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Roger C. Park

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"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 Meehl²

A cardinal 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. Our attachment to this principle is so strong that courts carry it a step further and usually exclude evidence of the defendant's bad character, even if it is relevant to his guilt of the crime charged.³

* Gray, Plant, Mooty, Mooty & Bennett Professor of Law, University of Minnesota.

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Comments or requests for reprints may be directed to the authors at the University of Minnesota Law School, 229 19th Ave S., Minneapolis, MN 55455, or through e-mail (parkx003@maroon.tc.umn.edu).

1. 636 F.2d 517, 523 (D.C. Cir. 1980), quoted in MCCORMICK ON EVIDENCE, PRACTITIONER TREATISE SERIES § 190, at 797 n.1 (John W. Strong et al. eds., 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. This approach is often contrasted with the European approach, under which courts freely receive evidence of prior criminal history. See Department of Justice, Office of Legal Policy, *The Admission of Criminal Histories at Trial*, 22 U. MICH. J.L. REF. 707, 751 (1989) (noting that in European criminal proceedings, criminal history is

This rule has come under sharp attack in Congress and the courts on the ground that it enables sex offenders to escape punishment.⁴ The televised trial of William Kennedy Smith heightened public awareness of the problem. Smith was accused of raping a woman whom he met in a bar in Palm Beach. She had gone with him 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.⁵ At a pretrial hearing, the prosecution offered testimony by three other women that Smith had sexually assaulted them.⁶ The trial judge excluded the evidence under Florida law,⁷ and the jury ultimately acquitted Smith.⁸ This decision to exclude was not a freak of local law; it was consistent with the law of many, but not all, jurisdictions.⁹

"routinely admitted"). *But cf.* Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 518 (1973) (maintaining that while continental jurists do not formally exclude criminal records from evidence, they normally regard a criminal conviction as logically irrelevant to a determination of guilt).

4. See *infra* text accompanying notes 159-62.

5. Timothy Clifford, *Smith on Stand: 'I Got Picked Up'; Says Sex Consensual*, NEWSDAY, Dec. 11, 1991, at 5 (describing courtroom testimony).

6. In two cases, the women reported that Smith suddenly became aggressive, pinned them down, and pawed them, but that they were able to repulse him. A third woman reported that after she became intoxicated at a party that she and Smith attended, they returned to Smith's apartment where he made unwelcome sexual advances and, although 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 Beach Rape Case*, BOSTON GLOBE, July 24, 1991, at 1.

7. See Michael Hedges, *Other Women Paint Smith as Violent, 'Not Too Bright'*, WASH. TIMES, Dec. 7, 1991, at A4 (describing exclusion of evidence).

8. Paul Richter, *Jury Acquits Smith of Rape at Kennedy Estate*, L.A. TIMES, Dec. 12, 1991, at A1 (describing acquittal).

9. See *State v. Saltarelli*, 655 P.2d 697 (Wash. 1982). In *Saltarelli*, the defendant, charged with the rape of an acquaintance, raised a consent defense. *Id.* The court held that it was reversible error to receive evidence of the defendant's prior attempted rape of a different woman. *Id.* at 700-01. In *People v. Tassell*, 679 P.2d 1 (Cal. 1984) (en banc), the court held that it was error, though harmless, to admit evidence of two prior rapes by a defendant charged with acquaintance rape. In *Reichard v. State*, 510 N.E.2d 163 (Ind. 1987), the defendant was accused of a knife-point rape of a woman with whom he had a dating relationship. *Id.* at 165. The court held that it was reversible error to receive evidence of "prior alleged rapes perpetrated by him upon various individuals." *Id.* at 165, 166. The court also remarked that "the trial court incorrectly categorized rape of an adult woman as depraved sexual conduct." *Id.* at 165. In *Lovely v. United States*, 169 F.2d 386 (4th Cir. 1948), the defendant was accused of raping an acquaintance after driving her to a remote part of a

The exclusion issue also arises in "stranger rape" cases, when the defendant claims the victim misidentified him and the prosecution seeks to introduce evidence that he committed other rapes. In this context, courts sometimes exclude the uncharged misconduct evidence as contrary to the rule against character evidence.¹⁰ Some courts, however, are more willing to admit the evidence in stranger rape cases than in consent defense cases.¹¹

federal military base. *Id.* at 387-88. The court excluded evidence of a rape 15 days earlier on the same base, reasoning that the rape of one woman had no tendency to prove that another woman did not consent. *Id.* at 388, 390. In *Brown v. State*, 459 N.E.2d 376 (Ind. 1984), the defendant met his victim in a gas station and drove her to a cornfield where he threatened, raped, and beat the victim. *Id.* at 377. Two other victims testified to rapes by the defendant in secluded areas after getting or giving him rides in a vehicle. *Id.* at 378-79. The court held that receiving this evidence was reversible error but indicated that the evidence might be admissible were identity in issue. *Id.* at 379. The court also held, however, that the evidence was not admissible in the case at bar because the defense was consent. *Id.* Further, the court distinguished depraved sexual instinct cases involving sodomy and incest. *Id.* But see *State v. Crocker*, 409 N.W.2d 840 (Minn. 1987), in which the court held it was not an error to admit evidence of prior sex crimes against children in a case in which the defendant raised a consent defense in response to an accusation of the rape of an adult victim. *Id.* at 843. The court reasoned that the evidence showed a "pattern" of opportunistic assaults on vulnerable victims. *Id.* See generally Sara S. Beale, *Prior Similar Acts in Prosecutions for Rape and Child Sex Abuse*, 4 CRIM. L.F. 307 (1993).

10. See, e.g., *Vaughn v. State*, 604 So. 2d 1272 (Fla. Dist. Ct. App. 1992). In *Vaughn*, the court held inadmissible evidence of the rape of a prostitute in an alley when the defendant was accused of raping a sixty-year-old victim whom he had awakened in the victim's bedroom. *Id.* at 1272-73. *People v. Sanza*, 509 N.Y.S.2d 311 (N.Y. App. Div. 1986), held that in a prosecution for rape and murder in New York state, evidence that the accused had raped three victims in Florida was inadmissible. *Id.* at 314-15. *White v. Commonwealth*, 388 S.E.2d 645 (Va. Ct. App. 1990), overruled on other grounds by *Lavinder v. Commonwealth*, 407 S.E.2d 910 (Va. Ct. App. 1991), held inadmissible the evidence that the defendant, accused of raping a woman in the women's rest room, had approached, three hours earlier, another woman, knife in hand, in another women's rest room. *Id.* at 645-47, 649.

11. Some of the courts that have rejected the evidence in consent defense cases have indicated in dicta that they would accept the evidence in alibi defense (stranger rape) cases because of its relevance to identity. See *People v. Tassell*, 679 P.2d 1 (Cal. 1984) (en banc); *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). In *Hanks*, the defendant was accused of raping a victim while he was wearing a ski mask. *Id.* at 411. The court held that the evidence of three other rapes, in which the defendant had used threats and violence and had wielded a knife, though not wearing a mask, was sufficiently similar to be admitted for the purpose of establishing the rapist's identity. *Id.* at 412-13. In *Coleman v. State*, 621 P.2d 869 (Alaska 1980), cert. denied, 454 U.S. 1090 (1981), similarities in race and age of victims, along with a similar situs of attack and a similar man-

A third type of case involves child sexual abuse. As in stranger rape cases, the accused cannot claim that the victim consented. The defense may claim, however, that no sexual abuse occurred, or that another person committed the offense. The prosecution in turn may offer evidence that on other occasions the defendant molested the same child or other children. Courts are divided about the admissibility of such evidence.¹²

ner of subduing the victim from behind, sufficed to allow evidence of other crimes to prove identity. *Id.* at 875. *Jenkins v. State*, 356 S.E.2d 525 (Ga. Ct. App. 1987), held that evidence of the defendant's prior sexual assault was admissible to establish identity in an attempted rape charge in which no dispute existed that the defendant had committed a prior assault. *Id.* at 526. Both the prior assault and the charged crime involved a sexual assault upon a woman who had no prior personal connection with the defendant and who frustrated the assault by screaming. *Id.* In *Copeland v. State*, 455 S.2d 951 (Ala. Crim. App. 1984), *cert. denied*, 455 So. 2d 956 (Ala. 1984), the court held that the prior rape and the charged rape were sufficiently similar to meet the admissibility standard for establishing identity when both incidents occurred in the same neighborhood; the attacks were late at night; a muscular attacker entered homes by breaking a window; he also wore a mask, brandished a weapon, and smelled bad. *Id.* at 954-55. In *Humphrey v. State*, 304 So. 2d 617 (Ala. Crim. App. 1974), a similarity linking two rapes and one attempted rape was that the attacker walked unarmed into the victim's bedrooms to attack them. *Id.* at 618, 612-22. The court held that the evidence was admissible to prove identity. *Id.* at 623-24. *Cf. State v. Mason*, 827 P.2d 748 (Kan. 1992). In *Mason*, the defendant was accused of the attempted rape of an 89-year-old victim. *Id.* at 750. The court held admissible evidence of the prior murder of a 76-year-old victim, in which the defendant asked to use the phone to gain entry and strangled the victim with a sock. *Id.* at 756-57. The court reasoned that the prior crime was sufficiently similar to the charged crime in which the defendant gained entry to the home by asking to use the phone and later prepared the stocking in his hands before fleeing the victim's house. *Id.* at 750, 757.

12. *Hall v. State*, 419 S.E.2d 503 (Ga. Ct. App. 1992), *cert. denied*, No. S92C1194, 1992 Ga. LEXIS 707 (Ga. Sept. 8, 1992). In *Hall*, the defendant was accused of molesting his teenage daughter. *Id.* at 504. Testimony that 16 years earlier the defendant had molested his teenage sister was admissible, even though his sister alleged penetration and his daughter did not. *Id.* at 505. Also, the daughter alleged continuing contacts but his sister alleged only one incident. *Id.* In *State v. Floody*, 481 N.W.2d 242 (S.D. 1992), the defendant was charged with the rape of a six-year-old. *Id.* at 245. Evidence of other sexual contact between the defendant and the victim, when the parents of the victim were not at home, was held admissible to show plan or course of criminal activity. *Id.* at 254. In *State v. Miller*, 632 P.2d 552 (Ariz. 1981) (en banc), evidence of a prior molestation of another child victim was held admissible to prove identity when the victim in the charged crime was unable to identify the defendant. *Id.* at 554-55. Both incidents were similar in that they occurred at the same time of day, the man bore the same description, and both children were fondled in the same way after the man broke into the residence through a bedroom window. *Id.* at 554. *Contra State v. Winget*, 310 P.2d 738 (Utah 1957). In *Winget*, the defendant was accused of the sexual abuse of his eight-year-old daughter. *Id.* at 738. The court held that it was reversible error to allow his 17-year-old stepdaughter to testify that he had abused her as a child. *Id.* at 739. In

Congress is now considering legislation that would allow the prosecution to introduce evidence of the accused's other crimes in most federal sex offense cases.¹³ Meanwhile, the courts are still wrestling with the issue.

The purpose of this Article is to reconsider the rule against evidence of uncharged misconduct by the accused as it pertains to sex offenses. Although the focus is primarily on rape, much of the analysis has implications for child sexual abuse cases as well. We begin with an examination of the traditional exceptions to the rule and the circumstances in which courts have applied those exceptions to sex crimes. We then consider whether the rule should be discarded. Finally, we evaluate the alternative of retaining the rule against uncharged misconduct evidence, but creating a general or limited exception for sex offenses.

People v. Jones, 335 N.W.2d 465 (Mich. 1983) (per curiam), the State charged the accused with a crime arising from sexual intercourse with his 15-year-old stepdaughter. *Id.* The court held it reversible error to admit testimony by his natural daughter and another stepdaughter of the defendant's sexual activity with them. *Id.* at 465, 467. In *Government of Virgin Islands v. Pinney*, 967 F.2d 912 (3d Cir. 1992), the prosecution of an 18-year-old defendant for the rape of a seven-year-old girl presented testimony of the victim's sister that the accused had also raped the sister six years earlier when she was six. *Id.* at 913. The court held that it was reversible error to admit the testimony. *Id.* at 915-16. In *People v. Woltz*, 592 N.E.2d 1182 (Ill. App. 3d 1992), the defendant was accused of digital penetration and other forcible touching of a 12-year-old girl. *Id.* at 1183. Evidence of a prior rape of a 14-year-old was inadmissible. *Id.* at 1184, 1185-86. In *Kelly v. State*, 828 S.W.2d 162 (Tex. Crim. App. 1992), the defendant was charged with sexual assault on a nine-year-old girl. *Id.* at 163. The court held it reversible error to admit testimony by a nine-year-old witness, who was a friend of the complainant, about other acts committed by the defendant with the complainant and the witness. *Id.* at 163, 165-66. In *Owens v. State*, 827 S.W.2d 911 (Tex. Crim. App. 1992), the court held it was reversible error, in a prosecution of the defendant for sexual assault of the defendant's daughter, to admit testimony of the defendant's alleged rape of his older daughter. *Id.* at 913, 915-17. In *Bolden v. State*, 720 P.2d 957 (Alaska Ct. App. 1986), the defendant was accused of sexual conduct with two underage girls, both of them his daughters. *Id.* at 958. The court held it was reversible error to admit evidence of the defendant's sexual conduct with other daughters and their underage friends. *Id.* at 959, 960. The court also noted that when identity and intent are not in issue, the only available defense is that the acts were not committed. *Id.* at 961.

13. S. 1607, 103d Cong., 1st Sess. § 121 (1993).

I. THE STATE OF THE LAW: UNCHARGED MISCONDUCT EVIDENCE IN SEX OFFENSE CASES

The rule against character evidence prohibits the admission of evidence in any form (opinion, reputation, or specific acts) to show that a person possesses a particular character trait, if offered to prove action in conformity with that trait. Thus, the rule generally forbids the introduction of evidence that a defendant, now charged with a sex offense, has also committed sex offenses on other occasions. Courts often admit such evidence, however, either on the ground that it is relevant for some purpose other than to show the accused's character, or on the ground that it falls within a recognized exception to the rule against character evidence.

We begin our analysis by examining these theories of admissibility.

