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Federal Rules of Evidence and the Political Process

David P. Leonard
Loyola Law School

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Victor Gold

THE FEDERAL RULES OF EVIDENCE AND THE POLITICAL PROCESS

*David P. Leonard**

I. Introduction

It has long been an important tenet of American evidence law that character evidence be regulated strictly. The Federal Rules of Evidence have maintained this perspective in virtually all its aspects, perhaps most importantly by making character evidence inadmissible as circumstantial proof of a person's extrajudicial conduct in all but the most narrow of circumstances. There are good reasons for such constraints on the use of character, and nothing in the modern study of psychology would suggest any need—or justification for wholesale rejection of the common law rules in all cases or, for that matter, in a particular subset of trials.

In their first twenty years, most provisions of the Federal Rules of Evidence have been spared any amendment save removal of gender bias. And the rules regulating the use of character evidence, for all its various uses, have been no exception. But recently, Congress has exhibited significant interest in the rules it adopted without much controversy (except with respect to a few provisions) in 1975. Congress apparently now sees in the Federal Rules an opportunity to effectuate substantive political and social policy.

In this Essay, I examine this development in light of Congress's boldest move to date, the proposed enactment of three rules apparently designed to open wide the door for character evidence in certain classes of criminal and civil cases dealing with sexual assault and child molestation. Specifically, I explain that because the political process has always played a role in shaping the Federal Rules, the Rules have never been entirely neutral toward the substantive policies of the law. Even so, for the most part this political influence has not changed the evidence rules fundamentally from their common law shape. With the new proposed rules, however, Congress has taken a far more dramatic leap toward politicizing

* Professor of Law and William M. Rains Fellow, Loyola Law School, Los Angeles. B.A., 1974, University of California at San Diego; J.D., 1977, University of California at Los Angeles. The author thanks Victor Gold, who provided helpful insights.

the law of evidence. In the process, Congress has reversed long-standing evidentiary policy, radically changed the shape of the rules governing character evidence, and challenged one of the key assumptions underlying the Federal Rules: that the evidence rules, for the most part, should apply the same way in different kinds of cases and treat different types of litigants similarly. These changes do not bode well for the future stability of the Federal Rules of Evidence.

Part II briefly describes the regulation of character evidence at common law and, until now, under the Federal Rules.[1] Part III shows that the political process has indeed affected the shape of the Federal Rules from the beginning, but that the rules adopted have not departed fundamentally from the common law.[2] Part IV explains how the proposed rules would alter existing rules, and examines both the profound nature of these specific changes and the degree to which the law of evidence as a whole might be affected.[3]

II. The Regulation of Character Evidence at Common Law and Under the Federal Rules

To understand how character evidence is regulated, it is necessary first to describe the most common means by which character might[4] be proven (the types of character evidence), and the most common uses to which character evidence might be put.

There are three primary ways in which a person's character may be proven. First, one can offer testimony as to a person's community reputation for a relevant character trait. While generally thought to be a weak form of proof,[5] it was also the most commonly allowable form of proof at common law.[6] Similarly, under the Federal Rules, reputation continues to be one of the favored methods of proving character.[7] The second, and somewhat more probative, way to prove character is by offering the testimony of a person familiar enough with the individual at issue to have a poten-

1. *See infra* notes 4-37 and accompanying text.

2. *See infra* notes 38-139 and accompanying text.

3. *See infra* notes 140-164 and accompanying text.

4. The word "might" is used here so as not to indicate that the rules *allow* this form of character evidence to be offered in all or any particular kinds of cases. What will be described in the paragraph to follow is merely the possible kinds of proof, not their permissibility.

5. Wigmore called reputation "the secondhand, irresponsible product of multplied guesses and gossip." 7 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1986, at 244 (James H. Chadbourn rev. 1978).

6. *Id.* §§ 1983-1986.

7. FED. R. EVID. 405(a).

tially valid opinion of an aspect of that person's character. Opinion evidence was greatly restricted at common law, but under the Federal Rules is admissible whenever reputation evidence is admissible.[8] The most restricted means of proving character, both at common law and under the Federal Rules, is evidence of specific instances of a person's conduct that tend circumstantially to reveal that person's character. For example, evidence that a person had engaged in fistfights with other fans at several football games would be thought to reveal a somewhat violent character.

There are several purposes for which character evidence might be used. Three are mentioned most commonly. First, character might itself be an essential element of a criminal charge, a civil claim or a defense to either.[9] Second, character evidence might be used as circumstantial proof of the truthful or untruthful character of a witness, thus supporting or casting doubt on the credibility of the witness's testimony.[10] Finally, character evidence might be used as circumstantial proof of the extrajudicial conduct of a person, thus tending to demonstrate how that person might or might not have acted on a particular occasion relevant to the action.[11]

The admissibility of character evidence for its first potential use, commonly referred to as "character in issue," is not controversial. Indeed, if the substantive law makes the character of a party a matter that must be established in order to prevail in a claim or defense, principles of evidence law *could not* exclude it; to do so would be to nullify the substantive rule by making it impossible to effectuate.[12] Thus, when character is "in issue," evidence rules admit character evidence essentially without limitation.[13]

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8. FED. R. EVID. 405(a) (providing that whenever character evidence may be offered, character may be proven by reputation or opinion evidence).

9. *See, e.g.*, Cleghorn v. New York Central & H. River Ry. Co., 56 N.Y. 44, 46-48 (1874) (railroad switchman's character for drunkenness, known to company, was source of liability and perhaps of punitive damages).

10. *See, e.g.*, United States v. Owens, 21 M.J. 117, 123 (C.M.A. 1985) (criminal defendant's prior acts of dishonesty in failing to disclose certain damaging information on warrant officer application were admissible to impeach).

11. *See, e.g.*, Seabrook v. State, 348 So. 2d 663, 664 (Fla. Dist. Ct. App. 1977) (criminal defendant charged with aggravated assault should have been permitted to offer evidence of his community reputation for "peacefulness and tranquility").

12. For a discussion of the relationship between rules of substantive law and evidentiary rules, see David P. Leonard, *Rules of Evidence and Substantive Policy*, 25 LOY. L.A. L. REV. 797 (1992).

13. The result is reached by implication from FED. R. EVID. 405. Part (a) of the rule provides that any time character evidence may be offered, character may be proved using reputation or opinion evidence. Part (b) provides that when character is "an essential element of a charge, claim or defense," character may be proven using

It is the circumstantial uses of character evidence that have been most tightly regulated. When character evidence is offered to establish the credibility (or lack of credibility) of a witness, the rules are narrow. Under the Federal Rules, for example, opinion and reputation evidence are admissible only when the evidence refers to character for "truthfulness or untruthfulness," and evidence of truthfulness is admissible only if the witness's character for truthfulness has been attacked.[14] Furthermore, evidence of specific instances of conduct bearing on the credibility of a witness is divided into two types of situations: those in which the evidence concerns the underlying conduct itself;[15] and those in which the evidence concerns a criminal conviction.[16] In both instances, admissibility is carefully regulated.[17]

Fairly early in the common law development of evidentiary rules, it was apparently common to admit evidence of character to prove conduct.[18] Eventually, however, this rule was overturned, and courts generally excluded evidence of character when offered for this purpose.[19] American courts have certainly excluded such evidence for over a century, recognizing only very narrow exceptions.

In 1948, the Supreme Court attempted to explain the complex common law rules governing the use of character evidence to

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specific instances of conduct. Taken together, these provisions would make character provable by any of the three common methods whenever character is "in issue." *See* 1 STEPHEN A. SALTZBURG & MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL 302 (5th ed. 1990).

14. FED. R. EVID. 608(a).

15. FED. R. EVID. 608(b).

16. FED. R. EVID. 609.

17. Specific instances of conduct to attack or support the credibility of a witness may not be proven by extrinsic evidence. The court has discretion to permit, on cross-examination, inquiry into specific instances of conduct that are probative of the witness's character for truthfulness or untruthfulness or that of another witness as to whose character the present witness has testified. FED. R. EVID. 608(b). The admissibility of criminal convictions to impeach depends on the complex interrelation of several factors, including the type of witness (a criminal defendant is treated differently than all other witnesses), and the type and age of the impeaching crime. For an analysis of the delicate balance Congress has struck in regulating the admissibility of a witness's prior convictions to impeach, see Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rules 609*, 15 CARDOZO L. REV. 2295 (1994).

18. Wigmore wrote, "Historically, the use of bad general character appears as originally allowable,—fitting, as it does, a more primitive notion of human nature. In England, it was used without question to the latter part of the 1700s. . . ." 3A WIGMORE, *supra* note 5, § 923, at 728 (1970).

19. *See* 1 MCCORMICK ON EVIDENCE § 188 (John W. Strong ed., 4th ed. 1992) (describing general rule of exclusion).

prove a criminal defendant's *out of court* conduct[20] in *Michelson v. United States*.[21] To simplify greatly, the common law did not allow the prosecution to offer character evidence in its case-in-chief to prove that the defendant was the sort of person who would have committed the crime.[22] The defendant, however, was permitted to offer character evidence on her own behalf in the form of reputation to prove her innocence of the crime,[23] and the prosecution was permitted to "rebut" such evidence either by calling its own witnesses to testify concerning the defendant's character using reputation evidence, or by cross-examining defendant's character witness by inquiring whether the witness had ever heard of specified instances in which the defendant's behavior was inconsistent with the witness's report of the defendant's reputation.[24] Even under these limited circumstances, the trial court retained broad discretion to limit the number of character witnesses and limit their cross-examination.[25]

The drafters of the Federal Rules adopted this arguably flawed system virtually wholesale, simply adding that where the common law restricted a party to the use of reputation evidence, the party could now employ both reputation and opinion evidence.[26]

While the primary exception to the character ban thus dealt with the character of the defendant, both at common law and under the Federal Rules, a party was sometimes allowed to prove the alleged victim's character.[27] Along similar lines, many states at common

20. Such use of character evidence was (and is) almost entirely forbidden in civil cases. *See id.* § 189.

21. 335 U.S. 469 (1948).

