

Washington Law Review

Volume 70
Number 3 *Symposium on Immigration Policy*

7-1-1995

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Recommended Citation

Jeffrey G. Pickett, Notes and Comments, *The Presumption of Innocence Imperiled: The New Federal Rules of Evidence 413-415 and the Use of Other Sexual-Offense Evidence in Washington*, 70 Wash. L. Rev. 883 (1995).

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THE PRESUMPTION OF INNOCENCE IMPERILED: THE NEW FEDERAL RULES OF EVIDENCE 413-415 AND THE USE OF OTHER SEXUAL-OFFENSE EVIDENCE IN WASHINGTON

Jeffrey G. Pickett

Abstract: The U.S. Congress has provisionally enacted three new federal rules of evidence (FRE). In cases of sexual assault or child molestation, FRE 413-415 allow the use, for any relevant purpose, of sexual assault or child molestation evidence not charged in the indictment or information. The new rules would operate in contravention of the traditional prohibition against using evidence of other misconduct for the purpose of proving that the defendant acted in conformity with a particular character trait on the occasion in question. This Comment surveys the arguments for and against the proposed changes. It concludes that Washington should not elect to follow this latest addition to the Federal Rules of Evidence on grounds that the new rules are too broad to fairly govern the use of such potentially prejudicial evidence. The Comment discusses less drastic changes which would improve the way in which other sexual misconduct evidence is used in Washington state courts.

On September 13, 1994, the U.S. Congress passed the Violent Crime Control and Law Enforcement Act of 1994.¹ Appended to this omnibus legislation were three provisory Federal Rules of Evidence (FRE).² Rule 413 will allow the government to introduce evidence of the commission of a prior sexual assault for "its bearing on any matter to which it is relevant" in a case where the defendant is charged with sexual assault.³ Rule 414 allows the same use of evidence of prior child molestation in cases where the defendant is charged with child molestation.⁴ FRE 415 extends this treatment of prior-sexual-offense evidence to civil cases.⁵

1. Pub. L. No. 103-322, 108 Stat 1796, 2135-37 (1994).

2. Fed. R. Evid. 413-415. The new rules are subject to a period of review by the Judicial Conference of the United States. The Conference has solicited comments from a broad spectrum of the legal community and will recommend changes. Congress is under no obligation to adopt the Conference's recommendations, however. The new rules will take effect before August 1995 either as currently enacted or as subsequently modified by Congress. See *infra* notes 105-107 and accompanying text.

3. Pub. L. No. 103-322, 108 Stat. 1796, 2136 (1994).

4. *Id.* at 2136-37.

5. *Id.* at 2137. Unless defined otherwise, the term "sexual offense" is used in this Comment to refer to the conduct encompassed under both Rule 413 (sexual assault) and Rule 414 (child molestation). Additionally, the Comment uses the words "prior-sexual-offense evidence" interchangeably with the words "uncharged-sexual-offense evidence." Both refer to evidence of crimes that are not charged in the indictment of the defendant, including crimes committed either before or after the act which led to the indictment. See *State v. Laureano*, 101 Wash. 2d 745, 764, 682 P.2d 889, 901 (1984), *overruled on other grounds by State v. Brown*, 111 Wash. 2d 124, 761 P.2d 588 (1988), *superseded on reh'g by State v. Brown*, 113 Wash. 2d 520, 782 P.2d 1013 (1989).

Lest there exist any doubt over the scope of this revolution in the law of evidence, the congressional sponsors of the legislation made it clear that relevant uses of prior-sexual-offense evidence include proving that a defendant acted in conformity with his or her character.⁶

These additions to Article IV of the FRE⁷ change two hundred years of evidentiary jurisprudence.⁸ The congressional sponsors of the new rules argue that the changes are needed to successfully prosecute sexual-assault and child-molestation crimes.⁹ Nevertheless, FRE 413–415 have encountered widespread attacks from within the legal community. When the Judicial Conference of the United States¹⁰ solicited comments from scholars, attorneys, and judges across the country, the vast majority of the responses it received criticized the new rules.¹¹

Part I of this Comment describes the evidentiary landscape into which the new rules are offered and outlines the current law in Washington with regard to evidence of uncharged sexual offenses. Part II sets forth the language of FRE 413–415, discusses possible interpretations of their provisions, and describes the hopes that the sponsors of the legislation have attached to the rules' enactment. Part II then briefly reviews the new rules' procedural disposition and reports a draft of an alternative formulation of the rules offered by the Judicial Conference of the United States.¹² Part III asserts that FRE 413–415 are based on unsupported views about the source and nature of sexual-offense behavior and that the rules undermine the presumption of innocence traditionally accorded

6. See 140 Cong. Rec. H8968-01, H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari). Rules of evidence historically have prohibited such use of uncharged-misconduct evidence. See *infra* notes 15–20 and accompanying text. This Comment uses the phrase “character evidence” interchangeably with “propensity evidence.”

7. Article IV of the Federal Rules of Evidence defines relevant evidence and governs the conditions under which such evidence is admissible at trial. See 1 Michael H. Graham, *Modern State and Federal Evidence: A Comprehensive Reference Text* 9–10 (1989).

8. See Thomas J. Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidence in Federal Criminal Trials*, 50 U. Cin. L. Rev. 713, 713 (1981) [hereinafter Reed, *Propensity—Part I*].

9. See *infra* notes 92–93.

10. The Judicial Conference of the United States was created pursuant to 28 U.S.C. § 331 and advises the United States Supreme Court on Court-prescribed rules of practice and procedure. 28 U.S.C. § 331 (1995).

11. Letter from Dean Margaret A. Berger, Professor of Law, Brooklyn Law School, to John K. Rabej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts (Nov. 17, 1994) [hereinafter Berger] (on file with the *Washington Law Review*) (declaring in enclosed materials entitled “Suggested Language for Transmittal Statement for Rule 404 (Broun draft #2)” that the “overwhelming majority” of respondents believed the rules were unwarranted).

12. The Judicial Conference's Advisory Committee on Evidence prepared the alternative rules after reviewing the written reactions of lawyers, judges, and legal scholars to the new rules. See Berger, *supra* note 11.

criminal defendants in the U.S. judicial system. Finally, part IV presents three possible responses that the state of Washington, either through its legislature or through its supreme court, might make in view of the new rules.¹³ First, the legislature and/or the state supreme court could reject suggestions that Washington follow the new federal rules and retain the status quo. Second, the supreme court could broaden the current “lustful disposition” rule¹⁴ to encompass evidence of offenses against victims in the same class as the victim of the charged crime. Lastly, the legislature or supreme court could limit the use of propensity evidence to those cases where a medical or psychological assessment has determined that a defendant suffers from a psychologically- or biologically-sourced compulsion to commit sexual offenses.

I. THE LANDSCAPE INTO WHICH FRE 413–415 ARE OFFERED

A. *The Tradition of Excluding Propensity Evidence*

A prohibition against using prior-misconduct evidence has existed in some form in Anglo-American jurisprudence for almost three hundred years.¹⁵ Numerous American state courts had adopted their English forebears’ restrictions on prior-criminal-acts evidence by the end of the eighteenth century.¹⁶ Though the adoption of the Federal Rules of

13. Although not obligated to follow the Federal Rules of Evidence, the Washington Rules of Evidence (ER) are modeled after and strongly influenced by them. See Lewis H. Orland, *Chairman's Introduction to the Washington Rules of Evidence* (1978), reprinted in Karl B. Tegland, 5 *Washington Practice: Evidence Law and Practice* viii (3d ed. 1989). See also *State v. Brown*, 111 Wash. 2d 124, 151, 761 P.2d 588, 603 (1988). The Washington Supreme Court adopted the Washington Rules of Evidence as rules of court in April 1979. See Orland, *supra*, at viii; Tegland, *supra*, § 1. It may amend the rules under a statutory grant of authority or under an assertion of inherent power to oversee the judicial process. See Wash. Rev. Code § 2.04.190 (1994) (conferring power on the state supreme court to prescribe rules governing the practice and procedure used in state courts); *State v. Fitzsimmons*, 94 Wash. 2d 858, 858, 620 P.2d 999, 1000 (1980) (stating that the state supreme court possesses inherent rule making powers). The Washington Legislature also may amend the state's evidence rules. “The legislature may prescribe rules of procedure and evidence . . .” *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 657, 771 P.2d 711, 722 (1989) (citation omitted). Thus, it can be expected that concerned citizens will ask either the legislature or the supreme court for a hearing on the merits of following the new federal rules.