A. UNCHARGED MISCONDUCT OFFERED AS CHARACTER EVIDENCE UNDER AN EXCEPTION TO THE RULE OF EXCLUSION

1. Impeachment of the defendant with prior convictions

If a defendant has been *convicted* of another sex crime, some courts allow the prosecution to introduce evidence of the conviction in order to impeach the defendant's testimony. When admitted for this purpose, the prior misconduct supposedly shows that the defendant is the sort of person who would lie on the witness stand, not that he is the type of person who would commit rape. Accordingly, the defendant is entitled to a limiting instruction informing the jury that it should use this evidence only for its bearing on his credibility, not as evidence of his guilt.¹⁴

14. For a typical instruction, see *State v. Schwab*, 409 N.W.2d 876, 882 (Minn. Ct. App. 1987) (Randall, J., concurring) (quoting 10 *Minnesota Practice*, CRIM.JIG, 3.15(1) (1985)): "In the case of the 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*, made the following comments on this instruction:

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

In most jurisdictions, the trial judge has the authority to prevent the use of other-crime convictions as impeachment evidence in situations in which the jury is likely to use the evidence improperly despite the limiting instruction.¹⁵ One factor judges consider in deciding this issue is the similarity of the other crime to the charged crime.¹⁶ The greater the similarity, the greater the danger that the jurors will treat the other crime as evidence of a propensity to commit the charged crime, rather than limiting their use of the evidence in the artificial way mandated by the instruction. Thus, similarity is a factor that weighs against admissibility when other crimes evidence is offered on an impeachment theory.

In contrast, similarity weighs in favor of admissibility if the evidence is offered under the theory that it shows a plan or modus operandi, rather than a trait of character. If one takes this web of doctrine seriously, a middle area may exist 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.¹⁷

One might suppose that judges often would exclude evidence of a prior rape when offered on an impeachment theory in a rape case, on the ground that the jury will draw the natural, yet improper, inference that the evidence shows a tendency to rape. Nevertheless, several appellate courts have upheld admission of a prior sex crime to impeach a defendant accused of rape or another sex crime as being within the trial judge's discretion.¹⁸

(read: substantive and credible) that the jury is apt to believe that he has also committed this one.

Id. at 882.

15. *See, e.g.*, FED. R. EVID. 609(a).

16. 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 609[04], at 609-54 to 609-55.

17. The middle area does not necessarily exist, however. The two categories conceivably border on each other (or overlap), so that when the felony is too similar to be offered to impeach, it is invariably similar enough to be offered for substantive purposes.

18. *See State v. Trejo*, 825 P.2d 1252 (N.M. Ct. App. 1991), *cert. denied*, 828 P.2d 957 (N.M. 1992). In *Trejo*, the court held that an extrinsic conviction for attempted criminal sexual penetration and kidnapping was admissible to impeach a defendant accused of the same crimes in a separate incident with a separate victim. *Id.* at 1253-54. The court also held that the state could show the defendant's dishonesty through his denial of the offense for which he was convicted in the prior trial. *Id.* at 1256-57. In *State v. Schwab*, 409 N.W.2d at 876, the court held that it was not an error to deny the defendant's motion to exclude a prior conviction for intrafamilial sexual abuse. *Id.* at 879. In the charged crime, the defendant was accused of sexually abusing his girlfriend's

The impeachment theory of admission verges on being a transparent fiction. Few if any attorneys believe that juries actually follow the limiting instruction, or even understand it. In addition, it is doubtful that the evidence has significant 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. When evidence is offered to impeach a defendant who testifies in his own defense at trial, however, 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, as shown by prior crimes. On the other hand, if 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 and has no prior convictions. In either case, therefore, his prior conviction is unhelpful to the jury except for the forbidden purpose of determining whether he has a propensity to rape.

If the accused is innocent of the crime at bar, then prior-conviction impeachment defeats justice because it makes his denial appear false when it is not. If the accused is guilty, then prior-conviction impeachment still does not illuminate his truthfulness unless one assumes that a guilty person with a clean record would be less likely to lie to obtain an acquittal. In view of

five-year-old son. *Id.* at 877. The court reasoned that the prior conviction "has legitimate impeachment value" and that the trial judge was within discretion in ruling that it would be admissible if the defendant testified. *Id.* at 878, 879. In *People v. Hall*, 453 N.E. 2d 1327 (Ill. App. Ct. 1983), *cert. denied*, 467 U.S. 1228 (1984), the court held that it was not an error to deny the defendant's motion to exclude his prior conviction for rape when the defendant was accused of attempted rape, armed robbery, and armed violence. *Id.* at 1330-31, 1335-37. The conviction was admissible to impeach despite the similarity to the charged crime. *Id.* at 1337. *State v. Grubb*, 541 N.E.2d 476 (Ohio Ct. App. 1988), held that the trial court did not abuse its discretion in admitting a sodomy conviction from the 1940's to "impeach" the defendant charged with gross sexual imposition. *Id.* at 477-78. *Jackson v. State*, 447 N.W. 2d 430 (Minn. Ct. App. 1989), held that in a prosecution for criminal sexual contact of a 14-year-old girl staying with the defendant's family, it was not an error to admit evidence of defendant's prior conviction for sexual abuse of his daughter. *Id.* at 432, 433-34. The court reasoned that the evidence served valid impeachment purposes because the jury "had to choose to believe either [the defendant] or [the victim]." *Id.* at 434. *But cf.* *United States v. Beahm*, 664 F.2d 414 (4th Cir. 1981). In *Beahm*, the court held that it was reversible error to admit prior convictions for sodomy (11 years before the trial) and unnatural sexual practices (9.5 years before trial) to impeach the defendant accused of child molestation. *Id.* at 417, 419. The court based its decision on the prosecution's failure to specify why the convictions were more probative than prejudicial, but indicated great doubt that they could ever be admissible. *Id.* at 418, 419.

the guilty defendant's strong incentive to lie on the stand, it is doubtful that those with clean records are much more credible than those with prior convictions.¹⁹

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 meager probative value for the permitted inference that the defendant has a greater-than-average propensity to lie. In any event, instructing a jury to follow only the permitted thought-path is like telling someone to ignore every flavor in an apple pie except the cinnamon.²⁰

2. Impeachment of a testifying defendant by cross-examination about sexual misconduct not resulting in conviction

The trial judge also has discretion to permit impeachment of a witness by cross-examination about witness misconduct that reflects on the witness's truthfulness, even if the misconduct has not resulted in a criminal conviction.²¹ The attorney performing cross-examination must "take the witness's answer" and may not introduce extrinsic evidence of the uncharged misconduct.²² Under the 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.²³ As in impeachment with prior convictions, uncharged sex offense evidence has little value on the issue of whether the defendant, if guilty, would give

19. For a persuasive argument on this point, see Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and A Proposed Overhaul*, 38 U.C.L.A. L. REV. 637, 655-64 (1991).

20. For an example of a social science study indicating that the limiting instruction does not function properly, see Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37 (1985).

21. See, e.g., FED. R. EVID. 608. Rule 608 codified the common law rule that prevailed in a number of jurisdictions. 3A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 982 (Chadbourn rev. 1970). Wigmore reported 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." *Id.* (emphasis omitted). 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.* (emphasis omitted).

22. FED. R. EVID. 608; 3A WIGMORE, *supra* note 21, §§ 979, 986.

23. FED. R. EVID. 403.

false testimony. Courts which adhere to the rule against propensity evidence should therefore exclude this evidence because of the danger that the jury will misuse it.²⁴

3. Rebuttal of defense character evidence and cross-examination of defense character witnesses

Under an exception to the rule against character evidence, the defendant may offer exculpatory reputation or opinion testimony²⁵ by character witnesses, but is not entitled to offer evidence of specific acts, such as occasions on which he behaved properly towards women.²⁶ If a defendant presents a character witness who gives reputation or opinion testimony that the defendant is peaceable, law-abiding, respectful to women, or the like, the prosecutor may rebut this evidence with character witnesses who offer reputation or opinion evidence to the contrary. More potently, the prosecutor, with a good faith basis, may cross-examine the defendant's character witness by asking whether the witness has heard that the defendant had committed specific bad acts on other occasions.²⁷ The standard justification of this type of question is that the evidence impeaches the character witness by showing either that the witness does not know of the defendant's true reputation or that the witness has

24. For a representative case holding that it is error to allow cross-examination about prior sex offenses on an impeachment theory, see *State v. Clemmons*, 353 S.E.2d 209 (N.C. 1987). In *Clemmons*, the court held that it was error, though harmless, to allow cross-examination of a rape defendant about his prior attempted rape of another woman. *Id.* at 210, 212-13. The court held that the trial judge's theory that the evidence was admissible to impeach the defendant's testimony under Rule 608 was invalid because the evidence was not probative of the defendant's character for truthfulness or untruthfulness. *Id.* at 213. *State v. Scott*, 347 S.E.2d 414 (N.C. 1986), held that in the prosecution of the defendant for child molestation, the trial judge committed reversible error by allowing cross-examination of the defendant about other acts of sexual misconduct. *Id.* at 415, 417. The court reasoned that a Rule 608(b) theory failed because the evidence was not sufficiently probative of truthfulness. *Id.* at 417-18. *Summerlin v. State*, 643 S.W.2d 582 (Ark. Ct. App. 1982), held that in the prosecution of the defendant for sexual contact with a young boy, cross-examination concerning the defendant's discharge from the Navy for the same type of sexual activity as the charged offense constituted reversible error. *Id.* at 583, 584-85. A Rule 608 theory of admission failed because the evidence was not probative of truthfulness. *Id.* at 584-85.

25. Common law jurisdictions usually allowed reputation testimony, but not opinion testimony. See 3A WIGMORE, *supra* note 21, § 921; FED. R. EVID. 405(a) advisory committee's note. The Federal Rules of Evidence allow proof in either form. FED. R. EVID. 405(a).

26. See, e.g., FED. R. EVID. 405(a).

27. *Michelson v. United States*, 335 U.S. 469, 479 (1948).

an unusual definition of a good reputation.²⁸ Because the adverse impact of this cross-examination typically would outweigh the benefit to the defendant from the character testimony, a competent defense counsel will rarely offer character evidence in sex offense cases if any evidence exists of other misconduct by the defendant.

4. Curative admissibility

If a defendant asserts that he has never been involved in similar incidents or otherwise conveys to the jury inadmissible denials of similar conduct, the prosecution may rebut by offering relevant evidence of uncharged misconduct. In such a case, the defendant's evidence is inadmissible because the exception permitting the defense to offer character evidence covers only reputation and opinion testimony, not testimony about the defendant's conduct.²⁹ In this situation, the prosecution "fights fire with fire"³⁰ by introducing evidence that would otherwise be inadmissible.

*State v. Banks*³¹ 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.³² When his lawyer questioned him about the charges, he responded with broad denials of any sexual conduct with children.³³ 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."³⁴ He also called a former girlfriend to the stand to testify that his sexual behavior was normal and that she had never

28. *Id.* at 479, 483. See also FED. R. EVID. 405(a) advisory committee's note.

29. See, e.g., FED. R. EVID. 405(a).

30. For a useful discussion of fighting fire with fire, see McCORMICK ON EVIDENCE, *supra* note 1, § 57, at 84. 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. *Id.* The adversary also should 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. *Id.* In other situations, the authors conclude, the trial judge should have discretion whether to allow the answering evidence.

31. 593 N.E.2d 346 (Ohio App. 3d 1991).

32. *Id.* at 347.

33. *Id.* at 347-48.

34. *Id.* at 347.

known him to engage in sexual conduct with children.³⁵ The Ohio Court of Appeals ruled that such testimony entitled the prosecution to submit evidence about the defendant's sexual misconduct with other children.³⁶

B. UNCHARGED MISCONDUCT OFFERED FOR REASONS OTHER THAN SHOWING CHARACTER: RULE 404(b) EVIDENCE

The character evidence rule does not prohibit uncharged misconduct evidence per se; rather, it prohibits a certain type of *reasoning* about such evidence: an inference of bad character from bad acts, and then an inference of guilt of the crime charged from the bad character.³⁷ Uncharged misconduct is admissible, subject to balancing for prejudice, when it is offered for a purpose that does not require such character reasoning. Federal Rule of Evidence 404(b) provides examples of permissible purposes, such as showing knowledge, identity, plan, preparation, opportunity, motive, intent, or absence of mistake or accident.³⁸

35. *Id.* at 347-48.

36. 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 349. *Accord* State v. Sonnenberg, 344 N.W.2d 95, 97 (Wis. 1984) (holding that in a prosecution for child molestation, defendant "opened the door" to cross-examination about his propositioning an adult woman ten days before trial when he testified that he never sought sexual satisfaction outside of his marriage); *Quimby v. State*, 604 So.2d 741 (Miss. 1992). In *Quimby*, the defendant "blurted out" on direct examination, "I have never abused my daughter or any other child ever in any way, shape, form or fashion." *Id.* at 745. The court held that this assertion opened the door to specific act evidence about prior sexual abuse of his daughter. *Id.* at 746. Many states would admit the *Quimby* evidence on the ground that it shows a "motive" arising from a lust for the particular victim. *See infra* note 45; *see also* State v. Anderson, 686 P.2d 193 (Mont. 1984). In *Anderson*, the defendant offered an amalgam of evidence that included opinion testimony as to character, reputation evidence, and broad denials of specific acts. *Id.* at 203-04. He offered testimony about his reputation for "morality and personal truthfulness"; his wife testified that he had "orthodox" sexual mores and that the charges did not comport with her knowledge of him; and he denied improper sexual conduct with the alleged victims or with anyone else. *Id.* at 204. The Montana Supreme Court approved admission of counter-evidence in the form of testimony by a young girl that she had slept with the defendant while he was naked. *Id.* at 203.

37. 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 55, at 1160-61 (Tillers rev. ed. 1983) [hereinafter WIGMORE ON EVIDENCE].

38. *See infra* note 115.

Courts have no difficulty applying this rule when it is plain that the trier of fact need not make any inference about disposition or propensity. Suppose, for example, that the defendant is accused of growing marijuana in his backyard. He claims that he thought that the plants were just ordinary weeds. To show the defendant's knowledge that they were marijuana, the judge would allow the prosecutor to put in evidence that the defendant had previously been convicted of growing marijuana. In such a case, the purpose of the evidence would be to show that the defendant knew what marijuana looked like, not that he is a drug dealer. In this example, the evidence does not require an inference about any personality disposition of the defendant, although the jury is likely to make one.³⁹

Unlike the marijuana hypothetical, permissible uses of uncharged misconduct evidence under Rule 404(b) usually do involve, to some degree, an inference about a propensity of the defendant to act similarly in similar situations. Consequently, it is often difficult to determine whether to admit the evidence. We now examine the four permissible uses specifically listed in Rule 404(b) that commonly arise in sex crime cases: "motive," "intent/absence of mistake," "plan," and "identity."

1. Motive

"Motive" evidence reveals the state of mind or emotion that influenced the defendant to desire the result of the charged crime.⁴⁰ Uncharged misconduct evidence can show motive in

39. In an article that describes practically all 404(b) evidence as propensity evidence, Professor Kuhns characterizes evidence offered to show knowledge as propensity evidence on the ground that it depends on the inference that "[a] person who has obtained knowledge of some fact has a propensity to retain that knowledge." Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 790 (1981). Knowledge evidence does not require, however, 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.