22. *Id.* at 475-76.

23. *Id.* at 476.

24. *Id.* at 479. For example, the prosecution might ask a character witness who has testified to the defendant's peaceable nature whether the witness had ever heard that the defendant had been involved in a fight in a bar.

25. *Michelson*, 335 U.S. at 480. In addition, if the prosecution wishes to cross-examine a character witness by asking if she had ever heard of a particular instance of conduct, it must demonstrate to the court's satisfaction that the event occurred. *Id.* at 481 n.18. Finally, the common law practice was to instruct the jury about the limited admissibility of the evidence. *Id.* at 484-85.

26. FED. R. EVID. 404(a)(1), 405(a). There is a fairly strong indication that by allowing opinion evidence of character, the drafters of the Federal Rules were actually returning to a practice allowed early in the common law development of evidence rules. *See* 7 WIGMORE, *supra* note 5 §§ 1985-86; FED. R. EVID. 405 advisory committee's note.

27. The common law, for example, generally allowed a homicide defendant who claimed self-defense to offer evidence of the victim's violent character. *See* 1A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 63, at 1350 (Peter Tillers rev.

law permitted the defendant to offer evidence of an alleged rape victim's unchaste character.[28]

Why did the common law so strictly regulate the use of character evidence as circumstantial proof of out-of-court conduct? In *Michelson*,[29] Justice Jackson summed up the reason in his opinion for the Court:

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, but it simply closes the whole matter of character, disposition and reputation on the prosecutions' case-in-chief. . . . The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defendant against a particular charge. 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.[30]

Somewhat more completely, Wigmore's most recent reviser states five basic rationales for the prohibition: (1) such evidence has little probative value; (2) it "diverts the jury's attention from the merits of the case by inducing it to punish or reward a party for being good or bad in general;" (3) adverse character evidence saddles one involved in legal proceedings with disabilities because of previous misconduct; (4) the use of such evidence "violates a social commitment to the thesis that each person remains mentally free and autonomous at every point in his life;" and (5) it is a senseless product of history.[31]

1983). Under the Federal Rules, the defendant in a criminal case is permitted to offer evidence of a pertinent trait of the alleged victim's character, and the prosecution may rebut that evidence. FED. R. EVID. 404(a)(2). (The exception is not limited to homicide cases.) And the prosecution is permitted to offer evidence of an alleged homicide victim's character for peacefulness to rebut evidence that the victim was the first aggressor. *Id.*

28. *See* 1A WIGMORE, *supra* note 27, § 62. This matter is discussed more fully *infra* note 116 and accompanying text.

29. Michelson v. United States, 335 U.S. 469 (1948).

30. *Id.* at 475-76 (footnotes and citations omitted).

31. 1A WIGMORE, *supra* note 27, § 54.1, at 1150-51. Tillers' reference to the autonomy thesis probably refers to the philosophical position that an individual's nature is not immutable—that people can change their fundamental nature—and that it is morally wrong to assume that they have not.

This general position about the restrictions on character to prove conduct was and remains most influential. The Advisory Committee cited *Michelson* as support for its decision to adopt virtually all of the common law rules governing this use of character.[32] The same can be found in other places such as the California Law Revision Commission's commentary on the California Evidence Code.[33]

The rationale for the position restricting this use of character evidence actually seems to have two prongs. The first prong concerns the potential for unfair prejudice. Simply put, so-called character "traits" are extremely weak predictors of conduct. This has long been known in the psychological world, which began to reject "trait theory" many decades ago.[34] Thus, character evidence—even specific instances of conduct unless they were nearly identical to the one at issue in the case—is of very low probative value. The problem, however, is that, psychological learning to the contrary notwithstanding, character evidence carries a very high *intuitive* value.[35] This high intuitive quality raises the distinct possibility that the jury will greatly overvalue character evidence as a predictor of conduct, and make an inaccurate assessment of the facts. As a result, character evidence risks destroying the truth-determina-

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32. FED. R. EVID. 405 advisory committee's note.

33. In its commentary to CAL. EVID. CODE § 1101 (West 1966), the Commission wrote that in civil cases, the rule excludes evidence of character to prove conduct because

> *First*, character evidence is of slight probative value and may be very prejudicial. *Second*, character evidence tends to distract the trier of fact from the main question of what actually happened on the particular occasion and permits the trier of fact to reward the good man and to punish the bad man because of their respective characters. *Third*, introduction of character evidence may result in confusion of issues and require extended collateral inquiry.

CAL. EVID. CODE § 1101 Law Revision Comm'n comment.

34. The psychological literature concerning character is surveyed in Susan M. Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 511-23 (1991); David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 26-29 (1987). Both works discuss the decline of trait theory and the modern acceptance of a blend of "situationism" (which permits predictions of human to conduct to be based only on evidence of behavior in prior situations identical in nearly all particulars to the one at issue) and the existence of generalized "traits," with greatest emphasis on the former.

35. *See generally* Leonard, *supra* note 34 (addressing the intuitive value of character evidence, and how that might affect our decision concerning the proper rules for its admission).

tion function of the trial, a very high cost for evidence of low probative value.[36]

The second prong of the rationale begins with the deeply ingrained (nearly constitutional) notion that a person should be tried based on what she did in a particular situation rather than for her general character. When a jury hears evidence of the bad character of a person, there is always a legitimate concern that the jury will render harsh decisions against that person not because the person is responsible in the situation at issue, but simply because she is bad. This concern is particularly relevant when the character evidence consists of prior bad acts, some of which may even have gone unpunished.

For both of these reasons, the law has chosen to err, if at all, on the side of excluding character, except in narrow circumstances, when offered as circumstantial evidence of extrajudicial behavior. From the common law through the codification movement, there has been little change in the character evidence rules, and the changes that have occurred have consisted of mere tinkering.[37]

III. The Dual Quality of the Federal Rules: Conserving Common Law and Effectuating Political Policy

A. The Intent of the Drafters To Preserve the Common Law of Evidence

The Federal Rules of Evidence hardly represented a radical departure from the general form and content of the common law as it had evolved by the late 1960s. On the contrary, they are the product of a fundamentally conservative codification effort. The Rules resulted from the Advisory Committee's desire to codify existing practice and to achieve uniformity where practice diverged among the federal courts.[38] Congress's involvement in the process did not

36. Given its low probative value, character evidence also tends to lengthen and overcomplicate the trial, a result that creates a risk of confusing the jury and, once again, contributing to the rendering of an inaccurate verdict.

37. The broadening of proof to include opinion evidence where the common law allowed only reputation is of little practical significance.

38. For a history of the drafting of the Federal Rules of Evidence, see 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5006 (1977). Particularly telling was the comment of Albert Jenner, Chair of the Advisory Committee, that the Committee was not "inclined to give the family jewels away or tip or rock the laws of evidence." HEARINGS ON PROPOSED RULES OF EVIDENCE, BEFORE SPECIAL SUBCOMMITTEE ON THE REFORM OF THE FEDERAL CRIMINAL LAWS OF THE HOUSE COMM. ON THE JUDICIARY, 93D CONG., 1st Sess., ser. 2, (1973), at 79.

change this general approach to codification. As one treatise states:

> What was accomplished by the Congressional intervention? In terms of the substance of the rules as finally enacted, the answer is "not much." . . . For the most part, Congress accepted the basic assumptions of the Advisory Committee and the notion that the primary purpose of the Rules was to achieve uniformity, not to reform the law of evidence.[39]

In most respects, the drafters of the Federal Rules simply adopted the common law rules. The basic structure of the Federal Rules reflects that of the common law. The hearsay rule, for example, was left essentially intact, with only minor (and largely technical) adjustments in its definition,[40] and only slight expansion of its exceptions.[41] And although the Rules do reflect a faith in the trial courts by granting rather broad "discretion" with respect to many provisions,[42] the Rules merely expanded a power that already existed at common law.[43]

The conservatism of the drafters is most strikingly reflected in situations in which the research of other disciplines (principally psychology) strongly suggests that the assumptions supporting the

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39. WRIGHT & GRAHAM, *supra* note 38, at 108 (footnotes omitted).

40. FED. R. EVID. 801(d) (excepting from the definition of hearsay rather than enacting as exceptions admissions and certain prior statements). *See* Tome v. United States, No. 93-6892, 1995 U.S. LEXIS 469 (Jan. 10, 1995) (holding that a prior consistent statement must precede a motive to falsify).

41. FED. R. EVID. 803-804.

42. For discussion of the flexibility of the Federal Rules and the power this gives to trial courts, see David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. CAL. L. REV. 937 (1990); Thomas R. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413 (1989); Jon R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U. L. REV. 1097 (1984).

43. It was well recognized at common law, for example, that a trial court had authority to exclude relevant evidence when the probative value of the evidence was substantially outweighed by several dangers, including that of unfair prejudice. *See, e.g.*, Rogers v. Rogers, 114 A.2d 270, 270 (1921) ("The test therefore to determine the admissibility of relevant facts capable of exciting prejudice is to inquire whether the prejudice they will excite will be so great as to overbalance any assistance they may be to the trier"). In 1954, McCormick wrote:

> [R]elevance is not always enough. There may remain the question, is its value worth what it costs. There are several counterbalancing factors which may move the court to exclude relevant circumstantial evidence if they outweigh its probative value.

CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 152, at 319 (1954). *See also* M.C. Slough, *Relevancy Unraveled*, 5 U. KAN. L. REV. 1, 12-15 (1956).

common law rules were questionable, at best, and simply wrong, at worst. Two examples amply demonstrate this point.

First, the common law hearsay exception for "dying declarations" was based on the assumption that such statements are likely sincere because a person who believes she is dying generally would not lie.[44] But such an assumption does not always hold true.[45] Among other things, the assumption generalizes among cultures.[46] Further, even in cultures in which the assumption accurately describes the beliefs and behavior of many people, it does not reflect the beliefs of all people. It is thus very difficult, and most risky, to generalize about the heightened sincerity of dying declarations. Though the variations among people within and between cultures were well known by the time the Federal Rules were drafted, the

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44. Probably the best known statement of this view was made in an eighteenth century English case:

> [T]he general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice.

Rex v. Woodcock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (K.B. 1789). Wigmore saw three components to the rationale:

> (1) The declarant, being at the point of death, "must lose the use of all deceit" — in Shakespeare's phrase. There is no longer any temporal self-serving purpose to be furthered. (2) If a belief exists in a punishment soon to be inflicted by a Higher Power upon human ill-doing, the fear of this punishment will outweigh any possible motive for deception, and will even counterbalance the inclination to gratify a possible spirit of revenge. (3) Even without such a belief, there is a natural and instinctive awe at the approach of an unknown future—a physical revulsion common to all men, irresistible, and independent of theological belief.

5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1443, at 302 (James H. Chadbourn rev. 1974).

45. Wigmore, for example, recognized that "the declarant may exhibit such strong feelings of *hatred* or *revenge* that the effect of all the . . . influences appears to be lacking. If he is in such a frame of mind, the supposed guarantee of trustworthiness fails. . . ." *Id.*

46. To the extent the rationale relies on religious or cultural beliefs, it is also subject to significant variation among and within cultures. One author described a common practice in the Punjab region of India in which "a person mortally wounded frequently makes a statement bringing all his hereditary enemies on to the scene at the time of his receiving his wound, thus using his last opportunity to do them an injury". SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND, Vol. 1, at 448 (1883). The author also quotes a remark made by a native of Madras: "Such evidence ought never to be admitted in any case. What motive for telling the truth can any man possibly have when he is at the point of death?" *Id.*, at 449.

Rules' did not make any effort to modify the foundation facts so as to separate those situations in which the evidence carries additional credibility from those in which it does not. On the contrary, they flagged the issue, only to ignore it.[47]

The second example is the "excited utterance" or "spontaneous exclamation" exception to the hearsay rule.[48] That exception rests primarily on two assumptions. First, it is assumed that when one observes or takes part in a "startling event," one's awareness is heightened, enhancing the accuracy of the observation.[49] Second, and more importantly, it is assumed that a startling event "temporarily stills the capacity of reflection and produces utterances free of conscious fabrication."[50] But psychologists showed decades ago that neither assumption is justified; exciting events actually warp our perceptions, and some people are capable of fabricating a story to suit their purposes in amazingly short periods of time.[51] As with dying declarations, the Advisory Committee was well aware of the data undercutting the validity of the assumptions underlying the excited utterances exception,[52] but the Committee chose to ignore the evidence and proposed the rule largely as it had come to be recognized at common law.

In regard to other rules, the drafters were either unaware of substantial research contradicting the common law rules or knew of such research but chose not even to cite it. The entire set of rules governing evidence of character to prove extrajudicial conduct in conformity is probably the best example, and is particularly pertinent to the problem at issue in this Essay. Those rules are based entirely on the assumptions of so-called "trait theory," which posits that a person's moral behavior is the product of discrete "character traits" that operate consistently across situations. It might be assumed, for example, that an individual possesses a character for

47. The Advisory Committee wrote: "While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present." FED. R. EVID. 804(b)(2) advisory committee's note.

48. FED. R. EVID. 803(2).

49. *See* Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence: Spontaneous Exclamations*, 28 COLUM. L. REV. 432, 437 (1928).

50. FED. R. EVID. 803(2) advisory committee's note. *See also* 6 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1747, at 195 (James H. Chadbourn rev. 1976).

51. Hutchins & Slesinger, *supra* note 49, at 436-38.

52. The Advisory Committee wrote that "the theory of [the excited utterance exception] has been criticized on the ground that excitement impairs accuracy of observation as well as eliminating conscious fabrication." FED. R. EVID. 803(2) advisory committee's note.

peacefulness, and that such trait would make it unlikely that she would react violently in any particular situation.[53] The common law character evidence rules are based squarely on this theory; in those situations in which character evidence would be admissible to prove conduct in conformity, the evidence would be in the form of "traits." And when it could be offered, the evidence could not generally take the form of specific instances of conduct to exemplify the trait.

Trait theory is intuitively plausible,[54] but by the end of the first half of the century it was already quite clear that the theory was simply wrong. Study after study demonstrated that the concept of immutable character "traits" is largely illusory—that predictions of behavior based on generalized "traits" are highly inaccurate.[55] The modern view is that a far better way to predict a person's moral behavior in a particular situation is to know how the person acted in other virtually identical situations,[56] and that the very best predictor would combine a healthy dose of information about past situations with a bit of information about generalized character "traits."[57] Thus, to know whether a particular person likely was the aggressor in a barroom fight, it would be useful primarily to know how she reacted in similar threatening situations, and also to have an idea of her general disposition toward violence.

This information about the flaws in trait theory was readily available to the members of the Advisory Committee when they adopted the Rules,[58] but the Committee either did not bother to locate it or knew of it but chose not to cite it. Instead, the Advisory Committee proposed rules governing character evidence as

53. *See* GORDON ALLPORT, PERSONALITY — A PSYCHOLOGICAL INTERPRETATION (1937). Allport stated: "Traits are not creations in the mind of the observer, nor are they verbal fictions; they are here accepted as biophysical facts, actual psychophysical dispositions. . . ." *Id.* at 339.

54. The present author has explored the possible significance of the intuitive value of character trait evidence. *See* Leonard, *supra* note 34.

55. *See* Leonard, *supra* note 34, at 26-31.

56. This is a short-hand description of the theory known as "situationism." *See* Bowers, *Situationism in Psychology: An Analysis and Critique*, 80 PSYCHOL. REV. 397 (1973). Perhaps the best known proponent of situationism is Mischel, who used the term "social behavior theory." WALTER MISCHEL, PERSONALITY AND ASSESSMENT (1968).

57. *See* Davies, *supra* note 34, at 518-19. The author writes: "The trait-versus-situation controversy in the field of personality and social psychology has produced widespread agreement that behavior is simultaneously a function of disposition and situation, and their mutual interaction." (footnote omitted.)

58. Much of the psychological research had been conducted before the Federal Rules were drafted, and certainly before they were enacted.

proof of extrajudicial conduct that were virtually identical to those at common law, and the Committee's proposals were enacted without substantive change.[59]

B. Politics and the Federal Rules

To say that the Federal Rules did not depart significantly from the common law is not to say that the Rules are "neutral" or do not reflect the political process. To the contrary, a number of the rules were clearly the product of political forces. Several examples will demonstrate this point.

1. Admissibility of opinions on "ultimate issues"

The 1984 amendment to Rule 704, the rule, which otherwise allows an opinion witness to testify in a way that "embraces an ultimate issue to be decided by the trier of fact, demonstrates the impact on political debate on the Federal Rules."[60] In 1984, a new subdivision was added to Rule 704 providing:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.[61]

This amendment did not materialize out of thin air. It was a direct response to the public outrage over the insanity defense, a reaction that emerged following the jury verdict in the trial of John Hinkley, whose televised 1981 attempted assassination of President Reagan left Reagan seriously injured and permanently disabled White House Press Secretary James Brady.[62] The jury found Hinkley not guilty by reason of insanity in a trial featuring the typical battle of experts on the question of his mental state at the time of the shooting. The amendment was part of the Insanity Reform Defense Act

59. FED. R. EVID. 404(a), 405(a).

60. FED. R. EVID. 704(b), added by P.L. 98-473, Oct. 12, 1984.

61. *Id.*

62. *See* David Cohen, Note, *Punishing the Insane: Restriction of Expert Psychiatric Testimony by Federal Rule of Evidence 704(b)*, 40 U. FLA. L. REV. 541, 542 & n.7 (1988) (referring to an ABC News poll which found that 83 percent of the public believed Hinkley's acquittal to have been unjust). For additional discussion of the effects of the Hinkley case on the insanity defense, see Jonathan B. Sallet, *After Hinkley: the Insanity Defense Reexamined*, 94 YALE L.J. 1545 (1985) (reviewing LINCOLN CAPLAN, THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINKLEY, JR. (1984)).

of 1984,[63] which principally declared the defense of insanity to be an affirmative defense and shifted the burden of proof on the issue to the defendant. The report of the Senate Judiciary Committee does not explicitly refer to the Hinkley case or to the public's reaction to the verdict. It does, however, refer to the "confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact and it is abundantly clear that the fallout from the Hinkley case was the impetus for the amendment."[64]

Rule 704(b) thus represents a situation in which the political process led to amendment of the Federal Rules. But while the amendment might reflect questionable judgment,[65] it can hardly be considered revolutionary. The common law had generally excluded opinion evidence on an ultimate issue.[66] Further, though the Advisory Committee noted a "trend to abandon the rule completely[67] and drafted a rule liberalizing the common law, some uncertainty remained about the scope of permissible opinions under the original version of Rule 704.[68]

Moreover, Rule 704(b) makes no fundamental change in the basic structure of the common law of evidence or of the Federal Rules. The amendment represents an incremental reversal of the liberalization represented by the original rule rather than a sweeping change in the way a particular class of evidence is treated or in the structure of the trial. Indeed, Rule 704(b) does not affect the right of a psychiatric expert to offer an opinion concerning the mental state of the defendant in a criminal case; the expert could still testify, for example, that the defendant suffered from a particular mental disease. What is excluded is only the legal conclusion that might follow from such a diagnosis—that, for example, the defendant did not possess the requisite mental state for the crime at

63. Title II § 402(a), Pub. L. No. 98-473, 98 Stat. 2057 (1984), *codified at* 18 U.S.C. § 17 (1988).

64. S. REP. NO. 225, 98th Cong., 1st Sess. 231 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3412.

65. *See* Cohen, *supra* note 62, at 560-61 (proposing repeal of Rule 704(b)).

