

3 of 5 DOCUMENTS

Copyright (c) 1994 Chicago-Kent College of Law  
Chicago-Kent Law Review

1994

*70 Chi.-Kent. L. Rev. 15***LENGTH:** 10812 words**SYMPOSIUM ON THE ADMISSION OF PRIOR OFFENSE EVIDENCE IN SEXUAL ASSAULT CASES: EVIDENCE OF PROPENSITY AND PROBABILITY IN SEX OFFENSE CASES AND OTHER CASES**

David J. Karp \*

\* Senior Counsel, Office of Policy Development, United States Department of Justice; B.A. 1972, Columbia College; Ph.D. 1975, Massachusetts Institute of Technology; J.D. 1979, Columbia University School of Law. This statement and the accompanying Response to Professor Imwinkelried's Comments, 70 Chi.-Kent L. Rev. 37 (1994), contain the prepared text of an address presented to the Evidence Section of the Association of American Law Schools ("AALS") on January 9, 1993. The new evidence rules discussed in this address have since been enacted as Fed. R. Evid. 413-15 by 320935 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (Sept. 13, 1994). This address provides "a detailed account of the views of the legislative sponsors and the administration concerning the ... reform, and should ... be considered an authoritative part of its legislative history." 140 Cong. Rec. H8991 (statement of principal House sponsor Representative Susan Molinari); see also 140 Cong. Rec. 512,990 (statement of principal Senate sponsor Senator Robert Dole). Because these statements are part of the legislative history of the enacted rules, they have not been changed from the text presented to the AALS Evidence Section, except for editing to conform to the Chicago-Kent Law Review's conventions regarding citation form and footnote documentation. The bracketed footnotes in this publication were added in the editing process and were not included in the original text of the address.

**SUMMARY:**

... My subject today is the admission of evidence of uncharged crimes against the defendant, with particular reference to the use of such evidence in sex offense cases. ... Rather, the effect of the new rules is to put evidence of uncharged offenses in sexual assault and child molestation cases on the same footing as other types of evidence that are not subject to a special exclusionary rule. ... The underlying legislative judgment is that the sort of evidence that is admissible pursuant to proposed Rules 413-15 is typically relevant and probative, and that its probative value is normally not outweighed by any risk of prejudice or other adverse considerations. ... Do such decisions show that the general rule against the use of propensity evidence against an accused is not honored in sex offense prosecutions? We think so ... Some states and courts have ... forthrightly and expressly recognized a "lustful disposition" or sexual proclivity exception to the general rule barring the use of character evidence against an accused... Jurisdictions that do not expressly recognize a lustful disposition exception may effectively recognize such an exception by expansively interpreting in prosecutions for sex offenses various well-established exceptions to the character evidence rule. ... American jurisdictions have generally adopted rules that narrowly limit inquiry into unrelated sexual behavior of the alleged victim in rape cases. ...

**TEXT:**

8131\*15

My subject today is the admission of evidence of uncharged crimes against the defendant, with particular reference to the use of such evidence in sex offense cases.

Public attention has been focused on this issue by the William Kennedy Smith case in Florida. n1 As everyone knows, the case involved a sexual assault prosecution, in which the court excluded evidence that the defendant had engaged in sexual assaults against a number of other women. n2

However, the proposal for reform in this area pre-dates that particular case. It initially appeared in February of 1991 in bills introduced by Representative Susan Molinari n3 and Senator Robert Dole. n4 The bills proposed a general rule of admissibility in sexual assault and child molestation cases for evidence that the defendant has committed offenses of the same type on other occasions. n5 The same proposal has subsequently been introduced in a number of other bills. These include the two violent crime bills that President Bush transmitted to 8131\*16 the 102d Congress, n6 and the proposed "Sexual Assault Prevention Act of 1992." n7

My discussion of this proposal will be in three parts. First, I will briefly describe the proposed new rules for sex offense cases and their intended operation. Second, I will discuss the arguments that have been made in support of these rules by the legislative sponsors and the Administration. Third, I will try to relate the proposed reform to broader issues in the law of evidence.

Before starting, however, I think it would be useful, as a kind of reality check, to describe two rape cases in which courts excluded evidence of this type under existing rules.

The first case is *People v. Sanza*, n8 from New York state in 1986. The evidence in that case indicated that Sanza raped and murdered Theresa Cha when she came to meet her husband in the building where Sanza worked. Among other evidence, Sanza was in the building at the right time, and was seen wearing the victim's ring by his sister within a few hours of the crime. n9 On the day after the killing, he ransacked the apartment where he was staying with his sister, took over \$1,000 in jewelry and other items, and never returned. n10 Another person also saw Sanza wearing the victim's ring, and observed scratches or a bruise on his arm, which Sanza explained away with a false story. n11 Blood of the same type as the victim's was found on Sanza's boots, which he left at his sister's apartment. n12

The police subsequently found Sanza in Florida, where he had pleaded guilty to three other rapes. n13 In the prosecution of Sanza for raping and murdering Theresa Cha, the government offered evidence 8131\*17 of these other rapes. They involved some specific similarities to the charged offense, including the theft or attempted theft of jewelry in all instances. n14 The trial court allowed the victims of Sanza's other rapes to testify concerning those crimes at the trial because the victim of the charged offense, having been murdered, was unavailable to identify her assailant. n15

The appellate court reversed Sanza's conviction for rape and murder because of the admission of this evidence. n16 The court concluded that the evidence of the earlier offenses "demonstrated a propensity to commit rape" but "proved nothing about our case" because the similarities to the earlier offenses were "hardly 'unique' or 'uncommon' in rape cases." n17

The second case is *People v. Key*, n18 a California case from 1984. In that case, the evidence indicated that when the victim was driving home at 2:30 a.m., Key drove next to her and said one of her wheels was coming off. When she stopped, Key choked her and held a knife to her throat, pulled her into his car, and forced her to perform oral sex on him as he drove to his sister's apartment, where he raped her twice. n19 Key claimed in his defense that the victim willingly came to his sister's apartment and had consensual sex with him there. n20

Key had prior convictions for assault with intent to commit rape, indecent assault, and assault with a deadly weapon, involving three separate victims. n21 When Key raised his defense of consent, the victim of one of his earlier assaults

was allowed to testify about Key's crime against her, which also involved a ruse, choking, threatening with a knife, and forced oral sex. n22

The appellate court reversed Key's conviction because of the admission of this evidence. n23 The court stated: "The only effect of the prior act evidence in this case is to allow it to bolster the witness' credibility. While this would seem to be a socially acceptable purpose, it does not comport with the applicable statutory and decisional law." n24 8131\*18

To the average person, I think the results in these cases would appear strange, if not outrageous. The type of legislative reform I will be discussing would greatly reduce the likelihood of such cases in the future. At this point, I will turn to the specifics of the proposed reforms.

