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## Cover Page Footnote

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# PROPOSED EVIDENCE RULES 413 TO 415—SOME PROBLEMS AND RECOMMENDATIONS

*James S. Liebman**

Section 320935 of the Violent Crime Control and Law Enforcement Act of 1994[1] proposes three new Federal Rules of Evidence—Rules 413-415—that would liberalize the admissibility of "propensity evidence" in criminal and civil cases involving allegations of sexual assault and child molestation.[2] This Article

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* Professor of Law, Columbia University School of Law. This Article is adapted from comments submitted to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States on October 5, 1994, in response to the Committee's request for comments on Proposed Federal Rules of Evidence 413-415. The comments were submitted on behalf of a group of law professors, including Samuel R. Gross, Martin Guggenheim, Randy Hertz, Richard Owen Lempert, Gerard E. Lynch, and John W. Reed. I thank them for their helpful suggestions.

1. Pub. L. No. 103-322, 108 Stat. 1796, 2136-37 (1994).

2. Proposed Rule 413, "Evidence of Similar Crimes in Sexual Assault Cases," is as follows:

> (a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.
> (b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
> (c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
> (d) [defines "offenses of sexual assault"].

*Id.* at 2136. Proposed Rule 414 is the same, except that the words "child molestation" are substituted for the words "sexual assault." *Id.* Proposed Rule 415, "Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation," extends to civil cases the same rule of broadened admissibility of evidence of sexual assault and child molestation. *Id.* at 2137.

Section 320935 of the Violent Crime Control and Law Enforcement Act of 1994 does not make Rules 413-415 immediately effective, which explains the description of those rules here as "Proposed Rules." Instead, section 320935(c) requires the Judicial Conference of the United States, within 150 days, to "transmit to Congress a report containing recommendations for amending the Federal Rules of Evidence as they apply to the admission of evidence of a defendant's prior sexual assault or child molestation crimes in cases involving sexual assault and child molestation." *Id.* Section 320935(d) delays the effective date of Rules 413-415 for an additional 150 days to give Congress the opportunity to review the recommendations of the Judicial Conference. Unless Congress adopts a new statute that either repeals or modifies Proposed Rules 413-415, the rules become law after the specified time periods have elapsed. *Id.*

At a meeting on October 17-18, 1994, the Judicial Conference Advisory Committee on Evidence Rules concluded "that the existing Rules of Evidence are adequate to deal with the concerns underlying the new rules" and "that the new rules could diminish significantly the protections . . . that have safeguarded persons accused in criminal cases and parties in civil cases against undue prejudice." Letter from Peter G. McCabe to James S. Liebman (Dec. 2, 1994) (on file with author). Notwithstanding these views, the "committee did not believe . . . that it was their role to prepare alternative rules that dilute the policies articulated by Congress." *Id.* "Instead, the committee drafted alternative amendments to [existing Federal Evidence] Rules 404 and 405 that would both correct ambiguities and possible constitutional infirmities . . . in [Proposed] Rules 413-415 and remain consistent with Congressional intent." *Id.* The Committee's substitute would combine Proposed Rules 413-415 into a single subsection (a)(4) of existing FED. R. EVID. 404. Doing so would create a single additional exception to the longstanding rule (in FED. R. EVID. 404(a)) barring the admissibility of propensity evidence. The Committee's proposal also would make clear (as Proposed Rules 413-415 do not, *see infra* note

expresses some reservations about, and suggests some alternatives to, Proposed Rules 413-415.

## I. THE POLICIES FAVORING EXCLUSION OF PROPENSITY EVIDENCE

Despite strong policy reasons to exclude propensity evidence, the proposed rules require the admission of such evidence whenever it is offered against the alleged perpetrator in a sexual abuse or child molestation case.[3] By propensity evidence, I mean evidence offered to show that the defendant has committed certain offenses in the past, thus has a disposition to commit such offenses, and thus is likely to have committed a similar offense on the occasion in question. Propensity evidence has long and justifiably been excluded in most circumstances for the following reasons, among others: Propensity evidence invites jurors to convict defendants or to find them liable not because they committed the acts alleged in the case but because they are bad people (or