40. For a similar definition of motive, see CHARLES A. WRIGHT & KENNETH W. GRAHAM, 22 FEDERAL PRACTICE AND PROCEDURE § 5240, at 479 (1980): "[M]otive' is . . . an emotion or state of mind that prompts a person to act in a particular way." See also WIGMORE ON EVIDENCE, *supra* note 37, § 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].

either of two ways.⁴¹ 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 witnessed the robbery. Thus, the robbery gave 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 commit the charged crime.

Second, the uncharged misconduct can be offered as 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, the defendant vandalized Mr. X's car. The vandalism would be admissible on the theory that it manifests animosity toward Mr. X, and that the animosity was the motive for the murder.⁴²

Commentators have criticized the reception of this second type of motive evidence on the ground that it amounts to propensity evidence.⁴³ The evidence, however, 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" connotes an enduring general propensity, as opposed to a situationally specific emotion.⁴⁴ Besides, the genuine probative value of the evi-

41. See EDWARD J. IMWINKELREID, UNCHARGED MISCONDUCT EVIDENCE § 3:15 (1984). Cf. 22 WRIGHT & GRAHAM, *supra* note 40, § 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.").

42. See, e.g., *State v. Green*, 652 P.2d 697, 701 (Kan. 1982) (holding that the defendant's prior assaults on his wife were admissible to show the defendant's motive for murdering her).

43. RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 226 (2d ed. 1982).

44. Cf. WIGMORE, *PROOF*, *supra* note 40.

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.

Id. at 103.

The concept of character as an enduring, cross-situational propensity is consistent with the purposes of the character rule. The danger that the jury

dence that the defendant hates X is usually much greater than the value of evidence that he is a hater in general.

In child sexual abuse cases, courts often admit evidence that the defendant previously abused the same child to show that he was motivated by a lustful desire for that particular child.⁴⁵ This use of motive evidence in sex crime cases is analogous to the use of vandalism in the previous example 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 the defendant's motive "to gratify lustful desire by grabbing or fondling young girls . . ." ⁴⁶ That reasoning is comparable to saying, in a burglary case, that other acts of thievery show a "desire to satisfy the [defendant's] greedy nature by grabbing other people's belongings."⁴⁷ In either case, a trait of character supplies the motive, and so nothing is left of the rule against character reasoning.

Courts appear more willing to admit this type of "motive" evidence in child sexual abuse cases⁴⁸ than in adult rape

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 146-52. The danger of punishing the defendant for the uncharged acts is less severe when the jury is being asked to infer not a consistent prolonged tendency, but rather, a temporary emotion.

45. See *Padgett v. State*, 551 So.2d 1259 (Fla. Dist. Ct. App. 1989) (holding that evidence of the defendant's prior sexual assaults against the victim was admissible to show his "lustful attitude" toward the victim); *State v. Scott*, 828 P.2d 958, 961 (N.M. Ct. App. 1991) (holding that evidence of the defendant's repeated fondling and sexual intercourse with the victim for ten years prior to the charged crime was properly admitted to show the defendant's "lewd and lascivious" disposition towards the victim); *State v. Ferguson*, 667 P.2d 68, 71 (Wash. 1983) (en banc) (holding that evidence of photographs showing that the defendant made the child victim put her mouth on his penis was admissible to prove a lustful disposition towards the child).

46. *State v. Schlak*, 111 N.W.2d 289, 292 (Iowa 1961) (stating in dicta that the conviction was reversed because the trial judge admitted the act was too remote in time).

47. See *LEMPERT & SALTZBURG*, *supra* note 43, at 230.

48. See *State v. Friedrich*, 398 N.W.2d 763 (Wis. 1987). In *Friedrich*, the defendant raised an alibi defense in response to a charge of sexual contact with his 14-year-old niece. *Id.* at 766. He claimed that he was working at the time of the charged acts. *Id.* at 766. Prior sexual touching of the victim and of another young girl was admissible to show the motive of obtaining sexual gratification, which is an element of the offense. *Id.* at 772. Alternatively, the evidence was admissible to show a plan because the defendant was involved in a system of

cases.⁴⁹ In neither type of case, however, is there a need to explain the accused's motive. Motive is not a mystery in a sex crime case as it sometimes is in other crimes, such as murder. Courts that admit the evidence of acts against third parties 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), but uncharged misconduct evidence is not automatically admissible when the perpetrator's identity is in issue.⁵⁰ The evidence must show that the defendant committed other crimes using the same *modus operandi* as the perpetrator of the charged crime. Courts often say that the *modus* must be

criminal activity by seeking sexual gratification from young girls with whom he had a familial or quasi-familial relationship. *Id.* at 773. In *Elliott v. State*, 600 P.2d 1044 (Wyo. 1979), the court held that the prior acts of child sexual abuse were admissible to show "motive". *Id.* at 1048. In *United States v. Herbert*, 35 M.J. 266 (C.M.A. 1992), the criminal charge arose from the defendant's alleged act of oral sex with his adolescent stepson. *Id.* at 267. The court held that it was not an abuse of discretion to admit evidence of the defendant's attempt to fondle one nephew and to have oral sex with another. *Id.* at 268. The court reasoned that even though a showing of desire for sexual gratification is not an element of the charged crime,

[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, the [defendant'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.

Id.

49. See, e.g., *People v. Tassell*, 679 P.2d 1, 3-4 (Cal. 1984) (en banc) (holding that prior rapes were inadmissible and noting that the prosecution did not pursue a motive theory); *State v. Saltarelli*, 655 P.2d 697, 700 (Wash. 1982) (en banc) ("[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 [Evidence Rule] 404(b)."). But see *Carey v. State*, 715 P.2d 244, 249 (Wyo. 1986) (holding that uncharged misconduct was admissible in an adult rape case and observing that, as an alternative ground, 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).

50. "[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.

like a "signature" or even that it must be "unique,"⁵¹ but many decisions have required less.⁵² For example, in a robbery case, the Arizona Supreme Court admitted evidence of prior robberies even though the only similarity between the uncharged crimes and the charged crime was that they all involved similar convenience stores.⁵³

As a rule, identity is in dispute in stranger rape cases, but not in acquaintance rape cases,⁵⁴ leading some courts to hold that *modus* evidence is not admissible in acquaintance rape (consent defense) cases.⁵⁵ This reasoning can result in exclusion even in situations when the uncharged misconduct and the charged acts are substantially similar. For example, in *People v.*

51. "[C]ourts use a variety of terms to describe the criteria needed to invoke the modus operandi theory, including 'distinguishing,' 'handiwork,' 'remarkably similar,' 'idiosyncratic,' 'signature quality,' and 'unique.'" John E.B. Myers, *Uncharged Misconduct Evidence in Child Abuse Litigation*, 1988 UTAH L. REV. 479, 550 (citing relevant cases).

52. See generally IMWINKELREID, *supra* note 41, § 3:13 (discussing relevant cases).

53. *State v. Smith*, 707 P.2d 289, 297 (Ariz. 1985) (en banc); cf. *People v. Massey*, 16 Cal. Rptr. 402 (Dist. Ct. App. 1961) (admitting evidence of similar burglary even though the similarities were hardly enough to justify an analogy to a "signature").

54. 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. The jury rejected this argument. See *Rapist Who Agreed to Use Condom Gets 40 Years*, N.Y. TIMES, May 15, 1993, at 6; Roy Bragg, *Condom Rape Suspect—Fear Made Him Pull the Knife*, 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 claim, when charged with rape, that he had been misidentified.

55. See, e.g., *United States v. Ferguson*, 28 M.J. 104 (C.M.A. 1989) (alternative holding) (holding that when a defendant was charged with sexual abuse of one adolescent stepdaughter, testimony of another stepdaughter about similar abuse was not admissible to show modus operandi because identity of the perpetrator was not in dispute); *Velez v. State*, 762 P.2d 1297 (Alaska Ct. App. 1988) (holding that it was error to admit *modus* evidence in a consent defense case because identity was not in issue); *People v. Tassell*, 679 P.2d 1, 3-4 (Cal. 1984) (en banc) (holding that a prior rape was inadmissible in a consent defense case and that *modus* evidence was not admissible unless identity was in issue); *People v. Barbour*, 436 N.E.2d 667, 672-73 (Ill. App. Ct. 1982) (holding that *modus* evidence was not admissible in consent defense cases because there was no issue of identity). But see *State v. Willis*, 370 N.W.2d 193, 198 (S.D. 1985) (overruling a prior case in which *modus* evidence was not admissible because identity was not in issue and holding instead that *modus* evidence was admissible in a consent defense case as showing intent and plan).

Tassell,⁵⁶ 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.⁵⁷ According to the state's evidence, the victim was a waitress who had given the defendant a ride home after she finished work.⁵⁸ The defendant forced her to drive to another location and then raped her in her van.⁵⁹ In several respects, the rape at issue closely resembled the uncharged rapes. All took place in vehicles, and involved the use of a similar thumbs-against-windpipe choke hold.⁶⁰ In one uncharged incident, the rapist even used the same false first name as that used by the defendant in the charged incident.⁶¹ Holding that the trial court should have excluded the evidence, 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."⁶²

3. Plan

Under Rule 404(b), evidence of uncharged misconduct is also admissible to prove "plan." Such evidence is consistent with the general rule against character evidence. Inferring that a defendant had a plan is different from inferring that he has a character trait.

The concept of "plan," however, is as protean as the concept of "motive." "Plan" 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.⁶³ Plan can also 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*,⁶⁴ 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 evi-

56. 679 P.2d 1 (Cal. 1984) (en banc).

57. *Id.* at 8.

58. *Id.* at 2.

59. *Id.*

60. *Id.*

61. *Id.* at 3.

62. *Id.* at 8.

63. WIGMORE, *supra* note 21, § 218, at 1883.

64. *KIND HEARTS & CORONETS* (Ealing Studios, 1949).

dence to show multi-crime plans whose parts are linked in the planner's mind is not controversial.⁶⁵

The concept "plan," and its frequent companion "common scheme," sometimes refers to a pattern of conduct, not envisioned by the defendant as a coherent whole, in which he repeatedly achieves similar results by similar methods.⁶⁶ These plans could be called "unlinked" plans. The defendant never pictures all the crimes at once, but rather plans a crime thinking, "It worked before, I'll try the same plan again." Some commentators have criticized courts for admitting such "spurious plan" evidence.⁶⁷ In a California acquaintance rape case, for example, the court described "common scheme or plan" as merely an unacceptable euphemism for "disposition."⁶⁸

Yet this concept of "plan" is a textually plausible interpretation of the rule against character reasoning. One could construe the concept of "character" as referring 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 shopping centers as a prelude to sexual assaults on the owners,⁶⁹ would be too specific to be called a trait of char-

65. See also *State v. Wallace*, 431 A.2d 613 (Me. 1981). In *Wallace*, the defendant had a plan to reconstitute a gun collection previously owned by his father. *Id.* at 615. The court held that evidence of an uncharged burglary in which one gun was recaptured was admissible to show the defendant's involvement in the charged burglary in which another gun was recaptured. *Id.* at 616.

66. "In effect, these courts convert the doctrine into a plan-to-commit-a-series-of-similar-crimes theory." IMWINKELREID, *supra* note 41, § 3:23. For example, the prosecution used this approach in a case in which the court admitted prior acts of accepting kickbacks from third parties to show a "common scheme" to use one's position to acquire kickbacks. *Commonwealth v. Schoening*, 396 N.E.2d 1004, 1009 (Mass. 1979). In *Schoening*, the court held that evidence that the defendant took kickbacks on two other occasions, even if from a different party, is admissible to show motive, plan, or 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." *Id.* But see *United States v. O'Connor*, 580 F.2d 38, 42 (2d Cir. 1978) (holding that bribes taken from third parties are not sufficiently probative of a "definite project" of committing the present crime).

67. 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 41, § 3:23 (noting that "commentators have been almost uniformly critical of the [spurious plan] doctrine" and stating that "[t]heir criticism is well-founded").

68. *People v. Tassell*, 679 P.2d 1, 4-5 (Cal. 1984) (en banc).

69. See *Williams v. State*, 110 So. 2d 654 (Fla.), *cert. denied*, 361 U.S. 847 (1959).

acter. The probative value of the evidence is, of course, enhanced by the situational similarity.

In other contexts, courts have accepted evidence of situationally specific propensities despite the rule against character reasoning. Evidence of "habit"⁷⁰ and of "modus operandi" to show identity⁷¹ are examples of evidence that requires propensity reasoning, but is not regarded as character evidence. Thus, liberal admission of evidence of unlinked plans does not actually 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 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 considered part of an overall plan to have invasive sex.⁷² Usually, however, the sex crime "plans" are unlinked or "spurious": the defendant repeatedly commits the same crime with the same technique and objective, and only in that sense follows the same "plan" or "scheme."⁷³

70. See FED. R. EVID. 406.

71. See *supra* text accompanying notes 50-52.

72. See *State v. Paille*, 601 So. 2d 1321, 1323 (Fla. Dist. Ct. App. 1992) ("The 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.").

73. *E.g.*, *People v. Oliphant*, 250 N.W.2d 443 (Mich. 1976); *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."). In *Oliphant*, the court upheld the admission of three uncharged rapes in a consent defense case reasoning that "[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 non-consent and the defendant could thereby escape punishment. The 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." *Oliphant*, 250 N.W.2d at 449. *But see* *United States v. Rappaport*, 22 M.J. 445, 447 (C.M.A. 1986) (holding that, in a case in which a psychologist was accused of sexual affairs with patients, evidence of an uncharged affair with another patient was not admissible because "[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"); *People v. Tassell*, 679 P.2d 1 (Cal. 1984) (en banc) (holding that evidence of the defendant's uncharged sex offenses was inadmissible when no issue of identity existed); *Getz v. State*, 538 A.2d 726, 733 (Del. 1988) (holding that "[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.").