14. Washington's current lustful-disposition exception allows the use of uncharged-misconduct evidence to prove criminal propensity when the victim of the charged and uncharged incidents is the same person. See *State v. Ray*, 116 Wash. 2d 531, 547, 806 P.2d 1220, 1229–30 (1991).

15. See Reed, *Propensity – Part I*, *supra* note 8, at 716–18. The types of prohibited uses have varied over time; however, a prohibition of some kind has existed since the end of the 17th century. *Id.*

16. *Id.* at 720–21.

Evidence in 1975¹⁷ greatly expanded the approved uses of prior-misconduct evidence, use of such evidence solely for the purpose of showing criminal propensity remained forbidden.¹⁸ All federal circuits recognize this basic maxim under the FRE,¹⁹ and all state jurisdictions at least formally recognize a similar maxim under their own rules of evidence as well.²⁰

The prohibition against using uncharged-misconduct evidence to prove propensity exists because much uncharged-misconduct evidence is only weakly relevant to the issue of a defendant's action at a later date.²¹ Psychological research indicates that disposition, or character, is a very poor predictor of conduct on a specific occasion.²² To the extent that the prior-act evidence is at all relevant, its probative value often is marginal.²³ For example, a woman whose past acts show her to be violent is violent only during a tiny percentage of her life.²⁴ Most of the minutes in her life are lived peaceably. Furthermore, her violence is much more likely to be triggered by situational variables than by a consistent

17. Congress enacted the Federal Rules of Evidence as Pub. L. No. 93-595; 88 Stat. 1926, on January 2, 1975; the rules became effective July 1, 1975. See 2 Graham, *supra* note 7, at 883, 1047 (1989).

18. See Report to the Attorney General, Office of Legal Policy, Department of Justice, *The Admission of Criminal Histories at Trial*, 22 U. Mich. J.L. Ref. 707, 719 (1989). Authorities often use the term "propensity" interchangeably with "character." Character evidence refers to evidence showing a person's general disposition, or to a disposition for a specific trait. *McCormick on Evidence* § 195 (Edward W. Cleary gen. ed., 3d ed. 1984).

19. See Thomas J. Reed, *Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of Evidence*, 53 U. Cin. L. Rev. 113, 162 (1984).

20. Thirty-eight states model their rules of evidence on the FRE. See letter from Paul R. Rice, Professor of Law, The American University, (containing unpublished manuscript entitled Memorandum of Law), to the Secretary of the Committee on Rules of Practice and Procedure 17 (Oct. 10, 1994) [hereinafter Rice] (on file with the *Washington Law Review*). The Memorandum of Law was prepared by Professor Rice and members of his Advanced Evidence seminar. The other state jurisdictions follow a state code or decisional law that expresses the maxim. See Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 Am. J. Crim. L. 127, 159 n.179 (1993) [hereinafter Reed, *Reading Gaol Revisited*] (stating that all states have a common law or statutory version of the rule set forth in *People v. Molineux*, 61 N.E. 286 (1901)). The court in *Molineux* held that evidence of prior poisoning was not admissible to prove the defendant's disposition to commit the charged crime of murder-by-poisoning, but could be used, if not unfairly prejudicial, to show motive, intent, lack of accident or mistake, common scheme, or identity. *Molineux*, 61 N.E. at 293-303.

21. See Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 2:18 (1994).

22. See Miguel Angel 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, 1052 (1984).

23. See Robert H. Aronson, *The Law of Evidence in Washington* 404-05 to 404-06 (2d ed. 1993).

24. *Id.* at 404-06.

character trait.²⁵ Thus, her past violence, in and of itself, does not offer a significant amount of help in determining what she did at a later time. Nevertheless, the jury is likely to be mesmerized by the uncharged misconduct and accord too much weight to its probative value.²⁶

The use of character evidence to prove conduct is potentially highly prejudicial in another manner as well.²⁷ The jury may be tempted by evidence of prior misconduct to punish a defendant for who he or she is rather than for what he or she has done. Research has demonstrated that admission of a defendant's prior bad acts significantly increases the chances that a jury will find liability or guilt.²⁸ One well-known study conducted at the University of Chicago Law School concluded that the introduction of such evidence threatens the presumption of innocence usually accorded the accused in a criminal trial.²⁹ Federal and state courts have echoed this fear.³⁰

Finally, the authorities also cite jury confusion and wasted time as further problems with allowing prior bad acts to prove character.³¹ They predict burdensome mini-trials on the history and importance of each prior act offered during a proceeding.³²

B. *Federal Rule of Evidence 404(b)*

Nevertheless, courts and scholars have felt that prior-act evidence is useful and not overly prejudicial when offered to prove something other than the character of the accused.³³ In federal jurisdictions, such use is regulated primarily under FRE 404.³⁴ Rule 404 has two subsections.

25. See *Mendez*, *supra* note 22, at 1052 (discussing studies showing that behavior is dependent on highly specific stimulus situations and discounting the widely-held view that people behave consistently with character traits).

26. See *Imwinkelried*, *supra* note 21, § 2:18.

27. See, e.g., *Michelson v. United States*, 335 U.S. 469, 475–76 (1948).

28. See, e.g., *Harry Kalven, Jr. & Hans Zeisel, The American Jury* 160–61, 178–79 (1966).

29. See *id.* at 179; see also *Imwinkelried*, *supra* note 21, § 1.02 nn.8–12 and accompanying text.

30. See *McCormick on Evidence*, *supra* note 18, § 190 n.1 (collecting cases).

31. *Id.* § 190.

32. See, e.g., Sara Sun Beale, *Prior Similar Acts in Prosecutions for Rape and Child Sex Abuse*, 4 *Crim. L.F.* 307, 316 (1993).

33. *McCormick on Evidence*, *supra* note 18, § 190.

34. *Cf.* 1 *Graham*, *supra* note 7, at 512–19 (discussing, both generally and in the context of the federal rules, the regulation of the use of character evidence). Provisions of several other rules also govern the admission of other misconduct evidence. Where character is not an essential element of the charge, Rule 405 restricts the admission of character evidence to reputation or opinion testimony. Rule 406 allows a proponent to prove the occurrence of a crime by introducing other act evidence showing the behavior in question to be habitual. Rule 412 prohibits the use of a victim's unrelated

Subsection (a) generally prohibits the use of character evidence to prove action in conformity therewith except when offered to prove or rebut a defendant's assertion of a positive character trait or to prove or rebut a pertinent victim or witness character trait.³⁵ Subsection (b) specifically prohibits the use of prior crimes, wrongs, or acts (bad-acts evidence) to show the defendant acted in conformance with a criminal character.³⁶ Exceptions outlined in 404(b) allow use of relevant bad-acts evidence for other purposes, including showing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.³⁷

The list of proper uses for bad-acts evidence cited in Rule 404(b) is not necessarily exclusive.³⁸ Most federal jurisdictions read the words "such as,"³⁹ which introduce the list, to indicate that the several named purposes which follow are examples and that the list is capable of expansion.⁴⁰ Thus, FRE 404(b) is an inclusionary rule,⁴¹ forbidding evidence of other crimes only when it is offered to prove that the defendant was predisposed by his or her character to commit the charged crime.⁴²

C. *The "Lustful Disposition" Rule*

Many state jurisdictions, including those following the federal rules and those following their own codes or common law rules, employ a non-enumerated exception to the prohibition against use of bad-acts

prior sexual activity to support defendant's claim of mistaken identity or victim consent to the charged act. Rules 608 and 609 govern the use of character evidence to impeach witnesses. *See* Fed. R. Evid. 405, 406, 412, 608, and 609. Finally, Rules 401, 402, and 403 control the admission of all evidence, including evidence admitted under Rule 404. *See* Fed. R. Evid. 401, 402, and 403 advisory committee notes.