#### The Proposed Rules

The legislative proposal would add three new rules to the Federal Rules of Evidence. The first of these, proposed Rule 413, would apply to sexual assault cases. The basic rule of admissibility, set out in subdivision (a) of the rule, reads as follows: "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."

Proposed Rule 414 states a parallel principle for criminal cases involving child molestation: Evidence that the defendant committed offenses of the same type on other occasions would be admissible. n25 Proposed Rule 415 makes the same rules applicable in civil cases. n26 Hence, for example, in a civil suit for damages by a rape victim, evidence of the defendant's commission of rapes on other occasions would be admissible.

All of the proposed rules include certain safeguards for the defendant. The prosecutor – or the plaintiff in a civil case – would be required to disclose the evidence of the uncharged offenses to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered. n27 This prevents unfair surprise and ensures that the defendant will have an opportunity to prepare any response or rebuttal.

The following points should be noted concerning the interpretation and application of these rules:

First, the proposed rules of admissibility mean what they say. Evidence admitted under the rules could be considered for its bearing on any matter to which it is relevant. This includes questions of the defendant's propensity or disposition to commit sex crimes. Evidence Rule 404(b)'s prohibition of "character" evidence would be superseded in this context. 8131\*19

Second, these rules are rules of admissibility, and not mandatory rules of admission. The general standards of the rules of evidence would apply to evidence offered under these rules, including the limitations of hearsay evidence, and the authority of the court to exclude relevant evidence under Rule 403. However, the rules would eliminate in sex offense cases the special restrictions on evidence of uncharged acts, where the acts are crimes of the same type as the charged offense. The analysis statement for the proposed Sexual Assault Prevention Act n28 explained the effect of this change as follows:

Evidence admissible pursuant to these rules would remain subject to the normal authority of the court to exclude evidence pursuant to *F.R.E. 403* if the evidence's probative value is "substantially outweighed by the danger of unfair prejudice" or other adverse effects noted in that rule.

It is not expected, however, that evidence admissible pursuant to proposed Rules 413–15 would often be excluded on the basis of Rule 403. Rather, the effect of the new rules is to put evidence of uncharged offenses in sexual assault and child molestation cases on the same footing as other types of evidence that are not subject to a special exclusionary rule. The presumption is in favor of admission. The underlying legislative judgment is that the sort of evidence that is admissible pursuant to proposed Rules 413–15 is typically relevant and probative, and that its probative value is normally not outweighed by any risk of prejudice or other adverse considerations. n29

Finally, the standard of proof with respect to uncharged offenses under the new rules would be governed by the Supreme Court's decision in *Huddleston v. United States*. n30 In *Huddleston*, the Supreme Court held that information about uncharged offenses may be admitted conditionally, and that such offenses may properly be considered so long as a jury could reasonably conclude by a preponderance that the offenses occurred. n31 While the case was directly concerned with admission under Rule 404(b), its reasoning on these points is also applicable to the proposed new rules for sex offense cases.

## II. Arguments for the Proposed Rules

The proposal of these rules presupposes that they will be more effective than the current rules in promoting accurate fact-finding and achieving just results. What are the policy considerations supporting this view? Let's start with common sense. 8131\*20

One obvious ground is considerations of probability. The defense in a rape case will claim that the police or victim fingered the wrong man, or that the victim consented and then made up a false charge, or that the claim that a rape occurred is a complete fabrication. If the direct evidence of guilt is not conclusive, there may be no adequate basis for excluding these possibilities.

Evidence that the defendant has committed sexual assaults on other occasions, however, often puts an entirely different light on the matter. It would be quite a coincidence if a person who just happened to be a chronic rapist was falsely or mistakenly implicated in a later crime of the same type. In conjunction with the direct evidence of guilt, knowledge of the defendant's past behavior may foreclose reasonable doubt as to guilt in a case that would otherwise be inconclusive. n32

The second common sense ground for admitting and considering this type of evidence is the ground that the existing rules most strongly condemn – the inference concerning propensity or disposition. If we put aside preconceptions for the moment, however, the inference is certainly not an unreasonable one.

Ordinary people do not commit outrages against others because they have relatively little inclination to do so, and because any inclination in that direction is suppressed by moral inhibitions and fear of the practical risks associated with the commission of crimes. A person with a history of rape or child molestation stands on a different footing. His past conduct provides evidence that he has the combination of aggressive and sexual impulses that motivates the commission of such crimes, that he lacks effective inhibitions against acting on these impulses, and that the risks involved do not deter him. A charge of rape or child molestation has greater plausibility against a person with such a background.

In addition to these general grounds, the statements supporting the legislative proposal have pointed to the strength of the public interest in admitting all significant evidence of guilt in sex offense cases. This reflects in part the typically

secretive nature of such crimes, and resulting lack of neutral witnesses in most cases; the difficulty of stopping rapists and child molesters because of the reluctance of many 8131\*21 victims to report the crime or testify; and the gravity of the danger to the public if a rapist or child molester remains at large.

In cases involving adult victims, the issue of consent is a further reason. In violent crimes other than sexual assaults, there is rarely any colorable defense that the defendant's conduct was not criminal because of consent by the victim. The accused mugger does not claim that the victim freely handed over his wallet as a gift. In contrast, claims are regularly heard in rape cases that the victim engaged in consensual sex with the defendant and then falsely accused him. In such instances, knowledge that the defendant has committed rapes on other occasions is frequently critical in assessing the relative plausibility of these conflicting claims and accurately deciding cases that would otherwise become unresolvable swearing matches.

