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Federal Rule of Evidence 415 and Paula Corbin Jones v. William Jefferson Clinton: The Use of Propensity Evidence in Sexual Harassment Suits

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FEDERAL RULE OF EVIDENCE 415 AND *PAULA CORBIN JONES V. WILLIAM JEFFERSON CLINTON*: THE USE OF PROPENSITY EVIDENCE IN SEXUAL HARASSMENT SUITS

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The phone call was every plaintiff attorney's dream — another woman was coming forward who had been sexually harassed by the defendant.[1] Before this call Joseph Cammarata had little more than Paula Corbin Jones' disputed testimony to convince a jury that she had been sexually harassed by then-Governor William Jefferson Clinton.

According to Cammarata, the caller was Kathleen E. Willey, a former volunteer in the White House social office. "I had a similar thing happen to me in 1993," she said.[2] The events are hotly disputed. Cammarata's version is that on November 29, 1993, Willey went to the Oval Office to ask Clinton to help her get a full-time, paying job. He took her into a private office adjacent to the Oval Office and "kissed and fondled her."[3] A witness who claims to have seen her as she left the Oval Office described her as "disheveled. Her face was red and her lipstick was off. She was flustered, happy and joyful."[4] Another witness initially told *Newsweek* that a distraught Willey had told her about the incident on the night it occurred. This same witness later recanted, telling *Newsweek* that Willey had "asked her to lie about what happened, in order to give credibility to the allegation that she had been harassed."[5] While it is unclear what, if anything, occurred in the President's office on November 29, 1993, it is known that Willey got a paying job in the White House office in December 1993.[6]

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1. *See* Michael Isikoff, *A Twist in* Jones v. Clinton, NEWSWEEK, Aug. 11, 1997, at 30, 30.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *See id.*

Although Willey has denied calling Cammarata and claims to have no information relevant to the case, Cammarata has subpoenaed her.[7] If she or other witnesses were to testify that Clinton had sexually harassed them, it could strongly bolster Jones' case. Hearing such testimony, the jury could conclude that it is unlikely that several women would fabricate such charges. They could also conclude that Clinton has a predisposition toward such conduct and is thus more likely than the average person to have committed sexual harassment. Prior to 1995, such evidence would have been inadmissible. Dramatic changes in the Federal Rules of Evidence have made it likely that such evidence is now admissible.

In 1995, Federal Rules of Evidence 413, 414 and 415, enacted by Congress as part of the Violent Crime Control and Law Enforcement Act of 1994,[8] became effective. These rules address the admissibility of evidence of similar acts in sexual assault-related prosecutions and civil actions.

Rule 413 makes admissible evidence of similar acts in sexual assault cases.[9] It requires that the government disclose any evidence it intends to offer to the defendant at least fifteen days before the scheduled date of trial, or later upon leave of the court for good cause.[10] Similar acts are defined as "offenses of sexual assault" which are further defined to include enumerated state and federal offenses.[11]

Rule 414 makes admissible evidence of similar acts in child molestation cases.[12] Its provisions regarding disclosure are the same as Rule 413,[13] and it similarly defines "offense of child molestation" to include enumerated state and federal offenses.[14]

Rule 415 provides that evidence of similar acts of sexual assault and child molestation is also admissible in civil cases where a claim for damages or other relief depends upon a party's having committed such an assault.[15] The rule also requires disclosure fifteen days before the scheduled date of trial, or later upon leave of the court for good cause.[16]

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7. Prior to publication of this article, Willey was deposed. Although a gag order is in effect, news reports claim that she confirmed that the incident with Clinton did occur.

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

9. *See* FED. R. EVID. 413.

10. *See* FED. R. EVID. 413(b).

11. *See* FED. R. EVID. 413(d).

12. *See* FED. R. EVID. 414.

13. *See* FED. R. EVID. 414(b).

14. *See* FED. R. EVID. 414(d).

15. *See* FED. R. EVID. 415.

16. *See* FED. R. EVID. 415(b).

From the time they were first proposed in 1991, the new rules have generated a plethora of commentary.[17] Scholars and courts alike are wrestling with the proper interpretation and application of the rules. This article seeks to highlight some of these problems by showing how they might affect the outcome of *Jones v. Clinton* should the case ultimately be tried.

I. THE LAW OF EVIDENCE BEFORE THE ADOPTION OF RULE 415

Circumstantial use of character evidence, that is, using evidence of character in any form — reputation, opinion from observation, or specific acts — to show that a person acted in a particular manner on a specific occasion is generally prohibited by Rule 404(a).[18] An exception is contained in Rule 404(a) which permits a defendant to introduce evidence of a pertinent character trait.[19] However, the committee notes are unequivocal that this exception does not apply in civil cases.[20] Thus, under Rule 404(a), the defendant in a civil case cannot introduce any evidence of his character, no matter how probative it may be, to show his lack of propensity to commit the act for which he is being accused.

The plaintiff, however, is not barred by Rule 404(a) from getting before the jury evidence of the defendant's character, provided it is introduced for a purpose other than showing propensity to commit the alleged offense.[21] Acceptable purposes include, but are not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[22] When evidence of character is admitted for these purposes, it is subject to Rule 403.[23] Even if relevant, the 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.[24]

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17. *See, e.g.*, James J. Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95 (1994); Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot*, 22 FORDHAM URB. L.J. 285 (1995).

18. *See* FED. R. EVID. 404(a); *see also* MCCORMICK ON EVIDENCE § 188 (Edward G. Cleary ed., 3d ed. 1984).

19. *See* FED. R. EVID. 404(a)(1).

20. *See* FED. R. EVID. 404 advisory committee's note.

21. *See* FED. R. EVID. 404(b).

22. *See* FED. R. EVID. 404(b).

23. *See* FED. R. EVID. 404.

24. *See* FED. R. EVID. 403.

In this context, Rule 415 has essentially overturned Rule 404 and makes evidence of a defendant's past, similar acts routinely admissible in civil cases predicated on accusations of sexual impropriety.

II. RULE 415

The text of Rule 415 provides:

> (a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.[25]
>
> (b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.[26]

A. *The History of Rule 415*

The new rules were first proposed by Senator Robert Dole and Representative Susan Molinari in 1991 as part of the Women's Equal Opportunity Act.[27] They were later reintroduced as part of the Sexual Assault Prevention Act bills of the 102nd Congress,[28] and included in President Bush's Comprehensive Violent Crime Control Act of 1991.[29] They did not emerge as Federal Rules of Evidence 413, 414 and 415 until passage of the Violent Crime Control and Law Enforcement Act of 1994.[30]

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25. Rules 413 and 414 provide that such evidence "may be considered for its bearing on any matter to which it is relevant." FED. R. EVID. 413(a); FED. R. EVID. 414(a).