35. Fed. R. Evid. 404(a).

36. Fed. R. Evid. 404(b).

37. *Id.* Identity is provable with prior bad acts by showing a defendant's "modus operandi." Modus operandi is a term used to describe the situation where a unique method or set of circumstances surrounds an act and therefore serves to identify a defendant as the person who committed a nearly identical act. *See* Aronson, *supra* note 23, at 404-18.

38. *See* United States v. Diggs, 649 F.2d 731, 737 (9th Cir.), *cert. denied*, 454 U.S. 970 (1981).

39. Rule 404(b) states that bad-acts evidence, while not admissible to show propensity, may "be admissible for other purposes, such as proof of motive . . ."

40. *See* Imwinkelried, *supra* note 21, § 2:30 (1994 & Supp. 1994) (indicating that all but one of the federal circuits clearly adhere to this view).

41. *See id.* The alternative, minority view of Rule 404(b) is that it is an "exclusionary" rule. Under this interpretation, the general rule is that uncharged-misconduct evidence is *inadmissible*, except in the specifically enumerated exceptions of Rule 404(b). *See id.*

42. Diggs, 649 F.2d at 737.

evidence in sexual-offense cases.⁴³ Washington is among these jurisdictions and categorizes the exception under the term “lustful disposition.”⁴⁴ The exception allows admission of evidence showing a passion for unusual or abnormal sexual gratification.⁴⁵ The category has at least three variations: the narrow, the broad, and the very broad.

The narrow exception restricts use of prior-sexual-misconduct evidence to cases where the victim of both the uncharged and the charged crimes is the same person.⁴⁶ Courts reason that the evidence of the uncharged crime shows a lustful disposition on the part of the defendant toward a particular victim⁴⁷ and thus, is probative of the defendant’s charged actions toward the victim.⁴⁸

Under the broad exception, evidence of prior sexual offenses against persons related to the victim of the charged crime may be used to prove the defendant’s propensity for similar conduct.⁴⁹ In an incest case, for example, courts reason that the evidence of a prior offense committed against the victim’s sibling is relevant to show the defendant’s incestuous inclination toward family members.⁵⁰

When the victims of a single defendant do not share enough in common to be comfortably classified into a group, the very broad exception may be called forth. Under this version of the lustful-disposition rule, courts focus on the defendant’s general sexual deviance or aggressiveness and not on the triggers for that deviance or

43. See Beale, *supra* note 32, at 312–13. See also Reed, *Reading Gaol Revisited*, *supra* note 20, at 188 n.340 (citing cases arising in jurisdictions that employ a lustful disposition type of exception).

44. See, e.g., *State v. Ray*, 116 Wash. 2d 531, 806 P.2d 1220 (1991) (holding that evidence of defendant’s earlier incestuous assaults against his daughter was properly admitted in later incest case involving the same daughter to show a lustful disposition toward the victim).

45. *McCormick on Evidence*, *supra* note 18, § 190. For a more complete discussion of the development of the sexual-offense evidence exceptions, including an explanation of the differing treatment “deviant” sexual offenses (homosexual acts, incest, child molestation, sodomy) at one time received from “non-deviant” sexual offenses (heterosexual rape, adultery), see Imwinkelried, *supra* note 21, § 4:11–4:18.

46. See, e.g., *State v. Carver*, 37 Wash. App. 122, 126, 678 P.2d 842, 844 (1984) (“An exception of long standing extends to collateral sexual misconduct of a defendant which establishes a lustful disposition toward the offended female.”) (citations omitted).

47. *Id.*

48. *Id.*

49. See, e.g., *Soper v. State*, 731 P.2d 587, 590–91 (Alaska Ct. App. 1987) (holding defendant’s sexual assaults on the sisters of the victim of the charged crime admissible to show a propensity to sexually assault his daughters).

50. *Id.*

aggressiveness.⁵¹ Uncharged-sexual-offense evidence will be admissible to prove that the defendant suffers from a general compulsion for sexual deviance, even where the charged crime is quite different from the prior misconduct.⁵² This version of the lustful-disposition rule is similar in spirit to FRE 413–415.⁵³

Not all courts recognize a specific lustful-disposition exception.⁵⁴ Nevertheless, observers of Rule 404(b) have concluded that many courts will more readily find that evidence of prior, similar acts satisfies one of the enumerated exceptions in sexual-offense cases than in other criminal cases.⁵⁵ Virtually nowhere in the United States, therefore, is the use of prior-sexual-offense evidence comprehensively banned. The supporters of the new rules are concerned, nevertheless, that this kind of evidence is not always presumed to be admissible in prosecutions for sexual offenses.⁵⁶

D. The Current Law in Washington with Regard to Prior-Sexual-Offense Evidence

Evidence of prior sexual offenses is admissible under numerous circumstances in Washington. Courts admit the uncharged-misconduct evidence if it satisfies one of the enumerated exceptions in Washington Rule of Evidence 404(b).⁵⁷ In addition, Washington recognizes a “lustful

51. See, e.g., *Burris v. State*, 420 S.E.2d 582 (Ga. Ct. App. 1992) (allowing use of evidence of defendant's ownership of pornography and sex toys to prove “bent of mind” in a child-molestation case).

52. *Id.*

53. Both allow evidence of prior sexual misconduct to be used in any subsequent case where the charge may be unrelated by victim or specific act to the proffered evidence but still falls within the broad category of sexual offense. Compare FRE 413–414 with *Burris*, 420 S.E.2d 582.

54. See *Imwinkelried*, *supra* note 21, § 4:18 (1994 & Supp. 1994).

55. See *Beale*, *supra* note 32, at 309.

56. See 140 Cong. Rec. S12990-01, S12990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole) (stating that the strength of the new rules lies in the presumption they establish that such evidence is “typically relevant and probative, and that its probative value is not outweighed by any risk of prejudice”).

57. See *Aronson*, *supra* note 23, at 404-13 to 404-19 (describing the criteria governing introduction of evidence under the motive, premeditation, intent, absence of accident or mistake, common plan or scheme, and identity (*modus operandi*) exceptions).

The doctrine of chances, which figures prominently in the reasoning used by the proponents of the new rules, offers a different basis of admissibility. Proponents of the doctrine assert that an innocent person is unlikely to be associated with evidence of repeated criminal behavior. As more incidents accumulate implicating the person, the prior-offense evidence becomes probative of whether the person committed the charged offense. The doctrine does not appear to be recognized in Washington as a separate basis of admissibility. See *Tegland*, *supra* note 13, § 120, at 428–29. Instead, the

disposition" exception⁵⁸ but limits its use to showing a lascivious predilection for the victim.⁵⁹

To appreciate the scope of the change Rules 413–415 would trigger should they be followed in Washington, it will be helpful to trace an offer of uncharged-sexual-offense evidence through a Washington court's decision-making calculus under the current rules. Professor Robert Aronson⁶⁰ has provided an example of the kind of analysis that Washington courts must undergo when faced with uncharged-sexual-offense evidence.⁶¹ In *State v. Bowen*,⁶² the Washington Court of Appeals reversed the trial court's conviction of a physician for indecent liberties. Two of the defendant's former patients testified that the defendant had similarly molested them. The court of appeals went through the possible exceptions under which the testimony might have been admitted properly.⁶³ It rejected the idea that the prior acts showed the defendant's motive, finding nothing about the earlier acts that might have driven the defendant to molest the third victim.⁶⁴ The court also could not discern an overarching scheme or plan, even though the testimony described a similar sequence of events leading up to the offense.⁶⁵ The court next rejected use of the evidence to prove *modus operandi* because the perpetrator's identity was not in issue.⁶⁶ Neither could the evidence be used to show absence of mistake, because the defendant had not claimed accidental touching.⁶⁷ Finally, the evidence was not admissible to prove the *mens rea* element, because it already was established from the

probability theory that the doctrine utilizes is admissible only to show absence of mistake or accident, or to prove intent. *Id.* See also *State v. Bowen*, 48 Wash. App. 187, 738 P.2d 316 (1987).