In child molestation cases, the importance of admitting similar crimes evidence is equally great, if not greater. Such cases regularly present the need to rely on the testimony of child victim-witnesses whose credibility can readily be attacked in the absence of substantial corroboration. In this context, the public interest in admitting all significant evidence that will illumine the credibility of the charge and any denial by the defense is truly compelling.

What can be said on the other side of the issue? Let me start by addressing the three standard justifications for restricting evidence of uncharged acts. n33

One ground is the need to provide fair notice to the defendant concerning the matters he will have to respond to at trial. n34 The proposed rules meet this concern by requiring full disclosure to the defendant of the evidence that will be offered in support of the uncharged offenses. This is more than the defendant would be entitled to in connection with a formally charged offense.

The second standard rationale for limiting evidence of uncharged acts is the need to establish reasonable limits on the scope of the proceedings. n35 The concern here is diffusing the focus of the proceedings and distracting the trier through prolonged explorations of the defendant's personal history.

The proposed rules also incorporate features which are responsive to this concern. They do not indiscriminately admit evidence of all the bad things the defendant may have done in the course of his 8131\*22 life, but only admit evidence of criminal offenses of the same type as those with which he is formally charged. This limits the number of incidents for which evidence may be offered. In addition, the requirement of similarity in kind to the charged offense tends to ensure that the uncharged acts will have a high degree of probative value, and will not be mere distractions from the main issues. n36

In some instances, the operation of the proposed rules will complicate the proceedings. However, even if a large number of incidents are brought in, the complexity will not exceed that of a trial in which several counts are charged, or a large number of uncharged incidents are brought in under existing rules. n37 For example, in the Atlanta child-murders case in 1982, the defendant Wayne Williams was formally charged with two murders, but evidence linking him to ten other killings was also presented. n38 Similarly, if the defendant in a rape case has passed through life leaving a trail of women who say that he raped them, that fact is singular enough to justify the time required for presenting it to the jury. n39

The third standard rationale for the existing restriction is the concern over prejudice. n40 The claim here, of course, is not just that admission of evidence of uncharged offenses increases the probability of conviction. That point is true, but

admission of any other persuasive evidence of guilt has the same effect.

Rather, the "prejudice" rationale maintains that this type of evidence carries an unacceptable risk of convicting the innocent. n41 This is premised on the view that jurors are likely to accord prior offenses more weight than they rationally merit as evidence of guilt, and are likely to return unwarranted convictions based on antagonism against the defendant that results from knowledge of his other offenses. n42 8131\*23

There is, however, no means of determining a priori whether particular categories of evidence are likely to be more prejudicial than probative. The lesson must be learned from experience, and in the context of sex offense prosecutions, the lesson of experience seems to point in the other direction. Courts in the United States have traditionally been inclined to admit evidence of other sex crimes by the defendant in sex offense prosecutions. n43 In some states, this has involved the formal recognition of special case law rules of admissibility in sex offense cases. n44

Special rules of this sort have become less common in the past few decades, in part because of the widespread adoption of codified evidence rules that appear to leave no room for them. However, the same practical result is often achieved by stretching the existing rules. The contemporary edition of Wigmore's Evidence n45 has described this tendency as follows:

There is a strong tendency in prosecutions for sex offenses to admit evidence of the accused's sexual proclivities. Do such decisions show that the general rule against the use of propensity evidence against an accused is not honored in sex offense prosecutions? We think so ... Some states and courts have ... forthrightly and expressly recognized a "lustful disposition" or sexual proclivity exception to the general rule barring the use of character evidence against an accused... Jurisdictions that do not expressly recognize a lustful disposition exception may effectively recognize such an exception by expansively interpreting in prosecutions for sex offenses various well-established exceptions to the character evidence rule. n46

Finally, the statements supporting the legislative proposal have addressed two more specific objections.

The first of these is an alleged inconsistency with the rape victim shield laws. American jurisdictions have generally adopted rules that narrowly limit inquiry into unrelated sexual behavior of the alleged victim in rape cases. n47 If the victim has immunity from disclosure of what she has done in the past, the argument runs, then why should the defendant be taxed with his past misconduct?

However, this objection is superficial. The shield laws further two important policies: First, they promote cooperation in the prosecution of sex offenses by not requiring the victim to suffer exposure of her sexual history as the price for doing so. Second, they safeguard the privacy of rape victims. There are no comparable policies supporting non-disclosure of the defendant's acts. The defendant's cooperation is not required for prosecution. Violent sex crimes are not private acts, and the defendant can claim no privacy interest in suppressing them when they are relevant to the determination of a later criminal charge.

In addition, there is a distinction in terms of probative value. The complainant in a rape prosecution is usually just a woman who had the bad luck to be raped. Inquiry into her sexual history will normally disclose nothing that particularly distinguishes her from the general population, and typically has little probative value on the question whether she consented to sex in the charged incident and fabricated a false accusation.

In contrast, evidence showing that the defendant has committed sexual assaults on other occasions places him in a small class of depraved criminals, and is likely to be highly probative in relation to the pending charge. The difference in typical probative value alone is sufficient to refute facile equations between evidence of other sexual behavior by the victim and evidence of other violent sex crimes by the defendant.

The second specific objection to the proposal is that it is too broad because it allows evidence of uncharged offenses for which the defendant has never been prosecuted, as well as evidence of prior convictions for sex crimes. One response is that the approach of the proposed new rules is no different in this respect than current Rule 404(b). The admission of evidence under the current rule is not conditioned on a prior conviction or other prior determination that the defendant committed the uncharged offenses. n48 The following additional points may be noted in response to this criticism:

First, there is no disadvantage to the defendant if he is only formally charged with a particular offense, and other (uncharged) offenses are offered as supporting evidence. The defendant has the same rights and opportunities to respond to evidence of uncharged offenses that he has in relation to a formally charged offense, including the assistance of counsel, cross-examination of witnesses, and presentation of rebuttal evidence. In addition, under the proposed new rules, the prosecutor would be required to make a full disclosure to 8131\*25 the defendant of the evidence to be offered to establish an uncharged offense. n49 Hence, the defendant's procedural rights under the proposed rules exceed those which he would have if he were formally charged with all offenses.