26. FED. R. EVID. 415.

27. S. 472, 102d Cong., 1st Sess. § 231 (1991), H.R. 1149, 102d Cong., 1st Sess. § 231 (1991), 137 CONG. REC. S2197 (daily ed. Feb. 21, 1991).

28. S. 3271, 102d Cong., 2d Sess. § 121 (1992), H.R. 5960, 102d Cong., 2d Sess. § 121 (1992), 138 CONG. REC. S15,163-64 (daily ed. Sept. 25, 1992).

29. S. 635, 102d Cong., 1st Sess. § 801 (1991), 137 CONG. REC. S3212 (daily ed. Mar. 13, 1991).

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

Key to the inclusion of the new rules was Representative Molinari, who joined a coalition of Congressmen blocking passage of the Act until the new rules were included.[31] Molinari touted the new rules as a "triumph for the public — for the women who will not be raped and the children who will not be molested.[32] Not everyone shared her enthusiasm. Representative William Hughes of New Jersey, speaking just before Molinari, called the proposed rules "absolutely awful"[33] and questioned their constitutionality.[34] Former New York City Mayor Ed Koch described the process leading up to the inclusion of the new rules as "disgraceful."[35]

Neither the congressional opposition nor the pending recommendations of the Judicial Conference deterred Molinari. "[R]egardless of what the judicial conference may recommend, the new rules will take effect within at most 300 days of the enactment of this legislation unless repealed or modified by subsequent legislation."[36] Molinari was referring to section 320935 of the Act which invited the Judicial Conference of the United States within 150 days to submit "a report containing recommendations for amending the Federal Rules of Evidence as they affect the admission of evidence of a defendant's prior sexual assault or child molestation crimes in cases involving sexual assault and child molestation."[37]

Speaking just prior to Molinari, Representative Hughes had entered into the record, along with his own acerbic comments, a letter from Alicemarie Stotler, chair of the Committee of Rules of Practice and Procedure of the Federal Judicial Conference, opposing the new rules.[38] The Judicial Conference transmitted a formal report to Congress on February 9, 1995, describing its opposition to the new rules, and making recommendations for different amendments.[39] Congress, however, took no action on

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31. For a detailed description of the events leading up to the passage of the bill on August 21, 1994, see Duane, *supra* note 17, at 95-97.

32. 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).

33. *Id.* at H8989 (statement of Rep. Hughes).

34. *See id.* at H8990.

35. Charles V. Zehren, *2 NY Reps Turned Tide*, NEWSDAY, Aug. 23, 1994, at A19.

36. 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).

37. Pub. L. No. 103-322, § 320935(e), 108 Stat. 1796, 2137 (1994).

38. *See* 140 CONG. REC. H8990 (daily ed. Aug. 21, 1994) (statement of Rep. Hughes).

39. *See* JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADMISSION OF CHARACTER EVIDENCE

the Judicial Conference's recommendations and the new rules became effective on July 9, 1995.

The inclusion of Rule 415 remains shrouded in the history of the new rules. It first appeared in 1991, when the rules were introduced by Senator Dole as part of the Women's Equal Opportunity Act.[40] A detailed analysis of the new rules was prepared by the Department of Justice and transmitted to Congress on March 13, 1991.[41]

B. *The Department of Justice's Position*

"The new rules are responsive to deficiencies in the existing rules of evidence, and the Department of Justice strongly supports their enactment."[42] The Department of Justice (DOJ) posited the "entirely sound perception that evidence of this type is frequently of critical importance in establishing . . . guilt of a rapist or child molester and that concealing it from the jury often carries a grave risk that such a criminal will be turned loose to claim other victims."[43] The importance of such evidence, according to the DOJ, derives from the "doctrine of chances." This doctrine maintains that it is unlikely that a defendant would be repeatedly the subject of false accusations.[44] As the Department contended:

> It is inherently improbable that a person whose prior acts show that he is in fact a rapist or child molester would have the bad luck to be later hit with a false accusation of committing the same type of crime, or that a person would for-

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IN CERTAIN SEXUAL MISCONDUCT CASES (1995), *reprinted in* 159 F.R.D. 51, 51-54 (1995).

40. *See* S. 472, 102d Cong., 1st Sess. § 231 (1991), H.R. 1149, 102d Cong., 1st Sess. § 231 (1991), 137 CONG. REC. S2197 (daily ed. Feb. 21, 1991).

41. *See* COMPREHENSIVE VIOLENT CRIME CONTROL ACT OF 1991 SECTION-BY-SECTION ANALYSIS, *reprinted in* 137 CONG. REC. S3238-42 (daily ed. Mar. 13, 1991) [hereinafter SECTION BY SECTION ANALYSIS]. While it would later be cited as part of a comprehensive analysis of the new rules, see 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari), it was actually a one-sided defense of the rules by the very department that drafted them. Rule 415 is mentioned only in the introduction. Nowhere in the following pages is there any treatment of Rule 415. Furthermore, the justifications that are posited for Rule 413 and Rule 414 do not apply largely to civil actions.

42. Letter from W. Lee Rawls, Assistant Attorney General, Office of Legislative Affairs, to Sen. Robert Dole, Minority Leader (Apr. 24, 1991), *in* 137 CONG. REC. S4927 (daily ed. Apr. 24, 1991). It is no surprise that the Justice Department "strongly support[ed]" the new rules — they drafted them.

43. *Id.*

44. *See, e.g.*, EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE §§ 4-5 (1996).

> tuitously be subject to multiple false accusations by a number of different victims.[45]

While acknowledging that Rule 404(b) already permits the introduction of similar acts evidence to establish the defendant's identity and intent, the DOJ went on to insist that such evidence should also be admissible to establish "consent" and that the alleged event in fact occurred.[46]

Because many alleged sexual assaults occur without witnesses, the defense will often be that the victim consented or that the assault never occurred. These situations, according to the DOJ, are where similar acts evidence is "likely to have a high degree of probative value on grounds of probability."[47] The DOJ offers as an example a case where the defendant is charged with rape and his defense is either that the event never occurred, or that the victim consented. The testimony of a woman that the defendant had previously committed an unreported rape would, according to the DOJ, carry a "high degree of probative value" because of the "improbability of multiple false charges" being brought against the defendant.[48]

The doctrine of chances is a noncharacter route for the admission of evidence of bad acts. It does not say that a person is bad and is, therefore, more likely to commit the current offense. Rather, it says that the possibility of repeated unfounded accusals is remote.[49] The DOJ offers no empirical evidence to support this claim of remoteness. Rather, it relies on "the strong support of experience."[50] This "experience" includes citing cases where the courts have stretched the application of Rule 404(b) to permit the introduction of such evidence as an indication of "widespread judicial support."[51] In contrast, cases where courts have applied 404(b) to exclude such evidence or reversed convictions on appeal where such evidence was not excluded are cited as "observable problems."[52]

The DOJ's other argument is a preemptive strike against opponents of the new rules who might argue that it is unfair to

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45. SECTION BY SECTION ANALYSIS, *supra* note 41, at S3240.