66. *See, e.g.*, United States v. Spaulding, 293 U.S. 498 (1935). The common law rule is discussed in 1 MCCORMICK, *supra* note 19, § 12, at 47-48.

67. FED. R. EVID. 704 advisory committee's note (citing illustrative cases).

68. What is meant by opinions that "embrace[ ] an ultimate issue to be decided by the trier of fact" is not altogether clear. *See, e.g.*, United States v. Scop, 846 F.2d 135 (2d Cir. 1988) (holding that the trial court should have excluded a witness's opinion that was framed in terms of the relevant statutory and regulatory language governing the defendants' behavior).

issue.[69] This is not much of a departure, if any, from more traditional practice.[70]

2. *The rule excluding certain plea bargaining evidence*

A second example of the involvement of political positions in the Federal Rules of Evidence can be found in Rule 410, which governs the admission of evidence of withdrawn guilty pleas, pleas of nolo contendere, and certain statements made in connection with the entry of such pleas and in the course of plea bargaining.[71] Unlike most of the Federal Rules, this rule was debated extensively in Congress, went through many drafts, and was in fact enacted in one form but revised before that version ever became effective. In the case of the plea bargaining rule, moreover, the political process involved not only the courts and Congress, but also the Executive branch and some other interest groups. A good part of that debate centered on the question of which factual statements made by the defendant in the course of plea bargaining negotiations should be excluded from the rule.

The complex history of Rule 410 can only be summarized here.[72] In 1969, the Advisory Committee circulated its first

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69. The Senate Report states that "expert psychiatric testimony would be limited to presenting and explaining their diagnoses, such as whether the defendant had a severe mental disease or defect and what the characteristics of such a disease or defect, if any, may have been." S. REP. NO. 225, 98th Cong., 1st Sess. 231 (1983). As the authors of the current edition of MCCORMICK write:

> Presumably the medical expert is able to answer the questions, "Was the accused suffering from a mental disease or defect?"; "Explain the characteristics of the mental disease and defect."; and "Was his act the product of that disease or defect?" However, the expert may not answer the question "Was the accused able to appreciate the nature and quality of his acts", or "Was the accused able to appreciate the wrongfulness of his acts."

1 MCCORMICK, *supra* note 19, § 12, at 52.

70. The MCCORMICK authors write:

> A court which does not ban opinion on the ultimate issue as such may nevertheless condemn a question phrased in terms of a legal criterion not adequately defined by the questioner so as to be correctly understood by laymen, the question being interpreted by the court as calling for a legal opinion.

Id. at 50. The authors do not believe such questions raise significant problems, however. As they write, "In a jurisdiction where there is no general rule against opinions on the ultimate issue, it seems that a request by the adversary that the questioner define his terms should be the only recourse." *Id.* at 51.

71. FED. R. EVID. 410.

72. For detailed review of the legislative history of the Federal Rule, see 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 142 (2d ed. 1994); 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 410[01] (1986); 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL

draft.[73] Following objections from the antitrust bar, a second Advisory Committee version broadening the rule's exclusionary provisions was published in 1971, before the rule was submitted to Congress.[74] The revised proposed rule expanded exclusion to statements made in connection with pleas or offers, and also made the evidence inadmissible in any civil or criminal proceeding, without limiting exclusion to situations in which the evidence is offered against the person who made the plea or offer.[75] The United States Department of Justice objected strenuously to this revision, arguing primarily that statements made freely and voluntarily in open court should not be excluded.[76] The Advisory Committee again revised its draft, limiting exclusion to situations in which the evidence is offered in a proceeding against the person who made the plea or offer, but still excluding statements made in connection with pleas or offers.[77] Though the Justice Department continued to object to certain aspects of the rule, the Advisory Committee declined to alter its proposal, and the rule was promulgated by the Supreme Court in this form.[78]

Congress debated the rule at length. Much of that debate took place against the backdrop of certain proposed changes in the Federal Rules of Criminal Procedure, promulgated by the Supreme Court. One proposal concerned changes in Rule 11 to deal with plea bargaining.[79] Part of the proposal would have added to the rule the same language that the Advisory Committee had proposed for Federal Rule of Evidence 410.[80] The Senate, however, favored a version of the rule which would permit some plea bargaining statements to be offered to impeach the individual making such statements.[81] A conference committee decided to defer resolution

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PRACTICE AND PROCEDURE: EVIDENCE § 5341 (1980). Some commentators note that "[t]he statutory history behind [the rule] is a murky fog which may well obscure more than it illuminates." 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 142, at 120 (2d ed. 1994).

73. Proposed FED. R. EVID. 4-10, 46 F.R.D. 161, 241-42 (1969).

74. *See* 2 WEINSTEIN & BERGER, *supra* note 72, ¶ 410[01], at 410-26-27 & nn.7-8.

75. *Id.*

76. *See* Letter From Richard G. Kleindienst, Deputy Attorney General to the Honorable Albert B. Maris (Aug. 9, 1971), *reprinted in* 117 CONG. REC. 33,648, 33,651.

77. 2 PLI FEDERAL CIVIL PRACTICE, at 27 (4th ed. 1972).

78. Proposed FED. R. EVID. 410, 56 F.R.D. 183, 228-29 (1972).

79. Proposed FED. R. CRIM. PROC. 11(e)(6), 62 F.R.D. 271, 276-77 (1974).

80. H.R. REP. NO. 93-650, 93rd Cong., 1st Sess. (1974).

81. The Senate version included the following sentence:

> This rule shall not apply to the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing

of the differences until the proposed amendments to the criminal rules had been considered. The committee then recommended passage of the Senate version of the evidence rule, but also recommended a provision delaying the effective date of the rule so that its language would be superseded by any inconsistent amendment to the criminal rules that might later be enacted.[82] This decision, in effect, delayed final consideration of the issues raised by the competing versions passed by the House and Senate. Both chambers then adopted the conference version of the rule. As it happened, subsequent developments prevented this rule from ever taking effect.

Several months later, the House of Representatives passed an amended version of the competing criminal rule. Despite objections by the Justice Department, this rule would not have permitted impeachment of criminal defendants with statements they made during plea bargaining. The Senate rejected this rule, instead passing a version of the criminal rule much like the interpretation of the proposed evidence rule it had previously passed. For impeachment purposes (or in a subsequent prosecution for perjury or false statement), this rule would permit introduction of voluntary and reliable statements (made in court on the record) in connection with pleas. The House refused to accede to the Senate version, and the conference committee restored most of the version passed by the House. The primary effect of this change was to disallow use of plea bargaining statements for impeachment purposes. This version of the criminal rules passed both chambers in July, 1975, and became effective almost immediately. At the end of 1975, the evidence rule was conformed to this language and went into effect.[83]

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pleas or offers where offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement.

S. REP. NO. 93-1227, 93d Cong., 2d Sess. (1974).

82. H.R. REP. NO. 93-1597, 93rd Cong. 2d Sess. (1974).

83. As originally enacted, FED. R. EVID. 410, which is identical to FED. R. CRIM. PROC. 11(e)(6), read in pertinent part as follows:

> Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for per-

This did not end the saga of Rule 410. Not long after Evidence Rule 410 and Criminal Procedure Rule 11(e)(6) were enacted, there was some concern that the rules could be interpreted so as to exclude admissions made at early stages of a criminal investigation. Although the drafters of the rules did not intend such a result,[84] which would have made inadmissible a large number of admissions in the criminal context, it was thought necessary to amend both rules to delineate the scope of the exclusionary rule more clearly. In 1978, the Rules of Criminal Procedure Advisory Committee made such a proposal in a preliminary draft of an amendment to Federal Rule of Criminal Procedure 11(e)(6), along with a recommendation that Federal Rule of Evidence 410 be changed to contain identical language, except for minor technical differences. After some revision, the proposed amendments were transmitted to the Supreme Court and became effective in December, 1980.[85]

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jury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

84. "[I]t is apparent that none of the [drafters] had any such intention." 2 WEINSTEIN & BERGER, *supra* note 72, ¶ 410[08], at 410-54. The authors give the following example:

> The police apprehend a suspect bank robber and one of them says, after giving the suspect his *Miranda* warnings: "Why don't you come clean, since we have the goods on you anyway. Your cooperation will be made known to the prosecutor and judge and you could well get a lesser plea or sentence." The suspect then talks. Is this a "statement . . . relevant to any . . . pleas or offers"? The answer should be no. The rule was not designed to apply to this early investigative stage. At this stage, the normal rules to determine whether the admissions were made voluntarily and without trickery should apply.