Second, rapists and child molesters frequently commit numerous crimes before being apprehended and prosecuted, and it is often impossible to join all offenses for trial in a single forum. This occurs, for example, in the case of a rapist or child molester who commits crimes in a number of different states, or who commits some crimes in state jurisdiction and others in federal jurisdiction. If the jury is to be made aware of all relevant criminal conduct of the defendant, this can only be accomplished in such a case through the admission of evidence of uncharged crimes.

Third, it also commonly happens in rape and child molestation cases that the victim is too traumatized, intimidated, or humiliated to file a complaint and go through the full course of proceedings in a criminal prosecution. Nevertheless, the victims in such cases are often willing to bear the more limited burden of testifying at the offender's trial for raping or molesting another person, when they find out that the person who marred their lives has also victimized others. Barring such testimony whenever the victims cannot take the stress of going through a full prosecution would enable rapists and child molesters to benefit from their success in traumatizing the victims of their crimes.

Fourth, evidence which links the defendant to several other rapes or child molestations may be highly probative when taken in the aggregate, even if it does not warrant charging separate counts based on all the individual incidents. As the Supreme Court observed in the Huddleston case, "individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts." n50

Fifth, the fact that the evidence supporting uncharged offenses may fall short of establishing their occurrence beyond a reasonable doubt is not a valid basis for barring the admission and consideration of such evidence. A defendant's commission of an offense with which he is formally charged must be proved beyond a reasonable doubt because we are unwilling to pronounce a person guilty of a crime - 8131\*26 and to subject him to criminal punishment - unless guilt is established with a high degree of certainty. This does not mean, however, that the truth or validity of any particular piece of supporting evidence must be shown beyond a reasonable doubt.

In this respect, evidence admitted under the proposed new rules for sex offense cases would be assessed in essentially the same way as evidence of uncharged offenses that is admitted under current Rule 404(b). The defendant cannot be

convicted for these offenses; they are admitted only for their bearing on the defendant's commission of the formally charged offense. If there are weaknesses in the government's evidence supporting the uncharged offenses, then the jury will be less persuaded of their occurrence, and their probative value as evidence of the charged offense is reduced accordingly. However, the strength of the supporting evidence generally goes to probative value rather than to admissibility. Evidence of this type is properly considered so long as the jury could reasonably conclude that the defendant committed the uncharged offense. No preliminary finding that the defendant committed the uncharged offense is required before evidence of the offense can be admitted, much less a finding that it occurred beyond a reasonable doubt. n51

### III. Evidence of Uncharged Acts Generally

At this point I'm going to step back from the pending legislative proposal, and talk more broadly about the rules governing the admission of evidence of uncharged acts.

When I make my own assessment of evidentiary rules, I start by asking myself what information a reasonable person would want to have in deciding an important matter. If I conclude that a reasonable person would want to have information that is excluded by existing evidentiary rules, I then ask whether there is a sufficient basis for denying juries evidence that one would reasonably desire to make an informed decision.

The answer to the first question is not hard in connection with similar crimes evidence. If I were responsible for deciding whether a person had committed a crime or engaged in other misconduct, I would reasonably want to know about his prior conduct in like matters. As noted earlier, this type of information often has a lot to say about the individual's dispositions and inclinations, about the presence or absence of effective inhibitions against engaging in serious violence or other criminality, about his willingness to hazard the practical risks of criminal conduct, and about the probability or improbability that he has been falsely or mistakenly implicated.

Nevertheless, the existing evidentiary rules embody an irrebuttable presumption that the ordinary people who serve on juries will behave unreasonably, if they are allowed to have this type of information and to accord it its natural probative value. The basis of this presumption is the idea that jurors will ineluctably overestimate this type of evidence, or be inflamed by it to convict the defendant merely because he is a "bad person." This idea is said to be a venerable piece of ancestral wisdom which has been passed down for centuries in the common law tradition. Thus, Wigmore's Evidence n52 offers the following assessment:

It may almost be said that it is because of the indubitable relevancy of specific bad acts showing the character of the accused that such evidence is excluded. It is objectionable not because it has no appreciable probative value but because it has too much. The natural and inevitable tendency of the tribunal ... is to give excessive weight to the vicious record of crime ... For nearly three centuries, ever since the liberal reaction that began with the restoration of the Stuarts, this policy of exclusion ... has received judicial sanction, which has become more emphatic with time and experience. n53

So says the treatise. But is it true? I would say that it is at least misleading. It overlooks a number of important contrary trends, and more broadly, I think, it misses the forest for the trees.

Let's start at the beginning. The rules excluding evidence of uncharged acts initially emerged in the late seventeenth century. n54 The early decisions, however, do not exclude this type of evidence on the ground that it is prejudicial.

Rather, they reflect the "fair notice" concern, and the need for some limit on the scope of the proceedings. n55

The seminal cases n56 do not point to a body of experience showing that evidence of prior crimes is likely to be overestimated by jurors, or that it is likely to result in unwarranted convictions based on antagonism. The "prejudice" idea may have originated as a rationalization for an established rule that arose for different reasons.8131\*28

By the eighteenth century the exclusionary principle was no longer novel. Various sources from that period state that evidence of character or uncharged acts is not admissible, subject to narrow exceptions. n57 However, the rule did not have the same practical significance that it has today. In a period when most trials were conducted before local juries in small communities, the likelihood was greater that jurors would have their own information about what the defendant had done in the past.

The debates over the ratification of the Constitution illustrate this point. Objections were raised that the Constitution required criminal jury trials within the same state, but did not perpetuate the "same vicinage" requirement. n58 In the Virginia ratification convention, Patrick Henry stated:

Will gentlemen tell me the trial by a jury of the vicinage where the party resides is preserved? ... This state ... is so large that your juries may be collected five hundred miles from where the party resides – no neighbors who are acquainted with their characters, their good or bad conduct in life, to judge of the unfortunate man ... By the bill of rights of England, a subject has a right to a trial by his peers. What is meant by his peers? Those who reside near him, his neighbors, and who are well acquainted with his character and situation in life. Is this secured in the proposed plan before you? No, sir. n59

The objections raised at the ratification conventions were primarily from the standpoint of a defendant who would be denied the jurors' independent knowledge of his good character. However, the same point could obviously work in the opposite direction. If a jury of the defendant's "neighbors" independently knew of the defendant's bad character or acts, that could work against him.