Courts have sometimes employed the "plan" theory to justify admission of evidence of prior rapes in consent defense cases. For example, in *People v. Oliphant*,⁷⁴ 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.⁷⁵ In *Oliphant*, the defendant met the victim while she was window-shopping.⁷⁶ After a friendly chat, they visited several bars.⁷⁷ He then took her to an isolated place and raped her.⁷⁸ Charged with rape and gross indecency, Oliphant relied on a consent defense.⁷⁹ At trial, the court permitted the prosecution to submit evidence of three prior rapes by Oliphant, including two of which he had been acquitted.⁸⁰

The Michigan Supreme Court held that the trial court properly admitted evidence of the prior rapes to show a common plan in which the defendant orchestrated circumstances so that if his sexual advances met resistance he would rape the woman, but cause the encounter to appear consensual.⁸¹ All four attacks occurred during a five-month period and involved college-age women; all began with a friendly, introductory conversation in

Commentators have noted that in sex crime prosecutions, some courts 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); IMWINKELREID, *supra* note 41, § 4:13, at 36 n.4; Myers, *supra* note 51, at 544 n.220 (citing *State v. Bennett*, 672 P.2d 772 (Wash. Ct. App. 1983) (noting plan to harbor and abuse runaway girls)); *Scadden v. State*, 732 P.2d 1036 (Wyo. 1987) (noting plan to gain confidence of volleyball team members coached by the defendant, and then molest them); *State v. Moore*, 819 P.2d 1143 (Idaho 1991). In *Moore*, the defendant was charged with sexual abuse of his granddaughter. *Id.* at 1143. Prior acts of abuse by the defendant of his daughter when she was aged nine through thirteen and his stepdaughter when she was aged eight and nine were admissible. *Id.* at 1147. A common scheme was shown by "a continuing series of alleged similar sexual encounters directed at the young female children living within [the accused's] household." *Id.* at 1149.

74. 250 N.W.2d 443, 450 (Mich. 1976).

75. Oliphant subsequently petitioned for habeas corpus in federal court, claiming a double jeopardy violation because the State had tried him for two of the prior crimes with both trials resulting in acquittal. The petition was denied. *Oliphant v. Koehler*, 594 F.2d 547, 550 (6th Cir.), *cert. denied*, 444 U.S. 877 (1979).

76. *Oliphant v. Koehler*, 594 F.2d at 548.

77. *Id.*

78. *Id.*

79. *Id.* at 549.

80. The Sixth Circuit held this was not a violation of the Double Jeopardy Clause. *Id.* at 556.

81. *Oliphant v. Koehler*, 594 F.2d at 552; *People v. Oliphant*, 250 N.W.2d at 449.

public, involving 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 physical force; the defendant did not rip the victim's clothing; and he took each victim to an unfamiliar place for intercourse.⁸² In addition, the defendant attempted to weaken his victims' credibility by providing them with or insisting that they remember his name, address, college identification card, and license plate number.⁸³ None of the victims had sustained serious physical injuries and they all had many opportunities to escape during the encounters.⁸⁴

The court concluded that evidence of this plan was relevant to the issue of consent.⁸⁵ In the charged crime, the defendant's plan made it appear that an ordinary social encounter culminating in consensual sex simply went sour after the defendant complained about the woman's body odor.⁸⁶ Thus, in *Oliphant* the absence of an identity issue did not preclude evidence of a similar modus operandi. Rather than characterizing the case as one in which the prosecution proved identity by a similar *modus*, the court allowed the prosecution to refute the consent defense by showing that the defendant had a "plan or scheme to orchestrate the events surrounding the rape . . . so that [the victim] could not show non-consent."⁸⁷

*People v. Tassel*⁸⁸ exemplifies a narrower definition of the concept of "plan." In *Tassel*, the defendant had committed three rapes, using a similar scheme for each crime.⁸⁹ The Supreme Court of California considered and rejected the "plan" theory.⁹⁰ It held that there must 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 a 'common plan or scheme' is really nothing but the bestowing of a

82. *Oliphant v. Koehler*, 594 F.2d at 550-52.

83. *Id.* at 552.

84. *Id.*

85. *Id.*

86. *Id.*

87. *People v. Oliphant*, 250 N.W.2d at 449; see also *State v. Valdez*, 534 P.2d 449, 452 (1975) (holding that an uncharged rape is admissible to show common plan when in both cases the defendant was acquainted with the victim, went to the victim's residence in the early-morning hours on the pretense of looking for someone, and both rapes involved a "sexual tour-de-force").

88. 679 P.2d 1 (Cal. 1984) (en banc).

89. *Id.* at 3.

90. *Id.* at 4.

respectable label on a disreputable basis for admissibility — the defendant's disposition."⁹¹

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 motive, identity, or plan.⁹²

The prosecution can sometimes prove intent by introducing uncharged misconduct evidence without relying on 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. To reach this conclusion, one need not infer that the defendant has a general propensity to assault people.

In most cases, however, the inference of intent depends on an underlying inference that the defendant has a propensity to commit the crime. This is true even in frequently-cited examples of the intent/mistake concept, such as when the court, to show that the defendant had guilty intent when he bought stolen goods on the occasion charged, admits evidence that he had previously bought stolen goods.⁹³ The prosecution seeks to create an inference 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 admission of such evidence wholly extinguishes the rule against character reasoning. When the evidence is offered to show intent, many courts require a special degree of similarity between the acts.⁹⁴ For example, in a prosecution for receiving stolen goods, the prosecutor may not show intent by evidence of a general propensity to be dishonest. A propensity to deal in stolen goods, by contrast,

91. *Id.* at 4-5.

92. 22 WRIGHT & GRAHAM, *supra* note 40, § 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.")

93. *See, e.g.*, Huddleston v. United States, 485 U.S. 681, 683, 685 (1988) (holding that in a prosecution for selling stolen goods, evidence of prior "similar acts" is admissible to show that defendant knew the goods he sold were stolen if such evidence is sufficient to allow the jury to find that the defendant committed the act).

94. 22 WRIGHT & GRAHAM, *supra* note 40, § 5242, at 490-91.

would 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 because it is open to rebuttal by evidence that the court otherwise would have excluded.

The main limitation on the intent exception—at least in sex crime cases—is that intent must actually be in issue. In many sex crime cases, intent is plainly in issue. This is so when, for example, the criminal sexual contact involves the defendant touching 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.⁹⁵ The prosecutor then can introduce uncharged acts of the defendant to show that he intended to derive sexual gratification from the touching.

In other sex crime 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 *United States v. Hadley*,⁹⁶ the defendant, a teacher, was accused of sexually abusing young boys who were his students.⁹⁷ After two students, aged nine and eleven, had

95. See, e.g., *United States v. Beahm*, 664 F.2d 414, 417 (4th Cir. 1981) (affirming the lower court's admission of evidence of molestation of another child to show intent when the defense counsel argued that the government had the burden of showing beyond a reasonable doubt that the touching at issue was not accidental); *State v. Wermerskirchen*, 497 N.W.2d 235, 236, 243 (Minn. 1993) (holding that when the defendant denies the act of touching a child's intimate parts, the court should instruct the jury that evidence of uncharged sexual touching of others is admissible to show intent). *But cf.* *People v. Thomas*, 573 P.2d 433, 438 (Cal. 1978) (reversing the conviction of a father convicted of abusing his daughter when the father testified he was merely rubbing cream on her chest for treatment of a cold, because even if the 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), *overruled by* *People v. Tassel*, 679 P.2d 1 (Cal. 1984) (en banc).

96. 918 F.2d 848, 850 (9th Cir. 1990), *cert. granted*, 112 S. Ct. 1261, and *cert. dismissed as improvidently granted*, 113 S. Ct. 486 (1992); see also *United States v. Bender*, 33 M.J. 111, 112 (C.M.A. 1991) (reiterating the lower court's holding that in a case in which the charged crime was fondling and digitally penetrating the defendant's ten-year-old daughter, and one element of the crime charged was deriving sexual gratification from that act, testimony by another young girl that the defendant had fondled her on numerous occasions is admissible to show intent and motive, despite lack of defense that the acts at issue were accidental or medicinal).

97. *Hadley*, 918 F.2d at 850.

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.⁹⁸ His counsel had offered not to argue the issue of intent to the jury.⁹⁹ Nevertheless, the Ninth Circuit held that the evidence was admissible because it went to criminal intent, and that the government had the burden of proving intent, regardless of whether the defendant relied on that defense or not.¹⁰⁰ A conflict exists on this point, however, with a number of courts holding that a significant dispute over the issue must exist before the court may receive uncharged conduct to show intent.¹⁰¹

98. *Id.* at 851.

99. *Id.* at 852.

100. *Id.*

101. See *United States v. Gamble*, 27 M.J. 298, 304 (C.M.A. 1988) (quoting with approval a passage from the *Military Rules of Evidence Manual* stating that, when the charged crime is nearly always intentional, a court should decline to receive uncharged misconduct evidence on the issue of intent until after the defendant has submitted evidence, in order to see whether the defendant challenges intent); *Thompson v. United States*, 546 A.2d 414, 423 (D.C. 1988) (“[W]here 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.”); *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 be in actual dispute. See, e.g., LEMPERT & SALTZBURG, *supra* note 43, at 224-25 (discussing the admissibility of evidence to prove intent). Kenneth Graham agrees that intent should be in serious dispute, but recognizes that authority exists to the contrary. 22 WRIGHT & GRAHAM, *supra* note 40, § 5242, at 488-89 (citing relevant cases); see also *People v. Thomas*, 573 P.2d 433, 443 (Cal. 1978) (Clark, J. dissenting) (arguing that when the defendant claimed that, to illuminate his true intent or absence of mistake, he was rubbing vaporizing cream on his daughter’s chest, the court should allow other daughters to testify that the defendant molested them), *overruled by People v. Tassel*, 679 P.2d 1 (Cal. 1984) (en banc); *State v. Wermerskirchen*, 497 N.W.2d 235 (Minn. 1993) (holding that in a case in which the defendant denied sexually touching his eight-year-old daughter, saying any contact was “at most” accidental, to show intent, the lower court properly admitted testimony from the defendant’s nieces and twenty-year-old daughter as to similar touching when they were children).

In adult rape cases, most courts hold that intent is not in issue.¹⁰² 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.¹⁰³

In the great majority of rape trials, the defense is either alibi (mistaken identity) or consent. If the defendant offers an alibi, he denies committing the act, and therefore his mens rea is not an issue. In such a case, the exception for evidence of intent is obviously inapplicable.

If the defense is consent, the propriety of evidence of intent is more problematic. Because force is one of the elements of rape,¹⁰⁴ proof that the accused committed the *act* of rape normally dispels any reasonable doubt about his intention to have

102. See SUSAN ESTRICH, REAL RAPE, 94-95 & nn.9-13 (1987) (citing relevant cases); see also *State v. Saltarelli*, 655 P.2d 697 (Wash. 1982) (en banc). In *Saltarelli*, the court held that when the defendant, charged with the rape of an acquaintance, raised the consent defense, the trial court committed reversible error when it received into evidence testimony of the defendant's prior attempted rape of a different woman. *Id.* at 698. The court reasoned that the evidence was not admissible on an intent theory. *Id.* at 700-01. But see *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989). In *Reynolds*, a consent-defense rape case, the prosecution indicated that the defendant took his date to his room, showed her a slide show that included music, and then forcibly raped her. *Id.* at 105. "[T]he theory of the defense was that [the defendant] 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." *Id.* at 107. The defense contended that the complainant either consented or misled him into thinking she was consenting. *Id.* The court held that evidence of other similar sexual assaults was admissible to show "intent, scheme or design" to have intercourse with his dates whether or not they consented. *Id.* at 110.

103. 22 WIGMORE ON EVIDENCE, *supra* note 37, § 357. Historically, courts and legislatures have made resistance by the woman and force by the man essential elements of rape. Consequently, focusing on the rapist's mens rea has not been necessary; if the victim resisted and the rapist overcame her by force, the crime must have been intentional. This may be why some courts have held that the perpetrator's intentions are immaterial. See generally ESTRICH, *supra* note 102, at 95 & nn.12-13 (discussing cases calling into question the role of the element of intent as to consent in rape cases). Insofar as modern statutes and decisions dispense with the resistance requirement, and move beyond a narrow, "schoolboy" concept of force, it becomes more plausible to assert that the defendant, because he was mistaken about consent, may have performed the act of rape without intending to do so. Judging by the reported cases, however, most defendants still claim that the woman in fact consented, rather than that the defendant made a good faith mistake about consent.

104. See generally ROLLIN M. PERKINS & RONALD N. BOYLE, CRIMINAL LAW 210-12 (3d ed. 1982).

nonconsensual sex. Perhaps partly for this reason, cases in which the defendant asserts that he lacked the requisite mens rea are relatively rare; normally the acquaintance rape defendant simply claims that the woman consented.¹⁰⁵ But it is difficult to draw sharp lines between issues of consent, force, and mistake. Even if the defendant does not raise the issue, the jury may decide that he made a reasonable mistake as to consent and acquit him for that reason.

Moreover, intent may be relevant as an evidentiary fact even if it is not an ultimate issue in the case. If a defendant initiated a sexual encounter with the intent to have intercourse regardless of consent, the existence of that intent increases the likelihood that he in fact had intercourse without consent.

Some courts have held that a defendant puts intent in issue when he claims consent as a defense.¹⁰⁶ A Texas appellate court, for example, held that a rape defendant who pleads consent necessarily denies that he intended to have non-consensual sexual intercourse with the complainant.¹⁰⁷

Other courts have held that intent is not an issue in the absence of a defense explicitly based on mistake about consent. In *People v. Tassell*,¹⁰⁸ a rape case, the California Supreme Court decided that the intent theory was not available to the prosecution. The trial court had admitted evidence of other rapes to show a common plan and to corroborate the victim's testimony.¹⁰⁹ The court took the opportunity to discuss exceptions to the rule against prior crimes evidence.¹¹⁰ The exception for evidence of intent, said the court, did not apply in this case.¹¹¹ The court held that intent becomes an issue only when the defense is

105. *But cf.* *Regina v. Morgan*, 1976 App. Cas. 182. Some courts declare that an intention to have non-consensual sex is not an element of rape. *See generally* ESTRICH, *supra* note 102, at 92-100. But there are a number of statutes and decisions which declare that a reasonable mistake as to consent is a valid defense to rape. *See, e.g.*, *People v. Smith*, 638 P.2d 1, 5 n.7 (Colo. 1981).

106. *See, e.g.*, *State v. Gardner*, 391 N.E.2d 337, 342 (Ohio 1979) (*per curiam*) (holding that because the defendant contended that he did not intend to commit forcible rape, but instead intended to participate in consensual sexual intercourse, the element of intent was a material fact in issue); *State v. Willis*, 370 N.W.2d 193, 198 (S.D. 1958) (holding that the defense of consent "begets the establishment of intent as a material issue" and that the prosecution may use other crimes evidence to establish intent).

107. *Rubio v. State*, 607 S.W.2d 498, 501 (Tex. Crim. App. 1980).

108. 679 P.2d 1, 7-8 & nn.6-7 (Cal. 1984) (*en banc*).

109. *Id.* at 4.

110. *Id.* at 4-8.