58. See Tegland, *supra* note 13, § 120, at 424–26 & nn.1–10 (collecting cases).

59. See, e.g., *State v. Bernson*, 40 Wash. App. 729, 737–38, 700 P.2d 758, 765 (1985) (stating that “[e]vidence showing lustful disposition should only be admitted in a sex offense case where it tends to show such lustful inclination toward the offended female”) (quoting *State v. Whalon*, 1 Wash. App. 785, 794, 464 P.2d 730, 737 (1970)); see also Tegland, *supra* note 13, § 120, at 424–25 nn.1–6 (collecting cases containing the rule in rape, statutory rape, incest, seduction, sodomy, and indecent-liberties cases). *But see State v. Sammons*, 47 Wash. App. 762, 737 P.2d 684 (1987) (holding that in a prosecution for indecent liberties, the statement of defendant that he had sexually molested other children seven years earlier was admissible as an admission by a party under ER 801(d)(2); ER 404(b) did not control, and the evidence was relevant on general principles).

60. Professor of Law, University of Washington School of Law.

61. See Aronson, *supra* note 23, at 404–21.

62. 48 Wash. App. 187, 738 P.2d 316 (1987).

63. *Id.* at 190–95, 738 P.2d at 319–21.

64. *Id.* at 191–92, 738 P.2d at 319–20.

65. *Id.* at 192, 738 P.2d at 320.

66. *Id.* at 192–93, 738 P.2d at 320–21.

67. *Id.* at 193–94, 738 P.2d at 321.

defendant's own testimony that he intended to touch the victim.⁶⁸ The court concluded that the only purpose for which the prior-offense evidence could be used was to show that the defendant was possessed of a character, or propensity, to behave in this manner. Such purpose, the court ruled, was prohibited under ER 404(b).⁶⁹

The new federal rules would precipitate a profound change in Washington criminal prosecutions for sexual offenses. The new rules' broad grant of admissibility of other sex-offense evidence in these cases would obviate the need for courts to go through the careful analysis of *Bowen*. Instead, a presumption of admissibility would exist, and prior-sexual-offense evidence could be used for any relevant purpose. FRE 413-415 do not reflect concerns that Washington state courts traditionally have shown regarding the prejudice of such evidence to defendants.⁷⁰

II. FEDERAL RULES OF EVIDENCE 413, 414, AND 415: THEIR LANGUAGE, MEANING, PROMISE, AND PROCEDURAL DISPOSITION

A. *The Language of FRE 413-415 and What the New Rules Mean*

The most crucial section in each of the three new rules is the first. FRE 413(a) provides: "(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant."⁷¹ Rule 414 mimics the structure and language of Rule 413 but extends 413's principle of general admissibility to evidence of past acts of child molestation in cases where the charge is child molestation.⁷² FRE 415 also mimics the language and structure of Rule 413, making evidence of prior sexual offenses admissible in civil cases that arise out of allegations of sexual assault or child molestation.⁷³

68. *Id.* at 194-95, 738 P.2d at 321.

69. *Id.* at 195-96, 738 P.2d at 321-22.

70. *See, e.g., State v. Saltarelli*, 98 Wash. 2d 358, 655 P.2d 697 (1982).

71. 108 Stat 1796, 2136 (1994). Subsection (d) defines sexual assault to include rape and other sexual contact prohibited under state and federal law. Subsection (b) requires that the defendant be notified at least 15 days before trial that the government intends to use prior-sexual-assault evidence.

72. 108 Stat. 1796, 2136-2137 (1994).

73. 108 Stat. 1796, 2137 (1994). Though Rule 415 may prove especially significant as more victims utilize civil actions to attempt to repair the damage caused by their attackers, the significance

The quoted language has provoked conflicting speculation over a variety of implications. Lawyers, judges, and scholars responding to the Judicial Conference's solicitation of comments have voiced concern that the new rules are ambiguous.⁷⁴ Predominant among the questions is how FRE 413–415 fit within Article IV's existing framework.⁷⁵

Article IV regulates the introduction of evidence into judicial proceedings by defining relevant evidence and setting forth the conditions under which relevant evidence may be admitted or excluded.⁷⁶ The new rules implicitly make themselves subject to FRE 401 and 402⁷⁷ by stating that evidence of prior sexual offenses may be used for "its bearing on any matter to which it is relevant."⁷⁸ But by stating without qualification that such evidence "is admissible" for such uses,⁷⁹ the rules have raised doubt as to whether they come within FRE 403's familiar balancing requirement.⁸⁰

of the new rules is greatest when a defendant's freedom is at stake. Thus, the focus of this Comment is on the ramifications for criminal defendants.

74. See, e.g., letter from Bernard Meltzer, Edward H. Levi Distinguished Service Professor Emeritus of Law, University of Chicago Law School, to the Judicial Conference's Secretary of the Committee on Rules of Practice and Procedure 1 (Oct. 11, 1994) [hereinafter Meltzer] (on file with the *Washington Law Review*) (wondering "whether [the new rules] are subject to Rule 403"); letter from David P. Leonard, Chair, Section on Evidence, Association of American Law Schools, and 19 other professors of law, to the Judicial Conference's Advisory Committee on Evidence Rules 1, 3 (Oct. 12, 1994) (on file with the *Washington Law Review*) (stating that the new rules "contain numerous inconsistencies and ambiguities" and therefore are likely to "cause considerable confusion to both courts and litigants").

75. The most widely discussed implication of the new rules' language in letters to the Judicial Conference has been whether FRE 413–415 are subject to a judicially administered balancing test. See generally, Meltzer, *supra* note 74.

76. See Fed. R. Evid. 401–412.

77. FRE 402 states that all relevant evidence is admissible, unless limited by constitutional requirements, statute, or any other rules applicable in federal court; FRE 401 defines relevant evidence as that which has "any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401–402.

78. 108 Stat. 1796, 2136–2137.

79. *Id.*

80. FRE 403 states that 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. The doubt exists among critics and supporters alike. See Meltzer, *supra* note 74, at 2 (observing that Congress failed to expressly make the new rules subject to FRE 403's balancing test); see also letter from Lynn McLain, Professor of Law, University of Baltimore School of Law, to the Judicial Conference's Secretary of the Committee on Rules of Practice and Procedure 2 (Sept. 28, 1994) (on file with the *Washington Law Review*) (supporting the new rules and assuming that their language is "intended to preclude the trial court's use of Rule 403 to exclude evidence—for fear . . . that unsympathetic judges easily could use 403 to circumvent the policy determination made by Congress").