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3; *infra* Part VII) that evidence falling within the new exception to the propensity rule nonetheless could be excluded under other applicable rules of evidence, including FED. R. EVID. 403, and lists factors relevant in assessing the probative value and (by negative inference) the prejudicial potential of evidence falling within the new exception. Not surprisingly, the proposed factors emphasize some of the same considerations now used to distinguish evidence being offered merely to show propensity, which is generally forbidden by FED. R. EVID. 404(a), from evidence being offered for some other purpose, as generally permitted by FED. R. EVID. 404(b), 405(b), and 406. The Committee also proposed adding a new subsection (c) to existing FED. R. EVID. 405, which would disallow evidence under the new FED. R. EVID. 404(a)(4) in the form of testimony as to reputation or in the form of an opinion unless the party against whom the evidence was offered had previously presented reputation or opinion evidence. As of this writing, the Judicial Conference as a whole has not acted, nor has Congress responded to any proposal by the Judicial Conference.

For more comprehensive discussions of earlier proposals to expand the admissibility of propensity evidence in sexual assault and child molestation cases, see Sara Sun Beale, *Prior Similar Acts in Prosecutions for Rape and Child Sex Abuse*, 4 CRIM. L.F. 307 (1993); David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529 (1994); Chris Hutton, *Commentary: Prior Bad Acts Evidence in Cases of Sexual Contact with a Child*, 34 S.D. L. REV. 604 (1989); David J. Kaloyanides, *The Depraved Sexual Instinct Theory: An Example of the Propensity for Aberrant Application of Federal Rule of Evidence 404(b)*, 25 LOY. L.A. L. REV. 1297 (1992); John E.B. Meyers, *Uncharged Misconduct Evidence in Child Abuse Litigation*, 1988 UTAH L. REV. 479; Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127 (1993).

3. The word "require" is used advisedly. Contrary to claims attributed by the press to the congressional proponents of the new rules, the rules do not give judges discretion. *See, e.g.*, Jundia Woo, *Judges Attack Law Easing Rape Evidence*, WALL ST. J., Sept. 22, 1994, at B8. Instead, the rules provide that "evidence of the defendant's commission of another offense or offenses of [a particular kind] *is* admissible, and may be considered for its bearing on any matter to which it is relevant." *See supra* note 2; *see also infra* part VII. Nor does the "relevan[ce]" requirement avoid the admission of propensity evidence. It has long been acknowledged that evidence supporting an inference that a party has a propensity to behave in a particular way is "relevant" when offered to show that the party acted in that way on a particular occasion. As Judge Cardozo put the point, "[t]here may be cogency in the argument that a quarrelsome defendant is more likely to start a quarrel," so that "the principle behind the exclusion is one, not of logic, but of policy." People v. Zachowitz, 172 N.E. 466, 468 (N.Y. 1930); *see* Michelson v. United States, 335 U.S. 469, 475 (1948) (character evidence generally is excluded, though it "might logically be persuasive that [the defendant] is by propensity a probable perpetrator of the crime"). Propensity evidence is typically excluded, therefore, not because it is irrelevant but because its probative value is outweighed by its potential for prejudice. By providing that such evidence "is admissible" at least as long as it is relevant, the proposed rules' language not only trumps the blanket exclusionary rule for character evidence (FED. R. EVID. 404(a)) but also the probativeness-versus-prejudice balancing rule in FED. R. EVID. 403. As a result (especially in the current era of "plain meaning" statutory construction), a judge applying Proposed Rules 413-415 would be compelled to conclude that evidence of a party's prior sexually assaultive conduct or evidence of prior child molestation "*is* admissible" in any case in which the same party is alleged to have committed sexual assault or child molestation.

because their having offended and having been stigmatized for doing so in the past removes any reason to forbear stigmatizing them again, despite reasonable doubts as to their guilt). Propensity evidence often is credited by jurors with having more weight than it deserves.[4]

Propensity evidence generates distracting collateral issues (*e.g.*, whether the defendant committed the prior bad act and whether he or she did so under mitigating circumstances that distinguish the current case). It invites lazy law-enforcement practices that focus too much attention on the "rap sheets" of potential suspects and too little effort on collecting case-specific evidence. For all of these reasons, propensity evidence creates the appearance and reality of a judicial system that (contrary to important moral and political values) convicts individuals for who they are, not what they did.

