a step father who had ravished his 15 year old epileptic step daughter for two years.[213] The court held that second degree rape involved the adulterous disposition of both parties, making their disposition to have sexual relations material to proof of the defendant's guilt.[214] The court found that the two year pattern of sexual relationship between the defendant and his step daughter corroborated her story about the offense for which the defendant was convicted.[215]

However, from 1890 to 1914, the courts rejected proof of later sexual relations between victim and defendant in second degree rape cases.[216] The Court of Appeals overruled these

cases in *People v. Thompson*.[217] Although the court had held later sexual relations inadmissible in *People v. Flaherty*[218], it dismissed *Flaherty* as a case of failure to elect the proper charge among several possible incidents. The Court of Appeals squarely held that both prior and subsequent sexual acts between the parties in both first and second degree rape were admissible in the trial of a single instance of rape to corroborate the victim's testimony and to show the defendant's lewd disposition.[219]

In 1926, an Asian named Hop Sing was charged with second degree rape of a 13 year old. The 13 year old went to Hop's laundry with a 12½ year old girl friend. Hop Sing also had sexual intercourse with the other child that day. At trial, evidence of both sexual encounters was admitted. The jury returned a conviction and Hop Sing appealed, claiming that any sexual activity with another female was irrelevant to the crime charged.[220] The Appellate Division disagreed and affirmed on the ground that the second sexual encounter was so interwoven with the first offense, for which he stood trial, that the two stories could not be told separately.[221]

By the 1930's New York allowed proof of prior and subsequent sexual activities between the defendant and his victim, or between the defendant and another victim, closely related in time to the time of the offense charged.

At the same time, New York was developing the general

theory of the uncharged misconduct exception to the character evidence rule. In *People v. Molineux*,[222] the Court of Appeals laid out the generally accepted structure for allowing the prosecution to prove specific instances of uncharged misconduct in its case in chief, despite the character evidence rule. If there was a substantial issue in the case as to the defendant's criminal intent, guilty knowledge, motive, criminal plan or design or identity of the perpetrator, or if the defendant's criminal activity charged in the indictment was so bound up with uncharged criminal misconduct occurring at the same time, the prosecution could offer evidence of specific instances of uncharged criminal misconduct to prove the intermediate issue, unless the probative value was counterbalanced by excessive prejudice to the defendant.[223] This rule later became the core of Rule 55 of the 1952 edition and Rule 404 of the 1973 edition of the Uniform Rules of Evidence.

Consequently, uncharged sexual misconduct evidence could be admitted under the *Molineux* rule when it was relevant to proving intent, knowledge, identity of the perpetrator or a criminal plan or design. The courts employed the *Molineux* rule to admit sexual misconduct evidence at the same time they used the lustful disposition rule for the same purpose, leading to confusion among the courts on the appropriate rationale for admitting this type of evidence.[224]

When a state court used the *Molineux* doctrine to review

admission of uncharged sexual misconduct evidence, it restricted admission of other sexual offense evidence in statutory rape cases to prior instances of forbidden sexual activity between the victim and defendant.[225] Sexual misconduct with the victim committed after the act charged in the indictment was usually,[226] but not always[227] excluded. The defendant's similar sexual activity with other victims was usually but not always excluded.[228] Intent, plan or design or identity of the accused were the *Molineux* categories most frequently used to justify admission of uncharged sexual misconduct.[229]

On the other hand, when a state court used the lustful disposition rule to review admission of uncharged sexual misconduct at trial, it tended to sustain admission of any prior[230] or later[231] sexual activity between victim and defendant. The courts rationalized this free use of uncharged sexual misconduct as "tending to shed light upon the relationship between the defendant and the complaining witness",[232] or to "corroborate the complaining witness' testimony".[233]

Since the courts frequently used both rationales to justify decisions sustaining admission of uncharged sexual misconduct in statutory rape cases, there was no consensus on the basis for admitting or excluding uncharged sexual misconduct evidence. No one could expect the cases to produce

a consistent guideline for admission or exclusion of uncharged sexual misconduct evidence.

The courts were also split on admission of other kinds of sexual activities between victim and defendant. A number of courts admitted any prior sexually oriented activities between victim and defendant, including fondling and caressing[234] and sodomy.[235] A few courts admitted evidence showing the defendant aided and abetted a third party's defiling of the same victim.[236] On the other hand, some courts excluded dissimilar sexual contact between victim and defendant on grounds of lack of relevance.[237]

However, the great division between the states had to do with admission of uncharged sexual misconduct between the defendant and other victims below the age of consent. A minority of reported decisions favored admission of any prior and later uncharged sexual misconduct with other victims, if not too remote in time, either to demonstrate the defendant's lustful disposition,[238] or to show a criminal plan or design.[239] In a few cases, such as *People v. Hop Sing*,[240] the court thought that the tale of a second victim who engaged in forbidden sexual activities with the defendant shortly after the first victim's defilement was so interwoven with the first victim's story that one could not be related without telling the other.[241] Some states, such as California, had cases going both ways, as the inferior appellate courts could not

decide on the proper way to limit admission of uncharged sexual misconduct.[242] One might expect a state using the lustful disposition rule to be more lenient on admission of similar sexual activities with different victims, but Idaho followed the lustful disposition rule when it excluded evidence of the defendant's prior sexual activities with the victim's sister below the age of consent as "too remote".[243] Missouri, a state which more or less adhered to the corroboration version of the lustful disposition rule and to the *Molineux* rule on uncharged misconduct, allowed proof of the defendant's misconduct with other victims to corroborate the victim's story, only after the defendant had testified that he did not have sex relations with the victim.[244]

2. Rape.

The courts were also busy between 1880 and 1930 fashioning a rule for admitting evidence of the defendant's uncharged sexual assaults in rape cases. The courts uniformly approved of admission of other attempted rapes or rapes of the victim perpetrated by the defendant when the defendant was charged with assault with intent to rape.[245] This represented a moderate use of the *Molineux* rule exception to the character evidence rule, since assault with attempt to rape required the prosecution to prove specific intent in its case in chief.[246]

Forcible rape was not a status offense like statutory rape. Some courts acknowledged that rape did not permit the

prosecution to prove a continuous relationship between the parties to corroborate their lustful disposition.[247] If so, then prior rapes or attempted rapes perpetrated by the defendant upon the complaining witness were irrelevant.[248]

The majority of U.S. jurisdictions admitted instances of prior rape or attempted rape between the victim and the defendant nonetheless. The courts often cited precedent derived from attempted rape and statutory rape cases to allow the prosecution to use prior rape evidence to show either lustful disposition[249] or a plan or design to rape[250] when the defendant raised no issue challenging mens rea. The elements of rape do not require proof of specific intent. Consequently, neither the defendant's motive nor any criminal plan or design to satisfy lust by sexual assault would have been relevant to proving guilt in such cases. At times, when the identity of the attacker was not at issue, and the defendant did not raise consent as an affirmative defense, the courts excluded evidence of prior rapes perpetrated on the victim by the defendant as irrelevant to proof of later guilt.[251]

However, when the attacker's identity was at issue, the courts were willing to admit evidence of prior rapes perpetrated on the victim by the defendant[252] or upon other women,[253] providing the modus operandi of the attacker was characterized as a "signature" sufficient to identify the

attacker in the case at bar as the defendant.[254] Many of these "signature" crimes were very commonplace assaults with practically no distinctive characteristics.[255]

The courts also admitted later sexual assaults on the victim if the later assault was characterized as part of the "res gestae".[256] Some courts excluded later assaults, if too remote.[257] Just about every case which authorized admission of prior sexual assaults committed by the defendant could be paired with a case from another jurisdiction on like facts which excluded the same evidence.[258]