Commentators generally advance two interpretations of the relationship between the new rules and Rule 403. The first reads FRE 413–415 as falling outside of Rule 403's dominion. It is based on a literal reading of the rules and on the placement of the rules in a new section at the end of Article IV.⁸¹ The second understands the new rules to be subject to Rule 403's balancing test. This view points to explicit statements in the legislative history indicating Congress's intention that Rule 403 govern admissibility.⁸²

The literalist interpretation assumes that Congress already has made the probative-value-versus-prejudicial-effect calculation for the courts in favor of always finding probative value.⁸³ Subscribers to this view direct attention to the "mandatory cast" of the new rules.⁸⁴ The rules state that the uncharged-misconduct evidence "is" admissible, suggesting that this is so regardless of the outcome of a Rule 403 analysis. Furthermore, the new rules make no mention of their relationship to Rule 403, and no official comment was included by Congress offering guidance for how the courts should address questions of prejudicial effect.⁸⁵ Thus, according to this reading, admissibility of evidence under the new rules is not conditioned on meeting the requirements of Rule 403.

The opposing view finds support in the *Congressional Record* itself. The sponsors of the rules believed that the new rules would be subject to some form of judicial balancing test.⁸⁶ The statements of the key

81. See Meltzer, *supra* note 74.

82. See 140 Cong. Rec. S12990-01 (daily ed. Sept. 20, 1994) (statement of Sen. Dole).

83. Cf. 137 Cong. Rec. S3238, S3240 (daily ed. Mar. 13, 1991) (statement of Sen. Thurmond introducing section 801 analysis) ("In general, the probative value of such evidence is strong, and is not outweighed by any overriding risk of prejudice."). The quoted language comes from a detailed, section-by-section analysis of, and argument for, substantially identical rules of evidence. These rules were submitted by President George Bush to Congress in 1991 and composed section 801 of Senate Bill 635. The rules were not passed into law. However, the section 801 analysis has been incorporated into the legislative history of the 1994 Crime Bill for the purpose of explaining the new rules' history, precedential support, and proper interpretation. See 140 Cong. Rec. S12990-01 (daily ed. Sept. 20, 1994) (statement of Sen. Dole).

84. See, e.g., Meltzer, *supra* note 74, at 1–2 (stating that the language of the rules "appears to mandate admissibility for 'relevant' evidence without regard to the balancing prescribed by Rule 403" and that "[t]he mandatory cast of this language is . . . reinforced by its sharp contrast with the language of other Rules").

85. The advisory committee note that follows FRE 403 states that "[t]he rules which follow in this Article are concrete applications evolved for particular situations." Fed. R. Evid. 403. Because the new rules obviously were not contemplated when the note to Rule 403 was written, it is at least arguable that the note would not apply to FRE 413–415.

86. See, e.g., 140 Cong. Rec. S12990-01 (Sept. 20, 1994) (statement of Sen. Dole) (stating that courts will retain their "authority under evidence rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect"); 140 Cong. Rec. H8968-01, H8991–92 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) (using the same language as Senator Dole).

sponsors made just before passage clearly present the view that Rule 403's balancing test applies to the new rules.⁸⁷

B. The Logic of the Sponsors' Arguments and the Goals They Hope to Achieve Through Enactment of FRE 413–415

The new rules received wide support in Congress⁸⁸ and carry with their enactment significant hopes. The rules' sponsors were concerned primarily with public safety.⁸⁹ The arguments made in support of the new rules can be divided into three general categories, all related to protecting the public: (1) the need to win convictions in difficult-to-prosecute sex-offense cases; (2) the probative value of sexual-offense evidence; and (3) the need for consistency in judicial decision-making with regard to uncharged-sexual-offense evidence.

The first category relies upon descriptions of the crimes involved. Supporters of the rules view sexual offenses as egregious attacks on vulnerable individuals.⁹⁰ Aggressive, successful prosecutions thus are especially warranted.⁹¹ The sponsors also describe sexual-offense crimes

87. *Id.*

88. *See* 129 Cong. Rec. S15137–38 (daily ed. Nov. 5, 1993) (75–19 vote in favor of adopting amendment adding FRE 413–415 to crime bill); 140 Cong. Rec. H5437, H5440–41 (daily ed., June 29, 1994) (348–62 vote in favor of adopting motion instructing conferees to include FRE 413–415 in crime bill).

89. *See* 137 Cong. Rec. S4925-03, S4928 (daily ed. Apr. 24, 1991) (statement of Sen. Dole) (speaking of “a number of fairly obvious policy considerations” supporting substantially identical rules, including protecting against “the grave risk to the public if a rapist or child molester remains at large”); 140 Cong. Rec. H8968-01, H8991 (daily ed. Aug. 21, 1994) (comments of Rep. Molinari) (stating that “the revised conference bill contains a critical reform that I have long sought to protect the public from crimes of sexual violence”).

90. *See* 137 Cong. Rec. S4925-03, S4925 (daily ed. April 24, 1991) (remarks of Sen. Dole) (asserting that an earlier crime bill containing a substantially identical version of the new rules was designed to offer protection against “those criminals who prey on women”); David J. Karp, Evidence of Propensity and Probability in Sex Offense Cases and Other Cases, Address Before the Evidence Section of the Association of American Law Schools 20 (Jan. 9, 1993) (on file with the *Washington Law Review*) (describing sex-offense cases as involving “one of the most atrocious forms of criminal violence”). This address has been referred to by Senator Dole and Representative Molinari as an authoritative part of the new rules' legislative history. *See, e.g.*, 140 Cong. Rec. S12990-01, S12990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole).

91. *See, e.g.*, Prior Crimes Evidence Rule for Sexual Violence Cases § 1, at 3 (1994) [hereinafter Background Materials] (contained in packet of materials provided by Representative Molinari's office for use in effort to gain support for the amendment containing the new rules) (on file with the *Washington Law Review*) (“The need to protect the public from crimes of sexual violence makes the adoption of [the new rules of evidence] by Congress imperative as a matter of institutional responsibility.”).

as difficult to prosecute.⁹² They have designed the new rules to remedy the structural difficulties that currently hinder prosecutions.⁹³

Of even greater importance is the sponsors' second category of arguments that focus on the nature of sexual offenders. This "small class of depraved criminals,"⁹⁴ so the argument goes, is motivated by an uncontrollable, omnipresent compulsion not present in ordinary people.⁹⁵ A defendant's prior sexual offenses work more like habit evidence rather than character evidence under this view.⁹⁶ Sexual-offense evidence, therefore, becomes especially probative of guilt.⁹⁷ Such evidence is imperative in showing which category of humanity a defendant falls into: the ordinary or the depraved. A charge of sexual assault or child molestation against a member of the depraved caste carries a special plausibility.⁹⁸

92. See 140 Cong. Rec. H8968-01, H8991-92 (daily ed. Aug. 21, 1994). For instance, one sponsor made the following statement:

Moreover, [child-sexual-abuse] cases require reliance on child victims whose credibility can readily be attacked in the absence of substantial corroboration. . . . Similarly, adult-victim sexual assault cases are distinctive, and often turn on difficult credibility determinations. . . . Knowledge that the defendant has committed rapes on other occasions is frequently critical in assessing the relative plausibility of these claims and accurately deciding cases that would otherwise become unresolvable swearing matches.

Id. (statement of Rep. Molinari). In addition, the problem of convincing victims of sexual offenses to testify at trial, or even to report their attack to the authorities, may be a burden on prosecution not present in other categories of crime. See Background Materials, *supra* note 91, § (5), at 1.

93. See letter from the chief congressional sponsors (Sen. Orrin Hatch, Rep. Susan Molinari, Rep. Jon Kyl), to Chief Justice William H. Rehnquist and submitted to the Secretary of the Judicial Conference's Committee on Rules of Practice and Procedure 2 (Oct. 11, 1994) [hereinafter congressional sponsors' letter] (on file with the *Washington Law Review*) (stating that the new rules "will greatly facilitate the effective prosecution of violent sex offenders and child molesters").

94. 137 Cong. Rec. S3191-02, S3241, *supra* note 83.

95. See *id.* (explaining that evidence of prior sexual assaults shows the defendant to be possessed of a combination of personality traits that renders him or her incapable of resisting sexual impulse). Implying that this compulsion is not satisfied by the single capitulation to it, but rather requires periodic indulgence, the chief congressional sponsors observe that "rapists and child molesters frequently commit numerous crimes before being apprehended and prosecuted." Congressional sponsors' letter, *supra* note 93, at 14.