46. *See id.* at S3240-41.

47. *Id.* at 3241.

48. *Id.*

49. *See American Bar Association Criminal Justice Section Report to the House of Delegates*, 22 FORDHAM URB. L.J. 343, 348-49 (1995) [hereinafter *ABA Report*].

50. Letter from W. Lee Rawls, Assistant Attorney General, Office of Legislative Affairs, to Sen. Robert Dole, Minority Leader, *supra* note 42, at S4927.

51. *Id.*

52. *Id.* at S4928.

expand the evidence that can be admitted against defendants in light of the restrictions that rape victim shield laws place on the admission of the victim's prior conduct. Asserting that the "rules of evidence do not generally aim at a superficial neutrality between rules of admission affecting the victim and defendant," the DOJ maintains that there is a "basic difference in the probative value that is subject to exclusion under such rules."[53]

Prior sexual behavior of the victim will, according to the DOJ, "at most [show] that she has engaged in some sexual activity prior to or outside the marriage — a circumstance that does not distinguish her from most of the rest of the population."[54] But evidence that the defendant had committed prior rapes[55] "places him in a small class of depraved criminals" and is highly probative of his guilt.[56]

A second distinction, according to the DOJ, is the rape shield laws' "important purpose" of encouraging victims to report sexual assaults. Limiting the admissibility of evidence of the defendant's past sexual assaults, says the DOJ, does "not further any comparable public purpose, because the defendant's cooperation is not required to carry out the prosecution."[57]

Finally, the DOJ asserts that defendants have little or no right to privacy regarding alleged prior sexual misconduct. "[V]iolent sex crimes are not private acts, and the defendant can claim no legitimate interest in suppressing evidence that he has engaged in such acts when it is relevant *to the determination of a later criminal charge.*"[58] The DOJ makes no distinction between violent sex crimes that may be charged in criminal cases and any lesser actions that may serve as the predicate for a civil suit.

C. *Congressional Support for the New Rules*

While the DOJ was careful to focus on the noncharacter justifications for the new rules, Congress was not. Speaking in support of the new rules on the Senate floor, Senator Dole referred to the "defendant's propensity to commit sexual assault" as well as the doctrine of chances.[59] Dole was unequivocal that the new rules would overturn the current prohibition that Rule 404(b) places on the use of character evidence. Dole argued that:

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53. SECTION BY SECTION ANALYSIS, *supra* note 41, at S3240.
54. *Id.* at 3241.
55. This includes previously unreported allegations from alleged victims.
56. SECTION BY SECTION ANALYSIS, *supra* note 41, at S3241.
57. *Id.*
58. *Id.* (emphasis added).
59. 140 CONG. REC. S12,990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole).

> [t]he new rules will supersede in sex offense cases the restrictive aspects of Federal rule of evidence 404(b). In contrast to Rule 404(b)'s general prohibition against evidence of character or propensity, the new rules for sex offense cases authorize admission and consideration of evidence of an uncharged offense for its bearing 'on any matter to which it is relevant.' This includes the defendant's propensity to commit sexual assault.[60]

Representative Molinari made the same speech before the House of Representatives on the eve of their vote.[61] Neither legislator offered any evidence or explanation as to why propensity evidence should be admitted in sexual assault cases when it is not admitted in other types of cases. Although both referred to the "distinctive character of the cases,"[62] neither explained what those characteristics are.

D. *Congressional Opposition*

Not everyone in the legislature shared Dole's and Molinari's unfettered support for the new rules. Representative Hughes, explaining that the current Rule 404(b) prohibited the use of similar past conduct as evidence of current guilt, characterized such evidence as "particularly inflammatory and thus potentially prejudicial to the fact finding process."[63] Such a procedure, asserted Hughes, is "extremely bad public policy" which would result in our "sinking into the star chamber procedures that have long been rejected by civilized societies everywhere."[64]

Hughes was especially troubled by rules that would allow the history of the defendant to be admitted, while the amendment to Rule 412 that was being adopted at the same time would not permit similar evidence to be admitted about the victim. This, claimed Hughes, raised "very serious constitutional questions."[65]

Senator Joseph Biden was also strongly opposed to the new rules. He argued that evidence that a person has been accused of similar sexual offenses in the past has little or no probative value as to whether they committed the offense with which they are currently charged. The essence of our criminal justice sys-

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60. *Id.*

61. *See* 140 CONG. REC. H8991-92 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).

62. *Id.* at H8991; 140 CONG. REC. S12,990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole).

63. 140 CONG. REC. H8990 (daily ed. Aug. 21, 1994) (statement of Rep. Hughes).

64. *Id.*

65. *Id.*

tem, according to Biden, is to ascertain whether a particular defendant in a particular case is guilty of the charge that is before the jury at that moment.[66] Biden asserted:

> This is not a fair thing to do to an individual because it does not speak to the elements of the crime. It does not speak to whether he was there at the place at the time and moment and committed the crime.[67]

Biden was especially concerned that such evidence would be misused by the jury. He feared that they would conclude that the prior acts mean the defendant is a "bad person" and convict him for that reason, rather than because they actually believed that he was guilty of the offense before them.[68]

E. *The Judicial Conference*

Under the Rules Enabling Act,[69] the Federal Judicial Conference (FJC) develops and proposes changes in the Federal Rules. These proposals are submitted to the Supreme Court for approval. If the Supreme Court approves the proposals, they are submitted to Congress. The proposed changes go into effect six months later if they are not rejected or modified by Congress.[70]

The FJC establishes committees made up of federal and state court judges, constitutional scholars and members of the bar. One such committee is the Committee of Rules of Practice and Procedure of the Judicial Conference. At the time the new rules were being adopted by Congress, Alicemarie Stotler chaired the committee. She sent a letter opposing the new rules to Representative Brooks which was entered into the Congressional Record.[71] On February 9, 1995, the FJC submitted a formal report to Congress opposing the new rules.[72]

The FJC expressed concern that the new rules would greatly diminish the protection from prejudice that the current rules provide for criminal defendants and parties in civil cases. The committee feared that a verdict could be based on past behavior or for being a "bad person" rather than the evidence in the current case. Judging on "bad acts" assumes that there is a direct correlation between prior and current behavior. According to

66. *See* 139 CONG. REC. S15,072-73 (daily ed. Nov. 4, 1993) (statement of Sen. Biden).