## II. THE INTEGRITY OF THE FEDERAL RULES' TREATMENT OF PROPENSITY EVIDENCE

The proposed rules undermine the integrity and rationality of the Federal Rules' treatment of propensity evidence. Rule 404(a) generally forbids the use of evidence of traits of character to prove action in conformity with those traits on a particular occasion.[5] The first sentence of Rule 404(b) repeats the prohibition with regard to evidence of specific instances of conduct revealing

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4. Writers on evidence have long alleged this to be so. *See Michelson*, 335 U.S. at 476 (propensity evidence "weigh[s] too much with the jury and [may] so overpersuade them as to prejudice one with a bad general record"); *Zachowitz*, 172 N.E. at 468 (jurors may have a "tendency . . . to give excessive weight to the [defendant's] vicious record of crime"). Social science recently has verified the point. *See, e.g.*, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, pt. II (Daniel Kahneman, Paul Slovic & Amos Tversky eds. 1982). Thus, presented with a description of an individual as, say, "quiet, introverted, bookish, and a wearer of glasses," and asked to guess whether it is more likely that the individual is a librarian, lawyer, store clerk, or sanitation worker, most people guess that the person is more likely a librarian. They make this guess because the description resembles a higher portion of librarians than of lawyers, store clerks, or sanitation workers. The guess is factually erroneous, however, because there are many more lawyers, store clerks, and sanitation workers than librarians in the general population. Accordingly, even if only a small proportion of, say, lawyers fits the profile, and even if a high proportion of librarians does so, there are still more lawyers fitting the profile than librarians. Likewise, a juror who is told that the defendant is a prior offender and is asked to guess whether the defendant is more probably a current offender or a currently law-abiding citizen is likely to guess that the defendant is more probably a current offender. The guess is probably wrong. Because there are so many more law-abiding citizens than criminals, it is probably the case that there are more currently law-abiding citizens who have committed prior crimes than there are current criminals who have done so.

For an introduction to the related debate over whether individual personality traits or collections of such traits or, more importantly, the predictable interactions between such traits and particular environmental conditions are sufficiently stable over time to permit reliable inferences of action in conformity with traits revealed on prior occasions, compare David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 25-31 (1987) and Miguel A. Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1041-60 (1984) (both concluding that reliable inferences of action in conformity generally are not possible) with Susan M. Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 518-19 (1991) and Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1, 32-34, 64-86 (1993) (both concluding that reliable inferences of action in conformity are possible under some circumstances).

5. FED. R. EVID. 404(a).

character traits.[6] The remainder of Rule 404(b) permits the use of specific instances of conduct for purposes *other* than showing action in conformity with a particular character trait.[7] Subsections 404(a)(1)-(3) create some limited exceptions to the general rule of exclusion—exceptions that are limited both in the range of situations to which they apply and in the kinds of evidence that can be admitted (typically, only weak reputation and opinion evidence is admissible; potentially more overpowering "specific instance" evidence is not permitted).[8]

By contrast, Proposed Rules 413-415 create exceptions to Rule 404(a) and to the first sentence of Rule 404(b) that are extremely broad—in terms of both the situations in which the exceptions apply and the types of evidence to which they apply, including "specific instance" evidence. These new, broad exceptions are so out of keeping with the pre-existing propensity provisions as to cause the propensity rules, taken as a whole, to lose coherence. There has been a substantial amount of writing recently on the need to reform the propensity rules, either by withdrawing the presumption that propensity evidence is inadmissible or by strengthening the presumption.[9] But to "do both"—that is, to retain the general presumption of inadmissibility, but then make mandatorily admissible two of the largest categories of such evidence—is to deprive the rules of any coherent rationale.

Proposed Rules 413-415 also create a potential for unequal treatment of similarly situated individuals. For example, a high proportion of robberies and burglaries are committed by "career" robbers and burglars.[10] Why should those wrongdoers be treated more favorably under the new rules than career rapists (even assuming the category of "career rapists" may fairly be said to exist[11])?

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

7. *Id.*; *see also* FED. R. EVID. 405(b), 406.