96. Compare Reed, *Reading Gaol Revisited*, *supra* note 20, at 146 n.102 (explaining that proponents of the logical relevance of uncharged-misconduct evidence base their reasoning on the postulation that "the more times a perpetrator repeats [an] act, the more likely it is that he repeated it on the date in question, if the conditions for its perpetration are much the same as before") with McCormick on Evidence, *supra* note 18, § 195, at 575 (explaining habit evidence as that which shows "one's regular response to a repeated situation").

97. See Karp, *supra* note 90, at 5 (employing the doctrine of chances and stating that "[i]t would be quite a coincidence if a person who just happened to be a chronic rapist was falsely or mistakenly implicated in a later crime of the same type").

98. See congressional sponsors' letter, *supra* note 93, at 6-7 (stating that "[a] charge of rape or child molestation has greater plausibility against a person" implicated in other sexual offenses).

Finally, the sponsors often appeal to a third set of arguments about the rules' potential to curb anomalous adjudications. Their concerns here rely on anecdotal testimony about the clearly guilty defendant who "got off" because either: (1) crucial corroborating character evidence was excluded at trial and the direct and circumstantial evidence that existed was not of a quality to convince a jury beyond a reasonable doubt of the defendant's guilt, or (2) the crucial character evidence was admitted, but the appellate court overturned the conviction under a more stringent interpretation of the jurisdiction's character-evidence rules.⁹⁹ Proponents of the new rules assert that the current rules are ambiguous,¹⁰⁰ and that judges are left either too free¹⁰¹ or too constricted¹⁰² to render consistent decisions regarding such evidence.¹⁰³ They lay responsibility for this unacceptable state of affairs at the doorstep of the Federal Rules of Evidence, which went into effect in 1975 and were thereafter mimicked by the states.¹⁰⁴ The proponents of the new rules have thus appealed to Congress to remedy these problems by modifying and making clear the law with regard to the admission of prior-sexual-offense evidence.

99. Numerous appellate cases are cited to prove the second assertion. The two cases cited most frequently are *People v. Sanza*, 509 N.Y.S.2d 311 (1986) (reversing defendant's conviction for rape and murder because of admission of evidence concerning three other rapes for which he had been convicted), and *People v. Key*, 203 Cal. Rptr. 144 (Cal. Ct. App. 1984) (excluding evidence of defendant's prior convictions for sexual assaults against three other women in prosecution of defendant for rape, and reversing conviction because of admission of testimony by another woman, offered to rebut defendant's claim of victim consent, that defendant had sexually assaulted her).

100. See 137 Cong. Rec. S3191-02, S3239, *supra* note 83 (stating that "[n]ot all courts have recognized the area of sex offense prosecutions as one requiring special standards or treatment"); 137 Cong. Rec. at S3239-40 (detailing conflicting decisions with similar facts).

101. The freedom here is that of being able to ignore the sponsors' pleas that prior-sexual-offense evidence is highly probative, not normally overly prejudicial, and should not be required to satisfy a current category of exception to be admitted. See, e.g., 137 Cong. Rec. at S3240 (expressing concern over the fact that under current versions of rule 404(b), admission of prior-sexual-offense evidence "may depend on unpredictable decisions by individual trial judges").

102. *Id.* (stating that since the adoption of the Federal Rules of Evidence, states following the federal model have rendered their courts "no longer free to recognize straightforwardly the need for rules of admission tailored to the distinctive characteristics of sex offense cases").

103. See 137 Cong. Rec. S3191-02, S3239, *supra* note 83 ("The approach of the courts has been characterized by considerable uncertainty and inconsistency.").

104. See congressional sponsors' letter, *supra* note 93, at 8 (stating that following the federal model has caused many states to create "evidence rules that deprive the courts of their former latitude to overtly adopt special rules of admissibility for similar crimes evidence in sex offense cases").

C. The New Rules' Procedural Disposition and an Alternative Formulation of the Rules Offered by the Evidence Advisory Committee to the Judicial Conference

FRE 413–415 did not go into immediate effect upon enactment. The amendments are subject to a period of review and comment by the Judicial Conference of the United States.¹⁰⁵ The Judicial Conference's Advisory Committee on Federal Evidence Rules took the opportunity afforded by the 150-day review period to solicit critiques and suggestions for changes from the wider legal community. The Committee's review resulted in a recommendation that the Judicial Conference send back to Congress the substance of the new rules composed in a different form.¹⁰⁶ In addressing the critics' concerns, the Committee chose to rewrite Rules 413–415 into Rule 404(a) and Rule 405.¹⁰⁷

105. 108 Stat. 1796, 2137. The Conference has 150 days after the date of enactment to suggest changes to FRE 413–415. Congress then has 150 additional days to adopt the Conference's suggestions. But Congress is under no obligation to do so. It may alter the new rules in any way it wishes. If it does nothing, the original amendments automatically become law. *Id.*

106. See Berger, *supra* note 11.

107. A new Rule 404(a)(4) would provide:

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

....

(4) Character in sexual misconduct cases. If otherwise admissible under these rules, in a criminal case in which the accused is charged with sexual assault or child molestation, or in a civil case in which a claim is predicated on a party's alleged commission of sexual assault or child molestation, evidence of another act of sexual assault or child molestation, or evidence to rebut such proof or inference therefrom.

(A) In weighing the probative value of such evidence, the court, as part of its rule 403 determination, may consider:

- (i) proximity in time to the charged or predicate misconduct;
- (ii) similarity to the charged or predicate misconduct;
- (iii) frequency of the other acts;
- (iv) surrounding circumstances;
- (v) relevant intervening events; and
- (vi) other relevant similarities or differences.

Id. Subsection (4)(B) changes the notice requirement to a "reasonable time in advance of trial." Additionally, Rule 405 would be amended by adding a new subsection (c), which would allow character to be proved, in sexual-offense cases, by specific instances of conduct and by reputation and opinion testimony. *Id.*

The Committee's recommendation answers many of the complaints leveled against the new rules.¹⁰⁸ Certainly, the clarification of the new rules' relationship to Rule 403 would preclude significant resources being expended litigating that issue. Nevertheless, the Committee's version incorporates the substance of the new rules into the existing rules of evidence, and in doing so, perpetuates the fundamental problems of prejudice presented by the proposition that character evidence should be allowed to prove conduct. Thus, no matter which version of the new rules eventually is adopted, the most disturbing problem remains.

III. THE PRESUMPTION OF INNOCENCE IMPERILED: THE DANGERS OF PREJUDICE IN THE USE OF PRIOR-SEXUAL-OFFENSE EVIDENCE TO SHOW PROPENSITY

FRE 413–415 are grounded on a view of the source and nature of sexual offender behavior that does not comport well with psychological and sociological evidence. The sponsors of the new rules are inviting the use of highly prejudicial information to resolve extremely discomfoting questions. A jury's answers to these questions will determine a defendant's freedom, and yet, under the new scheme, a defendant effectively might be denied one of the strongest protections against an inaccurate result that the U.S. criminal justice system offers: the presumption of innocence. The loss of the presumption of innocence would shake the foundations of our accusatorial system of justice.¹⁰⁹

The new rules are grounded on unconvincing arguments of the probative value of prior-sexual-offense evidence. Proponents describe prior-sexual-offense evidence as exceptionally illuminating on questions of later actions.¹¹⁰ The sponsors ground these claims on their beliefs about the psychological and/or biological nature of sexually aggressive

108. In the "Note to Rule 404(a)(4)" following the rewritten rules, the Committee explained:

The changes were made in order to integrate the provisions both substantively and stylistically with the existing Rules of Evidence; to illuminate the intent expressed by the principal drafters of the measure; to clarify drafting ambiguities that might necessitate considerable judicial attention if they remained unresolved; and to eliminate possible constitutional infirmities.