67. *Id.* at S15,072.

68. *See id.* at S15,073.

69. 28 U.S.C. §§ 2071-2077 (1994).

70. *See id.* § 2074.

71. *See* 140 CONG. REC. H8990 (daily ed. Aug. 21, 1994) (statement of Rep. Hughes).

72. *See* JUDICIAL CONFERENCE OF THE U.S., *supra* note 39.

the FJC, this core assumption of the new rules is not supported by empirical evidence.[73]

Another concern of the FJC was the potential for the new rules to complicate litigation. Because the new rules do not limit the admissible evidence to prior convictions, actions that did not lead to convictions, even actions that were never previously reported could be used. The result will be "mini-trials" within the main trial where each previous bad act is litigated when the defendant seeks to rebut such evidence.[74]

The FJC also expressed serious reservation over the applicability of Rule 403 which permits the judge to exclude evidence when its probative value is substantially outweighed by its prejudicial effect.[75] Under Rule 415, evidence of similar acts "is admissible."[76] Like other commentators, the FJC saw the phrase "is admissible" to indicate that the new rules are mandatory.[77] If so, the evidence must be admitted regardless of other rules of evidence such as the hearsay rule or the Rule 403 balancing test. The FJC opposition to the new rules was unanimous, except for the dissenting vote of the representative from the DOJ.

F. *The American Bar Association*

Like the FJC, the American Bar Association (ABA) opposed the new rules.[78] Ignoring the rulemaking structure whenever a rule is likely to generate controversy, said the ABA, subverts the "entire integrity of the Rules Enabling Act."[79] The ABA expressed several reservations about the new rules, including their ambiguous wording and their admission of propensity evidence to prove guilt.[80]

Juries, according to the ABA, may be overwhelmed by emotional responses when they are presented with propensity evidence. They may be less likely to apply the appropriate standard of proof, feeling "less responsibility for convicting an individual

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73. *See id.* at 52.
74. *See id* at 53.
75. *See* FED. R. EVID. 403.
76. FED. R. EVID. 415(a).
77. *See* JUDICIAL CONFERENCE OF THE U.S., *supra* note 39, at 53.
78. *ABA Report, supra* note 49, at 343 ("RESOLVED, that the American Bar Association opposes the substance of Rules 413, 414, and 415 of the Federal Rules of Evidence concerning the admission of evidence in sexual assault and child molestation cases, as enacted by the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103 - 322, 108 Stat. 1796 (1994).").
79. *Id.* at 345.
80. *See id.* at 344-45.

who they know has committed previous bad acts. Ultimately the jury may reach its verdict without deciding the defendant's guilt in the present case."[81]

III. RULE 415 AND SEXUAL HARASSMENT

> And finally, Mr. President, this amendment would create a new Rule 415, making it clear that in civil cases, evidence of a defendant's commission of past offenses of sexual assault and child molestation is admissible and may be considered for whatever purpose is relevant.[82]

Rule 415 applies to civil cases in which a claim for damages is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation.[83] "Sexual assault" evokes emotional responses which suggest that those who sponsored the rules may not have understood what they were proposing. Senator Dole spoke of "vicious sex crime offenders,"[84] and Representative Molinari of the "women who will not be raped and the children who will not be molested."[85] No one spoke of the true breadth of the rules. Neither person mentioned nor seemed to realize that much more innocuous behavior was included in the definition.[86]

A. *Offense of Sexual Assault*

Rule 413(d) defines sexual assault "for the purposes of this rule and Rule 415" as a crime under federal law or the law of a state that involves:

> (1) *any conduct proscribed by chapter 109A of title 18, United States Code*,
> (2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
> (3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

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81. *Id.* at 349.

82. 139 CONG. REC. S15,071 (daily ed. Nov. 4, 1993) (statement of Sen. Dole).

83. *See* FED. R. EVID. 415(a).

84. 139 CONG. REC. S15,071 (daily ed. Nov. 4, 1993) (statement of Sen. Dole).

85. 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).

86. 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5412B (Supp. 1997) ("Rule 415 is not limited to the 'rapists' that are featured prominently in the legislative history.").

> (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
>
> (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).[87]

Under federal law it is a crime to "cause[ ] another person to engage in a sexual act by threatening or placing that other person in fear."[88] Further, it is a crime to engage in "abusive sexual contact" under similar circumstances.[89] "Sexual conduct" is defined as "the intentional touching, either directly or through the clothing, of the genitals, anus, groin, breast, *inner thigh*, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[90]

In *Frank v. County of Hudson*,[91] the first reported case addressing Rule 415, the court held that Rule 415 is applicable where the plaintiffs have *included* in their allegations "assaultive behavior rather than mere verbal abuse or discriminatory treatment."[92] The magistrate below found that Rule 415 was not applicable because the case was not *predicated* on the commission of an offense of sexual assault. In reversing the magistrate's decision, the court made it clear that assaultive behavior need only be one of the allegations, not the only or central one.[93]

In *Cleveland v. KFC National Management Co.*,[94] the court held that Rule 415 applied where there were "allegations of sexual harassment that *includes* [sic] the touching of plaintiff's body in an overt sexual manner."[95] This position was also taken by the court in *Shea v. Galaxie Lumber & Construction Co.*[96] In granting a motion in limine, the court held that Rule 415 was not applicable because the alleged sexual harassment did not fit within the definition of "sexual assault," but left it open to the plaintiffs to offer evidence that the "acts alleged fit within the definition contained in Rule 412 [sic]."[97]

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87. FED. R. EVID. 413(d) (emphasis added).
88. 18 U.S.C. § 2242(1) (1994).
89. *See id.* § 2244.
90. *Id.* § 2246(3) (emphasis added).
91. 924 F. Supp. 620 (D.N.J. 1996).
92. *Id.* at 625.
93. *See id.*
94. 948 F. Supp. 62 (N.D. Ga. 1996).
95. *Id.* at 64 (emphasis added).
96. 1996 WL 111890 (N.D. Ill. Mar. 12, 1996).
97. *Id.* at *1.