A majority of courts continued to admit evidence of the defendant's other sexual assaults to show the defendant's lustful disposition to rape women.[259] These cases seemed to accept the theory that rape was committed by sexual psychopaths.[260] A few jurisdictions permitted proof of the defendant's other sexual assaults to corroborate the victim's account of the assault.[261] The theory behind this kind of corroboration is that the complaining witness could show lack of consent by proving the defendant had ravished her at other times, by multiplying her accusations. In some instances, the courts permitted proof of the defendant's assaults on other victims to corroborate the victim's story on the same rationale.[262]

The courts prior to World War II could not agree on a threshold rule permitting admission of uncharged sexual

misconduct. The courts had no coherent doctrine describing the foundation for admission of uncharged sexual misconduct, taking into account the time interval between the crime charged in the indictment and the uncharged incident. The courts were unable to articulate the degree of similarity required between the uncharged misconduct and the facts of the case at bar. The courts had no consistent rule on the quantum of proof necessary to establish the facts of any uncharged sexual misconduct. Most of the courts failed to note the dissimilarity between the elements of rape and those of such status crimes as adultery, fornication, incest and statutory rape. The courts frequently relied on precedent derived from status crimes such as statutory rape to admit uncharged sexual misconduct in rape cases.[263]

3. Incest, Adultery and Sodomy and the Defendant's Other Sexual Misconduct.

Incest cases generally followed the pattern of statutory rape cases. Prior incestuous acts between victim and perpetrator were admitted to show lustful disposition of the parties.[264] In most cases, incestuous acts between the defendant and other victims was excluded, unless the court felt that there was some incestuous design or plan at issue.[265] The handful of adultery prosecutions used uncharged sexual misconduct evidence in the same manner as in incest cases. Prior sexual activity between the parties was

admissible to show either lustful disposition[266] or a plan or design of adultery.[267]

Sodomy prosecutions were also treated as if sodomy was a status offense. The defendant's other sodomies committed on the same victim were held to be evidence of a lustful disposition[268] or a plan or design to commit sodomy.[269] Identity of the accused seems not to have been an issue in older sodomy cases.[270]

The widespread use of uncharged misconduct evidence in sex offender cases corresponded to deep seated public attitudes about sexual behavior. The courts followed the prevailing consensus about women's role in sexual relations. The ideal of feminine chastity had to be defended by effective prosecution of any man who took away a woman's virtue. Sodomists were depraved perverts. Rapists were depraved perverts. In 1937, the Gallup Poll asked Americans whether the whipping post should be reinstituted. Thirty nine percent of those polled favored its use principally for sex offenders.[271] This poll reflected the punitive, judgmental attitude toward antisocial sexual activity held by most Americans prior to World War II.

V. THE MODERN RATIONALE FOR ADMISSION OF EVIDENCE OF UNCHARGED SEXUAL MISCONDUCT.

A. THE REVOLUTIONS IN PUBLIC MORAL OPINION ABOUT SEXUAL CONDUCT.

Since the end of World War II, the United States has passed through a spiritual ordeal which altered the public attitude toward sexual activity. The great consensus about protecting women's virtue which endured for a century or more crumbled. Two books provide insight into the depth of these changes in American law and society: *Sex and the Law* and *The Closing of the American Mind.*

In 1951, when Judge Morris Ploscowe wrote *Sex and the Law*, most states forbade sodomy with any partner, male or female.[272] Most states had statutes making a crime out of fornication and adultery, although prosecutions under these statutes were exceedingly rare.[273] In 1951, a 16 year old boy could be sentenced to a long prison term for having sexual relations with a 15 year old girl.[274] Rape was a capital offense in two thirds of the states. Ploscowe's impassioned plea for decriminalization of sodomy between consenting adults caused clerics to denounce his book as immoral. His recommendations that adultery and fornication be struck from the statute books were denounced.

Almost everything Judge Ploscowe suggested in 1951 is commonplace in 1992. In many states, sodomy between consenting adults is no longer a crime.[275] Adultery and fornication have been decriminalized altogether in twenty eight states.[276] In twenty two states, a 16 year old boy cannot be imprisoned for sexual activity with a 15 year old girl.

Comprehensive sexual assault statutes have decriminalized statutory rape between partners over 12, unless there was a three or four years age differential between the partners.[277]

However, some of Judge Ploscowe's thinking seems pretty old fashioned. His easy going male chauvinist attitude toward rapists and child molesters does not abide well after public disclosure of the menace of male rape and child molesting since the mid 1970's. Ploscowe's suggestion that rape victims' stories shouldn't be accepted at face value sounds suspiciously like Sir Matthew Hale's famous denunciation of rape victims. Ploscowe almost ignored child molesting, as if it were not a serious, pervasive social problem. Ploscowe was a precursor of the 1960's student rebels who demanded greater sexual freedom on campus.

Allan Bloom's thesis in *The Closing of the American Mind* is that the nation has passed through a revolution of sexual permissiveness followed by a new sexual puritanism which was the product of feminism.[278] *The Closing of the American Mind* has been one of the most challenging social and intellectual critiques of the intellectual foundations for life in the 1980's. Bloom suggests that the two sexual revolutions of the past two decades have sabotaged the underpinnings of family life and encouraged hedonistic devotion to self expression at the expense of the common welfare of families. He believes that the double revolutions of permissiveness and

puritanism were the product of a major event in American intellectual history, the scrapping of Enlightenment rationalism and its replacement by Max Weber's sociology and Nietzche's antirational philosophy.[279] If Bloom is correct, then the underpinning upon which the old consensus about the ideal of female modesty and virtue which supported the admission of uncharged sexual misconduct in sex offender cases has been replaced by a new ideal. Bloom does not describe the shape of the new view of sexuality and women. The best one can do is to sketch the portrait of women as equals in the work place who are the rulers of their own bodies, who are also protectors of children from the invasive sexual incursions of unreconstructed males.

Public opinion polls confirm Bloom's prediction of a revolution in the American view of sexuality. In 1968, 68% of all respondents told the Gallup Poll that extramarital sex was wrong. By 1985, the number of respondents condemning extramarital sex had shrunk to 39%.[280] Despite a recent increase in those disapproving of premarital sex apparently due to the AIDS scare, the majority of Americans, classified by sex, age, race or religious affiliation no longer condemn fornication and adultery.[281] Forty four percent of all Americans favor the legalization of sodomy between consenting adults.[282] Extra marital sexual activity has become common practice among most middle class Americans. Such great changes

in public opinion on sexual conduct reflect a major shift in public morality. People are free to engage in any form of voluntary sexual activity they choose to do, so long as everyone participating in that sexual conduct does so freely, willingly, and voluntarily. The key word in this shift is voluntariness.

The feminist revolution can be verified from similar public opinion data. When women were polled regarding their ideal personal lifestyle in 1986, 43% responded that they wished to be married, have children and keep a full time job. Thirty per cent preferred marriage and children without outside work, a significant decline since 1975. Fifty eight percent of all women polled indicated that they expected to hold a full time job in their ideal life style. In 1975, 50% of all respondents wanted to be married and not to hold a full time job.[283] The Gallup Polls also indicated a heightened awareness of child abuse in the 1980's. Fifteen percent of adult Americans reported that they knew of at least one serious episode of child abuse occurring in the neighborhood or among friends in 1982.[284] It is difficult to summarize the public opinion poll results on feminist issues, because the polls have not asked all the right questions. The key to understanding these results seems to be that women want to be independent, and to be able to make voluntary choices with respect to career, marriage, family and other activities. The public

approves of such freedom of choice. The Gallup polls have not asked about women's attitude toward sexual activity. There are no available poll results on the issue of sexism in the work place or sexual harassment.