The likelihood of such knowledge by jurors presumably decreased in many areas with urbanization and the growth of population in the nineteenth century. At this point in time, however, other means of admitting evidence of uncharged acts opened up. The early nineteenth century brought formal recognition to a wide range of now-familiar exception categories. n60 The Supreme Court has offered the following assessment of this development:8131\*29

Alongside the general principle that prior convictions are inadmissible, despite their relevance to guilt ... the common law developed broad, vaguely defined exceptions – such as proof of intent, identity, malice, motive, and plan – whose application is left largely to the discretion of the trial judge ... In short, the common law ... implicitly recognized that any unfairness resulting from admitting prior convictions was more often than not balanced by its probative value and permitted the prosecution to introduce such evidence without demanding any particularly strong justification. n61

The late nineteenth and early twentieth centuries brought new doctrines which broadened further the grounds of admission. The common law rule had barred testimony by persons convicted of felonies and crimes involving dishonesty. n62 This was softened into a rule which allowed such persons to testify, but admitted their convictions for impeachment. n63 Once the defendant's testimonial incapacity was removed by statutes enacted in the late nineteenth century, it became possible to treat the defendant like other witnesses, and to disclose his conviction record if he testified.

The most common version of this rule automatically admitted a witness's convictions for felonies and crimina falsi. n64 Hence, when the defendant took the stand, the jury would learn of his entire record of convictions for serious crimes.

Another avenue of admission was created by recidivist sentencing statutes. Until the 1960's, the most common formulation of these statutes involved specifying the defendant's past convictions in the indictment. The jury would be instructed not to pay attention to the priors in determining guilt or innocence, but what's known is known. Under the procedures of these statutes, jurors could be aware of prior offenses of the defendant during the trial, and their assessment of the evidence was presumably colored by that knowledge. n65

Finally, there are aspects of procedural and substantive criminal law whose practical effect is much like that of admitting evidence of 8131\*30 uncharged acts. These rules depart from the atomistic approach of charging offenses based on discrete incidents taken in isolation, and give the trier information about broader patterns of criminal behavior of which the particular incident is a part.

One obvious example is joinder rules. Under *Federal Rule of Criminal Procedure 8(a)*, offenses can be joined in a single trial if they are "of the same or similar character," if they are based on the same act or transaction, or if they are based on acts or transactions which are connected or part of a common scheme or plan. Other examples include conspiracy prosecutions involving a number of criminal acts by the conspirators, and criminal enterprise offenses, such as RICO n66 and the Continuing Criminal Enterprise drug offense. n67 Much of the value for prosecutors of using these offenses is essentially the same as that of charging a particular offense and bringing in evidence of uncharged acts as supporting evidence: It permits the introduction of evidence concerning a pattern or series of crimes, whose cumulative effect may be "greater than its constituent parts." n68

At this point I can give more definite content to my earlier remark about "missing the forest for the trees." There have been restrictions on evidence of uncharged acts since the late seventeenth century. n69 However, the range, ingenuity, and breadth of the avenues that the system has devised for circumventing these restrictions is at least equally striking. The history is one of on-going tension between an early-established rule against admitting this type of evidence, and the desire to admit it anyway because of its obvious relevance and probative value in many circumstances. The result has been rules which instruct the jurors to pretend that they know nothing about a defendant's criminal propensities, but which ensure that jurors often have information whose probative value on this point is manifest.

Against this background, the special rules that have been recognized for sex offense cases in some jurisdictions are not that unique. The distinction is more that the need to allow evidence of propensity has appeared to be particularly exigent in this area, and decisionmakers have tended to be more straightforward than in other areas about what they were doing.

On the legislative side, many states adopted so-called "sexual psychopath" laws, which established special procedures for the civil 8131\*31 commitment of sex offenders. n70 This potentially provides a way around the rule against propensity evidence through proceedings in which the defendant's dangerousness is directly in issue. The Illinois commitment procedure for "sexually dangerous persons," n71 whose constitutionality was upheld by the Supreme Court in *Allen v. Illinois* n72 in 1986, illustrates the point. Under that procedure, a mentally disordered person can be committed for purposes of treatment and protection of the public if it is shown that he has "criminal propensities to the commission of sex offenses" and "demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children." n73 In establishing the required propensity, the government may introduce "evidence of the commission by the respondent of any number of crimes." n74

The judicial response has already been noted: Courts in some states have adopted special rules allowing evidence of similar crimes in sex offense cases, n75 and there has been a strong tendency to apply the standard exception categories with unusual liberality in such cases.

In the contemporary period, the adoption in most states of codified evidence rules barring "character evidence" has created new barriers to admitting evidence that is reasonably required for an informed decision in sex offense cases. The hostility of many legal writers to special treatment of sex offense cases, and the general shift of case law in favor of defense interests since the 1960's, have also presumably taken their toll. Nevertheless, the impetus to admit this type of evidence has not abated in the contemporary period, and the decisions continue to reflect the resulting tension with the general rule of exclusion.

I will give three illustrations: 8131\*32

The first is the case of *State v. Fears*. n76 The defendant in that case raped the victim of the charged offense when he picked her up while she was hitchhiking. n77 The evidence in the case included testimony by a 15-year-old witness that the defendant had also raped her two days prior to the charged incident, after offering her a ride at a bus stop. n78 The defendant conceded that he had sexual intercourse with the victim but claimed it was consensual. n79

In reviewing the case, the court of appeals stated that state evidence rule 404 must be "applied strictly in cases of sexual crimes because of the inflammatory nature of prior sexual crimes evidence." n80 Nevertheless, the court upheld the admission of the evidence on the ground that the defendant "essentially contended that he did not intend forcibly to compel the victim to have sexual intercourse." n81 In so many words, the court held that evidence of other non-consensual sex crimes is admissible to show the defendant's intent to get sex without consent.