Id. at 410-55.

85. FED. R. EVID. 410 now provides:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussion:
>
> (1) a plea of guilty which was later withdrawn;
>
> (2) a plea of nolo contendere;
>
> (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or
>
> (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plead of guilty or which result in a plea of guilty later withdrawn.
>
> However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

This language clarifies the reach of the exclusionary principle in several ways. Most importantly, it limits exclusion of plea bargaining discussions to those made to "an attorney for the prosecuting authority."[86] This amendment was designed to assure that only statements made to a prosecuting authority will qualify for exclusion.

The complex drafting history of Rule 410 thus reveals substantial debate over the admissibility of plea bargaining statements. Though the Senate wished to make such statements admissible for impeachment purposes, the House view disallowing such use, ultimately prevailed.[87] At the same time, however, not all statements that might be deemed relevant to an offer to plead guilty (or nolo contendere) qualify for exclusion. The 1980 amendment was intended to make clear that the exclusionary rule was to have limited application.

The debate over the plea bargaining rule clearly had political implications. Had the rule broadly excluded factual statements made in the course of plea bargaining, police and prosecutors would have been denied what they consider to be highly probative, and often essential evidence. A law-and-order minded Congress and Justice Department found the necessary support to impose limits on the exclusionary provision, and though the ultimate result was not all that the law enforcement community wanted, it did represent a reasonable compromise.

But the political process did not create a plea bargaining rule substantially different from the common law rule. While very early cases were in disarray as to the admissibility of withdrawn guilty pleas,[88] the tide turned decidedly in favor of exclusion when the Supreme Court visited the issue in 1927.[89] Further, support for a rule excluding at least some statements made in the course of plea bargaining grew in the first half of the twentieth century. It is likely, in fact, that before the adoption of the Federal Rules of Evidence, the larger number of courts considering the admissibility of

86. *Id.*

87. *See* 2 MUELLER & KIRKPATRICK, *supra* note 72, § 142, at 124 (asserting as a point of "overriding significance" that the drafting history of this rule and FED. R. CRIM. PROC. 11(e)(6) "demonstrate the intent of Congress to foreclose altogether the use of plea bargaining statements to impeach the defendant by contradicting his later trial testimony"); United States v. Mezzanatto, No. 93-1340, 1995 U.S. LEXIS 692 (Jan. 18, 1995) (protection against impeachment may be voluntarily waived).

88. *See, e.g.*, Commonwealth v. Ervine, 38 Ky. (8 Dana) 30 (1839) (admitting evidence of defendant's withdrawn guilty plea); Commonwealth v. Lannan, 95 Mass. 563 (1866) (excluding such evidence).

89. Kercheval v. United States, 274 U.S. 220 (1927).

statements made in compromise negotiations had decided that exclusion was the more appropriate course.[90] Also predating the Federal Rules, several other bodies, including the American Bar Association,[91] the American Law Institute[92] and the National Conference of Commissioners on Uniform State Laws, proposed exclusionary rules covering plea bargaining statements.[93] Even if a political effort to admit *all* plea bargaining statements as part of Rule 410 had been successful, this would hardly have worked a fundamental change in the basic structure and assumptions underlying the Federal Rules. Thus, Federal Rule 410 did not represent a revolution.

3. *The admissibility of prior convictions for impeachment purposes*

The most controversial provision of the Federal Rules of Evidence was Rule 609, which regulates the admission of prior convictions to impeach the credibility of a witness.[94] Congress debated this rule more than any other,[95] and ultimately reached a compromise that required substantial amendment after only a short time.

Impeachment by prior conviction is a character evidence rule. The conviction represents a particularly reliable judgment[96] that the witness did in fact engage in a prior act of dishonesty that circumstantially evidences her bad character for honesty. The factfinder in the present trial is then allowed to draw the inference that it is somewhat more likely the person would lie as a witness than would someone who had not been convicted of the crime.

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90. *See* Commonwealth v. Cohen, 2 A.2d 560, 564-65 (1938) (noting a "plain division of authority," but stating that "the apparent weight of authority [is] against the admissibility of" communications made in plea bargaining); Moulder v. State, 289 N.E.2d 522, 525-26 & n.10 (1972) (citing *Cohen* and reaching the same conclusion).

91. AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 3.4, at 77 (1968).

92. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.7 (Proposed Official Draft 1975).

93. UNIF. R. CRIM. PROC. 441(e) (1987).

94. FED. R. EVID. 609.

95. The floor debate in the House of Representatives "far exceeded that relating to any other provision in all the proposed Federal Rules of Evidence." Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2303 (1994). The author notes that this debate alone consumed nine pages of the Congressional Record, whereas the entire debate on the hearsay rule and its exceptions consumed only five pages. *Id.* at n.45.

96. The judgment of the factfinder is highly reliable because in order to find the defendant guilty of the crime, the factfinder must have been convinced of guilt beyond a reasonable doubt.

Of course, some crimes are more probative of truthfulness than others.[97] A conviction for perjury, for example, is particularly probative because it represents a prior instance of dishonesty under oath—the very possibility being raised in the present situation. A prior conviction for assault and battery, on the other hand, carries little probative value on the question of honesty, because the crime generally is committed in the absence of any act of dishonesty. Some crimes, such as embezzlement, fall in the middle; they are usually committed with a degree of dishonesty, but unlike other crimes such as perjury, are not fundamentally acts of dishonesty.

There is, of course, substantial disagreement about which crimes are probative of a person's truthfulness, and about the relative probative value of particular crimes on credibility. It should not be surprising, therefore, that a great deal of the Congressional debate over Rule 609 centered around which crimes should be admissible to impeach, and over the amount of discretion the trial court should have in regulating the admission of this evidence. More fundamentally, that debate centered on two sharply competing ideologies: society's interest in convicting guilty persons, and the accused's interest in receiving a fair trial and in being acquitted when innocent.[98] The task of forging a compromise between these competing values is hindered by the fact that the effect of conviction evidence on the accuracy of factfinding is not known,[99] and that conviction evidence has been shown to have a significant impact on the outcome of criminal trials.[100]

Congress's effort to reach a compromise led to adoption of a rule that, as one author has described it, "incorporat[es] no less than three balancing tests, two references to fairness, one to justice, and several other undefined terms, [and] leaves the task of resolving the many questions raised by these policy conflicts to the courts."[101] The legislative history of Rule 609 is too complex to

97. "Patently the force of the theory must depend on the nature of the prior crime. That a witness is a convicted perjurer gives more reason to be suspicious of his present testimony than that he has been convicted of drunken driving." 2 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 416, at 549 (2d ed. 1982).

98. Gold, *supra* note 95, at 2310.

99. *See id.* at 2310-16.

100. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 160 (1966) (showing significantly higher conviction rate when defendant's prior criminal record is disclosed than when it is not).

101. Gold, *supra* note 95, at 2296.

review here.[102] It is fair to say, however, that the debate took place along highly ideological lines, and that the imperfect compromise ultimately reached was plainly a political one. As originally enacted, the rule divided crimes into two classes,[103] those involving dishonesty or false statement (regardless of the applicable punishment), and those punishable by death or imprisonment in excess of one year. The first class of crimes was to be admitted without question,[104] and the second class was to be admitted if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant."[105] Other parts of the rule governed such questions as the admission of older convictions, the effect of pardons, the admissibility of juvenile adjudications, and the admissibility of convictions under appeal at the time of the current trial.[106]

The language governing the use of serious crimes that are not crimes involving "dishonesty or false statement" proved particularly confusing, especially in its reference to the "defendant," which could be interpreted to treat civil defendants and civil plaintiffs differently.[107] In 1988, an amendment process began, and in 1990, Congress adopted a new and very different rule governing the admission of serious crimes not involving dishonesty or false statement.[108] For the purpose of determining the admissibility of these crimes to impeach, the new rule provides a somewhat restric-

102. For a full treatment of the legislative history of Rule 609, see 28 CHARLES A. WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6131 (1993).

103. Implicitly, the rule governs a third class of crimes, misdemeanors that are not crimes involving "dishonesty or false statement." Those crimes are not admissible to impeach.

104. Some courts held that the trial court had no discretion to exclude evidence of crimes involving dishonesty or false statement. *See, e.g.*, United States v. Wong, 703 F.2d 65 (3d Cir.), *cert. denied*, 464 U.S. 842 (1983).

105. FED. R. EVID. 609(a) (*now superseded*).

106. FED. R. EVID. 609(b)-(e).

107. The Supreme Court made an effort to interpret the rule in Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989).

108. Some surprise has been expressed that Congress exhibited little interest in the amendment even though it created a very different rule governing matters about which there had been a "vigorous and protracted struggle less than a generation before." Gold, *supra* note 95, at 2309.

tive standard for the criminal defendant witness,[109] and a much more lenient one for all other witnesses.[110]

To what extent did the political debate over the prior crimes impeachment rule alter the landscape that had existed at common law? Prior to the enactment of Rule 609, as one author has written, there had been "an astonishing variety of views among the federal courts, as among American courts generally, on the impeachment of a witness by inquiry about prior criminal convictions."[111] As the author explains,

> Support could have been found in the federal cases for each of the following positions: a witness may be impeached by inquiry about any conviction of crime, whether felony or misdemeanor; felonies may be shown but misdemeanors may not; only crimes involving moral turpitude may be shown; any felony may be shown but misdemeanors only if they involve moral turpitude; all felonies and those misdemeanors amounting to crimen false; or that only crimes resting on dishonest conduct may be shown.[112]

Given this common law history, it is not surprising that members of Congress expressed divergent views on the proper scope of the rule. But neither the eventual compromise reached in Congress nor the amended version of the rule departs from traditions well-represented at common law. On the contrary, the rule fits neatly in the middle of the common law views. Like the rules governing the admissibility of expert opinion on the ultimate issue and plea evidence, the prior conviction rule does not work a basic structural change in the evidence law.