111. *Id.* at 7 n.7.

mistake or accident.¹¹² Here the defendant undoubtedly intended to have intercourse; the issue was simply consent.¹¹³ If the trier believed the defendant's version, the complaining witness freely consented; if the trier believed the victim's version, the defendant forced her with threats and violence to have intercourse. The defense made no claim of reasonable mistake.¹¹⁴

5. Other non-character purposes

By preceding the list of examples with the words "such as," Rule 404(b) indicates that the listed purposes governing the introduction of other crimes evidence are only illustrative.¹¹⁵ The court may admit misconduct evidence for a purpose not enumerated, if that purpose does not involve character reasoning.¹¹⁶

Although the list is fairly comprehensive, courts occasionally invent additional labels.¹¹⁷ For example, one finds statements that evidence of a "pattern" of criminal conduct is admissible. In a 1987 Minnesota case¹¹⁸ involving the 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.¹¹⁹ In cases like this, the "pattern" is so broad that admitting pattern evidence is indistinguishable from admitting character evidence.¹²⁰

112. *Id.*

113. *Id.* at 8.

114. *Id.*

115. Rule 404(b) provides, in relevant part:

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, *such as* proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" FED. R. EVID. 404(b) (emphasis added).

116. See *Getz v. State*, 538 A.2d 726 (Del. 1988) (supporting the principle that Rule 404(b) is illustrative, not exhaustive); 22 WRIGHT & GRAHAM, *supra* note 40, § 5240 (supporting the principle that the list is illustrative, not exhaustive).

117. See 22 WRIGHT & GRAHAM, *supra* note 40, § 5248, at 520 (listing other purposes, such as proof of guilty knowledge through evidence of spoliation).

118. *State v. Crocker*, 409 N.W.2d 840 (Minn. 1987).

119. *Id.* at 843.

120. Some cases achieve a similar breadth and vagueness by merely reciting a laundry list of permissible purposes without identifying any particular one or explaining why it is in issue. See, e.g., *Rivera v. State*, 840 P.2d 933, 940, 941 (Wyo. 1992) (holding that evidence of repeated preying on teenaged girls who were too intoxicated to consent is admissible to show "intent, motive, plan and identity"), *overruled on other grounds by* *Springfield v. State*, No. 92-162, 1993 WL 362357, at *1,*2 (Wyo. Sep. 21, 1993).

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 have admitted evidence of uncharged misconduct to show "lustful disposition" or "depraved sexual instinct" in cases involving sex crimes against children.¹²¹ Such decisions represent a partial rejection of the rule against character evidence. As Professor Edward Imwinkelreid has said, "In some 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."¹²² Other courts have rejected the "depraved sexual instinct" exception because it violates the prohibition against using character to show conduct.¹²³

121. See *Maynard v. State*, 513 N.E.2d 641, 647 (Ind. 1987) (holding that in a child sexual crime case, uncharged child abuse of a third party by the defendant is admissible to show "depraved sexual instinct" as well as the defendant's "continuing plan" to exploit and abuse the victim), *overruled by Lannan v. State*, 600 N.E.2d 1334, 1339 (Ind. 1992) (holding that the depraved sexual instinct exception is no longer recognized in Indiana); *State v. Lachterman*, 812 S.W.2d 759, 768 (Mo. Ct. App. 1991) (affirming the lower court's admission of prior acts on a "depraved sexual instinct" theory in a case involving homosexual sodomy with young boys), *cert. denied*, 112 S. Ct. 1666 (1992); *State v. Raye*, 326 S.E.2d 333, 335 (N.C. Ct. App.) (holding that prior sexual abuse of the victim's sister is admissible to show intent and "unnatural lust" of defendant-stepfather), *review denied*, 332 S.E.2d 183 (N.C. 1985); *State v. Tobin*, 602 A.2d 528, 531-32 (R.I. 1992) (recognizing the lewd disposition exception to the rule against character evidence in a case in which evidence of prior acts involved the same victim); *State v. Edward Charles L.*, 398 S.E.2d 123, 131 (W. Va. 1990) (holding that in a federal rules state, uncharged misconduct evidence is admissible to show, inter alia, the defendant's lustful disposition toward his children); *State v. Tarrell*, 247 N.W.2d 696, 702-03 (Wis. 1976) (holding that the lower court, to show the defendant's "propensity to act out his sexual desires with young girls," properly admitted evidence that the defendant had made an obscene remark to a female child and had masturbated in the presence of other young females), *overruled in part by State v. Fishnick*, 378 N.W.2d 272, 277 (Wis. 1985) (holding that the language in *Tarrell* which stated that the court could receive evidence to show sexual propensity is "withdrawn"). See generally *Myers*, *supra* note 51, at 540 & nn.205-06 (citing relevant cases).

122. IMWINKELREID, *supra* note 40, § 4:14, at 437.

123. See, e.g., *Getz v. State*, 538 A.2d 726, 733-34 (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 [Delaware Rule of Evidence] 404(b).").

The leading case is *Lannan v. State*,¹²⁴ a decision that abolished Indiana's "depraved sexual instinct" exception to the rule against character evidence.¹²⁵ The court noted that the exception reflected two rationales: the high rate of recidivism in child molestation cases¹²⁶ and the special need "to level the playing field by bolstering the testimony of a solitary child victim-witness"¹²⁷ The *Lannan* court concluded that the recidivism rate of sex offenders is high, but believed it to be no higher than for drug offenders.¹²⁸ Accordingly, the court decided that sex offenses are not special enough to justify a unique exception.¹²⁹

In its discussion of the bolstering rationale, the court noted that sex crimes against children are now thought to be common, and stated that the depraved instinct exception had its origins "in an era less jaded than today."¹³⁰ Noting that the exception had been created in a 1940s case in which a Superior Court judge was charged with child sexual abuse,¹³¹ the *Lannan* court observed that, in that era, the idea that a man who was a pillar of the community "would force himself sexually upon a child bordered on the preposterous."¹³² The court added the following:

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.¹³³

Although a few states have abandoned the "depraved sexual instinct" exception, many retain it in child sexual abuse cases, but not in adult rape cases.¹³⁴ The judges may feel that a desire

124. 600 N.E.2d 1334 (Ind. 1992); accord *Getz v. State*, 538 A.2d 726, 733-34 (Del. 1988) (overruling a prior case recognizing a sexual gratification exception); *State v. Fishnick*, 378 N.W.2d 272, 277 (Wis. 1985) (withdrawing language in a prior case that endorsed the use of other crimes evidence to prove sexual propensity).

125. The Indiana Legislature, however, recently passed a statute reinstating the exception for evidence of sex crimes similar to the charged crime in cases of child molestation or incest. See House Enrolled Act No. 1342, § 2, Pub. L. No. 232-1993, 1993 Ind. Legis. Serv. (West) (to be codified at IND. CODE § 15 (1994)).

126. *Lannan*, 600 N.E.2d at 1335.

127. *Id.*

128. *Id.* at 1336-37.

129. *Id.* at 1337.

130. *Id.*

131. *Id.* (citing *State v. Robbins*, 46 N.E.2d 691 (Ind. 1943)).

132. *Lannan*, 600 N.E.2d at 1337.

133. *Id.*

134. *E.g.*, *State v. Jerousek*, 590 P.2d 1366, 1372-73 (Ariz. 1979) (upholding "the 'emotional propensity for sexual aberration exception'" in a child sexual

for heterosexual intercourse with an adult, even when forced, is not as unusual or depraved as a desire for sex with a child.¹³⁵ Even if one accepts this proposition, it does not justify the admission of uncharged misconduct evidence to show a "depraved sexual instinct." Murder, after all, is at least arguably more depraved than child abuse,¹³⁶ but courts do not routinely admit a murder defendant's prior homicides.

Even if the courts were consistent in their designation of crimes as "depraved," the exception would be hard to justify, for there is no logical nexus between the depravity of a crime and the appropriate methods of proof. Few would suggest, for example, that the hearsay rule should be abandoned in kidnapping cases.

Another difference between rape and child sexual abuse is that a rapist may appropriately engage in consensual sex with other women, but sex with children is always inappropriate. That difference, however, is irrelevant when the issue is whether to admit allegations of prior misconduct. The accused child molester, no less than the rapist, may testify that the alleged prior misconduct never occurred. Instead of claiming consent, as the accused rapist could, the child molester may claim that the child misidentified him or misinterpreted his conduct, or is simply lying.

abuse case in which the act was similar to the charged crime and was committed shortly before or after the charged crime); *State v. Tobin*, 602 A.2d 528, 532 (R.I. 1992) (upholding the "lustful disposition" exception, at least in cases involving prior incestuous relations between the defendant and the victim); *State v. Edward Charles L.*, 398 S.E.2d 123, 133 (W.Va. 1990) (holding that in a federal rules state, uncharged misconduct evidence is admissible to show lustful disposition toward children). *Contra* *State v. McFarlin*, 517 P.2d 87, 90 (Ariz. 1973) (limiting the lustful disposition exception to cases involving sexual aberration, such as sodomy or child abuse); *State v. Valdez*, 534 P.2d 449, 451-52 (Ariz. Ct. App. 1975) (stating in dictum that the lustful disposition exception is not available in an adult rape case, even though the court ultimately admitted the evidence on a common plan rationale); *Lehiy v. State*, 501 N.E.2d 451, 453 (Ind. App. 1987) (holding pre-*Lannan* that heterosexual rape evidence is not admissible under the lustful disposition exception, unless there are "earmarking" trails, although evidence of incest or "sodomy" would be admissible), *vacated and adopted by* *Lehiy v. State*, 509 N.E.2d 1116 (Ind. 1987).

135. *See, e.g., Reichard v. State*, 510 N.E.2d 163 (Ind. 1987) (stating that the rape of an adult woman does not fit the then-recognized "depraved sexual instinct" exception because the rape of an adult woman is not depraved sexual conduct).

136. "Depraved" means "corrupt, wicked, or perverted." *RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE* 535 (2d unabr. ed. 1987). Unless "perverted" is given a purely sexual meaning, murder seems to fit the definition at least as well as child abuse.

D. THE STATE OF THE LAW, CONCLUDED

Generalizing about this body of law is difficult. In many jurisdictions, the law is in a state of confusion. One can draw two general conclusions, however. One is that the admission of sex crimes evidence is still a common basis for reversal of trial court decisions.¹³⁷ Despite the willingness of some courts to manipulate the Rule 404(b) categories to receive evidence of uncharged sex offenses, courts do not universally or uniformly treat sex offenses differently from other crimes.¹³⁸ The other conclusion is that 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.¹³⁹ This is due to the unwillingness of some courts to admit modus operandi evidence in consent defense cases, because identity is not in issue when the defense is consent. These courts would admit such evidence in a stranger rape/alibi defense case.¹⁴⁰ Similarly, in child sex abuse cases in which identity is not in issue, some courts invoke the "depraved sexual instinct" exception, which does not apply to adult rape cases.¹⁴¹

II. POSSIBILITIES FOR REFORM

A. ABOLITION OF THE RULE AGAINST CHARACTER EVIDENCE

The simplest way to resolve the conflicts and ambiguities in the law concerning uncharged misconduct evidence would be to abolish the rule against character evidence and to freely admit, for the purpose of showing criminal propensities, testimony about the accused's prior crimes. Although wholesale abolition of the rule is not on the immediate legal horizon, those who dislike the rule will naturally be inclined to support ad hoc exceptions that gradually undermine it.

137. See *supra* notes 9, 10.

138. See *supra* notes 9, 10.

139. See, e.g., *Lovely v. United States*, 169 F.2d 386, 391 (4th Cir. 1948) (holding that in consent defense (acquaintance rape) cases in which identity is not an issue, courts should not admit other crimes evidence); *Brown v. State*, 459 N.E.2d 376, 379 (Ind. 1984) (concluding that when the defendant admitted that the act of intercourse occurred and claimed that the complainant consented, evidence of other alleged rapes is inadmissible).

140. See *supra* note 55 (citing relevant cases). Of course, some counter-examples exist in jurisdictions in which courts using "spurious plan" reasoning equally admit the evidence in both situations. See *supra* note 73 and accompanying text.

141. See *supra* note 134 and accompanying text.

Much can be said in favor of abandoning the rule against character evidence. To begin, the character evidence doctrines are extremely complicated. They produce huge quantities of appellate litigation¹⁴² which does little to dispel the confusion. More speculatively, one may surmise that exclusion of prior crimes evidence undermines the legitimacy and acceptability of acquittals in some criminal cases.¹⁴³

The rule excluding uncharged misconduct is contrary to the trend in evidence law toward free proof. For centuries, the movement has been toward abolition of those exclusionary rules that have as their basis the danger of misleading the fact-finder.¹⁴⁴ Jurists and scholars alike increasingly have agreed with Bentham that technical rules of evidence designed to prevent fact-finders from making mistakes are, at best, more trouble than they are worth.¹⁴⁵

Yet powerful arguments can be advanced in favor of retaining the rule. One can find support for the rule against character reasoning in the literature on personality theory.¹⁴⁶ Character reasoning is logical only if humans possess underlying traits of character that make their behavior consistent in various types of situations. Many psychologists are skeptical about "trait theory," maintaining that human behavior is situationally specific and that character traits do not produce cross-situational stabil-

142. IMWINKELREID, *supra* note 41, § 1:04 (finding that a LEXIS search revealed over 3,000 cases); WRIGHT & GRAHAM, *supra* note 40, § 5239 (stating that "[t]here is no question of evidence more frequently litigated in appellate courts than the admissibility of other crimes, wrongs, or acts"). On the topic of the admissibility of uncharged sex crimes in sex crime cases, there were 95 published appellate opinions in the year 1992 alone.

143. Cf. Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1357 (1985) (arguing that "the need to promote public acceptance of verdicts can better explain many evidentiary rules").

144. See generally WILLIAM L. TWINING, *THEORIES OF EVIDENCE: BENTHAM AND WIGMORE* (1985) (describing Bentham's advocacy of free proof and its impact on scholarship today).

145. *Id.*

146. See Miguel A. Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 U.C.L.A. L. REV. 1003, 1041-60 (1984), and 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) for examples of commentators who find considerable support for the rule against character reasoning in 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. 504, 518-19 (1991).

ity of behavior.¹⁴⁷ For example, research indicates that children exhibit little consistency in deceitful behavior: a child might lie at school but not at home, or might cheat on an exam but not in sports.¹⁴⁸

Although this research is instructive, situationism is not a consensus position among psychologists. Some scholars support trait theory and reject the situationist position.¹⁴⁹ Others argue for another approach to the study of behavior, interactionism, which emphasizes the need to consider both a person's relevant traits and the specifics of the situation in predicting behavior.¹⁵⁰ Another group maintains that one can observe stability for certain traits, such as aggressiveness, but not for others.¹⁵¹

147. Leonard, *supra* note 146, at 26-29; see generally WALTER MISCHEL, *PERSONALITY AND ASSESSMENT* (1968); 1 HUGH HARTSHORNE & MARK A. MAY, *STUDIES IN THE NATURE OF CHARACTER* 411-412 (1928) (reporting the results of a study measuring the situational specificity of traits).