The three decisions that form the core of this article represent three approaches to the social policy behind the sexual revolutions. The *Getz* court, in an exceptionally well crafted opinion, took a conservative course. It confined admission of uncharged sexual misconduct to a limited number of situations matching the examples listed in Rule 404(b). The *Getz* court did not accept the principle of inquisitorial proof in sex offender cases. At the same time, Delaware prosecutors would be permitted to introduce uncharged misconduct evidence which would be taken as proof of predisposition to commit criminal activity by the jury, although ostensibly offered under express limitations confining the jury's use of uncharged misconduct evidence to the traditional *Molineux* list of exceptions.[285] The *Getz* court achieved a temporary truce between inquisitorial proof and traditional Anglo-Saxon accusative proof.

The *Lannan* court was much less sure of itself. The court wanted to integrate its long-standing depraved sexual instinct exception to the common law character evidence rule in sex offender cases with its own case law following the *Molineux* rule. It chose to do this by abolishing the depraved sexual

instinct exception by adopting Rule 404(b) of the Federal Rules of Evidence as the only guideline for admitting uncharged misconduct evidence. At the same time the court embraced Rule 404(b), it treated Rule 404(b) as an enumeration of exceptions to the character evidence rule, as if it were the common law *Molineux* rule. The court added to the enumerated "exceptions", a "res gestae" exception that does not appear in the text of Rule 404(b).[286] Federal Rule 404(b), however, was expressly designed to do away with a list of specific exceptions to the general character evidence rule, in order to prove a non-character reason for admitting uncharged misconduct evidence.[287]

Finally, the *Tobin* court wanted to continue its long-standing common law treatment of character evidence, even though it had adopted the Uniform Rules of Evidence, and imported wholesale the inclusionary view of Rule 404(b) favored by the commentators. It wanted to use Rule 404(b) as a laundry list of pigeonhole exceptions to a general exclusionary character evidence rule, and provide for a further special exception for uncharged misconduct evidence in sex offender cases. The *Tobin* court did not see the inconsistencies between the exclusionary and inclusionary versions of the character evidence rule and the treatment of uncharged misconduct evidence.

It is time to review the current state of the law of

uncharged misconduct evidence as applied to sex offender cases.

The United States and thirty six other jurisdictions have adopted the 1973 edition of the Uniform Rules of Evidence.[288] Uniform Rules 404, 405, 406, 608 and 609 have supplanted the common law basis for admission of other sexual misconduct evidence in sex offender cases. Two states follow their own codified rules of evidence which differ somewhat from the Uniform Rules, but contain provisions essentially similar to Rule 404 of the Uniform Rules of Evidence.[289] The remainder have adopted the *Molineux* rule as a matter of case law.[290] A plurality of jurisdictions admit uncharged sexual misconduct evidence under either the lustful disposition exception to the character evidence rule or under the *Molineux* rule, without distinguishing the basis for choice of one rule over another.[291] A few states confine admission of uncharged sexual misconduct to the *Molineux* rule list of exceptions to the character evidence rule.[292] Three states have repudiated the lustful disposition rule by decision.[293]

B. MODERN LUSTFUL DISPOSITION RULE JURISDICTIONS: GEORGIA, ARKANSAS, ARIZONA.

Georgia, Arkansas and twenty six other states[294] admit sexual misconduct evidence via the common law lustful disposition rule, although they also employ the *Molineux* rule for the same purpose. Georgia practice is representative of those states that still recognize the lustful disposition

exception to the character evidence rule. Georgia admits evidence of an offender's other sexual misconduct to show the offender's lustful disposition in statutory rape,[295] sodomy,[296] indecent liberties,[297] incest,[298] and child molesting[299] cases. The Georgia courts admit evidence of other similar sexual misconduct either to show the defendant's "bent of mind"[300] or the accused's "lustful disposition".[301] Georgia also follows the common law *Molineux* rule, and occasionally admits evidence of the defendant's other sexual misconduct to show motive, intent, plan or design as well as the defendant's bent of mind or lustful disposition.[302] Georgia courts admit evidence of prior similar sexual misconduct if the evidence is deemed relevant to showing a lustful disposition to engage in that type of criminal deviant behavior.[303] The Georgia courts have no compunction about admitting uncharged sexual misconduct occurring after the incident charged in the indictment.[304]

A few cases help explain how the lustful disposition rule works in practice in Georgia. In *Hall v. State*,[305] the court followed the "bent of mind" version of the lustful disposition rule. The defendant was charged with child molesting, attempted rape and battery committed on his 12 year old daughter. At trial, the victim's younger sister testified over objection that the defendant had sexual relations with her at age 12 or 13, some 16 years before the trial and 15 years

before the alleged sexual activity by the defendant with his daughter. The trial judge held a hearing on admissibility of the 16 year old incest outside the presence of the jury and held the former misconduct admissible to prove the defendant's lustful disposition, although the current indictment did not allege penetration, and the 16 year old offense involved a single act of conventional intercourse between defendant and his younger sister. The Court of Appeals affirmed Hall's conviction. Relying on much precedent, it found the 16 year old act of incest on the defendant' sister probative of the defendant's predisposition to commit crimes of that sort on his own daughter.[306]

Burris v. State[307] represents a further extension of the lustful disposition doctrine. The defendant was accused of child molesting. The State produced Cindy Sexton, who testified that the defendant's sister-in-law told her that the defendant and his wife had intercourse while the victim was in their bed. Sexton testified to the presence of pornographic literature in the Burris household. She also testified that she was in Burris' home when unnamed sexual devices were delivered by UPS.[308] The defendant argued that possession of pornography and of sexual devices was not criminal, and dissimilar to the crime with which he was charged. The court held, however, that proof that the defendant possessed pornographic literature and special devices designed for sexual

stimulation tended to show the defendant's unnatural bent of mind, which was relevant to the crime with which he was charged.[309]

Most lustful disposition jurisdictions admit uncharged sexual misconduct evidence on much the same basis as Georgia does. The courts allow uncharged similar sexual misconduct evidence to be used by the trier of fact in determining the defendant's lustful disposition by circumstantial proof of a general character trait, followed by an inference from that inductively proved general character trait that the defendant committed the crime charged in the indictment.[310]

Some jurisdictions also follow the lustful disposition rule although the jurisdiction has adopted the Uniform Rules of Evidence. Arkansas and Arizona are examples of two different approaches to amalgamating the lustful disposition rule with Rule 404(b). Both jurisdictions have done a better job than Indiana has done. Arkansas limits the use of its lustful disposition exception to incest and child abuse cases.[311] Arkansas, unlike Georgia, has adopted the Uniform Rules of Evidence. The Arkansas Supreme Court's leading decision on admission of similar instances of uncharged misconduct, *Price v. State*,[312] held that uncharged misconduct could be admitted under Rule 404(b) if the prosecution established some independent grounds of relevance other than proof of the defendant's bad character, providing that the probative value

of the uncharged misconduct outweighed any prejudice to the defendant.[313] It construed Rule 404(b)'s limitations on admission of uncharged misconduct as a series of examples, rather than a strict laundry list of exceptions to the exclusion of character evidence.[314] In incest and child abuse cases, however, the Arkansas Supreme Court has continued its earlier case law sanctioning admission of similar uncharged misconduct to prove "a proclivity toward a specific act with a person or class of persons with whom the accused has an intimate relationship".[315] Arkansas has also been known to extend its rules on admission of uncharged sexual misconduct in forcible rape cases involving family members to permit introduction of child molesting incidents preceding the forcible rape.[316]

Arkansas has taken an approach prefiguring proposed new Federal Rule of Evidence 414, which would allow similar uncharged sexual misconduct evidence to be admitted for any relevant purpose, without regard to Rule 404(b). It has established a highly specialized rule for admitting sexual misconduct in child molesting and incest cases, which it has extended to forcible rape cases whose victims are children or close relatives.