8. FED. R. EVID. 404(a)(1)-(3); *see also* FED. R. EVID. 405, 608, 609.

9. *See generally* Davies, *supra* note 4; Richard D. Friedman, *Character Impeachment Evidence: The Asymmetrical Interaction Between Personality and Situation*, 43 DUKE L.J. 816 (1994); Richard D. Friedman, *Character Impeachment Evidence: Psycho-Bayesian Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637 (1991); Edward J. Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465 (1985); Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specified Acts Evidence*, 66 IOWA L. REV. 777 (1981); Leonard, *supra* note 4; Mendez, *supra* note 4; Robert D. Okun, *Character and Credibility: A Proposal to Realign Federal Rules of Evidence 608 and 609*, 37 VILL. L. REV. 533 (1992); Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135 (1989); Taslitz, *supra* note 4; H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776 (1993); H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845 (1982); H. Richard Uviller, *Unconvinced, Unreconstructed, and Unrepentant: A Reply to Professor Friedman's Response*, 43 DUKE L.J. 834 (1994); Glen Weissenberger, *Making Sense of Extrinsic Act Evidence: Federal Rules of Evidence 404(b)*, 70 IOWA L. REV. 579 (1985).

10. *See, e.g.*, JAMES Q. WILSON, THINKING ABOUT CRIME 145-58 (rev. ed. 1983).

11. *But see* ALLEN J. BECK, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1983, at 6 (1989) (in study of 100,000 prisoners during three years following their release from prison in 1983, same-offense recidivism rate for burglars was 31.9%; for drug offenders was 24.8%; for violent robbers was 19.6%; and for rapists was 7.7%; the only offenders with same-offense recidivism rate lower that for rapists were homicide offenders, with 2.8% reoffense rate); James M. Gregg, *Other Acts of Sexual Behavior and Perversion as Evidence in Prosecutions for Sexual Offenses*, 6 ARIZ. L. REV. 212, 231-34 (1965) (research does not show that rapists and child molesters have particularly high recidivism rates); Timothy J. Khan & Heather J. Chambers, *Assessing Reoffense Risk with Juvenile Sexual Offenders*, 70 CHILD WELFARE 333,

The outcome favored here is to preserve the existing rules. Even if the rules are to be changed, however, the change ought to be wholesale, not piecemeal. The Federal Rules of Evidence are a rather successful codification of modern evidence law—a codification worthy of the emulation the rules have received in the state legislatures and courts. Piecemeal changes of the sort contained in Proposed Rules 413-415 threaten this important attribute of the rules.

## III. THE NEED FOR MORE STUDY

Relatedly, the new rules (and the need for rules of some sort, in the area) have not been the subject of the kind of study that is needed. The proposed rules were not the subject of hearings in Congress, much less of consideration by the Supreme Court's Advisory Committee on the Federal Rules of Evidence or by the Court itself. The Evidence Rules have succeeded in large measure because of their careful consideration and construction. On general principles, that process ought to be preferred to the current process.[12]

## IV. CONSTITUTIONAL QUESTIONS

The new rules may be unconstitutional. This Article does not undertake a comprehensive study of the constitutional status of the longstanding rule forbidding propensity evidence. If, however, character evidence rules or rulings can ever be said to present constitutional questions, then Proposed Rules 413-415 surely do so, given the breadth of the propensity evidence that those rules would admit. Moreover, a number of courts have held that the admission of propensity evidence—including evidence of prior sexual assault crimes and child molestation—violates the Due Process Clause under certain circumstances and

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344 (1991) (confirming findings in other studies of "relatively low rates of sexual recidivism for adolescent sexual offenders" although recidivism rates were relatively high when all subsequent crimes, and not simply subsequent sexual offenses, were considered); Joseph J. Romero & Linda M. Williams, *Recidivism Among Convicted Sex Offenders: A 10-Year Follow Up Study*, FED. PROBATION, Mar. 1985, at 58, 62 (concluding that "public's conception of the sexual assaulter as a man continually driven to aberrant sexual behavior is not supported by the current research"). *See generally* Fred S. Berlin & H. Martin Malin, *Media Distortion of the Public's Perception of Recidivism and Psychiatric Rehabilitation*, 148 AM. J. PSYCHIATRY 11 (1991); Lita Furby & Mark R. Weinrott, *Sex Offender Recidivism: A Review*, 105 PSYCH. BULL. 3, 22, 27 (1989) ("Despite the relatively large number of studies on sex offender recidivism, we know very little about it. Indeed, there does not even seem to be a relation between length of follow-up and [the sexual offense] recidivism rate, as one might reasonably expect for a crime that has such notoriously low reporting, arrest, and conviction rates.").