4. The "rape shield" rule

When the Federal Rules of Evidence were first enacted, they did not contain a provision protecting the privacy and reputations of alleged victims of rape and other sexual assaults. This was true despite the fact that in the mid-1970s, a national debate had begun about the need for such legislation, and that by the end of 1975, thirteen states had already enacted rules protecting these inter-

109. As to the criminal defendant, such crimes shall be admitted "if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." FED. R. EVID. 609(a)(1).

110. Other witnesses may be impeached by such a crime "subject to Rule 403," the general probative value prejudicial impact rule, under which prejudicial effect must substantially outweigh probative value for the conviction to be excluded. *Id.*

111. 2 WRIGHT, *supra* note 97, at 549.

112. *Id.* at 550-51 (footnotes omitted).

ests.[113] The primary contours of the debate have been laid out extensively in the literature and are well known.[114] At common law, the character for chastity of an alleged rape victim was considered relevant and admissible evidence in the alleged attacker's trial.[115] Earlier commentators also agreed that such evidence is relevant.[116] While the courts disagreed to some extent about the type of character evidence admissible to prove the alleged victim's character, and about the means by which evidence of prior behavior by the alleged victim (if admissible at all) could be proven, the general rule allowed fairly wide inquiry into the person's character. In most instances, of course, the evidence was offered to prove consent.

Many people perceived that such a rule permitted the defendant to shift the focus from his conduct to that of the alleged victim,

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113. *See* 23 WRIGHT & GRAHAM, *supra* note 72, § 5381, at 483 & n.2. The authors suggest that one reason there was no significant Congressional consideration of a rape shield rule was that few rape cases are tried in federal courts. This would have meant organizations interested in reform legislation would not have felt a need to turn significant attention to Congress. *Id.* at 483-84.

114. Even as of the late 1970s, numerous works had appeared in the popular press. *See, e.g.*, sources cited at 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5238, at 410 n.1 (1978). In addition, the law reviews by that time had published extensive commentary concerning the rules regulating the admission of evidence concerning a testifying rape victim. *See id.* at 410-11 n.2. The commentary has continued in the years since. *See, e.g.*, sources cited at 2 WEINSTEIN & BERGER, *supra* note 72, at 412 [10]-[12].

115. *See* 1 MCCORMICK, *supra* note 19, § 193, at 822. As one court stated:

> This class of evidence is admissible for the purpose of tending to show the nonprobability of resistance upon the part of the prosecutrix; for it is certainly more probable that a woman who has done these things voluntarily in the past would be much more likely to consent than one whose past reputation was without blemish, and whose personal conduct could not truthfully be assailed.

People v. Johnson, 39 P. 622, 623 (1895). *See also* Gish v. Wisner, 288 F. 562 (5th Cir. 1923) ("in a prosecution or suit for an assault with intent to commit rape, the rule is established by the great weight of authority that the general reputation for chastity of the complaining witness, who claims to be the victim, is material as bearing upon the vital question of her consent or nonconsent").

116. Wigmore, for example, believed that character for chastity in general, and specific instances of behavior in particular, is relevant to the issue of consent:

> It is generally accepted . . . that the bad character for chastity of the complainant in a rape charge is relevant and admissible to show the probability of her consent to the intercourse. In evidencing this character, may *particular* acts of the woman's unchastity be resorted to, as showing her to be a person more prone than another to have consented?
>
> No question of evidence has been more controverted. The Relevancy of the fact is seldom doubted. . . .

1 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 200, at 682 (3d ed. 1940) (emphasis in original).

essentially putting the victim on trial rather than the defendant. Evidence indicated that women were hesitant to report incidents of rape because of their fear of being subjected to the invasion of privacy and humiliation involved in such a process. The rape shield laws were intended to end the practice of putting victims on trial[117] and thus increase the rate of reporting of rape and the successful prosecution of rapists.

Though the state rules differ in many respects,[118] they generally place strict limits on the use of specific instances of the alleged victim's sexual conduct (particularly conduct with persons other than the defendant) on such issues as consent.[119] The rules generally contain exceptions (common ones are evidence concerning the alleged victim's prior sexual behavior with the defendant, and evidence of the alleged victim's sexual conduct with other persons to explain the presence of semen, illness or injury).[120] In addition, under some circumstances, the constitution requires that the evidence be admitted.[121] The exceptions, however, are rather narrow, and in most cases, the character evidence will be excluded. The statutes also generally specify procedures a party wishing to offer character evidence under an exception must follow.

Between 1975 and 1977, a number of bills were introduced in Congress to address these problems.[122] One bill, introduced in the House in 1977,[123] was amended and ultimately adopted late in 1978 as Federal Rule of Evidence 412. The rule was amended in 1988 so

117. *See* 2 WEINSTEIN & BERGER, *supra* note 72, ¶ 412[01], at 412[12]-[13] (noting that the legislative history of the Federal Rule indicated a desire "to prevent the victim, rather than the defendant, from being put on trial"); David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 568 (1994) ("[r]ape shield laws are grounded not only in a desire for accurate verdicts, but also in considerations of extrinsic policy. They are designed to protect victims from unnecessary embarrasment and to encourage them to report rape").

118. The various forms are summarized in 1 GREGORY P. JOSEPH & STEPHEN A. SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES ch. 22, at 3 (1987).

119. The rules generally disallow or restrict the use of reputation or opinion evidence. *See, e.g.*, HAW. R. EVID. 412 (forbidding the use of reputation or opinion evidence of the alleged's victim's past sexual behavior); IDAHO R. EVID. 412 (similar); N.M. R. EVID. 412 (restricting reputation and opinion evidence).

120. *See* 1 JOSEPH & SALTZBURG, *supra* note 118, § 22, at 3.

121. See Olden v. Kentucky, 488 U.S. 227 (1988), for a discussion of the Constitutional implications surrounding Rape Shield Laws. *See* STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL, 562-65 (1994).

122. *See* 23 WRIGHT & GRAHAM, *supra* note 72, § 5381, at 484.

123. H.R. 4727, 95th Cong., 1st Sess. (1977).

as to clarify the offenses for which the rule applies.[124] As part of the Violent Crime Control and Law Enforcement Act of 1994,[125] the same law which contains Proposed Rules 413 to 415, Rule 412 was again amended, effective December 1, 1994.[126] The Federal Rule is not markedly different from the rules in many states. As recently amended, it generally forbids evidence of other sexual behavior of the alleged victim as well as evidence intended to prove the alleged victim's sexual predisposition.[127] The rule establishes

124. FED. R. EVID. 412.

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

126. The text of Rule 412 as recently amended is as follows:

(a) EVIDENCE GENERALLY INADMISSIBLE.-The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) evidence offered to prove that any alleged victim engaged in other sexual behavior; and

(2) evidence offered to prove any alleged victim's sexual predisposition.

(b) EXCEPTIONS.-

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) PROCEDURE TO DETERMINE ADMISSIBILITY.-

(1) A party intending to offer evidence under subdivision (b) must-

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

127. FED. R. EVID. 412(a).

specific exceptions applicable to criminal cases,[128] and a more generalized exception for civil cases.[129] Procedures for admission of evidence pursuant to the exceptions are also set forth.[130]

Clearly, the existence of Rule 412, and of similar rules in forty-eight states,[131] can be attributed to the political process. Were it not for general pressures brought to bear by the feminist movement and prosecutors,[132] it is doubtful that Congress would have acted in this area.[133] But did the rape shield rule work a basic change in the law or in the structure of the evidence rules?

As to the changes in the law, the answer appears to be yes, but with a caveat. If the practice before enactment of rape shield legislation was to use the threat of revealing prior sexual history to discourage reporting or testimony,[134] and if the threat was carried out frequently in the event the victim complained and testified,[135] the rape shield rules have indeed had an impact on the law and on the practice of litigants because they prohibit most of the offending conduct.

It is clear that courts already possessed the power under existing rules to exclude much of this testimony. In particular, the court has long had power to exclude evidence the probative value of which is substantially outweighed by such dangers as unfair prejudice or confusion of issues.[136] If prior sexual activity possesses low probative value on the issue of consent, as has long been asserted,

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128. FED. R. EVID. 412(b)(1).

129. FED. R. EVID. 412(b)(2).

130. FED. R. EVID. 412(c).

131. *See* 1 JOSEPH & SALTZBURG, *supra* note 118, § 22.1, at 2 (reporting that though the federal model has not been adopted widely by the states, all states except Arizona and Utah have enacted rape shield statutes or rules. Even in those two states, there is protection for victims. The Arizona Supreme Court has constructed a rape shield rule from Arizona Rules 401 and 403 (counterparts to the same Federal Rules).). *See* State v. Oliver, 760 P.2d 1071 (Ariz. 1988). In Utah, the Advisory Committee believed the issues could better be dealt with under Rules 404 and 405 (counterparts to the same Federal Rules). *See* 1 JOSEPH & SALTZBURG, *supra* note 119, at 134.