Id.

109. *Cf. Reed, Propensity – Part I, supra* note 8, at 713–14 (stating that an accusatorial system of justice presumes innocence and requires that the state prove that the defendant broke the law, whereas an inquisitorial system of justice presumes guilt and requires that the defendant prove his or her innocence); *Reed, Reading Gaol Revisited, supra* note 20, at 163 (explaining how the use of uncharged-criminal-conduct evidence in sexual-offense cases is moving the federal courts toward an inquisitorial criminal trial process).

110. *See supra* notes 94–98 and accompanying text.

behavior.¹¹¹ However, in making these empirical judgments, the sponsors do not distinguish between the motivations underlying the variety of sexual offenses encompassed by Rules 413–415. For instance, the most recent research indicates rape is a crime of violence and not of sexual compulsion.¹¹² Thus, evidence of a past charge of fondling a teenaged daughter may not offer any meaningful help in answering the question of whether the defendant committed the charged rape. Yet, by the terms of the new rules, such inflammatory evidence would be admissible for this purpose.¹¹³

Moreover, studies indicate that sexual offenders exhibit either a low rate of recidivism¹¹⁴ or, at the very least, no greater a likelihood of reoffense than other types of criminals.¹¹⁵ Thus, prior-sexual-offense evidence is at worst weakly relevant and at best only as relevant as most other bad-act evidence on questions of conduct on a specific occasion. Special treatment of sexual-offense evidence, therefore, is unwarranted.

The non-exceptional probative value of prior-sexual-offense evidence, when used to show propensity for conduct, gives rise to the two dangers discussed in part I.A. Juries will be more likely to convict a defendant because of who he or she is rather than what he or she did, and juries

111. See *supra* note 95. The sponsors did not support their claims by including studies on sexual offender psychology in the legislative debate or record. See *infra* note 123. Studies nevertheless demonstrate a differing probability of reoffense between rape, pedophilia, sexual abuse of adolescents, and exhibitionism, making it illogical to afford the same propensity effect to all behaviors as if they were motivated by the same compulsion. See Reed, *Reading Gaol Revisited*, *supra* note 20, at 146–56.

112. *Id.* at 147–48 (discussing recent studies).

113. Under FRE 413, the admissibility of other sexual-assault evidence is given a “mandatory cast.” See Meltzer, *supra* note 74, at 1–2. By the terms of the rules, the use of the evidence is subject only to a test of relevancy. See *supra* notes 77–78 and accompanying text. Presumably, then, evidence with even the slightest relevance may be used to show propensity. A past charge of fondling makes it just slightly more likely that the defendant committed the charged violent rape, if for no other reason than that the evidence shows that the defendant is willing to flout social proprieties. The evidence would, therefore, pass a naked test for relevancy but would not carry with it the probative value claimed for it by the proponents of the new rules.

114. See, e.g., Allen J. Beck, Bureau of Justice Statistics, U.S. Dep’t of Justice, *Recidivism of Prisoners Released in 1983* 6 (1989), reported in David P. Bryden & Roger C. Park, “Other Crimes” Evidence in Sex Offense Cases, 78 Minn. L. Rev. 529, 572 and n.182 (finding among rapists only a 7.7% rate of rearrest for rape). But see Bryden & Park, *supra*, at 572–73 & nn.183–85 (reporting higher recidivism rates among sex offenders in studies adopting alternative methodologies).

115. See Reed, *Reading Gaol Revisited*, *supra* note 20, at 155 (citing studies showing the national recidivism rate for rearrest within three years is 65% for criminals in general, 50% for violent criminals, 30% for pedophiles and adolescent child abusers, and 25% for rapists rearrested for another sexual offense). But see A. Nicholas Groth et al., *Undetected Recidivism Among Rapists and Child Molesters*, 28 Crime & Delinq. 450, 453, 456–58, cited in Reed, *Reading Gaol Revisited*, *supra* note 20, at 149–50, n.117 (indicating that sexual offenses are under-reported and suggesting that sexual offenders may reoffend at a rate comparable to other types of criminals).

may overemphasize the evidence, paying less attention to gaps or inconsistencies in the non-character evidence.¹¹⁶ The probability that a court will face the specter of presiding over the conviction of an innocent defendant increases under FRE 413–415.

The sponsors of the rules counter arguments about prejudice by implying that there is little danger of unfairly prejudicing a defendant because the evidence accurately predicts what the defendant did on the occasion in question.¹¹⁷ But, as the studies just cited indicate, conflicting research casts serious doubt on the reliability of these claims.¹¹⁸ Equally important, our society's view of sexual offenses renders this type of evidence particularly inflammatory.¹¹⁹ Sex offenders have been the objects of numerous "crusades" by the public.¹²⁰ The widespread contempt with which suspected sexual offenders are held provides a strong basis for the fear that juries will punish the defendant regardless of other evidence pointing to guilt or innocence.

Psychological evidence about how people react to certain kinds of information supports this fear. Researchers describe a "halo effect" wherein people tend to form generalized judgments about another person on the basis of one exceptionally good or bad quality.¹²¹ This tendency, coupled with the predilection to focus more closely on negative information than on positive information, gives a single, negative bit of information inordinate weight in the mind of the person forming a judgment.¹²² Additionally, people will make predictions based on single or small numbers of past events, which, according to statistical theory, is an unreliable methodology.¹²³ The Kalven study showing that prior-

116. See Bryden & Park, *supra* note 114, at 565. State v. Dawkins, 71 Wash. App. 902, 863 P.2d 124 (1993), offers a good example of the influence character evidence has on a jury. In *Dawkins*, the defendant was accused of fondling two 13-year-old girls as they slept next to one another on his living room floor. Both girls claimed to have been touched on the same date, at the same time, and in the same location. The jury acquitted Dawkins of the charge involving one of the girls but convicted on the charge involving the second girl. The only difference in the evidence presented was testimony by the second girl that the defendant had fondled her on prior occasions.

117. See *supra* notes 96–98.

118. See Bryden & Park, *supra* note 114, at 561–64 & nn.146–56 (describing the range of often conflicting conclusions about the source of behavior drawn from psychological studies of human behavior).

119. See Reed, *Reading Gaol Revisited*, *supra* note 20, at 162 & n.189.

120. See *id.* at 162–63 (describing past and present crusades in the United States against sex offenders).

121. See Mendez, *supra* note 22, at 1047 & nn.234–36.

122. *Id.* at 1045–46 & nn.226–28.

123. *Id.* at 1048 & nn.238–48.

misconduct evidence in general is extremely persuasive suggests that what is true of individuals in this regard is also true of juries.¹²⁴

The use of such influential evidence effectively jettisons the presumption of innocence accorded defendants.¹²⁵ Evidence of character is so persuasive that its use often will place the defendant in the position of having to prove his or her innocence.¹²⁶ Such change is a departure from the tradition of accusatorial justice in the United States.¹²⁷ If Congress really intended to move the federal courts into the realm of inquisitorial adjudication, it should at least have explicitly debated and voted on such a proposal. To move in that direction after a brief floor debate marked by insupportable notions of the probative value of sexual-offense evidence¹²⁸ is a poor way to invite so profound a change.¹²⁹

IV. THREE OPTIONS FOR WASHINGTON TO CONSIDER IN THE FACE OF FRE 413-415

Washington should consider three options as it decides whether to follow FRE 413-415. The state could decide that it is satisfied with the current regime governing uncharged-sexual-offense evidence and retain the status quo. Alternatively, it could expand the lustful-disposition exception to include evidence of crimes committed against a class of victims. Finally, it could adopt a modified version of FRE 413-415, requiring a finding that a defendant suffers from a compulsion to commit sexual crimes before prior sexual offenses may be used to show propensity.