12. The Judicial Conference review process that precedes the effective date of Proposed Rules 413-415 is not an adequate substitute for the normal process of developing Federal Rules of Evidence. *See supra* note 2. To begin with, the Judicial Conference review process for Proposed Rules 413-415 is considerably more truncated than the process typically used in proposing, reviewing, and adopting new Federal Rules of Evidence. In addition, as the Judicial Conference Advisory Committee on Evidence Rules concluded in the initial stage of the abbreviated review process that Congress created, Congress did not clearly give the Judicial Conference the role of "prepar[ing] alternative rules that dilute the policies articulated by Congress" even if the Conference believed that alternative rules (or no new rules at all) were appropriate. Letter from Peter G. McCabe to James S. Liebman, *supra* note 2.

is a basis for habeas corpus relief.[13] In a separate opinion in a case in which the issue was presented to, but avoided by, the Supreme Court, Justice O'Connor suggested that certain uses of propensity evidence *may* violate the Due Process Clause.[14] Numerous other cases might be cited in which courts, in conducting due process analyses of the admissibility of character evidence, have struggled mightily to find nonpropensity uses of the evidence—as if the use of the evidence for the sole purpose of showing propensity would present difficult constitutional questions.[15]

## V. THE ADEQUATE TREATMENT OF PROPENSITY EVIDENCE UNDER EXISTING RULE 404(b)

The author's impression from reading the cases is that evidence (at least in the form of prior convictions) of other sexual assault crimes and child molestation crimes often is admitted under existing Federal Rule 404(b) and similar state rules, and that an invitation to even freer admissibility is not necessary, apart from a desire to abrogate the propensity rule entirely. Evidence of prior sexual assault or child molestation is very often held to be admissible to support inferences other than propensity—for example, that the defendant had access to the victim ("opportunity"), had a motive to attack the particular victim, had an intent to harm the victim, had no reasonable basis for assuming the victim consented to sexual relations, is the likely perpetrator because of the similarity between the prior and the instant attack (*modus operandi*), or was operating according to a common scheme or plan that included both the prior (or subsequent) and current attack. Courts rarely invoke the propensity rule to forbid the admission of prior sexual assault or child molestation evidence whenever there is an even arguable basis, apart from propensity, for admitting the evidence. The impression conveyed by the published cases, thus, is that there

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13. *See, e.g.*, McKinney v. Rees, 993 F.2d 1378, 1384-86 (9th Cir.), *cert. denied*, 114 S. Ct. 622 (1993); Henry v. Estelle, 993 F.2d 1423, 1427-28 (9th Cir. 1993), *rev'd on other grounds sub nom.* Duncan v. Henry, 115 S. Ct. 887 (1995) (*per curiam*); Tucker v. Makowski, 883 F.2d 877, 878, 881 (10th Cir. 1989) (*per curiam*); Stidum v. Trickey, 881 F.2d 582, 583-84 (8th Cir. 1989), *cert. denied*, 493 U.S. 1087 (1990). Given the longstanding acceptance in Anglo-American evidence law of the proscription against propensity evidence (at least in criminal cases), Proposed Rules 413-415 (or, at least, Proposed Rules 413 and 414) might be thought to violate the substantive component of the Due Process Clause because they "'"offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental."'" Herrera v. Collins, 113 S. Ct. 853, 864 (1993) (quoting Medina v. California, 112 S. Ct. 2572, 2577 (1992) (quoting Patterson v. New York, 432 U.S. 197, 202 (1977))); *see also* cases cited *supra* note 3. Different authors have reached different conclusions about the number of jurisdictions in the United States that, at one time or another, have declared an exception to the rule forbidding propensity evidence for cases involving sexual assault or child molestation and about the length of time such exceptions have been in effect. *Compare* EDWARD J. IMWINKELREID, UNCHARGED MISCONDUCT EVIDENCE §§ 4:11 to 4:18, at 34-52 (1984 & Supp. 1994) (minority of states, mainly in the early and mid-20th Century) *with* Reed, *supra* note 2, at 154-88 (larger number of states; longer period of time). There seems to be agreement, however, that the recent trend has been to reject or jettison such exceptions. *See* Sarah B. Colley, *New Mexico Rejects the "Lewd and Lascivious" Exception to Rule 404(b): State v. Lucero*, 24 N.M. L. REV. 427 (1994); Beale, *supra* note 2; Bryden & Park, *supra* note 2, at 557 n.121; Hutton, *supra* note 2, at 615 n.54, 623; Reed, *supra* note 2, at 188-90 n.340, 218.