148. The results of the Hartshorne and May 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." 1 HARTSHORNE & MAY, *supra* note 147, at 411; see also PETER D. SPEAR ET AL., *PSYCHOLOGY: PERSPECTIVES ON BEHAVIOR* 574-76 (1988) (describing the Hartshorne and May and other studies). *But cf.* Roger V. Burton, *Generality of Honesty Reconsidered*, 70 *PSYCHOL. REV.* 481 (1963) (reanalyzing the Hartshorne and May study and finding greater generality of behavior even though situational factors still account for much variance).

149. JACK BLOCK, *LIVES THROUGH TIME* 9-10 (1971); James J. Conley, *Longitudinal Stability of Personality Traits: A Multitrait-Multimethod-Multioccasion Analysis*, 49 *J. PERSONALITY & SOC. PSYCHOL.* 1266, 1266 (1985) (stating that "[t]he 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, 111 (1983) (finding that "even some situational factors that must be considered important do not possess quite [a large] degree of predictive power, just as dispositional factors do not"); David Crump, *How Should We Treat Character Evidence Offered to Prove Conduct?*, 58 *U. COLO. L. REV.* 279, 283 (1987) (asserting that "social science is by no means monolithic in condemning trait theory . . . [but] the literature suggests an ambivalence toward both trait and situation theory").

150. Norman S. Ender & J.M. Hunt, *Generalizability of Contributions From Sources Of Variance in the S-R Inventories of Anxiousness*, 37 *J. OF PERSONALITY* 1 (1969).

151. [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 (1993).

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."¹⁵² This startling fact shows that, contrary to what one would expect, Himmler did not possess a general trait of "cruelty toward living creatures." It does not follow, however, that Himmler lacked the trait of "cruelty toward Slavs" or even the more general trait of "cruelty toward humans." The key, perhaps, is not the intrinsic reliability of character analysis but the sophistication with which one attempts to infer propensity. Jack the Ripper may have had no unusual propensity to kill men, and he may even have been highly selective in picking the prostitutes who were his victims. No doubt in many situations—a crowded street for example—he would not have killed anyone. But it would be absurd to deny that he was more likely than the average man to kill a female prostitute.

Similarly, the character trait "sex criminal," a propensity to commit many different sex crimes, may not exist. Even the propensity to commit a specific sex crime such as rape may be situational. Perhaps "date rapists" rarely crawl through basement windows to rape strangers; even on dates, they may rape only in certain situations or with certain types of women. Granting all these possibilities, it remains true that one can describe a man who has raped some of his dates as "a date rapist," meaning someone who is much more likely than the average man to rape a date. Unless one knows that this propensity does not extend to the situation in which the crime charged allegedly occurred, his prior rapes are relevant evidence of his guilt.

Even if character evidence is potentially useful, perhaps courts should exclude it on the ground that juries tend to overestimate its value. The results of psychological experiments suggest that research participants tend to attribute too much influence to a person's disposition, and not enough to the situation, in assessing causes of human behavior.¹⁵³ For example,

152. ALAN BULLOCK, *HITLER AND STALIN: PARALLEL LIVES* 721 (1991).

153. See Teree E. Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 *FORDHAM L. REV.* 1, 33 (1988) (reporting that "[t]he 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) (stating that "[i]t is predictable . . . 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

even if told that a debater had no choice about which side to take in a debate, people tend to believe that the debater actually agrees with the position the debater is arguing.¹⁵⁴

This research, however, 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.¹⁵⁵ Moreover, some critics have charged that the professional literature is based in favor of reporting human error—either because it is easier to study, or simply because it makes a better story.¹⁵⁶

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, 353 (1979) (asserting that "[t]he jury, like any individual, is incapable of segregating [evidence of prior bad acts] to just one trait . . . [and that the jury] will inevitably use it to form a complete picture of the [defendant]").

Commentators also have pointed out that research participants 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 146, at 1047.

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.

Id. (footnotes omitted).

154. In one well-known experiment, for example, participants were asked to form a judgment about whether a debater favored Fidel Castro. See Edward E. Jones, *The Rocky Road from Acts to Dispositions*, 34 AM. PSYCHOLOGIST 107 (1979) (describing Castro experiments). Even if told that the debater had no choice, because the debate team advisor had instructed the debater whether or not to support Castro, the participants were more likely to attribute a pro-Castro attitude to the debater if the debater spoke in favor of Castro than if the debater spoke against Castro. *Id.* at 108.

155. David C. Funder, *Errors and Mistakes: Evaluating the Accuracy of Social Judgement*, 101 PSYCHOL. BULL. 75 (1987); Davies, *supra* note 146, at 528-30.

156. Funder, *supra* note 155, at 75. 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 "[s]tudies of error appear in the literature at a prodigious rate, [and] are disproportionately likely to be cited, and fill whole books." *Id.* at 75 (citations omitted). Furthermore, he argues that "the 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." *Id.* at 83.

On the whole, personality theory probably lends some support to the idea that character evidence is more prejudicial than informative. The research, however, has not achieved the level of acceptance that one sees, for example, in eyewitness testimony research. In addition, its applicability to legal issues is sometimes questionable.

The real danger in admission of character evidence is that the jury will give the evidence 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 not be sufficiently diligent in resolving gaps and conflicts in non-character evidence.

To express the point in terms of decision theory, jurors will seek to minimize their expected regret over reaching incorrect decisions.¹⁵⁷ They will weigh the regret they expect from a conviction against the regret they expect from an acquittal. Jurors will anticipate less regret over wrongfully finding the defendant guilty if they believe that he or she committed other crimes.¹⁵⁸ They will therefore be more willing to convict in cases where the other evidence of guilt is weak.

A subsidiary, but significant, benefit of the rule against propensity evidence is that it limits the scope of the proceedings. Excluding propensity evidence saves time and money by preventing the trial of collateral issues. It also protects the parties from surprise. The prosecution should not force the accused to defend his past behavior without an adequate chance to prepare. Although notice and discovery can reduce the danger of surprise, these procedures also add complexity and expense to the system.

The cost of the rule against propensity evidence is that a certain number of criminals go free. Observers will have differing opinions about whether this price is worth 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.

157. See LEMPERT & SALTZBURG, *supra* note 43, at 162 (discussing prejudice in terms of regret matrix of jurors).

158. *Id.* at 165.

B. A GENERAL EXCEPTION FOR SEX CRIMES

Some reformers contend that, although the general rule against uncharged misconduct evidence is sensible, an exception should exist 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, adding three new rules.¹⁵⁹ Proposed Rule 413 would provide that for a defendant accused of an offense of sexual assault, evidence of his commission of another sexual assault is admissible.¹⁶⁰ Jurors may consider this evidence for its bearing on any matter to which it is relevant.¹⁶¹ Proposed Rule 414 would make the same provision for criminal child molestation cases, and proposed Rule 415 would do so for civil cases involving sexual assault or child molestation.¹⁶² The proposed rules provide for notice before trial to the accused of the nature of the alleged prior misconduct.¹⁶³

Whether exclusion under Rule 403¹⁶⁴ would still be available to an accused seeking to challenge the admissibility of this evidence is unclear. The proposed rules do not mention Rule 403,¹⁶⁵ and one could plausibly construe the text of the bill to create an exception to the rule. Instead of saying that the evidence "may" be admissible, as in Rule 404(b),¹⁶⁶ the language of the proposed rules reads that the sexual history evidence "is" admissible, and that jurors may consider the evidence "on any matter to which it is relevant."¹⁶⁷ One of the supporters of the bill claims, however, that Rule 403 would still be available as a backup.¹⁶⁸

159. S. 1607, 103d Cong., 1st Sess. § 121 (1993).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. 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, "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." FED. R. EVID. 403.

165. See S. 1607, 103d Cong., 1st Sess. § 121 (1993).

166. FED. R. EVID. 404(b).

167. S. 1607, 103d Cong., 1st Sess. § 121 (1993).

168. See 137 CONG. REC. E3503-02 (Extensions of Remarks, Oct. 22, 1991) (statement of Rep. Molinari about predecessor legislation) (alluding to Rule 403 as a possible basis for exclusion); cf. 137 CONG. REC. S3191-02, 3193 (daily ed. Mar. 13, 1991) (statement by Senator Thurmond, on behalf of 27 sponsors of the Comprehensive Violent Crime Control Act of 1991) (inserting a section-by-section analysis of the bill in the Congressional Record) [hereinafter Section-by-

Even if Rule 403 would still be available, the proposed rules would broaden the admissibility of sexual history evidence. In cases covered by the proposed rules, the rule against character reasoning would be replaced by a rule permitting character reasoning, subject to exclusion if the prejudicial effect of the evidence "substantially" outweighs its probative value.

The proposed rules do contain some limitations on the admissibility of uncharged misconduct evidence. The uncharged misconduct itself must be a serious offense;¹⁶⁹ sexual misconduct that does not rise to the level of a serious crime would still require screening under Rule 404(b).¹⁷⁰ On the other hand, the new rules would have some potentially broad effects. For example, if courts read proposed Rule 414 literally and without qualification, evidence that the defendant previously had consensual intercourse with a 13-year-old girl would be admissible in a subsequent case in which the defendant allegedly had sex with a 5-year-old boy.¹⁷¹

One way to analyze this bill is by asking whether its provisions are consistent with the way the law treats character evidence in other areas. One possible inconsistency is with rape shield laws, under which courts exclude evidence of the putative victim's sexual history, subject to certain exceptions such as evidence of sexual intimacy with the accused.¹⁷² One might argue

Section Analysis]. The analysis applicable to proposed Fed. R. Evid. 413-415 is at 137 CONG. REC. S3191-02, S3238-42 (daily ed. Mar. 13, 1991). The 1991 proposed Rules 413-415 are identical to the 1993 proposed evidence rules, and the sponsors of the 1991 bill overlap with those of the 1993 bill.

169. 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, sex crime involving anal or genital contact with an adult, any offense that involves deriving sexual gratification from the infliction of death, bodily injury, or physical pain on another person, and any attempt or conspiracy to engage in the above-described conduct. S.1607, 103d Cong., 1st Sess. § 121 (1993).

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

171. See *supra* note 169.

172. For a comprehensive review of the provisions of rape shield statutes, see Harriett R. 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 in which the evidence concerns other sexual acts with the defendant himself, or in which the evidence is necessary to show the source of semen or injury. See FED. R. EVID. 412. Even in these jurisdictions, however, the Constitution will require reception of some other types of evidence, as when the evidence suggests a motive to fabricate a charge of rape. See *Olden v. Kentucky*, 488 U.S. 227 (1988) (per curiam) (holding it unconstitutional to prevent the defendant from cross-examining the accuser about the possibility that the victim was fabricating the rape to protect her relationship with

that because the law excludes the sexual history of the victim, it should also exclude the sexual history of the accused.

This is not the place to analyze all of the possibly desirable exceptions to rape shield laws. Suffice it to say that in our view the basic concept of a rape shield law does not conflict with admission of evidence of the rape defendant's prior crimes. 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 unnecessary embarrassment and to encourage them to report rape.¹⁷³ These rationales do 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. Suppressing evidence of the defendant's prior sex offenses serves no similar purpose. One who commits a crime is not entitled to keep that fact secret.¹⁷⁴

The most important distinction between exclusion of the victim's sexual history and exclusion of the defendant's past sexual misconduct is the probative value of the two types of evidence. To understand this distinction, one must recognize that the conventional arguments in favor of rape shield laws are not quite satisfactory. Advocates of rape shield laws have not provided a fully persuasive justification for the proposition that evidence of promiscuity is irrelevant to whether the complainant consented to sex with the defendant.

Contrary to conventional wisdom, evolving sexual mores do not justify the exclusion of prior sexual history evidence.¹⁷⁵

her boyfriend); *State v. Jalo*, P.2d 1359 (Or. Ct. App. 1976) (declaring it unconstitutional to exclude evidence of a child complainant's prior sexual conduct when an adult defendant claimed that the child had falsely accused him after the defendant said he would inform the child's parents of her sexual conduct).

173. See Section-by-Section Analysis, *supra* note 168, at S3241 (discussing policy behind rape shield laws). Studies indicate that rape is underreported. See *ESTRICH*, *supra* note 102, at 10-11; John Monahan & Laurens Walker, *Social Frameworks: a New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987).

174. See Section-by-Section Analysis, *supra* note 168, at S3241.

175. Wigmore expressed the original view: "The character of the woman as to chastity is of considerable probative value in judging the likelihood of consent." 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 62 (3d ed. 1940). As Wigmore recognized, however, "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.* § 200 (quoting *Rice v. State*, 17 So. 286, 287 (Fla. 1895)). Numerous commentators have made the argument that "evolving mores have

Evolving mores merely establish a new benchmark of normal sexual experience; they do not rebut the argument that women who have had an unusually large number of casual sexual partners are statistically more likely to consent than are women of average sexual habits. To be sure, every woman is entitled to refuse sex, whenever and with whomever she chooses. But this right is irrelevant when the issue is whether or not a woman in fact said no on a particular occasion. Nor can rape shield laws be justified on the ground that rape is a crime of violence, not of sex. Classifying rape as a crime of violence addresses why rather than whether a rape occurred. Finally, it is misleading to assert that "just because she consented to one man doesn't mean she consented to another."¹⁷⁶ This truism confuses relevance with conclusiveness.

If the issue were simply whether the defendant and the complainant had voluntary sex on a certain date, evidence that she had often done so before (with the same man or even with other men) would be relevant, though far from conclusive. Suppose, for example, that the woman were being tried for burglary and she offered an alibi: "On that night I was having sex with Harry, a fellow I had just met in a bar." In evaluating her alibi, it would surely be useful—though not conclusive—to know that she frequently had done this with other men. We would not reject such evidence on the ground that nowadays women often engage in non-marital sex, nor on the ground that "just because

made extramarital sex normal." *E.g.*, Evelyn Sroufe, *Evidence—Admissibility of the Victim's Past Sexual Behavior Under Washington's Rape Evidence Law—Wash. Rev. Code § 9.79.150 (1976)*, 52 WASH. L. REV. 1011, 1031-32 (1976); Note, *If She Consented Once, She Consented Again—A Legal Fallacy in Forcible Rape Cases*, 10 VAL. U. L. REV. 127, 138-43 (1976); Lisa Van Amburg & Suzanne Rehtin, *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, 55-56 (1977).

176. The claim that prior consent is relevant to whether subsequent consent was given to another man usually is rejected out of hand by authors defending rape shield laws. "[O]ne 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 175, 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 consent defense rape trial, cuts both ways is a different question, as is the danger that the jury will overvalue the evidence.

she had sex with other men doesn't mean she had sex with Harry."