Arizona also retains the lustful disposition rule, but applies the rule in an unusual manner to sex offenses. Arizona's leading cases on uncharged misconduct happen to be a

sex offender case. In 1973, before the Arizona Supreme Court had adopted the Uniform Rules of Evidence, the court reaffirmed its earlier case law admitting uncharged sexual misconduct evidence in sex offenses where "there is sufficient basis to accept proof of similar acts near in time to the offense charged as evidence of the accused's propensity to commit such perverted acts."[317] Four years later, after Arizona had adopted the Uniform Rules of Evidence, but prior to their effective date, the Arizona Supreme Court took up uncharged sexual misconduct again in *State v. Treadaway*.[318] The defendant was charged with the sodomy and murder of a 6 year old boy. The assailant had crept into the boy's bedroom through a window and had raped and murdered him. Treadaway was arrested on fingerprint evidence. At trial, a three year old incident in which Treadaway sodomised a 13 year old boy was admitted to show his emotional propensity for sexual satisfaction with little boys.[319] The Arizona Supreme Court reversed his conviction, holding that the prior sodomy was too remote in time and too dissimilar to be relevant without a foundation from an expert medical witness which would show that a three year old sodomy of a boy demonstrated an emotional propensity to commit such crimes.[320]

The Arizona Supreme Court has a passion for reviewing social science literature to support its decisions in sex offender cases. In *State v. McDaniel*,[321] decided back in

1956, the Arizona Supreme Court relied on the obsolete criminal sexual psychopath theory to explain why it admitted uncharged misconduct evidence against the defendant, who was charged with committing anal and oral sexual acts with two 12 year old boys.[322] The court found that a person who has "given way to unnatural proclivities"[323] within a short time of the offense in the case at bar demonstrated a "specific emotional propensity for sexual aberration."[324] Twenty one years later, the court reviewed Tappan's 1951 New Jersey work in *Treadaway*, to show that it now had doubts about the recidivism of sex offenders and of the relevance and materiality of prior similar uncharged sexual misconduct evidence.[325] Since *Treadaway*, the Arizona courts have waffled on the basis for admitting uncharged sexual misconduct.

In *State v. Day*,[326] decided in 1986, the Arizona Supreme Court approved of joinder of 17 separate, distinct counts of first degree sexual assault on the ground that evidence of each assault was relevant to establish the defendant's "emotional propensity" to engage in rape.[327] The opinion is devoid of any reference to the proper psychiatric foundation for such evidence required by *Treadaway*. In *State v. Cousin*,[328] a child molesting case, the Court of Appeals approved of admitting prior episodes of child molesting involving the defendant's 18 year old daughter which occurred four to seven years before the acts charged in the indictment. The state

called a psychiatrist who testified that the earlier acts demonstrated the defendant's emotional propensity for child molesting.[329] In two recent child molesting cases, *State v. Lindsey*[330] and *State v Smith*,[331] the prosecution offered photographs of defendant's victims while engaged in different forms of perverse sexual activity with the defendant to show a common plan or scheme, without reference to the fact that the photos also proved the defendant's emotional propensity to commit depraved sexual acts on children. Apparently no psychiatric foundation evidence was put in to prove that the photographs demonstrated emotional propensity.

The practical criteria for choosing between the lustful disposition rule and the *Molineux* rule in Arizona is the availability of a psychiatrist who can lay the foundation required for proof of emotional propensity. When the State cannot find such a witness, it chooses a *Molineux* exception. In either case, the State usually succeeds in putting in evidence that shows the defendant's predisposition to commit sex offenses.[332] The Arizona approach does require the court to make an assessment of the probative value of uncharged misconduct incidents and to review the potential for unfair prejudice against the defendant arising from over-generalizing from a few instances of similar sexual misconduct to an improper guilty verdict. However, Arizona has departed from accusative criminal justice. The defendant's whole sex

life is on trial during the state's case in chief, providing that an expert witness has examined the defendant and reviewed the defendant's sexual case history.[333] This expert will help the jury interpret specific instances of sexual misconduct and apply those incidents to the general verdict of guilt or innocence. The jury, being thus advised, will be reaching a verdict on the basis of general predisposition to commit crimes of that ilk.

C. MOLINEUX RULE STATES.

The majority of U.S. jurisdictions admit uncharged sexual misconduct evidence under one or more of the traditional exceptions to the character evidence rule formulated in *Molineux*. Most of the states that have adopted the *Molineux* rule by case law, by statute or by rule view it as a specialized rule of relevance allowing admission of the defendant's specific acts of uncharged misconduct when relevant to some intermediate issue such as motive, intent, knowledge, opportunity, plan or design, identity or the like.[334] Uniform Rule 404 and its common law predecessors do not list "lustful disposition" or "corroboration of the victim's testimony" as an example of another relevant purpose for which uncharged sexual misconduct would be admissible in sex offenses. Those states that follow a judge made version of Rule 404 adhere to much the same line of reasoning as do those jurisdictions following the Uniform Rules. A surprising number

of these jurisdictions, however, retain one version or another of the lustful disposition rule alongside more modern character evidence rules.

Uncharged sexual misconduct is admitted under the *Molineux* rule to show the accused's motive, to show the accused had a plan or design to commit the sex crime charged, to prove identity of the accused through modus operandi evidence, and to rebut a claim of accidental touching. Intent is not an issue in sex offenses, unless the accused is charged with sexual assault against a non-consenting adult, and raises the defense that the victim consented to the defendant's sexual conduct, where consent would decriminalize the act. The courts generally grant the prosecution great leeway to introduce uncharged sexual misconduct when the intermediate issue, enumerated under Rule 404(b) or its common law predecessor, is not truly an issue in the case.

1. Proof of Motive Where Motive is A Non-Issue.

Proof of motive is proof of intent. Sex crimes are not crimes of specific intent. Mens rea is established by consciously committing the forbidden act against the victim. Two recent cases will illustrate the appropriate and inappropriate admission of uncharged sexual misconduct to prove motive under the *Molineux* rule.

In *State v. Yager*,[335] the defendant was indicted on a single count of sexual assault on a male child committed around

Thanksgiving, 1988. The 31 year old defendant was accused of touching the penis of C.M., an 8 year old child for whom he was babysitting. The defendant first admitted touching the victim, claiming that his hand accidentally slipped while massaging the child's stomach to cure his stomach ache. At trial, the defendant changed his story and denied touching the boy. The prosecution produced two young men, A.L. and A.G., who testified to long-term sexual relationships with Yager, beginning when they were children with fondling episodes. Yager objected to A.L.'s and A.G.'s testimony on the ground that the testimony was improper character evidence. The court permitted the men to testify in order to show the defendant's motive for touching C.M.

In short, Yager claimed an "innocent reason" for touching C.M., and the State sought to rebut that evidence by showing that Yager had long-term sexual relations with two other boys anywhere from ten to fifteen years before the date of the offense charged in the indictment.[336] Yager was convicted and appealed. The court found that Yager's original story put his intent at issue, because he first claimed to have touched C.M. innocently. Consequently, the court ruled that the State was properly permitted to prove Yager's motive for the touching by showing his prior sexual misconduct with other young boys.[337]

This case follows earlier decisions allowing proof of

similar sexual misconduct to rebut the defendant's claim of lack of mens rea due to accidental touching or touching for an innocent purpose. Once the defendant makes an issue out of mens rea, the prosecution is free to rebut a claim of lack of mens rea by proof of similar misconduct, which eliminates any claim of accident or innocent purpose by the rule of probabilities.[338] Of course, the jury will also learn that the defendant has a criminal history involving sex offenses.