B. *Is Admissible and May Be Considered*

Rule 415 specifies that evidence of a defendant's prior sexual misconduct "is admissible" but does not contain any explicit language of limitation or exception.[98] The comments of Dole and Molinari indicate that they believed that evidence which is admissible under Rule 415 is still subject to the constraints of Rule 403. As Molinari stated:

> [i]n other respects, the general standards of the rules of evidence will continue to apply, including the restrictions on hearsay evidence and the court's authority under evidence rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect.[99]

This belief may be misplaced. Dole and Molinari apparently read the "is admissible" language as though it were a conditional, not compulsory phrase.[100] Compare this to Rule 412, which was amended by the same legislation that adopted Rule 415. Under Rule 412, evidence "is admissible *if it is otherwise admissible under these rules.*"[101] Yet Dole and Molinari would read both statutes to have the same effect — conditional, not compulsory admission of the evidence. Such a loose statutory construction is inconsistent with current Supreme Court jurisprudence. Thus, either the italicized portion of 412 is superfluous, or Dole and Molinari are wrong. Recent Supreme Court decisions would seem to indicate that they are wrong.

When interpreting statutes, the Court construes them "where possible, so as to avoid rendering superfluous any parts thereof."[102] It generally presumes that Congress acts intentionally and purposefully when it "includes particular language in one section of one statute but omits it in another."[103] Thus, courts should hesitate to conclude that "the differing language in the two subsections has the same meaning in each."[104] Applying this analysis, Rule 415 should be read as to exempt itself from the

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98. *See* FED. R. EVID. 415(a).

99. 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).

100. *See* Duane, *supra* note 17, at 118-19.

101. FED. R. EVID. 412(b)(1) (emphasis added).

102. Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991) (citation omitted).

103. City of Chicago v. Environmental Defense Fund, 511 U.S. 328, 338 (1994) (citation omitted).

104. Russello v. United States, 464 U.S. 16, 23 (1983). In other words, "is admissible" cannot be synonymous with "is admissible if it is otherwise admissible under these rules." For a more detailed examination of this issue, with additional citations, see Duane, *supra* note 17, at 118-20.

limitations imposed by Rule 403. Thus, evidence is admissible under Rule 415, even if its probative value is vastly outweighed by its prejudicial effect.[105]

Not all writers agree with this interpretation of the applicability of Rule 403. One author has even suggested that Rule 403 "may in fact prove to be the device which defines the boundaries of Rule 413 [and the identical Rule 415]."[106] This prophetic interpretation is based, however, on the legislative history of the new rules and is suspect in light of the Supreme Court's repeated admonition that "[l]egislative history is irrelevant to the interpretation of an unambiguous statute."[107]

Notwithstanding the Supreme Court's admonition, the first court to reach this issue held that Rule 415 does *not* trump Rule 403. Acknowledging that some commentators have interpreted Rule 415 to "require a court to admit such evidence regardless of its probative value and without analysis under FRE 403," the court nonetheless held that evidence must "still be shown to be relevant, probative and 'legally relevant' under FRE 403."[108]

At least one district court judge may not agree. In *Galaxie*, the court granted a motion in limine after finding that Rule 415 was not applicable because the plaintiff had not alleged acts that came within the definition of "sexual assault."[109] Thus, the court relied on Rule 404(b) and Rule 403.[110] However, the court gave the plaintiff leave to proffer evidence that acts within the scope of Rule 415 had occurred. In so doing, the court did not dispute the plaintiff's suggestion that "Rule 415 trumps Rule 404(b) and would make this evidence admissible."[111] There would be no reason for the court to permit the plaintiff to offer evidence to bring Rule 415 into play if it were subservient to Rule 403 when the court had already found that Rule 403 would keep the evidence out. Thus, one reading of *Galaxie* is that Rule 404(b) is controlled by Rule 403, but Rule 415 is not.

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105. Other writers have reached the same conclusion. *See, e.g.*, Duane, *supra* note 17, at 118-20 (asserting that "is admissible" language trumps all other rules of evidence).

106. Debra Sherman Tedeschi, Comment, *Federal Rule of Evidence 413: Redistributing 'The Credibility Quotient'*, 57 U. PITT. L. REV. 107, 123 (1995).

107. Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 808 n.3 (1989).

108. Frank v. County of Hudson, 924 F. Supp. 620, 624 (D.N.J. 1996) ("FRE 413-415 'are permissive rules of admissibility, not mandatory rules of admission'") (quoting Memorandum from Department of Justice to United States Attorneys 3 (July 12, 1995)).

109. *See* Shea v. Galaxie Lumber & Constr. Co., 1996 WL 111890, at *1 (N.D. Ill. Mar. 12, 1996).

110. *See id.*

111. *Id.*

No case involving Rule 415 has reached a United States Court of Appeals. However, the Eighth Circuit recently addressed the interplay between Rule 414 and Rule 403. In *United States v. Sumner*,[112] the defendant appealed a conviction for aggravated sexual abuse and abusive sexual contact. The district court had admitted testimony from two children who claimed to have been abused by the defendant. The evidence was admitted under Rule 404(b) as evidence of intent.[113] After finding that the evidence was *not* admissible under Rule 404(b), the court turned to the alternative grounds for admission that had been proffered by the government – Rule 414. The court opined:

> The district court denied the government's proffer under Rule 414, stating that the rule is unconstitutional because it allows "any kind of evidence to show propensity" without allowing for the application of the Rule 403 balancing test. The court stated that it would have to read Rule 403 into Rule 414 in order to provide a balancing test, which it believed was contrary to Congress's intent.[114]

The Eighth Circuit disagreed with the district court's interpretation. Citing the Second Circuit, the court held that a Rule 403 analysis of evidence offered under Rule 414 is consistent with Congress' intent in enacting Rule 414.[115] In a footnote, the court stated that "[t]hree district courts have concluded that the Rule 403 balancing test applies to Rule 413 *and Rule 415*."[116] One of the three district court cases, *Cleveland v. KFC National Management Co.*,[117] offers a unique interpretation of the interplay between Rule 415 and Rule 403 that is actually contrary to the Eighth Circuit's position.[118]

In *KFC*, the plaintiffs, who had brought a sexual harassment suit against KFC, sought to admit evidence of prior sexual misconduct by one of KFC's managers.[119] The *KFC* court commented that Rule 415 would "clearly apply" to admit evidence of

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112. 119 F.3d 658 (8th Cir. 1997).

113. *See id.* at 659.

114. *Id.* at 661.

115. *See id.* at 661-62 (citing United States v. Larson, 112 F.3d 600 (2d Cir. 1997)).

116. *Id.* at 662 n.3 (emphasis added) (citing United States v. Guardia, 955 F. Supp. 115, 117 (D.N.M. 1997); Cleveland v. KFC Nat'l Management Co., 948 F. Supp. 62, 66 (N.D. Ga. 1996); Frank v. County of Hudson, 924 F. Supp. 620, 624 (D.N.J. 1996)).