132. *See* 23 WRIGHT & GRAHAM, *supra* note 72, § 5382, at 493 (noting that the rule was "the product of an alliance between feminist groups and prosecutors").

133. It is worthy of note that FED. R. EVID. 412 passed the House with little debate, and the Senate with no debate. *Id.* § 5381, at 484-85.

134. A substantial body of literature, much of it available at the time Congress was considering Rule 412, supports the claim that rape tends to be seriously underreported. *See id.* § 5382, at 497-501. The authors note, however, that the relationship between underreporting and the evidence rules has not been shown. *Id.* at 500-01.

135. There is some controversy about the extent of the problem that existed before enactment of rape shield legislation. *See id.* at 496-97.

136. *See, e.g.*, FED. R. EVID. 403.

then exclusion will often be justified on the ground that the evidence adds little to the issues and only tends to distract and confuse the jury (as well as to cause jurors holding particular moral beliefs to punish the victim for her past behavior). In addition, courts could read existing character rules as empowering them to exclude prior sexual history on the ground that such conduct does not reveal a "pertinent" trait of the alleged victim's character.[137] Thus, although the rape shield rules explicitly address the problem, courts likely possess the power to exclude much of this evidence under other provisions.[138]

The second question (whether rape shield legislation altered the general structure of evidence law) can be answered in the negative. The rules do not fundamentally change long-held assumptions about character evidence except insofar as they reject the generalization that a person's prior consensual sexual experience makes her more likely to have consented in the present situation. That assumption, however, was on the wane long before the rape shield rules, and the formal recognition of its falsity was not revolutionary. Moreover, to the extent the rape shield rules do reject preexisting assumptions, they do so by following the more general view, represented in other rules, that character evidence should be admitted in only the most limited circumstances. Thus, the rape shield rules harmonize well established evidence doctrine.

In one sense, however, the rape shield rules do represent something of a structural change. For the most part, modern evidence rules, including the Federal Rules, are written so as to apply equally to all types of cases. To the extent that the rape shield rules single out a particular type of evidence for exclusion in a certain class of cases, they arguably violate this general principle.[139] But they do so in a rather mild sense, and, as already explained, they do so in a way quite consistent with the general thrust of the law's treatment of character. To the degree that the rules depart from the structure of evidence law, therefore, the departure is not particularly significant.

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137. *See, e.g.*, FED. R. EVID. 404(a)(2) (permitting evidence of a "pertinent trait" of a crime victim's character).

138. The existence of this power helps to explain the failure of Arizona and Utah to enact specific rape shield rules. *See supra* note 131.

139. The degree to which Proposed Rules 413-415 change the landscape by creating different evidence rules for specified classes of cases is discussed *infra* notes 159-161 and accompanying text.

5. Summarizing the effect of the political process on other rules

The preceding discussion does not explore fully the areas in which political considerations have driven the provisions of the Federal Rules of Evidence. A complete list would certainly include discussion of a number of other areas, most notably privileges (which were considered so politically sensitive that no specific rules were adopted). Discussion of other examples, however, would not change the essential point: though political concerns have informed the evidence rule-making process, they have led to incremental rather than revolutionary change in the rules applicable at common law. Indeed, though one can only speculate, it is altogether possible that even absent codification, most of the changes represented by the rules discussed above would have occurred as a part of the common law process.

It would be much more difficult to make the same case for Proposed Rules 413-415. The next section will address those rules.

IV. Proposed Rules 413-415

This section will consider the effects the proposed rules would have on the admissibility of character evidence and on the general structure of the Federal Rules. As will be shown, the proposed rules would open wide the door to character evidence currently kept virtually closed. In addition, by accelerating a process of carving out particular kinds of cases for different evidentiary treatment, the proposed rules would significantly alter the present relatively uniform treatment of both civil and criminal cases from an evidentiary standpoint. These changes are far more fundamental than the changes created by the political process in the other evidence rules considered above. Before the effects of the proposed rules can be considered, however, it is necessary to set forth exactly what they would permit that is now forbidden.

A. The Proposed Rules: What They Would Do

While many things about Proposed Rules 413-415 are unclear,[140] the rules clearly carve out particular types of criminal and civil cases and render admissible what normally would be excluded:

140. There are numerous ambiguities in the proposed rules. This makes it difficult to determine their precise scope. Some of the key ambiguities were addressed in a letter from a group of law professors, including the author, in response to the invitation for comments issued by Judge Ralph K. Winter, Jr., Chair of the Advisory Committee on Evidence Rules. The following excerpts are taken from the law professors' letter:

The first sentence of FRE 413 and 414 states that evidence of prior sexual offenses or child molestation "is admissible, and may be considered for its bearing on any matter to which it is relevant." Is a distinction being drawn between the decision on admissibility and consideration by the jury? Is a judge required to admit irrelevant evidence, but then instruct the jury to consider it only on points to which the jury finds it to be relevant? How much discretion, if any, does the judge have to decide what prior sexual offenses are relevant? We believe the Rules should be amended to make clear that the relevancy determination is for the trial judge under Rule 104(a) rather than under Rule 104(b).

Does the "is admissible" language mean that the new Rules override other evidentiary restrictions on the form of evidence, such as the expert opinion rules, hearsay, authentication, and best evidence requirements? Do the Rules mean to admit hearsay evidence of prior sexual offense? For example, would the prosecution be permitted to call a police officer to testify about what other victims told the officer? Would reputation for being a sex offender be admissible under these rules as circumstantial evidence that defendant did in fact commit other acts? Do the proposed rules mean to make admissible expert testimony concerning pedophile profiles? Battering parent profiles? Could a witness testify that she looked at defendant's rap sheet and that it reflected several prior acts of sexual misconduct? Do the new rules abrogate the best evidence rule?

Subparagraph (d) of FRE 413 and 414 defines "offense of sexual assault" to mean a criminal offense "that involved" certain specified sexual conduct. But what if the past offense was not a sexual offense but nonetheless "involved" sexual misconduct, such as a kidnapping conviction where sexual contact occurred. Are such convictions within the definition?

Subparagraph (d) also covers crimes involving specified sexual contact "without consent." Does this mean "actual" or "lawful" consent? If it means "lawful" consent, then offenses such as statutory rape, incest, and perhaps even acts of prostitution would be included within the definition of "offense of sexual assault." Is this the intent of the drafters?

An "offense of sexual assault" is defined to mean an offense involving certain listed conduct that is a crime under federal law or the law of "a" state, thus incorporating by reference the varying state definitions of sexual offenses, some of which are much broader than the federal definitions. Did Congress intend to allow the law of one state to set the standard for admissiblity in criminal trials by making evidence of the act admissible in a federal trial even if the defendant's conduct did not occur in that state?

Because under the new rules the evidence "may be considered for its bearing on any matter to which it is relevant," this presumably would make it admissible on the issue of credibility. While we doubt that this is what Congress intended, the issue needs to be clarified. In particular, was the rule intended to admit evidence that would be excluded by the narrowly drafted language of Rule 608(b)? What if defendant was charged with the conduct, but acquitted? The evidence would not be admissible under Rule 609, but would it now be admissible under the new rules? If the conduct has been the subject of a criminal conviction, would it be broadly admissible without consideration of the very delicate balance that the rule strikes for every other type of case? Should we make any accommodation, as does Rule 609, for very old conduct, conduct by a juvenile, or conduct that was pardoned? Would acts such as these be admissible based on other impeachment theories, such as to show that the defendant's story is improbable, or to establish bias?

character evidence in the form of specific prior acts to prove "any matter to which [such acts are] relevant," including, of course, that the person possessed a trait of character that made it more likely he committed the offense in question. This is precisely the inference otherwise forbidden by a long tradition of evidence law.

Rules 413 and 414 are identical in structure. They differ only in their application to different types of criminal prosecutions. Rule 413 is applicable to prosecutions for "sexual assault," which the rule defines to include violations of any federal *or state*[141] law falling into several broad categories.[142] The key provision of the rule states:

> 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.[143]

Proposed Rule 414 concerns prosecutions for "child molestation," which is also broadly defined in terms of both federal and state

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> Are there any inconsistencies between the policies and procedures of the new rules and FRE 412? Will courts view it as constitutional to permit the government to offer evidence of certain prior sexual conduct of the defendant, but not to allow the defendant to offer similar evidence relating to the alleged victim? If courts vitiate the rape shield statute on this ground, the new Rules could have the effect of making the prosecution of sex crimes more difficult, not easier.

Letter from group of law professors to Hon. Ralph K. Winter, Jr., Chair, Advisory Committee on Evidence Rules 3-5 (Oct. 12, 1994). The letter also cited a number of concerns about the merits of the proposed rules. *Id.* at 1-3.

141. For purposes of the proposed rules, "state" is defined in accordance with the definition in 18 U.S.C. § 513(c)(5) (1988), which defines "state" to include the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and "any other territory or possession of the Unites States," in addition to the fifty states.

142. Proposed FED. R. EVID. 413(d) refers to:

> (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;
> (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).

18 U.S.C. ch. 109A, referred to in subdivision (1), sets forth the crimes of "aggravated sexual abuse", "sexual abuse", "sexual abuse of a minor or ward", and "abusive sexual contact". 18 U.S.C. §§ 2241-2244 (1988).