However, *State v. Plymesser*[339] represents misuse of the motive category in sex offender cases. The defendant was charged with a single count of second degree sexual assault of a child. The defendant was alleged to have placed his hand over the vagina of Kelly, D., a 13 year old daughter of defendant's friends. The defendant had Kelly in his car and was driving her to his house to decorate a Christmas tree. He stopped the car, began french kissing the child and touched her breasts and vagina with his hand. He then got out of the car, urinated, re-entered the car and forced Kelly to touch his penis.[340]

The state filed a motion in limine to permit it to introduce evidence of prior sexual misconduct. After much wrangling over admitting two prior 1969 and 1977 convictions for child molesting, psychiatric testimony surrounding each of the prior offenses, and the arresting officer's testimony relating the defendant's confession to the 1977 incident, the

trial judge permitted proof of the 1977 conviction for sexual assault of a child and the arresting officer's version of defendant's confession that he put his penis in the child's mouth while intoxicated. The defendant objected on the ground that admission violated the character evidence rule.[341] The defendant was convicted and his conviction was affirmed by the Wisconsin Supreme Court. According to the court, the trial judge properly admitted the 1977 sexual assault conviction and the accompanying confession under Wisconsin's relaxed version of Rule 404(b) that permits proof of uncharged sexual misconduct to show the defendant's motive to commit the crime.[342]

However, the defendant never claimed an accidental or innocent purpose for his actions. He denied touching the victim as described in the indictment. Intent was not an issue, and the defendant's motive for his actions was not an issue. The court in fact was admitting proof of the defendant's prior misconduct to show his lustful disposition towards the 13 year old victim. Nonetheless, the jury in *Yager* and *Plymesser* considered the defendant's criminal sexual misconduct in precisely the same way: in each case a limiting instruction was given, allegedly confining the jury to consider criminal history as it related to motive, but the jury had the defendant's criminal sexual misconduct history and could do what it pleased with that history.

2. A Plan or Design Which Proves Defendant's Disposition to Commit Sex Offenses.

The *Molineux* rule contemplates use of uncharged sexual misconduct to demonstrate a continuing criminal activity, such as a conspiracy, or to demonstrate intent by showing the defendant's criminal plan or design.[343] While a continuing criminal activity such as running an illegal still[344] or a house of ill fame[345] can be proved by proving more than one overt instance of resort to such a place, sex offenders rarely show any concerted plan or design to engage in sex offenses. If the courts, following the *Molineux* rule, limited admission of uncharged sexual misconduct to those instances where the defendant has a criminal plan or design, such as the case of the physician who drugged his female patients to commit sexual assaults upon them, no abuse would occur. However, the courts have shown great willingness to admit prior and later instances of sexual assaults by rape defendants to show a design or plan to commit rape, which simply proves that the defendant had a propensity to commit rape.[346]

People v. Ing[347] illustrates appropriate use of the plan or design exception to admit uncharged sexual misconduct. Dr. Ing, an obstetrician, was accused of committing a sexual assault on a patient during a pelvic examination. Ing simply denied any offensive touching. The State was allowed to prove that Dr. Ing had assaulted other patients as much as 18 years

prior to the date of the crime charged in the indictment, to show that Ing had a long standing criminal plan or design to take advantage of anesthetized patients.[348] The jury was permitted to consider Dr. Ing's criminal history in reaching a verdict.

State v. Hampton[349] illustrates the misuse of the plan or design exception. The victim and the defendant worked at the same business. While at work, the victim testified the defendant approached her, threw her down on the floor, strangled her, pressed a sharp instrument to her throat and raped her. After copulation, the defendant allegedly offered the victim money if she would have sex with him again. Two other women who were not fellow employees, who were not attacked at the same location, testified that the defendant had approached them, thrown them down and attempted to strangle them while he tried to have sexual intercourse with them.[350] A third woman testified the defendant had strangled her, thrown her to the floor and raped her, offering her money for further sexual relations. The Kansas Supreme Court sustained Hampton's conviction on the ground that the three other victims' stories proved a plan or design of rape on Hampton's part. This evidence merely showed that Hampton committed several sexual assaults in a similar manner. The offer of money might have made the three assaults similar enough to be modus operandi evidence if the identity of the accused was an issue in the

case. However, neither specific intent nor identity of the accused was an issue, and the location of the assault and the relationship the defendant had with the other victims were not identical to those connected with the victim in the case tried. The evidence of other attacks amounted to proof of the defendant's predisposition to commit sexual assault.[351] However, the jury had Hampton's criminal history to consider in reaching verdict. Although *Ing* presented a better rationale for allowing the jury to consider the defendant's criminal history, the jury was allowed to consider the defendant's criminal history in reaching a verdict in both cases.

3. Proof of Identity of the Sex Offender When Identity is not a Bona Fide Issue.

The *Molineux* rule was formulated in a case in which the identity of the accused was the only issue. The courts have admitted uncharged sexual misconduct evidence to prove the identity of the accused. *King v. State*[352] represents an orthodox use of the identity exception. The victim was stopped by a man while she was driving home. He told her that her tail lights were out. As he engaged the victim in conversation, he pulled out a pistol and forced the victim into his car and drove her to a secluded place where the victim was raped.[353] Two weeks later, she was stopped again by a man in a similar light colored station wagon who forced her at gunpoint into his car and drove her to a secluded place where the victim was

raped again. She identified the defendant as the perpetrator of the first assault, but was unsure of her second attacker's identity. The Arkansas Supreme Court sustained King's conviction, holding that the prosecution was properly permitted to prove that the defendant committed the first sexual assault to prove the identity of the accused in the second case.[354] This particular rapist had an unusual modus operandi which warranted the inference that the same person perpetrated both rapes. Therefore, the jury could consider the defendant's criminal history with respect to the victim in reaching a verdict.

People v. Oliphant[355] represents an abuse of the identity exception to the character evidence rule. A Michigan State University coed was raped by a black man after a social encounter. She had agreed to accept a ride home from the campus with her new found friend. On the way home, the defendant made a detour to an out of the way place and according to the victim, importuned her for sexual intercourse. When she refused, he grabbed her. Under fear for her life, the victim did not resist further and the defendant completed intercourse with her.[356] Identity was not an issue. Oliphant claimed the victim consented to interracial sexual intercourse with him. The prosecution was allowed to bring on four other white women who identified Oliphant as the young black man who had offered them a ride home from the Michigan State campus,

made a detour to an out of the way place and importuned them for sexual intercourse. Each said they refused his advances. When they refused, all four claimed he forced them to have sex relations with him. Two of the four women had made criminal complaints against Oliphant which had resulted in Oliphant's acquittal before another jury.[357]

Oliphant was convicted. The Michigan Supreme Court affirmed his conviction, finding that the four other uncharged acts of sexual misconduct were properly admitted to prove Oliphant's identity as the rapist, to corroborate the victim's story and to disprove any consent to his amorous advances.[358] First, Oliphant had admitted sexual intercourse with the victim, eliminating identity of the accused as an element in the case. Second, the victim's story could not be corroborated by testimony by other victims that they had been raped by the defendant at other times. Third, the State could not prove that Oliphant had sexual intercourse with the victim against her will by proving that at some other time, Oliphant had sexual intercourse with another woman against her will. In reality, the court employed the identity exception to allow proof of four similar complaints of sexual assault to corroborate the victim's story by proving the defendant's propensity to commit sexual assaults on white women. This is precisely the same result reached by the House of Lords in *Dept. of Public Prosecutions v. Boardman*.[359] The effect upon

the jury is the same, whatever rationale the courts use to explain away admission of uncharged sexual misconduct. The jury will have the relevant portion of the defendant's criminal history before it for consideration in reaching a verdict.

Finally, the courts have faced one or two cases in which the alleged perpetrator committed multiple acts of rape or sodomy on more than one victim at the same time. Using the interwoven crime exception to the character evidence rule, the prosecution has been allowed to prove all of the multiple acts committed by the defendant.[360] The jury again was permitted to receive the defendant's relevant criminal history and to use that history in reaching a verdict.