14. Estelle v. McGuire, 112 S. Ct. 475, 484 (1991) (O'Connor, J., dissenting).

15. *See, e.g.*, *id.* at 482-83 (majority opinion).

are few instances under the pre-existing rules in which prior sexual assault or child molestation evidence is excluded, except when the probativeness of such evidence is at its lowest and its potential for prejudice is at the highest.

## VI. BEYOND PROPENSITY: COMPULSIVE BEHAVIOR

Although there may be situations in which evidence of sexual misbehavior or of child molestation deserves to be treated differently from evidence of "traits of character," Proposed Rules 413-415 are not limited to those situations. In some instances, evidence of sexual misbehavior or of child molestation may reveal a condition that is not fairly described as a mere "trait of character" and that rises to the level of a "compulsion." In such cases, the probativeness of the evidence may be considerably higher than the probativeness of evidence of mere traits of character, because it then may be known that the defendant almost *always* responds in a particular way in the particular situation at hand—and not simply that the defendant *tends* to or is *disposed* to act in a particular way in some situations. Amending Rule 406 to permit the admission of evidence sufficient to establish compulsive behavior on a par with "habit" or "routine practice" would suffice to admit this somewhat more probative evidence. Rules 413-415 go too far, however, because they admit considerable evidence of sexually assaultive behavior and child molestation that is not of this compulsive variety.[16]

## VII. POOR DRAFTING

All three proposed rules use the following formulation: "Evidence of X is admissible and may be considered for its bearing on any matter to which it is relevant." By separating the concepts of "admissib[ility]" and of "consider[ation]," by making the former concept mandatory, and by qualifying only the latter concept with a "relevance" requirement, the rules as drafted require the "admissib[ility]" of evidence that is *not* relevant and that (by negative implication) may *not* be "considered." It seems unlikely that the drafters intended the awkward procedure that the language requires.

Additionally, on its face, the "evidence . . . is admissible" language trumps all other rules of evidence—thus, apparently, permitting evidence in the form of otherwise inadmissible lay opinions[17] and hearsay[18] and in forms as to which prejudice substantially outweighs probative value.[19] If such evidence is to be

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16. *See generally* sources cited *supra* note 11. For proposed language amending FED. R. EVID. 406, see *infra* text accompanying note 25. For somewhat similar proposals, see Hutton, *supra* note 2, at 623-25; Reed, *supra* note 2, at 220.

17. *Cf.* FED. R. EVID. 701 (generally excluding lay opinion testimony).

18. *Cf.* FED. R. EVID. 802 (generally excluding hearsay evidence).

19. *Cf.* FED. R. EVID. 403 (excluding evidence when prejudice substantially outweighs probative value). *See generally supra* note 3. Subsection (c) of each Proposed Rule, which says that "[t]his rule shall not be construed to limit the admission or consideration of evidence under any other rule," does not solve the problem. Pub. L. No. 103-322, 108 Stat. 1796, 2136-37 (1994). Subsection (c) keeps Rules 413-415 from interfering

admitted, it should only be admitted in "otherwise admissible" forms.

## VIII. RECOMMENDATIONS

If some version of the proposed rules is to be retained, the rules at the least should be amended to limit admissibility to evidence of prior *convictions* for sexual assault or child molestation. This change would avoid some of the worst potential abuses that may arise from the use of unsubstantiated charges as a basis for an inference that a defendant has a propensity to offend and thus that he or she is guilty of the offense at hand. This change also would keep trial judges from having to conduct numerous disruptive, confusing, and time-consuming "mini-trials" on the validity of each allegation of prior misconduct, in the process of trying sexual assault and child molestation cases. Furthermore, this change would avoid various constitutionally important burden of proof and other procedural problems of the sort that split the Supreme Court in *Estelle v. McGuire*.[20] Consider, additionally, the many cases of accused child molesters in which there is reason to fear that at least some of the allegations were the result of memories implanted in children.[21] By limiting "other crimes" evidence to convictions, one would diminish the pressure to find children to testify about incidents extraneous to the one charged and could enhance the reliability of other crimes evidence that *is* admitted. As Rule 609 illustrates, there is a long history of preferring evidence of prior misbehavior in the form of convictions to evidence in the form of mere allegations.[22]