117. 948 F. Supp. 62 (N.D. Ga. 1996).

118. *See id.* at 64-66.

119. *See id.* at 64.

the manager's prior acts against the company were this a case where both the individual and the company were being sued.[120] Moreover, while conceding that Rule 403 should apply, the court offered a unique interpretation of the interplay between Rule 403 and Rule 415:

> Rule 415 is tempered by Rule 403: evidence of defendant's agent's misconduct must be both probative in that it proves corporate knowledge of similar misconduct and it must corroborate plaintiff's story; *otherwise*, the prejudicial effect on the jury is not substantially outweighed.[121]

Put another way, merely showing that the evidence of prior acts is probative of the elements of the claim (knowledge, actual occurrence) creates an irrebutable presumption that the probative value outweighs any prejudicial effect on the jury.

The *KFC* court's interpretation seems to be exactly what the drafters and sponsors of the new rules were intending. Like the *KFC* court, Senator Dole first stated that Rule 403 would still apply to the new rules.[122] He later receded from this position, stating that the new rules created a "presumption" that exclusion of evidence under Rule 403 would be "typically" improper.[123] According to Representative Molinari:

> The underlying legislative judgment is that the evidence admissible pursuant to the proposed rules is typically relevant and probative, and that its probative value is normally not outweighed by any risk of prejudice or other adverse effects.[124]

In other words, Rule 403's balancing test is presumed to be met once the evidence is determined to meet the broad requirements for admission under Rule 415. Once the evidence is admitted, the jury may consider it for whatever purpose they choose.[125]

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120. *See id.* at 66. Only the corporation, not the manager, was a party to the suit.

121. *Id.* at 66 (emphasis added).

122. *See* 140 CONG. REC. S12,990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole); *see also* 140 CONG. REC. H8991-92 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).

123. *See* WRIGHT & GRAHAM, *supra* note 86, § 5416.

124. 140 CONG. REC. H8992 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).

125. *See* WRIGHT & GRAHAM, *supra* note 86, § 5416.

C. *Shall Not be Construed to Limit the Admissibility or Consideration*

Rule 415 "shall not be construed to limit the admission or consideration of evidence under any other rule."[126] The only purpose of this paragraph is to make clear that the rule does not restrict other means by which the evidence may be admitted.[127] It does not imply, nor apparently was it meant to imply, that other rules of evidence (such as Rule 403) would have any control over Rule 415.

IV. THE APPLICATION OF RULE 415 TO *JONES V. CLINTON*

> [Paula Jones had] first noticed Governor Clinton looking at her as she manned a desk at the Governor's Quality Management Conference in Little Rock that May of 1991. At the time, Jones, 24, earned $6.65 an hour in a clerical job with a state agency, the Arkansas Industrial Development Commission. At about 2:30 p.m., she claims a state trooper, Danny Ferguson, asked if she would accompany him to the governor's suite. She asked Ferguson what Clinton wanted, and the trooper replied, "It's OK, we do this all the time for the governor." Jones hesitated, but she went, she said, because she hoped the governor would give her a job. (Ferguson later confirmed that he escorted Jones to Clinton's room.) Jones says she entered the suite and found herself alone with Clinton. She claims that the governor began by saying that he was a good friend of Jones's boss, Dave Harrington. Clinton complimented her hair and her "curves," then began slipping his hands up her legs, pulling her close to "nibble" her neck. "I will never forget the look on his face," said Jones. "His face was just red, beet red." Jones said she exclaimed "What are you doing?" and pushed away from him. Clinton then walked over to the sofa. According to Jones, as he sat down, he lowered his trousers. "Kiss it," he said. Horrified, Jones said she jumped up and announced, "Look, I'm not that kind of girl." Clinton said, "Well, I don't want to make you do anything you don't want to do." Clinton pulled up his pants. He told her to keep quiet about the encounter.[128]

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126. FED. R. EVID. 415(c).

127. *See* SECTION BY SECTION ANALYSIS, *supra* note 41, at S3240.

128. Evan Thomas & Daniel Klaidman, *Clinton v. Paula Jones*, NEWSWEEK, Jan. 13, 1997, at 26, 28.

Based on these alleged events, Jones brought suit against President Clinton under 42 U.S.C. §§ 1983 and 1985 and Arkansas state law alleging, inter alia, that while he was governor of Arkansas, he made "abhorrent" sexual advances to her, and that her rejection of those advances led to punishment by her supervisors in the state job she held at the time.[129] The Supreme Court ultimately rejected President Clinton's claim of immunity and the case has been set for trial.[130] Although there are witnesses who verify that Jones went to Clinton's hotel room[131] and others who claim that Jones told them about the encounter shortly after it happened,[132] no witness has come forward claiming to have actually witnessed the alleged encounter. If this case eventually reaches a jury, their decision may turn on whose version of events they believe.

Jones' case will be bolstered if she can show the jury that Clinton is somehow more likely than the average person to have committed these acts. One way to accomplish this would be to introduce evidence that Clinton has made similar sexual advances towards other women. Such evidence, while ordinarily not admissible, *is admissible* under Rule 415.

Rule 415 is not applicable unless the "claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault."[133] At first glance, the events that may have occurred in then-Governor Clinton's hotel room, while reproachable, do not appear to fall under Rule 415. However, the broad definition of "sexual assault" includes touching, through the clothing, the "groin, breast, *inner thigh* or buttocks . . . with an intent to . . . gratify the sexual desire of any person."[134] Thus, Jones' version of the events arguably falls within the broad definition of sexual assault contemplated by Rule 415.[135]

The underlying principle behind the new rules is that evidence of the commission of prior similar acts is somehow relevant to the accused's liability in the current case. This principle is broadly based on two widely divergent theories — propensity and the doctrine of chances.

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129. *See* Clinton v. Jones, 117 S. Ct. 1636, 1640 (1997).

130. *See id.* at 1651-52.

131. *See* Thomas & Klaidman, *supra* note 128, at 28.

132. *See id.*

133. FED. R. EVID. 415(a).

134. 18 U.S.C. § 2246(3) (1994) (emphasis added).

135. Specifically, sexual assault could be said to have occurred when Clinton allegedly "slipped his hand up her legs." Likewise, exposing his penis and asking her to "kiss it" could be construed as an attempted sexual assault.