The point of this analysis of the operation of the *Molineux* rule is to demonstrate that following the *Molineux* rule and Rule 404(b) does not stop the state from proving the criminal history of a sex offender. It requires the state to give some plausible intermediate issue such as motive, intent, plan, design or identity that the defendant's criminal history might also prove. If the state can prove the defendant's relevant criminal history by a preponderance, following the standard of proof established by *Huddleston v. United States*,[361] the jury will receive that history. Although the *Molineux* rule requires a limiting instruction that informs the jury that it can apply that criminal history only to an appropriate intermediate issue, the legal cure provided by a

limiting instruction is not a psychological or practical remedy for the harm done. No one can guarantee that the jury has not used the defendant's criminal history to reach a general verdict of guilty based in predisposition.

Prior to World War II, statutory rape prosecutions made most of the law relative to uncharged sexual misconduct, but statutory rape has been reclassified by many jurisdictions as sexual assault on a person under 16.[362] In the infrequent modern prosecutions for sexual assault on a non-relative under 16, prior and subsequent sexual activity with the same person under 16 is generally admitted to show plan, design, motive intent or identity.[363] Child molesting and incest decisions have made more law since the 1960's than criminal sexual assault cases involving non-relations. The same sexual assault statute which forbids genital contact with a person under 16 also forbids fondling, touching the genitals, oral sexual activity or anal sexual activity with a person under 16. Most of the recent prosecutions under the sexual assault statutes have involved child molesters. The defendant's other similar, sexual acts with the same victim are admitted to show the defendant's plan or design.[364] Dissimilar acts with the same victim are also routinely admitted.[365] Additionally, the defendant's sexual misconduct with the victim's brothers and sisters are admitted to prove a guilty plan or design, or motive.[366] The courts disregard the passage of time between

child molesting incidents for the most part, admitting former sexual misconduct with the victim's siblings occurring as long as ten years prior to the assault on the victim.[367] In short, accused child molesters must expect the state to prove other similar child molesting incidents at trial, just as the State of Delaware did in *Getz*. Many states still allow proof of uncharged sexual misconduct between defendant and victim to corroborate the victim's story or to prove the attacker's lustful disposition in those states adhering to the lustful disposition rule.[368] Whatever rationale the court may invoke to permit proof of the defendant's criminal history, the result is essentially the same. The jury will receive the defendant's history of criminal sexual misconduct and convict the defendant, in part, on propensity to commit that type of crime.

Since the *Molineux* rule fails to explain judicial behavior on admission of uncharged sexual misconduct, it is a dishonest rule to use in sex offenses. It may be a dishonest rule in other criminal prosecutions as well, when the defendant's propensity to commit similar criminal misconduct is submitted to the jury to be used to determine the defendant's guilt.

California and New York jurisprudence on uncharged sexual misconduct is intriguing and a perfect example of the confusion that the *Molineux* rule causes when the courts try to admit uncharged sexual misconduct.

C. NEW YORK AND CALIFORNIA

New York and California each claim to follow the *Molineux* rule with respect to uncharged misconduct. However, New York retains a vestigial version of the lustful disposition rule for incest cases. California's jurisprudence on uncharged misconduct evidence has been shattered by bewildering appellate decisions and Proposition 8 that restrains appellate review of evidence in criminal prosecutions. Since neither state neatly fits into the general mold of *Molineux* rule states, their version of the law on uncharged sexual misconduct has to be treated separately.

1. New York: A State in Which a Vestigial Lustful Disposition Rule Coexists with the Molineux Rule.

New York happens to be one of the twenty nine jurisdictions which recognize the *Molineux* rule for uncharged misconduct. These states also recognize some version or another of the lustful disposition rule. In recent years, New York has gradually abandoned its lustful disposition exception to the character evidence rule in sex offender cases. The Court of Appeals ruled in *People v. Johnson*,[369] in 1968 that the defendant's prior uncharged sexual assaults were irrelevant and inadmissible to prove any issue, because the defendant was charged with both forcible and statutory rape, and he had made no issue of the victim's consent.[370] In 1987, the Court of Appeals overruled *People v. Thompson*[371] in *People v.*

Lewis.[372] Lewis was charged with committing incest with his 14 year old illegitimate daughter, Ceceil. She testified to at least ten different sexual encounters with the defendant over a period of several months in addition to the incestuous act charged in the indictment.[373] The Court of Appeals held that none of the traditional *Molineux* rule exceptions applied to Ceceil's testimony about the ten other acts of sexual intercourse with her father. The court disposed of the "amorous design" exception derived from *Thompson* by stating that the "amorous design" rule was *dicta* and unsupported by the English and American cases cited in support of the rule.[374] It limited the *Thompson* decision to condoning proof of other uncharged sexual misconduct in those kinds of sexual misconduct cases in which a mutual decision to engage in sexual activity is relevant.[375] The court also held that a complaining witness cannot corroborate her report of one offense by making further uncorroborated charges against the accused.[376]

Later New York cases followed *Lewis* in excluding evidence of uncharged sexual misconduct merely to demonstrate the defendant's "amorous designs".[377] However, New York courts found other ways to approve admission of uncharged sexual misconduct evidence after *Lewis*. In *People v. DeLeon*,[378] the Appellate Division held that the defendant's statement to the victim that "he had just recently . . . raped a girl" made during the course of a sexual assault on the victim was

admissible to rebut any suggestion of consent in a case of overwhelming guilt.[379]

New York courts following the *Molineux* rule have already admitted uncharged sexual misconduct to prove plan or design[380] and identity of the accused.[381]

New York's experience with the *Molineux* rule in sex offender cases has been paralleled in Illinois[382] where vestiges of the lustful disposition rule may coexist with the *Molineux* rule in sex offender cases. Kentucky's lower appellate courts continue to apply the lustful disposition rule, questioning the real intent of the Supreme Court in *Pendleton*.[383] New York's vestigial amorous design exception to the character evidence rule would still apply in incest and bigamy prosecutions. New York has rejected corroboration as a reason for admitting the defendant's sexual misconduct history with the victim, but its jurisprudence has the plan or design rational at hand to permit proof of the same misconduct to demonstrate a plan or design.

Despite an attempt to reform its law on character evidence and a further attempt to limit uncharged sexual misconduct evidence, New York has really made no improvement in its law on uncharged sexual misconduct, although the courts may feel better because their approach to admission of uncharged sexual misconduct has some plausible theoretical consistency.

2. California: Failure to Harmonize The Molineux Rule or

to Develop Any Consistent Policy Towards Uncharged Sexual Misconduct Evidence.

California has an almost unintelligible position on admission of uncharged sexual misconduct in sex offender cases. Because it is so baffling, it is worthwhile to review the twists and turns of California's case law, statutes and constitutional initiatives to see how the common-law approach to the character evidence rule can absolutely fail to achieve any clarity or consistency in practice.

California's case law on proof of other sexual misconduct in sex offender cases has always been confusing. A number of pre-Evidence Code intermediate appellate court decisions seemed to have adopted the lustful disposition rule.[384] However, a significant number of pre-1967 cases followed the *Molineux* rule, admitting uncharged sexual misconduct only when relevant to prove intent, motive, design or plan or identity of the accused.[385] Section 1101 of the California Evidence Code, which restated the common law bar against admitting character evidence, did very little to ease the confusion. Section 1101(b) set out the common law exceptions to the character evidence rule for uncharged misconduct in much the same way as the Uniform Rules did. The lustful disposition rule was not clearly repealed by the Evidence Code.

Since 1967, the California courts have struggled with the application of section 1101(b) of the Evidence Code to sex

offender cases. At times the courts tend to use section 1101(b) as a series of magic words, which if uttered by the State in its offer of proof, sanctify use of the defendant's criminal history. At other times, the courts prescribe limitations and controls on use of the defendant's criminal history, derived from the Evidence Code and from its common law tradition.