The issue in a consent defense rape case, however, is not simply whether the alleged victim had consensual sex on a particular occasion. Rather, the question is comparative: Is the complainant's or the defendant's account more credible? Did she consent to sex and then falsely accuse the defendant of rape, or was she raped? Evidence of her promiscuity¹⁷⁷—even if extreme—tends to support both accounts of the incident. On the one hand, it tends to show, however slightly, that she is the sort of person who might have consented to casual sex. On the other hand, her failure to accuse her other lovers of rape tends to show, however slightly, that she does not readily make rape accusations in a fit of pique or because of pathological delusions. As Wright and Graham stated, "If the victim has had twenty instances of prior sexual conduct with rock stars before without claiming rape, in the absence of other evidence of motivation the most reasonable inference is that she claimed rape this time because she was raped."¹⁷⁸

It is also likely that promiscuous women, though more likely to consent to sex than other women, 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 than other women. Statistically, women who have had numerous sexual partners are more likely to live in high-crime areas, or to engage in high-risk behavior, or both.¹⁷⁹ For these reasons, the traditional assumption that promiscuous women are more likely

177. We have not been able to find a less pejorative synonym for "promiscuous," but it should be obvious that our purpose here is to describe rather than censure.

178. 22 WRIGHT & GRAHAM, *supra* note 40, § 5287, at 584 n.51.

179. Two studies indicate that college rape victims have more partners than non-victims. This may be because of increased post-rape sexual activity, which we think unlikely, or because a larger number of dates increases the chances of encountering a rapist, rather than because women who have had numerous sexual partners are more vulnerable than other women during any single social encounter. However, the evidence also suggests that rape victims, as compared to non-victims, as a class have more liberal sexual attitudes and are more likely to have sex on first dates, data which tend to support the hypothesis in the text. See Philip A. Belcastro, *A Comparison of Latent Sexual Behavior Patterns Between Raped and Never Raped Females*, 7 VICTIMOLOGY: INT'L J. 224, 225-26 (1982) (stating that students who have been raped 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*, 9 PSYCHOL. WOMEN Q. 193, 201-202, 208 (1985) (stating that "acknowledged rape victims reported significantly more liberal sexual values and a larger number of sexual partners . . . than nonvictimized women did").

to be lying when they accuse men of rape is at best highly conjectural. In most cases, therefore, a jury has no rational use for evidence of the victim's sexual history.¹⁸⁰ In a typical case, the main impact of such evidence is not to throw light on the issue of consent but solely to inflame jurors' prejudice against "loose women."¹⁸¹

Admittedly, the defendant's prior rapes are not conclusive evidence that he is guilty of the rape charged. Just as a woman might consent to sex on one occasion, but not another, a man might force himself on one woman but not another. His prior rapes, however, do not support both the defendant's and the victim's accounts, as does evidence of the victim's sexual history. One may disagree about their precise evidentiary weight, but they do have probative value, and it is all on the side of the prosecution. No inconsistency arises, therefore, in admitting evidence of a defendant's prior rapes while excluding evidence of the victim's prior consensual sex.

Rape victims and women who have had numerous sexual partners both tend to be younger, more urban, and poorer than the general population. Kathryn Kost & Jacqueline D. Forrest, *American Women's Sexual Behavior and Exposure to Risk of Sexually Transmitted Diseases*, 24 FAM. PLAN. PERSP. 244, 246-47 (1992) (stating that women most likely to have many sexual partners are 20-34 years of age, with an income below the poverty level, and living in an urban area); BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1991 259, 274, 280 (Timothy J. Flanagan & Kathleen Maguire eds., 1992) (providing similar data concerning rape victims). Although some scholars have been understandably reluctant to discuss this subject, because it may be interpreted as "blaming the victim," recognition that victim characteristics and behavior increase the risk of rape does not entail absolving the rapist of his crime.

180. Some exceptional cases exist in which the authors' analysis does not apply because the sexual history evidence is offered, not to show a propensity to consent, but for some other purpose such as to show a motive for fabrication. See generally Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 903 (1986) (proposing that evidence of a victim's sexual conduct be admissible for purposes other than showing the propensity to consent).

181. K. L'Armand & A. Pepitone, *Judgements of Rape: A Study of Victim-Rapist Relationship and Victim Sexual History*, 8 PERSONALITY AND SOC. PSYCHOL. BULL. 134, 135-37 (1982) (describing a study of stranger and date rape scenarios in which defendants were sentenced to 8.5 years when the victim's sexual history was not mentioned, 7.3 years when the victim was described as having limited sexual experience, and 4.5 years when the victim was described as having had many previous casual sexual relationships); C. Neil MacRae & John W. Shepherd, *Sex Differences in Perception of Rape Victims*, 4 J. INTERPERSONAL VIOLENCE 278 (1989). MacRae and Shepherd describe an acquaintance rape study in which male and female participants blamed the victim less if she was a virgin. *Id.* at 283. The participants also believed that a virgin was more psychologically damaged by rape. *Id.*

The proposed federal statute would, however, mandate a different sort of inconsistency. 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 when the charged crime is, for example, arson, manslaughter, robbery, drug-dealing, or murder? 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 unless it is shown to involve a closely similar *modus operandi*?

The available data on recidivism do not support a unique rule for sex crimes. It is unclear whether the recidivism rate for sex crimes is higher than for other crimes. In a 1989 Bureau of Justice Statistics study that followed 100,000 prisoners for three years after release, the recidivism rate was lower for sex offenders than for most other criminals. According to these figures, 31.9% of released burglars were rearrested for burglary, 24.8% of drug offenders were rearrested for a drug offense, and 19.6% of violent robbers were rearrested for robbery. Only 7.7% of rapists were rearrested for rape. Of the offenses studied, only homicide had a lower recidivism rate—2.8%.¹⁸² A follow-up period of longer than three years might have yielded a much higher recidivism rate for sex offenders,¹⁸³ but this might be true for other crimes as well. Studies of sex offenders with smaller samples and different follow-up periods have shown both higher and lower recidivism rates for certain populations of sex offenders, but no study has demonstrated that sex offenders have a consistently higher or lower recidivism rate than other major of-

182. Allen J. Beck, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, *RECIDIVISM OF PRISONERS RELEASED IN 1983* 6 (1989).

183. For scholars who have argued for a longer follow-up period, see Joseph J. Romero & Linda M. Williams, *Recidivism Among Convicted Sex Offenders: A 10-Year Followup Study*, 49(1) *FED. PROBATION*, Mar. 1985, at 58, 63 (1985). The authors state that the number of sex offenders rearrested for a sex offense four 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. They then conclude that "5 years is minimal as an effective [follow-up] period when investigating recidivism among sex offenders." For a related view, see 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 & R.A. Maller, *The Recidivism of Sex Offenders in the Western Australian Prison Population*, 32 *BRIT. J. CRIMINOLOGY* 54, 72 (1992); David Finkelhor, *Abusers: Special Topics*, in *A SOURCEBOOK ON CHILD SEXUAL ABUSE*, 134-141 (Finkelhor ed. 1986).

fenders studied for the same time period with the same methods.¹⁸⁴

Some commentators have suggested that studies based on rearrest or reconviction vastly understate the rate of recidivism for sex offenders because sex offenders may commit hundreds of unreported crimes.¹⁸⁵ This argument is plausible, but it may also apply to several other types of criminals, such as purse-snatchers, illegal gamblers, shoplifters, recipients of stolen goods, drunken drivers, and drug offenders. Although acquaintance rape is a grossly underreported offense,¹⁸⁶ this may be even more true of drug crimes which, being consensual, are notoriously hard to detect.

Even if one were to assume 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 all types of prior sex crimes should be admissible. The probative value of the evidence, however high, may be lower than the value the average jury would

184. Furby et al., *supra* note 183, at 22; see also Finkelhor, *supra* note 183, at 134 (discussing studies of recidivism rates for several types of sex offenders). 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 J. CONSULTING & CLINICAL PSYCHOL. 381, 386 (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. *Id.* at 383-84. The authors, however, noted that the nature of their subjects, maximum security inmates, may have inflated their recidivism results. *Id.* at 386. In their comprehensive review of sex offender recidivism studies, Furby et al. noted that "[t]he differences in recidivism across these studies is truly remarkable; clearly by selectively contemplating the various studies, one can conclude anything one wants." Furby et al., *supra* note 183, at 27 (quoting Vernon L. Quinsey, *Sexual Aggression: Studies of Offenders Against Women*, in 1 LAW AND MENTAL HEALTH: INTERNATIONAL PERSPECTIVES 84, 101 (D. Weisstraub ed. 1984)).

185. See, e.g., A. Nicholas Groth et al., *Undetected Recidivism among Rapists and Child Molesters*, 28 CRIME & DELINQ. 450, 453-54 (1982) (describing an anonymous questionnaire given to convicted and incarcerated rapists and child molesters in which, on average, the subjects indicated they "committed two to five times as many sex crimes for which they were not apprehended"); Finkelhor, *supra* note 183, at 132. Finkelhor noted that ten studies of child molestation "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.*" *Id.* See also, e.g., 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) (stating that "[u]ndetected crime is quite extensive among sex offenders and . . . official data may reveal only a small percentage of the total sexual offenses committed").

186. Furby et al., *supra* note 183, at 27 (stating that no more than 10% of sex offenses are reported).

assign to it. Perhaps the recidivism rate for stranger rape or child molestation is high in comparison with other offenses, yet lower than jurors commonly believe. Conversely, the recidivism rate for some other offense, such as murder, may be low but not as low as jurors suppose. On this hypothesis, the case for admitting a prior stranger rape would be weaker than for admitting a prior homicide. It is also conceivable that jurors would underestimate the likelihood of recidivism by acquaintance rapists because acquaintance rapists are not usually considered compulsive.

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 of the same offense.¹⁸⁷ The plausibility of such a coincidence, however, does not turn on whether sex crimes are involved, but upon other factors. One factor is whether the accusations are independent, so that a prior accusation did not cause a later one. Additional factors include the number of separate accusations and their similarity.¹⁸⁸ If the defendant is accused of arson, it would be a bizarre coincidence if he were independently, but falsely, accused by three unrelated victims of three other acts of arson. If one is to make a probabilistic exception to the rule against character evidence in cases involving multiple accusations, consistency requires that the exception apply to all types of cases in which the probative force of multiple accusations is equally great.¹⁸⁹

187. Section-by-Section Analysis, *supra* note 168, at S3240 (analysis applicable to the predecessor bill, introduced in 1991, that had the same evidence provisions as the 1993 bill).

188. 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 50-53, 63-91.

189. If one assumes that the base rate of false accusations in consent defense cases is very low, then one can make a case for treating consent defense cases differently, especially when multiple accusations exist. This line of reasoning requires an *a priori* judgment, in our view a reasonable one, that the likelihood of falsity is lower than for most crimes. It is not, however, unprecedented in evidence law, and is simply the reverse side of the *a priori* judgment, on which the corroboration requirement was once based, that women commonly lie about rape. See 7 WIGMORE, *supra* note 21, § 2062 (Chadbourn rev. 1978) (describing the corroboration requirement). The argument, however, only applies to consent defense cases. No proof has been found that the rate of mistaken witness identification is lower in sexual offenses than in nonsexual offenses. *But see* FAIRSTEIN, *infra* note 193, at 201-05.

By now, the astute reader has undoubtedly detected some ambivalence on the authors' part, both in their attitude toward the character evidence ban and in their attitude toward the proposed exception for sex crimes. Although we ultimately reject wholesale abolition of the rule against character reasoning, we regard this issue as a close one. Partly for that reason, we also see merit in an argument for partial abolition in sex crime cases. One superficially plausible argument against receiving such evidence, that it would be inconsistent to exclude the victim's sexual history while admitting the sexual history of the accused, does not withstand careful scrutiny. We believe, however, that a blanket exception for sex crime cases would be inconsistent with retention of the rule for other crimes, such as murder and non-sexual assault.

We now address a more limited proposal: to relax the exclusionary rule in 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, a danger exists in stranger rape cases that the defendant became a suspect because of prior rapes. This danger is not present in acquaintance rape cases. In stranger rape cases, the police may have shown the victim photographs of persons suspected of committing prior rapes, or otherwise may have focused their investigation on suspected sex offenders. Consequently, the apparently amazing coincidence—that a person who actually committed prior rapes had the misfortune to be falsely accused of a subsequent one—is not as incredible as it sounds. Because suspicion was focused on the defendant as a result of the prior crime, his chance of being accused, even if innocent, was fairly high.¹⁹⁰ In other words, the accusations of the various crimes 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

190. See LEMPERT & SALTZBURG, *supra* note 43, at 217 (suggesting that the danger that the defendant was identified because he was one of the "usual suspects" for that type of crime undermines the value of other crimes evidence).

perpetrators.¹⁹¹ Even without such prodding, eyewitness identification is a hazardous enterprise. A strong body of social science research demonstrates that such identifications, especially in emergencies, are fraught with difficulties and chances for error,¹⁹² and that jurors tend to overrate the ability of witnesses to make identifications.¹⁹³ Thus, in stranger rape cases, evidence of prior rapes may distract the jury from the task of evaluating problematic identification evidence.

To some extent courts can guard against these dangers. The judge could allow the defense to present evidence that the identification stemmed from the defendant's status as a "usual suspect." The judge could also allow the defense to present expert testimony about identification problems. These options,

191. See Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1088 (1986): "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 Robert Buckout, *Eyewitness Testimony*, 231 SCI. AM. 23-27 (1974) (describing police practices that might interfere with accurate identification).

192. See, e.g., ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* 142-44 (1979) (stating that unconscious transference can cause a witness to identify a suspect because the witness saw the suspect, or a photo of the suspect, in a context other than the crime); Stephanie J. Platz & Harmon M. Hosch, *Cross-Racial/Ethnic Eyewitness Identification: A Field Study*, 18 J. APPLIED SOC. PSYCHOL. 972, 981-83 (1988) (discussing inaccuracy of cross-racial identification); Elizabeth F. Loftus et al., *Some Facts about "Weapon Focus"*, 11 L. & HUM. BEHAV. 55, 61-62 (1987) (stating that "weapon focus" often interferes with identification capacity); see generally ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* (1979) (describing problems with eyewitness identification).

193. See e.g., Bryan L. Cutler et al., *Juror Decision Making in Eyewitness Identification Cases*, 12 LAW & HUM. BEHAV. 41, 54 (1988) (discussing a study that found jurors "do not possess the knowledge and skills necessary to adequately assess the reliability of eyewitness identification"); Gary L. Wells, *How Adequate is Human Intuition for Judging Eyewitness Testimony*, in *EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES*, 271-72 (Gary L. Wells & Elizabeth F. Loftus eds., 1984) (suggesting jurors be counseled on problems with eyewitness identification).