Washington readily admits prior-sexual-offense evidence when it plausibly falls within one of the enumerated exceptions in ER 404(b).¹³⁰

124. See Kalven & Zeisel, *supra* note 28 and accompanying text.

125. Cf. Reed, *Reading Gaol Revisited*, *supra* note 20, at 163 (identifying in trials of sex offenders a movement toward an inquisitorial system of justice marked by a relaxation of the bar to proof of the defendant's bad moral character by specific, uncharged acts).

126. Cf. *id.* Professor Reed does not lament this result in sexual-offense cases, arguing both that nothing in the Bill of Rights mandates a presumption of innocence and that society's interest in being free from sexual assaults outweighs the benefits derived from the procedural protections the presumption offers. *Id.*

127. See *id.* at 160.

128. See 140 Cong. Rec. H8968-01, H8990 (daily ed. Aug. 21, 1994) (statement of Rep. Hughes) (explaining that the rule changes had 20 minutes of debate on the Senate floor).

129. Professor Reed argues that the United States already has moved significantly toward an inquisitorial system of criminal justice, so perhaps the change is not so profound. See Reed, *Reading Gaol Revisited*, *supra* note 20, at 160-63. Nevertheless, the full ramifications of this type of change should have been acknowledged during the congressional debates.

130. See *supra* note 57 and accompanying text.

In addition, such evidence may be used to prove that the defendant suffers from a lustful inclination toward a specific individual.¹³¹ Thus, uncharged-sexual-offense evidence is available to prosecutors under a variety of situations. At the same time, this scheme protects defendants against the naked use of such evidence to prove propensity. Though still vulnerable to the dangers of jury prejudice if the evidence is offered under one of the recognized exceptions, the defendant is at least protected when the relevance of the uncharged-misconduct evidence is at its lowest. This option would protect from further erosion the presumption of innocence granted to defendants in an accusatorial system of justice.

Expanding the lustful-disposition exception to include evidence of sexual offenses committed against a class of victims, on the other hand, would offer prosecutors a stronger weapon with which to fight sexual assault and child molestation. Studies support the view that some sex offenders suffer from a compulsion to assault a certain kind of victim.¹³² Evidence of past assaults are probative of the act in question, therefore, when the victim of the charged crime is in the same class as the victim of the uncharged assault. The class, however, should be defined in a way that does not diminish the relevance of the uncharged-misconduct evidence. Thus, the pre-teenage female children of the defendant might form a class, but college-aged men probably would not. Classes could be specified by legislation, expert testimony, or judicial discretion. Because it would exclude highly prejudicial character evidence of tenuous relevance, this scheme is a far better option than adoption of rules like FRE 413–415.

If the state legislature or the state supreme court nevertheless chooses to adopt rules similar to FRE 413–415, it should consider mechanisms to limit the risk of convicting innocent defendants. One promising option would require an expert to testify that a defendant suffers from a sexually aggressive compulsion before prior-sexual-offense evidence could be used to prove conduct in conformity with character.¹³³

131. See *supra* notes 58–59 and accompanying text.

132. See Reed, *Reading Gaol Revisited*, *supra* note 20, at 150–52 & nn.124–33, 138 (describing several known compulsions marked by a lust for a member of a class of victims, including heterosexual pedophilia, homosexual pedophilia, and hebephilia (lust for teenagers, usually female and often family members)).

133. Washington would not be the first state to precondition admission of prior-sexual-offense evidence on this type of finding. See *State v. Treadaway*, 568 P.2d 1061 (Ariz. 1977) (holding uncharged-sexual-offense evidence inadmissible without expert testimony stating that the evidence showed an emotional propensity to commit the charged offense). *But see*, *State v. Smith*, 753 P.2d

Washington already has a mechanism in place for making such determinations. The Sexually Violent Predators Act¹³⁴ mandates that a psychological and medical assessment of a defendant's personality be made before committing sexually violent predators to a special facility.¹³⁵ Due to the criteria used in making the determination, the past, similar sexual misconduct of a defendant who is deemed a sexually violent predator becomes much more reliable as circumstantial evidence of culpability in the charged crime.

The state legislature defined a sexually violent predator as any person who suffers from a mental abnormality or personality disorder which predisposes the person to commit acts of sexual violence.¹³⁶ It defined a mental abnormality as a "congenital or acquired condition affecting the emotional or volitional capacity" of the person.¹³⁷ Though these definitions are specific to violent sexual offenders, the state could establish criteria appropriate to other sexual-offense behavior. The most important aspect of the definition, in any case, is the requirement of a finding that the source of the prohibited behavior is likely to lead to repeated conduct.

Under the Sexually Violent Predators Act, the evaluation of the defendant is performed by a person "professionally qualified" to conduct such an exam.¹³⁸ Included within the scope of the assessment data are the defendant's criminal history, psychological and physiological testing results, substance abuse history, interviews with significant others, the defendant's sexual history, information on prior attempts to remediate and control behavior, including past treatment, and information on triggers of offending behavior.¹³⁹ The statute assumes, then, that after such an assessment is performed a reasonably accurate statement about the defendant's sexual compulsions can be made.

A similar scheme could be implemented in the context of a criminal trial where the prosecution seeks to introduce evidence of prior sexual misconduct for the purpose of proving propensity. The finding of compulsion would operate as a threshold test for admissibility under this

1174 (Ariz. Ct. App. 1987) (admitting uncharged propensity evidence in a child molestation case without, apparently, the required expert testimony).

134. Wash. Rev. Code § 71.09 (1992).

135. Wash. Rev. Code §§ 71.09.040, .060(1) (1992).

136. Wash. Rev. Code § 71.09.020(1) (1992).

137. Wash. Rev. Code § 71.09.020(2) (1992).

138. Wash. Rev. Code § 71.09.040 (1992). The Washington Department of Health promulgated the standards for the psychological assessment. See Wash. Admin. Code § 246-930-320 (1992).

139. Wash. Admin. Code § 246-930-320.

mechanism. The most important benefit would come from the increased reliability of the prior-sexual-offense evidence. If a court found that a defendant suffers from a biologically or psychologically-sourced compulsion, evidence of his or her past sexual misconduct would suggest that the defendant does not possess the ability to control his or her behavior. Thus, the finding of compulsion would catapult the prior-misconduct evidence much closer to the realm of habit evidence.¹⁴⁰ Authorities assert that the probative value of habit evidence presumptively outweighs its prejudicial effect,¹⁴¹ and requiring sexual misconduct evidence to meet this level of reliability before courts allow it to prove propensity would go a long way toward overcoming problems of prejudice and relevance.

V. CONCLUSION

Congress, in its enthusiasm to control crime, has changed the Federal Rules of Evidence in a manner that is overbroad and incapable of fairly taking into account the complexities of antisocial sexual behavior. The new rules are too broad and clumsy to fairly regulate the use of such a powerful class of evidence. Under the present manifestation of the lustful-disposition exception, Washington has developed a reasonable system to govern the use of uncharged-sexual-offense evidence. If decisionmakers within the state nevertheless decide that prosecutors are not able to effectively win convictions against sexual offenders and child molesters, broadening the lustful-disposition exception is one rational way to re-balance the advantages at trial. At the very least, the decisionmakers should temper the undeniable potency that the new rules will bring to the prosecution's arsenal of weapons against defendants in sexual-offense cases with the protection that a required finding of psychological or biological compulsion would afford.

140. *See supra* note 96.

141. *See McCormick on Evidence, supra* note 18, § 195. The critics' argument that prior sexual misconduct is so inflammatory that it will render a jury incapable of focusing on the other evidence remains valid and strong. Subscribers to this view are not likely to accept the use of prior-sexual-offense evidence in order to prove propensity under any circumstance. The argument in part IV is that if such evidence must be used, it should at least be used with the minimal protections a finding of compulsion would provide.