The doctrine of chances is a noncharacter approach to prior acts. It purports to make no statements or assumptions about the character of the accused. Rather, it operates on the assumption that "the accused has . . . become enmeshed in such circumstances more frequently than the ordinary incidence of such . . . involvement."[136] Put another way, other allegations against the defendant increase the likelihood that the current allegation is true:

> If the defense disputes both the [current charge] and the [other allegation], this typically amounts to a claim that not just one, but two women have made false charges of rape against the defendant. Here as well, the improbability of multiple false charges normally gives similar crimes evidence a high degree of probative value and supports its admission.[137]

Early application of the doctrine of chances dealt with the coincidence of repeated unusual events. In *Rex v. Smith*,[138] the defendant claimed that his wife accidentally drowned in her bath. The English court admitted evidence that two other women who had been married to the defendant had also died in their baths.[139] In such a case the probative value allegedly lies in the remoteness of the possibility that a man would have three wives accidentally drown in their baths.

Nor is the application of the doctrine of chances limited to cases where there have been numerous recurrences of the unusual event. In *Oregon v. Allen*,[140] the Supreme Court of Oregon upheld the admissibility of one prior act of arson by the defendant as logically relevant to whether he had committed the arson for which he was currently accused. Citing the doctrine of chances, the court concluded that the prior act was not offered to prove character and was therefore admissible.[141]

Assuming, *arguendo*, that the doctrine of chances is probative and its application in *Smith* and *Allen* is proper, what does this say about its application in civil cases? It is fundamental to the outcomes in *Smith* and *Allen* that the underlying "unusual event" had occurred. In *Smith*, it was uncontroverted that the defendant's

136. Edward J. Imwinkelried, *The Dispute Over the Doctrine of Chances*, CRIM. JUST., Fall 1992, at 16, 53.

137. Letter from W. Lee Rawls, Assistant Attorney General, Office of Legislative Affairs, to Sen. Robert Dole, Minority Leader, *supra* note 42, at S4928.

138. 11 Crim. App. 229 (1915).

139. *See id.* at 237.

140. 725 P.2d 331 (Or. 1986).

141. *See id.* at 334.

three wives had drowned in their baths. In *Allen*, the defendant had confessed to a prior arson. According to the DOJ and Senator Dole, the doctrine applies equally well when the underlying "unusual event" is unproven, or even previously unreported.[142]

The efficacy of the doctrine of chances as support for Rule 415 is diminished by two relevant distinctions between the previous applications of the doctrine to criminal cases, and its use in sexual harassment civil suits.

A. *The 'Unusual Events' Aren't So Uunusual*

The rule does not require that the actions alleged in the suit and the evidence offered be the same. It only requires that the acts be assaultive behavior within the definition of the statutes. Nor is there any time limitation on when the acts occurred. While Senator Dole opined that an act that occurred ten years prior "probably would not have any value[,]"[143] the new rules contain no time limitations.

The credibility of the doctrine of chances rests on the premise that the events are of such an unusual nature, such as three drowned wives, that it is statistically improbable that a person would become involved in more than one such incident. When the evidence is prior uncharged acts, the premise is that the statistical probability is remote that a defendant would be falsely accused on more than one occasion.[144] This may be true when the accusations involve serious criminal acts such as rape, but is dubious at best when applied to sexual harassment suits.

If President Clinton argues that he never committed the acts described by the witnesses, the doctrine of chances would have the jury consider the statistical probability that Clinton would be falsely accused by two or more women. Yet Clinton was never the subject of *prior* accusations. Not only was the alleged incident involving Kathleen Willey never reported by Willey, it allegedly occurred in 1993, two years *after* the Jones incident.

If Clinton admits that the "groping" occurred, the doctrine of chances would have the jury consider the statistical probability that a proven sex offender would later be the subject of a false

142. *See* Letter from W. Lee Rawls, Assistant Attorney General, Office of Legislative Affairs, to Sen. Robert Dole, Minority Leader, *supra* note 43, at S4928.

143. 139 CONG. REC. S15,073 (daily ed. Nov. 4, 1993) (statement of Sen. Dole).

144. *See* Letter from W. Lee Rawls, Assistant Attorney General, Office of Legislative Affairs, to Sen. Robert Dole, Minority Leader, *supra* note 42, at S4928.

accusation of sexual assault.[145] The DOJ asserts that this type of coincidence is "inherent[ly] improba[ble]."[146] They do not, however, provide any support to explain why it is "inherently improbable." Paula Jones is seeking $700,000 in damages. Arguably, if Jones has fabricated her complaint, she might be more likely to bring an action against someone with a history of such behavior. Likewise, Willey's accusations, which have surfaced four years after they allegedly occurred and at the height of the Jones' controversy, are suspect for the same reasons.

B. *The Evidence is Not Limited to Prior Convictions*

Rule 415 does not restrict the sources from which the evidence may be derived. The only requirement is that the prior acts fall within the broadly prescribed category. They do not have to be established by prior conviction or even supported by having been previously reported. Jones' and Willey's accusations were never reported to police. There were no first-hand witnesses and there is little evidence beyond Willey's statements that these acts occurred. Yet, according to the doctrine of chances, their revelations are now somehow probative of Jones' veracity. The jury is supposed to draw from Willey's accusations that it is less likely that Jones is fabricating her story because others are now making accusations against Clinton.

If prior accusations of sexual harassment have any probative force, it comes from their independence. Accusations by unrelated parties made on separate occasions describing unrelated but similar acts may have some relevance under the doctrine of chances. That cannot be said for previously unreported, unverifiable events, especially when the details have been the subject of endless media coverage. The doctrine functions, if at all, when the events relied on, whether they are occurrences or accusations, are prior in time and independent in nature.[147]

C. *The "Lustful Disposition"*

The second theory behind the new rules is the familiar, but until now largely banned, use of propensity evidence. Rule

145. "Groping," if it involves touching the breasts or buttocks, even through the clothing, can constitute sexual assault under federal law. *See* 18 U.S.C. § 2246(3) (1994); *see also supra* note 134 and accompanying text.

146. Letter from W. Lee Rawls, Assistant Attorney General, Office of Legislative Affairs, to Sen. Robert Dole, Minority Leader, *supra* note 42, at S4928.

147. *See* Edward J. Imwinkelried, *A Small Contribution to the Debate Over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions*, 44 SYRACUSE L. REV. 1125, 1130-32 (1993).