The history of the development of the admission of uncharged sexual misconduct evidence under section 1101(b) of the Evidence Code really began with *People v. Covert*.[386] The defendant was charged with committing incest and lewd and lascivious acts on his 16 year old daughter. The defendant's 19 year old daughter testified to earlier, similar incest committed on her by defendant. The Court of Appeals approved of admission of these stories to show the defendant's criminal plan or design and also to corroborate the story of the 16 year old victim.[387] In the same year, in *People v. Paxton*,[388] a rape and robbery case, the state called a second victim to testify to an earlier rape committed on her by defendant in what the court thought was a strikingly similar manner. This second uncharged incident was admitted to prove identity, although identity was not a real issue in the case.[389] In *People v. Gray*,[390] which was decided the year after the Evidence Code became effective, the defendant claimed the victim consented to his advances. The defendant also proved

that he had voluntary sexual relations with the victim before the alleged assault.[391] The prosecution put on three rebuttal witnesses who stated that they had been casual acquaintances of the defendant, and were forcibly raped and beaten by the defendant when they did not consent to his advances.[392] So far, the California courts were using section 1101(b) as a vehicle to funnel uncharged sexual misconduct evidence into the prosecution's case in chief with minimal restraints.

The court did not care much about the age of prior sexual misconduct. In *People v. Ing*,[393] the California Supreme Court admitted similar episodes of uncharged sexual assaults perpetrated by an obstetrician on patients as much as 18 years before trial to show modus operandi and plan or design on the theory that Dr. Ing had a single conception or plot for ravishing his patients. Although the court's rationale was classic *Molineux* rule theory, it did not explain why the 18 year old episodes of similar misconduct were still probative.

California courts used the modus operandi rationale to admit prior sexual misconduct under section 1101(b) in *People v. Whittington*,[394] decided in 1977. The First District Court of Appeals held that a rape committed almost three years before the date of the crime charged was relevant to prove the identity of the perpetrator because the modus operandi in both instances was similar.[395] In both instances, the victim was

accosted while emptying garbage outside her apartment. The perpetrator threatened to rob the victim, but informed the victim that he was free of venereal disease and had not had any sexual relations for a long time. The sexual assault then followed.[396] It may have been the defendant's express warranty of freedom from venereal disease that the court found to be a "signature" of the accused.

In *People v. Cramer,*[397] the defendant was charged with sexual assault on a 13 year old boy. Intent and identity of the accused were not in issue. Nonetheless, the court approved admission of similar homosexual acts committed by defendant on another boy to show "common design or modus operandi".[398]

So far, this section has reviewed cases that treat section 1101(b) as "magic words". *People v. Stanley*[399] represents the other side of the coin. The defendant was charged with sexual assault of a boy. Prior similar assaults by the defendant on the same victim were admitted at trial, but admission was disapproved by the Supreme Court on the ground that the prior uncharged sexual misconduct evidence was inadmissible when the only issue was the veracity of the victim at trial.[400] *Stanley* was complicated by the fact that the victim may have been an accomplice under California law. At any rate, the Supreme Court tried to limit admission of uncharged sexual misconduct evidence to cases in which there was real issue raised under section 1101(b) requiring weighing

of probative value against prejudice to the defendant.

During the mid 1970's, the California Supreme Court continued to ease the limits on the use of uncharged sexual misconduct. *People v. Thornton*,[401] involved the identity of the perpetrator of robbery, kidnap, sodomy and rape against two different victims, Ottila J. and Eileen S. The defendant gave alibi evidence at trial. The prosecution retaliated by producing Marcia B., Edith B., and Suzanne P., who had identified the defendant as the man who robbed and sexually assaulted them. The five separate instances of sexual assault had unusual and distinctive common elements. The perpetrator used a ruse to gain access to the victim's car. The victim was driven to a remote place in her own car and ordered to completely disrobe. The victim's purse was ransacked before sexual assault was perpetrated. The victim was threatened with death if she talked. Finally, in all five cases, the victim was physically abused, kicked, beaten and foreign matter was stuffed in the victim's vagina.[402] The trial court admitted the other victim's stories. The Supreme Court, on mandatory review of a death penalty, set aside the penalty phase of the trial, but affirmed Thornton's guilt on the ground that the five similar sexual assaults amounted to signature crimes rebutting his alibi.[403]

People v. Pendleton[404] came up in 1979. It involved prosecutorial use of two prior instances of rape against the

defendant in a rape trial. In each case, the victim had been attacked early in the morning by an intruder who entered the victim's locked residence, threatened the victim with harm and robbery. The attacker then started discussing his family and friends, and the victim's friends while holding the victim. The victim was then struck and sexually assaulted.[405]

Identity of the accused was not an issue during Pendleton's trial on a third sexual assault charge. The victims of the two prior assaults testified, giving their stories to prove the defendant's intent. The California Supreme Court affirmed Pendleton's conviction on the theory that the stories of the other two victims proved criminal intent, although rape was not a crime of specific intent. The court also found that the two prior sexual assaults proved the defendant's plan or design, but it is difficult to see what kind of plan was carried out by these separate attacks. The court seemed to be returning to the lustful disposition rule without explicitly reaffirming its existence.[406] The Pendleton decision was not classic *Molineux* rule theory, because the intermediate issues for which the prior assaults were offered were not actually litigated at trial. The court slipped back into the magic words approach.

By the mid 1980's California's inferior appellate courts responded to the *Pendleton* opinion by letting down the bars to use of uncharged misconduct evidence in sex offender

cases.[407] In 1984, however, the Supreme Court pulled in the reins in *People v. Tassel*.[408] Tassel was charged with sexually assaulting Ann B., a waitress, whom Tassell allegedly forced to commit oral copulation with him and conventional intercourse in her Volkswagen vanagan.[409] Tassell testified in his own behalf, claiming that Ann B. willingly consented to his sexual advances. The prosecution then produced Mrs. G. and Cherie B. Mrs. G., a waitress in a bar, testified that Tassell had picked her up after work and forced her to engage in sexual intercourse. Cherie B., a hitchhiker, told a similar story. She claimed Tassell had picked her up and forced her to engage in sexual relations with him. The prosecution offered these two tales to prove that Tassell had a design or plan to pick up women and assault them.[410] The Supreme Court affirmed Tassell's conviction, but held that the two rebuttal witness' stories were irrelevant to any issue which could be proved under section 1101(b). The court found that the only issue to which these two stories related was the defendant's evil propensity to commit sexual crimes. The court reasoned that the two other victim's stories were harmless error in an overwhelming case of guilt.[411]

Shortly after the *Tassell* decision was announced, the California Legislature amended section 1101(b) of the Evidence Code to "clarify" the decision by providing that uncharged similar misconduct evidence was admissible in sexual assault

cases whenever the defendant raised the issue of consent.[412]

In 1985, the Supreme Court put further limitations on the use of uncharged sexual misconduct evidence in *People v. Ogunmulga*.[413] The defendant, a gynecologist, was charged with sexual assault on a patient during a pelvic examination. The defendant claimed that the step at the end of the examining table made it impossible for the examining physician to perform sexual acts on a patient during a pelvic exam. To rebut this contention in advance of defense evidence, the prosecution called two other victims who testified that Dr. Ogunmugla had sexually assaulted them during their pelvic exams.[414] The trial court allowed the other victim's testimony to prove Ogunmulga's plan or design, although neither identity of the accused nor criminal intent was at issue in the case. The Supreme Court reversed an Appeals Court affirmation of conviction, finding that the admission of the two other victims' stories was error, since neither identity nor intent was at issue.[415] This decision is very difficult to accept. The defendant claimed that it was physically impossible to commit rape upon his patients during a pelvic examination. The testimony of the other victims rebutted that claim squarely. While section 1101(b) does not contain an enumerated exception authorizing admission of uncharged misconduct to rebut a claim of physical impossibility, the evidence was certainly relevant under any view of the uncharged misconduct rule.