This case is typical of many that admit evidence of other offenses in response to the defendant's claim of consent. There is no claim that the defendant engaged in unintentional touching of a sexual nature, or misunderstood the victim's attitude. Rather, the court is presented with unequivocally different versions of the incident. The defendant claims that it was a romantic interlude. The victim says that she was raped. The evidence of other sexually assaultive behavior by the defendant is admitted because it makes the victim's version more probable and the defendant's less so.

In cases of this type, creative use of the "intent" exception and other categories has enabled some courts to approximate a broad rule of admissibility for evidence of other similar crimes. n82 However, there are also many comparable cases involving claims of consent in which 8131\*33 courts have concluded that the existing rules bar evidence of uncharged offenses. n83

My second example is a child molestation case. Consent is not a defense in these cases, but they generate pressures of other sorts. The problem of proof that results from the need to rely on child victim-witnesses has already been noted. Prior offenses of this type by the defendant show an unusual disposition - a sexual or sado-sexual interest in children - that does not exist in ordinary people. In the common situation where the victim is the daughter or step-daughter of the defendant, there is often testimony by the victim's sisters that the defendant has also molested them. The trier has an incomplete picture of the situation if it is denied the evidence that the defendant has been using his children as his harem.

In *Elliott v. State*, n84 the Supreme Court of Wyoming apparently achieved a global resolution of the problem of admission in child molestation cases by use of the "motive" exception in state evidence rule 404(b). In the prosecution of a man for raping his nine-year-old step-daughter, the court held that evidence of uncharged sexual assaults by the defendant on the victim's sister was admissible as proof of motive. n85 In support of this conclusion, it cited definitions

of "motive" which included "that which leads the mind to indulge in a criminal act" n86 and "something within a person (as a need, idea, organic state, or emotion) that incites him to action." n87 The court stated:

We have ... a victim whose testimony is corroborated by fresh complaint and some apparent injury ... The defendant testified that no such conduct occurred, and ascribed a motive to the victim for testifying falsely. Given this evidentiary conflict a finder of fact would be extremely interested in other information that might be available to help resolve the ultimate issue. Evidence of motive would be such information. One ... whose preference or addiction for unusual sexual practices occurs in the form of pedophilia, could well be recognized as having a motive to commit the acts complained of by the victim. The fact finder could infer from the acts complained of by the older sister that Elliott was so motivated. n88 8131\*34

This appears to be the practical equivalent of a rule of admissibility for propensity evidence, where the propensity in question is a disposition to engage in child molestation. n89 However, child molestation cases can be found in other jurisdictions in which courts have excluded this type of evidence. n90

My final illustration concerns the class of cases in which the charged offense and the uncharged acts were committed against the same victim. A special rule admitting evidence of sexual disposition was widely recognized for these cases in traditional case law. n91 Currently, courts are still disposed to find, on one rationale or another, that evidence of the defendant's sexual inclinations towards the particular victim is admissible, notwithstanding the general rule against evidence of "character" or "propensity." n92

In this area as well, some courts have cut the Gordian knot. In *State v. McKay*, n93 the Supreme Court of Oregon apparently adopted a rule that evidence of this type is always potentially admissible. n94 The defendant was charged with sexually abusing his stepdaughter when she was 15, and the victim testified about earlier sexual contacts when she was between the ages of 10 and 13. n95 The court's rationale was that evidence of a disposition towards the particular victim is outside the scope of Rule 404's prohibition of evidence of character:

Simply stated, the proffered evidence here was admissible to demonstrate the sexual predisposition this defendant had for this particular victim, that is, to show the sexual inclination of [the] defendant towards the victim, not that he had a character trait or propensity to engage in sexual misconduct generally. n96 8131\*35

However, this view of Rule 404 is not shared by all courts, and cases can be found in which courts have excluded evidence of other sexual assaults against the same victim on the basis of the no-propensity-evidence rule. n97

In closing, I would suggest that the current rules are subject to criticism on two grounds. First, they are inadequate in providing the trier with information that is reasonably necessary to achieve just results in sex offense prosecutions, and hence inadequate to protect people from a particularly dangerous class of criminals. Now as in the past, many courts attempt to get around the restrictions, but there is no reliability in the results of this effort. The evidence that is needed to establish the guilt of rapists and child molesters is often subject to exclusion.

The result is cases in which everyone who is fully informed about the case – the police, the prosecutor, the victim, the judge, the defendant's lawyer, even spectators in the courtroom – is persuaded that the defendant did it, because the combination of the direct evidence and knowledge of the defendant's past conduct forecloses any genuine doubt on that point. Only the people who are actually responsible for deciding the case are denied the critical information.

The second criticism is the resulting distortions in the law. The vagueness of the standards of Rule 404(b) ensures considerable variation in their application by the courts, and this tendency is magnified in sex offense cases by the special

pressures courts have felt to find some way of getting the evidence in. People's security against sexual violence should not have to depend on the willingness of courts to stretch evidentiary rules in particular cases.

The legislative proposal I have discussed provides a reasonable and honest alternative. It permits the use of evidence of other sex crimes in sex offense cases, while providing appropriate safeguards of fairness for the defendant. No fictions of limited admissibility are relied on; evidence admitted under the new rules would be subject to rational assessment. The result would be a major step forward in achieving justice and protecting people from one of the most atrocious forms of criminal violence.