404(b) explicitly prohibits the use of evidence of prior bad acts to "prove the character of a person in order to show that he acted in conformity therewith. . . ."[148] In contrast, the new rules permit the use of such evidence "for its bearing 'on any matter to which it is relevant.' This includes the defendant's propensity to commit sexual assault."[149]

Proponents of the use of propensity evidence in the sexual assault context argue that the defendant has a "lustful disposition" which somehow makes it more likely that he committed the sexual offense that the plaintiff is seeking to prove.[150] The DOJ refers to the defendant as being of such a character as to "indicate that the defendant has the unusual combination of aggressive and sexual impulses that motivate the commission of such crimes, and a lack of effective inhibitions against acting on such impulses."[151] This is appropriate, says the DOJ, because of the "fairly obvious policy considerations"[152] that distinguish sex offense cases.

What are the "fairly obvious policy considerations" implicated by sex offenses? According to the DOJ, these offenses are "secretive [in] nature" and lack "neutral witnesses."[153] Many crimes are committed in secret without witnesses. Why is the victim of a date rape more deserving of special treatment than the wife who is murdered by an abusive husband? Neither crime may be committed in the presence of witnesses. Yet, the rape victim is available to testify. Further, there is a higher probability that the rapist will have left trace evidence which bolsters the victim's claim.[154]

If not the nature of the crime, then perhaps something about the perpetrators justifies the unique treatment under the new rules. The DOJ says that they are a "small class of depraved criminals."[155] This characterization may not be supported by the facts. Recidivism rates are not higher for rapists or child molest-

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

149. 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).

150. *See ABA Report*, *supra* note 49, at 351.

151. Letter from W. Lee Rawls, Assistant Attorney General, Office of Legislative Affairs, to Sen. Robert Dole, Minority Leader, *supra* note 42, at S4928.

152. *Id.*

153. *Id.*

154. *See* Imwinkelried, *supra* note 17, at 299-300.

155. Letter from W. Lee Rawls, Assistant Attorney General, Office of Legislative Affairs, to Sen. Robert Dole, Minority Leader, *supra* note 42, at S4928.

ers than for other convicted criminals.[156] The DOJ's own figures show that the recidivism rate among rapists in 1983 was 7.7%, while it was 33.5% for larcenists, 31.9% for burglars, 24.8% for drug offenders, and 19.6% for robbers.[157] Yet the DOJ has not proposed amending the rules to permit the use of propensity evidence against any of those other offenders.

Despite the rhetoric surrounding it, the "lustful disposition" argument is nothing more than "round[ing] up the regular suspects."[158] This approach has long been rejected by scholars and the courts. As the Supreme Court has stated:

> The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime . . . . The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.[159]

The DOJ dismisses any concern that juries may misuse evidence admitted under the new rules. In what may be the most absurd use of circular logic to come out of this debate the DOJ claimed that "there is no risk that evidence admitted under the proposed new rules will be considered for a prohibited purpose, since the [new] rules do not limit the purposes for which such evidence may be considered."[160] In other words, impermissible uses can be avoided by making all uses permissible.

Propensity evidence invites the jury to infer that the defendant is a bad person and from there to conclude that he is more likely to have committed this bad act.[161] Rule 415 gives a plaintiff's attorney the right "to ask the jury to deliberate over the questions of the 'kind,' 'sort,' or 'type' of person the accused

156. *See* ALLEN J. BECK & BERNARD E. SHIPLEY, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1983 at 6 tbl.9 (1989).

157. *See id.* The under-reporting of rape cannot justify this distinction. Other crimes, such as drug offenses, which have considerably higher recidivism rates are also greatly under-reported. *See* Katherine A. Baker, *Once a Rapist? Motivational Relevancy in Rape Law*, 110 HARV. L. REV. 563, 579-80 (1997); *see also* IMWINKELRIED, *supra* note 44, § 4:16 (citing additional studies that show recidivism rates for rapists are equal to, or lower than the recidivism rates for other crimes).

158. *See ABA Report*, *supra* note 49, at 349.

159. Michelson v. United States, 335 U.S. 469, 475-76 (1948); *see* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 4.11 (1995).

160. SECTION BY SECTION ANALYSIS, *supra* note 41, at S3242.

161. *See* Imwinkelried, *supra* note 136, at 18.

is."[162] Returning to *Jones v. Clinton*, Jones' attorney in closing argument could tell the jury:

> Ladies and gentlemen, consider the evidence of the other acts of sexual assault committed by Mr. Clinton. That evidence shows you what type of person he is. This evidence shows you that the accused is precisely the kind of vicious, perverted person who would commit the sexual harassment and assault that he's now on trial for. He is disposed to sexual assault. Simply stated, he is a sex offender. He is that sort of criminal, and that's exactly what he did in this case. He has gotten away with this heinous behavior before, don't let him get away with it this time.[163]

The plaintiff's attorney has given the jury at least two reasons (Jones and Willey) to return a verdict against Clinton. Even if the jurors are not convinced that he assaulted Jones, they may choose to use a verdict against him as a means of punishing him for the incident with Willey.[164]

CONCLUSION

When criticizing the new rules, it is easy to lose sight of the sponsoring legislators. Representative Molinari, for example, was undoubtedly sincere in her belief that these rules would protect women and children. Yet, it was this sincerity and, arguably misplaced, sense of urgency that led the Congress to bypass the Rules Enabling Act and to disregard the strong opposition to these rules. Good intentions, like great cases, can make bad law.[165]

The new rules in general, and Rule 415 in particular, are bad law. I have only attempted to show the impact that the unbridled admission of propensity evidence can have in a sexual harassment suit. President Clinton's liability to Paula Jones, if any, should turn on what happened in the hotel room in Arkan-

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162. Imwinkelried, *supra* note 147, at 1146.

163. This hypothetical closing argument is an adaptation of the example used by Professor Imwinkelried to illustrate the closing argument that could be made in a criminal case under Rule 413. Other than the addition of the last line, and small changes to adapt it to the civil context, the work is his. *See id.* at 1146-47.

164. *See* Dowling v. United States, 493 U.S. 342, 361-62 (1990) (Brennan, J., dissenting) ("[The] danger is particularly great where . . . the extrinsic activity was not the subject of a conviction; the jury may feel that the defendant should be punished for the activity even if he is not guilty of the offense charged.").

165. With apologies to Justice Holmes. *See* Northern Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

sas in 1991, not on something that may have occurred in the White House in 1993.

Moreover, if the new rules survive, they may herald the beginning of the end for the exclusion of propensity evidence in other areas. The case for admitting such evidence is strongest when it is supported by empirical evidence. Statistics released by the DOJ, which drafted the new rules, show that other types of offenses have much higher recidivism rates.[166] Perhaps, as has been suggested, this is but the opening salvo in the campaign to make character and propensity evidence generally admissible.[167]

166. *See supra* notes 156-57 and accompanying text.
167. *See* WRIGHT & GRAHAM, *supra* note 86, § 5412B.