California law on uncharged sexual misconduct is too confused to generalize. California may still recognize a "lustful intent" exception to the character evidence rule in criminal sexual assault cases. On the other hand, it may limit evidence of uncharged sexual misconduct to those few cases where identity of the accused or intent are real issues. In 1982, the voters passed Proposition 8, an initiative that abolished nearly all limitations on evidence in criminal prosecutions. Section 28(d) was an attempt to deprive the appellate courts of supervision over admission or exclusion of evidence in criminal prosecutions.[416] It is extremely difficult to assess the impact of Proposition 8 on admission of uncharged sexual misconduct. If Proposition 8 is rigorously applied to the character evidence rule, the character evidence rule embodied in section 11101 of the Evidence Code no longer applies to any criminal prosecution. So far, the California courts have not followed Proposition 8's literal command to permit proof of the defendant's predisposition to commit evil.[417]

VI. CONCLUSION.

The jury usually gets to review the criminal history of sex offenders, despite the character evidence rule that bans convicting any U.S. citizen on his or her predisposition to commit crimes. There are two popular rationales that permit

the courts to ignore the character evidence rule: the lustful disposition rule and the *Molineux* rule.

The *Molineux* rule, codified by Uniform Rule 404(b), permits introduction of criminal history when some straw man issue can be interposed to make criminal history evidence relevant to something other than character or predisposition to do evil. All U.S. jurisdictions recognize one version or another of this rule.[418] The *Molineux* rule permits the jury to consider uncharged sexual misconduct when it proves both the defendant's bad moral character and some other issue, such as criminal intent, plan or identity of the accused. The palliative offered is a limiting instruction telling the jury not to consider the defendant's criminal history on the issue of guilt or innocence, but only to prove the intermediate issue.

Twenty nine states follow some version of the lustful disposition rule. Four states have done away with their version of the lustful disposition rule in the past four years.[419] West Virginia dumped its lustful disposition rule in 1987, but returned to it in 1990.[420] Rhode Island considered rejecting the lustful disposition rule, but decided not to do so.[421] The lustful disposition rule permits proof of a sex offender's criminal history to show his or her predisposition to commit sex crimes. No intermediate issue must be at stake when prior sexual misconduct is offered under

the lustful disposition rule. The rule simply permits proof of bad character in sex crimes.

The character evidence rule was made by judges to explain why the defendant's criminal history could not be used to prove the defendant's guilt. The *Molineux* and lustful disposition exceptions to the rule permit proof of character or predisposition to act in predictable ways to prove the defendant's guilt in sex cases. The exceptions have swallowed the exclusionary rule. In truth, character evidence is inadmissible in sex crime prosecutions only when the court finds that such evidence is unreliable.

Unreliability means that the court finds that the probative value of the uncharged misconduct evidence is exceeded by prejudice to the defendant, confusion of the issues and waste of time in collateral matters. When uncharged sexual misconduct is dissimilar to the crime charged in the indictment, or committed at a time judged to be too remote to show the defendant's propensity to commit sex crimes, or the quantum of proof of uncharged misconduct fails to meet the threshold level set by the court, it is excluded.

However, the same analysis will hold true if applied to other criminal prosecutions in which uncharged misconduct evidence is frequently offered and admitted, such as drug or conspiracy cases. There is nothing particularly unique about sex offenses that requires a special rule just for sex crime

prosecutions that lets in uncharged criminal conduct more leniently than in drug sales or possession of stolen property prosecutions. Prior uncharged misconduct evidence, based on recidivism, is relevant in those prosecutions as well.

What makes sex crimes unique is the public reaction to sex offenses. The public is morally outraged by sex offenses, particularly those that involve small children or others unable to protect themselves from harm. If Oscar Wilde had been accused of writing rubber checks, there would have been no criminal libel prosecution and Wilde would not have been cross examined about his prior criminal behavior.

In short, the courts bow to public pressure to convict sex offenders and try to make it easier for the victim of a sex crime to secure retribution than the victim of a crime against property. This is done by relaxing the evidentiary safeguards that were supposed to protect U.S. citizens from Star Chamber justice.

The Sixth and Fourteenth Amendments do not require accusative criminal justice. The Sixth Amendment mandates the defendant's rights to receive due notice of the charges made against him, to legal counsel, to confrontation by the accuser, and to compulsory process. The Fourteenth Amendment incorporates these specific rights, and also guarantees the defendant a fundamentally fair trial that requires the state to prove guilt beyond a reasonable doubt.[422] Indiana gave up

the lustful disposition rule because it did not provide for due notice to be given to the defendant. It could have kept the rule by ordering the prosecution to give notice of intent to use uncharged misconduct evidence. The United States, Minnesota and a few other states have faced the notice issue by requiring notice of intent to use specific instances of uncharged misconduct.[423] This satisfies the notice clause of the Sixth Amendment by putting the defendant on guard that uncharged misconduct will come up, and allows the defendant to prepare a rebuttal case.

More than forty years ago, Justice Jackson characterized the character evidence rule as absurd in *Michelson v. United States*.[424] The foregoing analysis shows that the rule is still absurd, especially as it works out in sex crime prosecutions. The lustful disposition rule, which acknowledges the probative value of criminal history, and would admit such history in sex crime prosecutions, is more rational than the *Molineux* rule. Nothing but inertia and fear of inquisitorial proof stands in the way of a reversal of the character evidence rule in criminal prosecutions. Since the courts generally permit admission of uncharged misconduct, particularly in high profile prosecutions such as sex offender cases, the rule should be that the defendant's propensity to commit crimes of the type charged in the indictment may be proved by specific instances of uncharged misconduct or opinion evidence showing

the defendant's propensity to commit crimes of that type. Propensity evidence would be excluded if proof submitted is more prejudicial to the defendant than probative on the issue of predisposition.

If the courts cannot bring themselves to reverse the character evidence rule entirely, then the courts can do so in sex offender cases by adopting a modified lustful disposition rule. The courts would permit admission of uncharged misconduct evidence to prove habitual criminal sexual activity. Arizona has taken this course. The *Treadaway* rule that permits proof of uncharged sexual misconduct to serve as basis for an expert opinion on the defendant's habitual sexual behavior patterns is an honest rule of law fashioned for sex crime prosecutions. It does change the dynamics of the criminal prosecution. The defendant's sexual behavior in general is on trial. The jury, aided by an expert, will use evidence of the defendant's sexual behavior in general to convict or acquit the defendant. Arizona has given the victims of sex crimes an equal opportunity to obtain redress for the wrong done to them. It has recognized the needs of victims for justification and revenge as well as the need for effective punishment for sexual offenders.

The second approach is adopt court rules similar to proposed Rules 413 through 415 that establish a specialized character evidence rule for sex crime prosecutions without the

requirement that uncharged sexual misconduct evidence be the basis for an expert opinion.

However, conservative courts would be extremely uncomfortable with either of these solutions because they turn a sex crime prosecution into an inquisition. Like the Delaware Supreme Court, conservative courts will reject open acceptance of inquisitorial justice in sex offender cases. They will continue to try to limit admissibility of similar uncharged sexual misconduct to one or more of the intermediate objects of proof noted in *Molineux*. In *Getz*, the Delaware Supreme Court tried to restrict such evidence to the minimum absolutely necessary to support a criminal prosecution. The issue of habitual criminal conduct evidence offered under Rule 406 was neither briefed nor argued and was not raised at trial. However, the *Getz* decision continues to permit proof of uncharged sexual misconduct. Delaware's courts can be comforted by the formalistic instruction that tells the jury not to consider uncharged misconduct evidence on the issue of guilt or innocence. Perhaps the jury will understand the instruction and follow it, and apply the uncharged misconduct only to the allowable intermediate issue. Perhaps the jury will get the instruction wrong and convict the defendant based on predisposition, but the jury cannot be impeached for such misconduct.