#### FOOTNOTES:

n1. *State v. Smith*, Fifteenth Judicial Circuit of Florida, # 91-005482 CF A 02.

n2. See Cathy Booth, *The Case That Was Not Heard*, *Time*, Dec. 23, 1991, at 38; David A. Kaplan & Bob Cohn, *Palm Beach Lessons*, *Newsweek*, Dec. 23, 1991, at 30.

n3. H.R. 1149, 102d Cong., 1st Sess. 231 (1991).

n4. S. 472, 102d Cong., 1st Sess. 231 (1991).

n5. *Id.*

n6. The original violent crime bill transmitted to Congress by the President [i.e., President Bush] in March of 1991 was S. 635 and H.R. 1400. The proposal relating to prior crimes evidence in sex offense cases was in 801 of the bill. See 137 Cong. Rec. S3212 (text) and S3238-42 (analysis statement) (1991). The President [i.e., President Bush] transmitted to Congress on September 30, 1992, a second violent crime bill, the proposed "Violent Crime Control Act of 1992," which included substantially the same proposal as 121 of the proposed "Sexual Assault Prevention Act of 1992," H.R. 5960 and S. 3271.

n7. The proposed "Sexual Assault Prevention Act" was introduced in the House of Representatives as H.R. 5960 by Rep. Susan Molinari and Rep. Jon Kyl, and in the Senate as S. 3271 by Senator Robert Dole and several co-sponsors. The text of the bill appears in 138 Cong. Rec. S15,160-69 (1992); the proposed new evidence rules for sex offense cases are in 121 of the bill. This proposal was also introduced by Rep. James Sensenbrenner as a separate bill, H.R. 3463, in 1991.

n8. *509 N.Y.S.2d 311 (N.Y. App. Div. 1986)*.

n9. *Id. at 312-13*.

n10. *Id. at 313*.

n11. *Id.*

n12. *Id.*

n13. *Id.*

n14. *Id. at 315*.

n15. *Id. at 312*.

n16. *Id. at 315-16*.

n17. *Id.*

n18. *153 Cal. App. 3d 888 (Cal. Ct. App. 1984).*

n19. *Id. at 892.*

n20. *Id. at 893.*

n21. *Id.*

n22. *Id.*

n23. *Id. at 892.*

n24. *Id. at 898.*

n25. *Fed. R. Evid. 414(a).*

n26. *Fed. R. Evid. 415(a).*

n27. *Fed. R. Evid. 413(b), 414(b), 415(b).*

n28. H.R. 5960, 102d Cong., 2d Sess. (1992); S. 3271, 102d Cong., 2d Sess. (1992).

n29. Unpublished analysis statement.

n30. *485 U.S. 681 (1988).*

n31. *Id. at 688-91.*

n32. See generally 137 Cong. Rec. S3240-41 (1991) (analysis statement accompanying S. 635); Office of Legal Policy, U.S. Dep't of Justice, *The Admission of Criminal Histories at Trial*, 22 *U. Mich. J.L. Ref.* 707, 737-38, 738 n.64 (1989) [hereinafter *Histories*].

n33. See generally *Histories*, supra note 32, at 727-33.

n34. See *id.* at 727-28.

n35. See *id.* at 727, 730.

n36. See generally *id.* at 725-27, 737-38, 738 n.64 (1989); Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1983*, at 2, 6 (1989) (in survey of 108,580 offenders, offenders imprisoned for rape were 10.5 times more likely to be arrested for rape within three years of release than offenders imprisoned for other offenses).

n37. See, e.g., *State v. Day*, 715 P.2d 743 (Ariz. 1986) (upholding joinder and conviction on fifty felony counts against thirteen victims, including seventeen counts of sexual assault).

n38. See *Williams v. State*, 312 S.E.2d 40 (Ga. 1983).

n39. Cf. *State v. DeBaere*, 356 N.W.2d 301 (Minn. 1984) (admission of evidence of sexual assaults against five other women within three year period); *State v. Santos*, 413 A.2d 58 (R.I. 1980) (protestation of defendant to police that he did not know why women kept having consensual sex with him and then falsely accusing him, following statement to victim that two other women had made rape complaints against him).

- n40. See Histories, *supra* note 32, at 727, 730–31.
- n41. See *id.* at 731–32.
- n42. See *id.* at 730–31.
- n43. See *infra* notes 45, 46, 75 and accompanying text.
- n44. See *id.*
- n45. 1A John Henry Wigmore, *Evidence in Trials at Common Law* 62.2 (Tillers rev. ed. 1983).
- n46. *Id.* at 1334–36.
- n47. E.g., *Fed. R. Evid.* 412.
- n48. See *Huddleston v. United States*, 485 U.S. 681 (1988).
- n49. *Fed. R. Evid.* 413(b), 414(b), 415(b).
- n50. *Huddleston*, 485 U.S. at 690–91 (applying principle to admission of evidence of uncharged offenses).
- n51. See *Huddleston*, 485 U.S. 681.
- n52. Wigmore, *supra* note 45, 58.2.
- n53. *Id.* at 1212–13.
- n54. See Histories, *supra* note 32, at 716–17.
- n55. See Wigmore, *supra* note 45, 58.2 nn.1–2 (citing *Hampden's Trial*, 9 *How. St. Tr.* 1053, 1103 (K.B. 1684) and *Harrison's Trial*, 12 *How. St. Tr.* 833, 864 (Old Bailey 1692)).
- n56. See *id.*
- n57. See Thomas J. Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidenced in Federal Criminal Trials*, 50 *U. Cin. L. Rev.* 713, 717–18 nn.19–20 (1981).
- n58. See U.S. Const. art. III, 2, cl. 3.
- n59. III Jonathan Elliot, *Elliot's Debates* 578–79 (1836); see II *id.* at 109–10 (similar point by participant in Massachusetts convention).
- n60. See Histories, *supra* note 32, at 717.
- n61. *Marshall v. Lonberger*, 459 U.S. 422, 438–39 n.6 (1983).
- n62. See Histories, *supra* note 32, at 722–23.
- n63. See *id.*
- n64. See Mason Ladd, *Credibility Tests – Current Trends*, 89 *U. Pa. L. Rev.* 166, 176–77 (1940); Note, *Procedural Protections of the Criminal Defendant – A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime*, 78 *Harv. L. Rev.* 426, 441 (1964); see also Harry

Kalven Jr. & Hans Zeisel, *The American Jury* 147 (1966) (in cases where defendant had criminal record, jury was aware of record in 59% of cases, including 72% of cases in which defendant testified and 13% of cases in which defendant did not testify).

n65. See generally *Spencer v. Texas*, 385 U.S. 554 (1967); Note, Recidivist Procedures, 40 *N.Y.U. L. Rev.* 332 (1965); Note, The Pleading and Proof of Prior Convictions in Habitual Criminal Prosecutions, 33 *N.Y.U. L. Rev.* 210 (1958).