Rule 609 illustrates two additional ameliorative devices that might be used, if rules along the lines of Proposed Rules 413-415 are to be retained. Those devices are (1) to limit the admissibility (in this case, of "propensity" evidence) to situations in which probativeness substantially outweighs or, at least, is greater than prejudice,[23] and (2) to limit admissibility to evidence of reasonably recent misconduct.[24]

For the reasons discussed above, the character rules in the Federal Rules of Evidence should be left intact. Alternatively, some or all of the following actions might be taken:

First, the Federal Rules of Evidence Advisory Committee, the Judicial Conference, the Conference's Evidence Rules Advisory Committee, or some

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with the admissibility of sexual assault/child molestation evidence under some other rule but does not let other rules (*e.g.*, hearsay) constrain the admissibility of sexual assault/child molestation evidence under Rules 413-415. *Id.*

20. 112 S. Ct. 475 (1991) (discussed in text accompanying *supra* notes 14-15).

21. *See* Daniel Goleman, *Studies Reveal Suggestibility of Very Young as Witnesses*, N.Y. TIMES, June 11, 1993, at A1; Seth Mydans, *Brevity Follows Marathon in Retrial*, N.Y. TIMES, July 6, 1990, at A9 (discussing collapse of the McMartin Preschool child-molestation case in Los Angeles, notwithstanding sexual abuse allegations by many children).

22. FED. R. EVID. 609.

23. *See* FED. R. EVID. 609(b) (evidence excluded unless probative value substantially outweighs prejudicial effect); *see also* FED. R. EVID. 609(a)(1) (evidence excluded unless probative value outweighs prejudicial effect to the accused).

24. *See* FED. R. EVID. 609(b) (convictions more than ten years old are presumptively inadmissible).

other appropriate authority might be directed to conduct a comprehensive survey of the character rules and to report back proposals to Congress by a date certain.

Second, Rule 406 might be amended by inserting a phrase of the following sort after the words "Evidence of a habit of a person": "or of a person's compulsion to engage in sexual assault or to molest children."[25]

Third, Rule 404(b) might be amended by inserting a phrase or phrases designed to emphasize the nonpropensity uses of character evidence in sexual assault and child molestation cases.

At the very least: (1) all three newly proposed rules should contain a provision making clear that the admissibility of evidence to which reference is made is subject to the other rules of evidence, apart from Rule 404;[26] and (2) admissible evidence should be limited to evidence of prior convictions occurring within the last ten years and to situations in which probativeness substantially outweighs prejudice.[27]

One way to accomplish these last-mentioned changes (*i.e.*, as a last resort) would be to recast each of the new rules as a new exception to Rule 404(a), with limitations drawn from the language of Rule 609(b). Thus, for example, rather than stating that "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," Rule 413(a) might be reformulated as new subsection (4) of Rule 404(a), as follows:

> (a) Character evidence generally. Evidence of a person's character or trait of character is not admissible for the purposes of proving action in conformity therewith on a particular occasion, except:
>
> . . . .
>
> (4) Conviction of a sexual assault crime. Evidence that the defendant has been convicted of an offense of sexual assault when offered by the prosecution in a criminal case in which the defendant is accused of an offense of sexual assault, provided that no more than ten years has elapsed since the date of the conviction or of the release of the defendant from the confinement imposed for that conviction, whichever is the later date, and provided that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Subsections (b)-(d) of Rule 413 might then be inserted as sub-subsections (A)-(C).[28]

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25. *See supra* part VI.

26. *See supra* part VII.

27. *See supra* notes 20-24 and accompanying text.

28. *See supra* note 2 (discussing substitute for Proposed Rules 413-415 that was suggested by the Judicial Conference Advisory Committee on Evidence Rules, which incorporates some, but not all, of the changes proposed as a "last resort" in this Article).

## IX. CONCLUSION

Neither the process by which Congress developed Proposed Rules 413-415 nor the proposed rules themselves or the policies that may be gleaned from them suggest any convincing rationale for changing the existing treatment of propensity evidence under the Federal Rules of Evidence. Moreover, the particular changes that are proposed are overbroad, potentially unconstitutional, and poorly drafted. A more modest change would include compulsive (but not other prior or subsequent) sexual assault and child molestation within the definition of habitual conduct that the Federal Rules of Evidence currently make admissible to show action in conformity. If the proposed rules are to become effective in something like their current form, then modifications should be made to integrate them more successfully within the structure of the Federal Rules of Evidence and to cure various drafting anomalies.