One experienced sex crime prosecutor argues that eyewitness identifications of stranger rapists are usually reliable because the perpetrator and the victim are in intimate contact for a relatively long period. LINDA A. FAIRSTEIN, *SEXUAL VIOLENCE: OUR WAR AGAINST RAPE* 201-05 (1993). She concedes, however, that "[w]hile the larger number of sexual assault cases occur under circumstances that afford the victim a good opportunity to identify the attacker, there are many rapes . . . in which the assailant remains behind his prey or blindfolds her or covers her head with bed linens or clothing." *Id.* at 183. Even if eyewitness identifications of rapists are typically reliable, it remains true that because of the "mug shot" book, the accusations of multiple stranger rapes are not wholly independent; moreover, the police may have "steered" a victim toward a particular suspect. As a result, the jury may regard the identification as more reliable than it is.

however, multiply the cost and complexity of the proceeding, and are not always available as a practical matter. Further, they may not correct the underlying misapprehensions.¹⁹⁴

Acquaintance rape, by contrast, is one of those rare crimes in which both the individual accusations and the cumulative uncharged misconduct evidence are usually extraordinarily credible. The credibility of the individual accusations derives from two sources. First, compared to crimes that involve eyewitness testimony or circumstantial evidence, the risk of an honestly mistaken accusation is negligible. Second, the danger of deliberately false accusations is reduced by the unpleasant intrusiveness of the police investigation and the well-known prospect that the defense will launch an all-out attack on the complainant.

Similarly, the uncharged misconduct evidence in an acquaintance rape case is likely to be better than most such evidence, because the accusations are not only individually credible but are usually independent and uncontaminated by the police department's focus on "the usual suspects." In acquaintance rape cases, multiple accusations have a synergistic effect.

If a woman accuses a man of raping her on a date, he may raise a reasonable doubt by pointing to inconsistencies in her story, the absence of bruises, or conduct on her part that is thought to suggest consent or a motive for a vendetta against him. If two other women also accuse him of date rape, he may be able to raise similar doubts about each of their individual accounts as well. If one considers all three accusations together, however, and no reason exists to suspect collaboration among the accusers, each of their charges will corroborate the others' to a much greater degree than in cases involving eyewitness identifications derived from "mugshot books" of rapists. Although it remains conceivable that the defendant is innocent of the crime charged, the danger of an erroneous conviction appears to be less in this sort of case than in many ordinary criminal trials.¹⁹⁵

194. See LOFTUS, *supra* note 192, at 200-01.

195. The distinction in erroneous convictions between an acquaintance rape case and other crimes that are subject to the character evidence rule rests partially on a priori judgments about the likelihood of false accusations. Assuming false accusations of date rape are rare, multiple accusations strongly corroborate each other. Admittedly, this belief rests on a generalized judgment about a social fact that cannot be proven conclusively with scientific evidence. Cf. Patricia Frazier & Eugene Borgida, *Juror Common Understanding and the Admissibility of Rape Trauma Syndrome Evidence in Court*, 12 L. & HUM. BEHAV. 101, 106-07 (1988) (assessing sparse data about false rape reports and concluding that the rate of false reports is the same or lower than for other categories of crime).

In acquaintance rape cases, the evidence of prior sexual assaults by the accused may help to combat prejudice against victims. Researchers have shown that jurors have a tendency to blame the victim in acquaintance rape cases. The classic Kalven and Zeisel jury study presents data suggesting that jurors often nullify the law of rape by giving decisive weight to the legally irrelevant contributory negligence of victims in acquaintance rape cases.¹⁹⁶ Kalven and Zeisel measured the judge-jury disagreement rate, which reflected situations in which the jury acquitted, but the judge felt that the jury should have convicted, the defendant.¹⁹⁷ They examined numerous criminal cases, including two types of rape cases.¹⁹⁸ In "aggravated" rape cases (stranger rape, extra violence, or multiple assailants), the disagreement rate was only 12 percent.¹⁹⁹ In "simple" rape cases (acquaintance rape cases without extra violence), it reached 60 percent.²⁰⁰ Juries thus acquitted much more often than judges would have done in the "simple" rape cases, but only slightly more often in stranger rape cases. Interpreting judges' comments, Kalven and Zeisel attributed jurors' leniency to the jurors' belief that the victim had precipitated the event by behavior such as hitchhiking or wearing provocative clothing.²⁰¹ Evidence that the defendant raped other victims may counteract this excessive leniency by suggesting that the defendant would have raped the victim even without the victim's legally irrelevant contributory behavior.

Consent defense rape trials, like some child sexual abuse trials, are cases in which juries need additional evidence to reach an informed decision. By its nature, the crime occurs in private. In consent defense trials, because the accused admits the act of intercourse, physical evidence that it occurred is unhelpful. In some cases the complaining witness's version of events is partially corroborated by physical evidence such as bruises, but such evidence is often lacking or inconclusive.

In an influential article,²⁰² Professor Dale Nance argued that the organizing principle of evidence law is not the desire to control the jury in order to prevent it from making foolish or

196. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 249-54 (1966).

197. *Id.* at 251-54.

198. *Id.*

199. *Id.* at 253.

200. *Id.*

201. *Id.* at 249-51.

202. Dale A. Nance, *The Best Evidence Principle*, 73 *IOWA L. REV.* 227, 294 (1988).

irrational decisions.²⁰³ Instead, he suggested, the fundamental principle is to encourage the parties to offer the best evidence they feasibly can obtain.²⁰⁴ Although no single foundational principle can explain all evidence law, the Nance hypothesis identifies one of the driving forces behind rules excluding various types of evidence.

The Nance hypothesis provides some guidance when applied to evidence of the accused's prior crimes. For example, in stranger rape cases, one concern is that admitting uncharged misconduct would have a harmful effect on the development of proof. If the uncharged misconduct rule were relaxed, prosecutorial resources might be unwisely diverted from the search for better evidence to the search for or reliance on uncharged misconduct. Specifically, the prosecution might devote less attention to evidence tending to disprove the defendant's alibi, or it might forego analysis of blood, hair, or semen showing the defendant's connection to the crime. These analyses are expensive²⁰⁵ and the prosecution might prefer to rely on less expensive uncharged misconduct evidence. In acquaintance rape cases, on the other hand, the danger that the prosecution might bypass other sources of evidence is minimal. Aside from the testimony of the alleged victim, the uncharged misconduct is likely to be the best evidence available.²⁰⁶

203. *Id.* at 294.

204. *Id.* at 227, 245.

205. 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, Minn. (May 20, 1993); see also Sally E. Renskers, Comment, *Trial by Certainty: Implications of Genetic "DNA Fingerprints"*, 39 EMORY L. REV. 309, 322 n.95 (1990) (stating that costs approximate \$200-300 per sample, with samples needed from the victim, the suspect, and the crime scene); Joseph G. Petrosenelli, Note, *The Admissibility of DNA Typing: A New Methodology*, 79 GEO. L.J. 313, 315 n.14 (1990) (stating that private labs charge \$325-490 for DNA tests and \$750-1000 for a day of expert testimony about tests).

206. In some cases the prosecution may be able to offer evidence of rape trauma syndrome, but its utility is problematic. See generally *State v. Black*, 745 P.2d 12, 13 (Wash. 1987) (en banc) (holding that expert testimony on rape trauma syndrome is inadmissible because it lacks scientific reliability and prejudices the defendant); *State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982) (en banc) (holding that the trial court should not have admitted evidence of rape trauma syndrome). Although rape trauma syndrome literature describes differences between victims who report that they have been raped and nonvictims who report that they have not been raped, it says nothing about the characteristics of nonvictims who report that they were raped. Conceivably, complainants who falsely report that they were raped after consensual sexual acts show the same symptoms of trauma that a genuine victim shows. No knowledge is available on the subject because such complainants have not been, and perhaps can-

The evidentiary problems in consent defense cases are analogous to problems the government faces in prosecutions for receiving stolen goods. In those prosecutions, courts usually admit prior crimes, supposedly to show the defendant's criminal intent.²⁰⁷ Such evidence, however, effectively amounts to propensity evidence. Yet courts are sympathetic to the prosecution's difficulties in proving beyond a reasonable doubt that the recipient of the stolen goods knew that they were stolen. Courts have created what one might loosely describe as a rebuttable presumption of guilty knowledge in cases in which the accused previously has been guilty of receiving stolen goods.

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.²⁰⁸ This may be a vestige of the traditional bias against date rape complainants. At least, it seems to reflect an attitude that defendants in these cases deserve more protection than accused stranger rapists and child molesters. In some consent defense cases, courts even deny the minimal relevance of the evidence, stating that "the fact that one woman was raped has no tendency to prove that another woman did not consent."²⁰⁹ That statement is true

not be, studied. Further, receiving rape trauma syndrome testimony raises questions of fairness because, unless the defense is allowed to conduct an invasive investigation into the victim's private life, the defense normally will lack the ability to develop evidence that the victim did not suffer from rape trauma.

207. See *supra* note 93 and accompanying text.

208. One finds this result in opinions reasoning that in consent defense cases identity is not in issue, so *modus* evidence is not admissible. A necessary implication is that courts would decide differently if the case had been a stranger rape case. See *supra* note 55. In some jurisdictions, no difference would occur between the two types of rape cases 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 note 87.

209. *Lovely v. United States*, 169 F.2d 386 (4th Cir. 1948). In *Lovely*, the defendant was accused of raping an acquaintance after driving her to a remote area of a federal military base. *Id.* at 387-88. The court excluded evidence that the defendant committed a rape 15 days earlier on the same base, reasoning that "[t]he fact that one woman was raped . . . has no tendency to prove that another woman did not consent." *Id.* at 390. In *Brown v. State*, 459 N.E.2d 376 (Ind. 1984), the defendant met his victim at a gas station and drove her to a cornfield where he threatened, raped, and beat her. *Id.* at 377. Two other victims testified to rapes by the defendant in secluded areas after getting or giving him rides in a vehicle. *Id.* at 378-79. The court held that receiving this evidence was reversible error, reasoning that the rape of one woman had no tendency to prove that another woman did not consent. *Id.* at 379. The court cited *Lovely*, 169 F.2d at 390. *Id.* In *United States v. Gamble*, 27 M.J. 298 (C.M.A. 1988), *aff'd* 33 M.J. 179 (C.M.A. 1991), the court held that it was reversible error to admit evidence of a prior sexual assault in a consent defense rape case.

only if one ignores the fact that both women were with the same man. Certainly the fact that the defendant was willing to use force in obtaining sex from one woman has some tendency to indicate that he was willing to do so again.

Extralegal considerations influence police, prosecutors, and especially jurors to allow some acquaintance rapists to go without punishment.²¹⁰ The same attitudes may influence judges to some extent as well. Although appellate judges are usually not the major obstacle to a successful rape prosecution, the judiciary historically has been exceedingly suspicious of victims of acquaintance rape. This suspicion led to the requirement that rape complaints be corroborated,²¹¹ to the idea that rape complainants should automatically undergo a mental examination,²¹² to instructions warning the jury that rape is easy to fabricate and hard to disprove,²¹³ and to the requirement of "utmost resistance" by the victim.²¹⁴ Reconsideration of the rules concerning prior misconduct evidence in acquaintance rape cases would be consistent with the pattern of changes elsewhere in rape law, which is beginning to recognize that acquaintance rape is a crime as deserving of punishment as other forms of sexual assault.

At a minimum, the law should abandon the differential treatment of acquaintance rape cases. The justifications for ad-

Id. at 305. The court reasoned that the fact that one woman was sexually assaulted has no tendency to prove another did not consent (citing *Lovely*, 169 F.2d at 390). *Id.* at 304.

210. See *ESTRICH*, *supra* note 102, at 17-20.

211. See *supra* note 189.

212. 3A *WIGMORE*, *supra* note 21, § 924, at 736-37.

213. *ESTRICH*, *supra* note 102, at 54.

214. *Id.* at 29-31. *Estrich* describes cases such as *Brown v. State*, 106 N.W. 536 (1906), which involved neighbors who had known each other all their lives. *Id.* at 537. The court held that screaming, pushing, and saying "let me go" was not enough to satisfy the utmost resistance requirement, even when the defendant grabbed the victim, tripped her, covered her mouth with his hand, and told her to shut up. *Id.* at 537-39. *Estrich* also asserts that the "utmost resistance" requirement was applied unevenly, a view that is related to her view that acquaintance rape is just as frightening as stranger rape. *ESTRICH*, *supra* note 102, at 25, 32-37. "[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.]" *Id.* at 32-37. Other sources have argued that racism lies behind the differences in the treatment of acquaintance and stranger rape, on the ground 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, which lacked substantial racial minorities.

mitting 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 different sexual assaults, courts should also admit it under the *modus operandi* exception to show that the defendant acted with force in acquaintance rape cases. Indeed, admitting uncharged misconduct evidence in consent defense cases would be sensible even in circumstances in which it would not be admissible if the defense were alibi.

For similar reasons, uncharged misconduct evidence probably should be admissible in child abuse cases, provided that the current accusation is independent of the uncharged accusation(s). Yet these cases are more problematic than consent defense rape cases. As in acquaintance rape cases, the perpetrators may have a pattern of abusive activity, and may succeed in discrediting individual accusers. In other respects, however, the problems of proof in child abuse cases are distinctive. 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 adults, such as parents and therapists, creates a danger that the child's accusation will not be truly independent of other children's stories, or of adults' suspicions, which in turn may have been fueled by rumors of the defendant's alleged prior crimes. When making their initial accusations, the children are probably unaware that they are commencing a process that will be an ordeal for them. Partly for this reason, the danger that they are fabricating their complaints is probably 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 courts have been unduly restrictive about receiving evidence of other rapes by the accused in acquaintance rape cases. At the least, courts should receive evidence of other rapes as freely in acquaintance rape cases as in stranger rape cases in which identity is an issue. One could justify an exception to the rule against uncharged misconduct that would make the evidence of other rapes freely admissible in acquaintance rape cases. The pending legislation goes too far, however, in provid-

ing for free admissibility of uncharged misconduct evidence in all sex offense cases, including stranger rape cases. No justification exists for making uncharged misconduct evidence more freely admissible in stranger rape cases than, for example, in murder cases.

As a practical matter, all of the arguments discussed in this Article may be unimportant in comparison with one's substantive attitude toward sex offenses. If one thinks of rape as a crime similar to other violent felonies, comparable to homicide or nonsexual assault, for example, 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, part of a system of oppression that promotes male supremacy, then one may think that the need to increase the conviction rate is greater than the need to maintain consistency across the law of character evidence and greater than the need to avoid speculative dangers of prejudice in the fact-finding process. As usual, beliefs about substance overwhelm beliefs about process.