n66. The Racketeer Influenced and Corrupt Organizations offense, 18 U.S.C. 1961-63.

n67. 21 U.S.C. 848(a)-(c).

n68. *Huddleston v. United States*, 485 U.S. 681, 691 (1988).

n69. See supra notes 54-55 and accompanying text.

n70. See Comment, The Illinois Sexually Dangerous Persons Act: An Examination of a Statute in Need of Change, 12 *So. Ill. U. L.J.* 437, 437 (1988).

n71. Ill. Comp. Stat. Ann. ch. 725 205/0.01-12.

n72. 478 U.S. 364 (1986).

n73. Ill. Comp. Stat. Ann. ch. 725 205/1.01.

n74. *Id.* 205/5.

n75. See, e.g., *Bracey v. United States*, 142 F.2d 85, 88-89 (D.C. Cir.), cert. denied, 322 U.S. 762 (1944); *State v. Spence*, 704 P.2d 272 (Ariz. Ct. App. 1985); *Farmer v. State*, 398 S.E.2d 235 (Ga. Ct. App. 1990); *Benefiel v. State*, 578 N.E.2d 338, 346 (Ind. 1991), cert. denied, 112 S. Ct. 2971 (1992); *State v. Allen*, 183 P.2d 458, 460 (Kan. 1947); *State v. Bisagno*, 246 P. 1001 (Kan. 1926); *Abbott v. State*, 204 N.W. 74, rev'd, 206 N.W. 153 (Neb. 1925); *State v. Reineke*, 106 N.E. 52, 54-55 (Ohio 1914); *State v. Charles L.*, 398 S.E.2d 123, 131-33 (W. Va. 1990); see also *State v. Tarrell*, 247 N.W.2d 696, 702-03 (Wis. 1976) (evidence demonstrating defendant's "propensity to act out his sexual desires with young girls" admissible notwithstanding codified rule against character evidence).

n76. 688 P.2d 88 (*Or. Ct. App.* 1984).

n77. *Id.* at 89.

n78. *Id.*

n79. *Id.*

n80. *Id.*

n81. *Id.* at 90.

n82. See, e.g., *Oglen v. State*, 440 So.2d 1172, 1176 (Ala. Crim. App.), cert. denied, 440 So.2d 1177 (Ala. 1983); *O'Neal v. State*, 318 S.E.2d 66 (Ga. Ct. App. 1984); *State v. DeBaere*, 356 N.W.2d 301 (Minn. 1984); *State v. McRae*, 371 N.W.2d 66 (Minn. Ct. App. 1985); *Rubio v. State*, 607 S.W.2d 498 (Tex. Crim. App. 1980); *Carey v. State*, 715 P.2d 244 (Wyo.), cert. denied, 479 U.S. 882 (1986); *Evans v. State*, 655 P.2d 1214 (Wyo. 1982).

n83. See, e.g., *Velez v. State*, 762 P.2d 1297 (Alaska Ct. App. 1988); *People v. Key*, 153 Cal. App. 3d 888 (1984); *State v. Pace*, 275 S.E.2d 254 (N.C. Ct. App. 1981); *State v. Saltarelli*, 655 P.2d 697 (Wash. 1982); see also *State v.*

*Hansen*, 608 P.2d 1083 (Mont. 1980) (exclusion of evidence of prior offense in relation to claim of fabrication).

n84. 600 P.2d 1044 (Wyo. 1979).

n85. *Id.* at 1045-49.

n86. *Id.* at 1048 (quoting *Thompson v. United States*, 144 F. 14, 18 (1906)).

n87. *Id.* (quoting Webster's New International Dictionary, Unabridged 1475 (1961)).

n88. *Id.* at 1048-49.

n89. For examples of other recent decisions taking a broad approach to admission in child molestation cases, on various rationales, see, e.g., *State v. Crane*, 799 P.2d 1380, 1383-84 (Ariz. Ct. App. 1990); *Beasley v. State*, 518 So.2d 917 (Fla. 1988); *Potts v. State*, 427 So.2d 822 (Fla. Dist. Ct. App. 1983); *Cooper v. State*, 325 S.E.2d 877 (Ga. Ct. App. 1985); *Andrews v. State*, 529 N.E.2d 360, 365-66 (Ind. Ct. App. 1988), cert. denied, 493 U.S. 919 (1989); *State v. Lachterman*, 812 S.W.2d 759 (Mo. Ct. App. 1991), cert. denied, 112 S. Ct. 1666 (1992); *State v. Long*, 726 P.2d 1364, 1365-68 (Mont. 1986); *State v. Plymate*, 345 N.W.2d 327 (Neb. 1984); *State v. Raye*, 326 S.E.2d 333 (N.C. Ct. App.), rev. denied, 332 S.E.2d 183 (N.C. 1985); *State v. Champagne*, 422 N.W.2d 840 (S.D. 1988); *State v. Friedrich*, 398 N.W.2d 763 (Wis. 1987).

n90. See, e.g., *People v. McMillan*, 407 N.E.2d 207 (Ill. Ct. App. 1980); *Wells v. State*, 799 P.2d 1128 (Okla. Crim. App. 1990); *Hall v. State*, 615 P.2d 1020 (Okla. Crim. App. 1980).

n91. See Thomas J. Reed, Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases, 21 *Am. J. Crim. L.* 127, 168-81 (1993).

n92. See, e.g., *People v. Bradley*, 470 N.E.2d 1121, 1128 (Ill. Ct. App. 1984); *State v. Spaulding*, 313 N.W.2d 878, 880-81 (Iowa 1981); *State v. Moore*, 748 P.2d 833, 837-38 (Kan. 1987); *Vogel v. State*, 554 A.2d 1231 (Md. 1989); *State v. Graham*, 641 S.W.2d 102, 104-05 (Mo. 1982); *State v. T.W.*, 715 P.2d 428 (Mont. 1986).

n93. 787 P.2d 479 (Or. 1990).

n94. See *id.* at 480.

n95. *Id.* at 479.

n96. *Id.* at 480.

n97. See, e.g., *Getz v. State*, 538 A.2d 726 (Del. 1988); *People v. Lewis*, 506 N.E.2d 915 (N.Y. 1987).