143. Proposed FED. R. EVID. 413(a).

law.[144] Its key provision is identical to that in Proposed Rule 413, simply substituting the term "child molestation" for "sexual assault."[145]

Proposed Rule 415 is similar to the first two, but applies to "civil cases concerning sexual assault or child molestation." Its key provision states:

> 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.[146]

From the language "may be considered for its bearing on any matter to which it is relevant" specifically contained in Proposed Rules 413 and 414, and incorporated by reference in Proposed Rule 415, it seems clear that Congress intended to permit the factfinder to draw an otherwise impermissible character inference.[147] To take a simple example, suppose defendant is charged with a crime of "sexual assault" as defined in Proposed Rule 413. If defendant has previously committed an offense of sexual as-

144. Proposed FED. R. EVID. 414(d) provides that a "child" is a person under the age of fourteen. The rule defines "offense of child molestation" as:

(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

(2) any conduct proscribed by chapter 110 of title 18, United States Code;

(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

(4) contact between the genitals or anus of the defendant and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

Id. 18 U.S.C. ch. 110, referred to in sub. (2), concerns "sexual exploitation of children". 18 U.S.C. §§ 2251-2257 (1988).

145. Proposed FED. R. EVID. 414(a).

146. Proposed FED. R. EVID. 415(a).

147. Subdivision (c) of each rule is somewhat ambiguous. It provides: "This rule shall not be construed to limit the admission or consideration of evidence under any other rule." Presumably, this provision is intended to ensure that the new rules would not *exclude* evidence otherwise admissible under other rules. It does not appear to make the new rules subject to the exclusionary provisions of existing rules such as Rule 404(a). If that were the intent, subdivision (c) would eviscerate the primary thrust of the new rules, contained in subdivision (a).

sault,[148] the court would allow the jury to engage in the following reasoning:

→ EVIDENCE: Defendant committed a sexual assault in the past.
  → INFERENCE: Defendant is the kind of person who would commit offenses of sexual assault.[149]
    → CONCLUSION: Defendant committed the sexual assault for which he is currently on trial.[150]

In the absence of Rule 413, of course, this inference would be forbidden by Rule 404(a).[151] Under the terms of Proposed Rule 414, the same inferences would be permitted in child molestation prosecutions and in civil cases for sexual assault or child molestation under Proposed Rule 415.

There is even some question whether the trial court has discretion to exclude the evidence in the event the court believes the evidence raises dangers that far exceed its probative value. The language of all three proposed rules provides that the evidence "is

148. The rule does not prescribe how a court is to deal with a situation in which there is a dispute as to whether defendant in fact committed the prior offense. In the absence of any indication of Congressional intent to the contrary, however, it is likely that the court will determine, consistent with its holding in Huddleston v. United States, 485 U.S. 681 (1988), that the decision is to be made subject to the standard of FED. R. EVID. 104(b). That is, the court is to admit the evidence of the prior offense if the prosecution offers evidence sufficient to support a finding that the offense in fact occurred.

149. The generalization or premise supporting this inference is that people who engage in certain kinds of behavior do so, at least in part, because they possess a trait of character that predisposes them to such behavior.

150. The generalization or premise supporting this conclusion is that people who possess a trait of character that predisposes them to certain behavior and who have in fact engaged in that behavior are somewhat more likely to engage in that behavior repeatedly than are people who do not possess the relevant character trait.

151. *See supra* notes 20-22 and accompanying text. This does not mean, of course, that under existing law the evidence necessarily would be excluded altogether. In some instances, for example, a series of similar assaults might tend to establish a pattern of conduct that cuts against the defendant's consent defense in the present case. If so, the court could admit the evidence pursuant to Rule 404(b), though it would also be obligated by Rule 105 to issue a limiting instruction *sua sponte* or if defendant requests one. Caution should be exercised in such a case, however. The inference to intent is arguably weak, and the danger that the jury will misuse the evidence by invoking a character inference is great. A few jurisdictions have, in the past, admitted evidence of a rape defendant's prior similar offenses on the ground that such offenses demonstrated a "depraved sexual instinct" that made criminal intent likely in the instant case. But such a theory is suspect, and Indiana, one of the few states that had recognized such a doctrine, recently abrogated it. *See* Lannan v. State, 600 N.E.2d 1334 (Ind. 1992). Still, however, a number of states retain the "depraved sexual instinct" rule in child sexual abuse cases. *See* Bryden & Park, *supra* note 117, at 558-59.

admissible,"[152] rather than "may be admitted" or other permissive language sometimes found in the Federal Rules[153] Whether the drafters intended this language to remove the trial court's discretion under such rules as Rule 403 is not clear.[154]

B. The Proposed Rules' Effect on the Traditional Treatment of Character Evidence

An earlier section of this Essay briefly sketched the common law and Federal Rule treatment of character evidence to prove extrajudicial conduct.[155] The severe restrictions on the use of such evidence are justified primarily by the view that the evidence, while arguably relevant, generally carries low probative value but high potential for unfair prejudice. In addition, the Rules flow from the position that it is morally wrong to try a person based on her (possible) character or for her past misdeeds. The effect of these views on the shape of the evidence law should not be underestimated. The sharp restrictions on the use of character to prove both extrajudicial and in-court conduct[156] most likely have a significant effect on the trial. Given the temptation for wide use of character evidence that would no doubt exist in the absence of these rules, it is fair to say that the rules are among the most regulative of strategic litigative behavior.

Proposed Rules 413 to 415 would shake this structure in fundamental ways. The proposed rules would ignore traditional skepticism about the probative value of character evidence as proof of conduct. This they would do in particular classes of cases and in the absence of specific empirical support for the assumption that

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152. Proposed FED. R. EVID. 413-415, subdivision (a).

153. *See, e.g.*, FED. R. EVID. 404(b) ("[E]vidence of other crimes, wrongs, or acts . . . may . . . be admissible" for certain purposes); FED. R. EVID. 407 (subsequent remedial measures rule "does not require the exclusion of evidence. . ." for certain purposes); FED. R. EVID. 608(a) (a witness's credibility "may be attacked or supported" by opinion or reputation evidence under certain circumstances); FED. R. EVID. 608(b) (specific instances of conduct probative of truthfulness or untruthfulness "may . . . in the discretion of the court, . . . be inquired into on cross-examination of the witness. . . .").

154. In its proposed redraft of the rules, the Advisory Committee has included language making clear that evidence offered pursuant to the new rules is subject to the Rule 403 balancing standard. Judicial Conference Advisory Committee on Evidence Rules, proposed amendment to Rule 404(a) (October, 1994).

155. *See supra* notes 20-37 and accompanying text.

156. The Federal Rules governing the use of character to prove extrajudicial conduct are summarized *supra* notes 26-28 and accompanying text. The use of character evidence as bearing on the credibility of a witness is discussed *supra* notes 14-17 and accompanying text.

such evidence has greater probative value in those cases than in others.

It is particularly interesting that the empirical evidence, while hardly conclusive, appears to suggest precisely the opposite of what the rules assume. While it is difficult to determine empirically whether a person who has committed an act of sexual assault or child molestation is more likely to repeat the conduct than a person who has committed another crime, one can examine such things as recidivism rates for persons *convicted* of various crimes. Though the statistics are inconclusive and might be somewhat counterintuitive, they suggest, in fact, that the recidivism rate for sex offenders is lower than that for many other types of offenders.[157] One commentator has discussed the assumption that sex offenders are particularly likely to repeat their crimes, and summarized what appears to be the true state of affairs:

> It is true that this belief is common among laypersons. There is even some support for the belief in the older medical literature. However, the most recent research largely discredits the old medical literature sanctioning the lay belief. On several Federal Bureau of Investigation ratings of recidivism, sex offenses rank quite low. It is also clear that the recidivism varies radically among types of sex offenses; it is silly to generalize about the recidivism of sex offenders as a broad category.[158]

Congress seems to have ignored this evidence when proposing the adoption of Rules 413 to 415.

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157. *See* Bryden & Park, *supra* note 117. The authors discuss a 1989 Bureau of Justice Statistics report that tracked 100,000 prisoners for three years after release. The report found the following rates for rearrest for the same type of crime:

burglary	31.9%
drug offenders	24.8%
violent robbers	19.6%
rapists	7.7%

Only the rate for those convicted of homicide, at 2.8 %, was lower than that for rape. *Id.* at 572 (discussing ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1983 (1989)).

It has been suggested that the recidivism rate for sex offenders is greatly understated because such offenders may commit many unreported crimes. *See* Bryden & Park, *supra* note 117, at 573. One researcher, for example, reported that in response to an anonymous questionnaire, convicted rapists and child molesters reported that they had committed two to five times as many sex crimes than those for which they had been apprehended). A. Nicholas Groth et al., *Undetected Recidivism Among Rapists and Child Molesters*, 28 CRIME & DELINQ. 450, 453-54 (1982).

158. EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 4.16, at 45 (1984) (footnotes omitted).

If the proposed rules become effective, it should be anticipated that the prosecution in criminal sexual assault and child molestation cases, and civil plaintiffs in such matters, will frequently offer such evidence. If admitted, the evidence will likely have a significant impact on the factfinder, and will no doubt affect the outcome of a large number of these types of cases. These effects will be magnified if it is determined that Congress intended to make such evidence admissible categorically, denying the trial court its general power to exclude evidence when its probative value is substantially outweighed by the dangers it creates.[159] It is difficult to imagine, however, that Congress intended to turn the trial judge into a kind of administrative clerk rather than a person whose job is to exercise careful judgment in the context of each situation.

Of course, few federal criminal or civil trials concern matters of sexual assault or child molestation. But the Federal Rules have been extremely influential in the states.[160] Because the lion's share of sexual assault and child molestation cases are brought in state court, it can be expected that, if adopted, the proposed rules will also have a substantial impact on the states.[161]

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159. *See supra* note 148 and accompanying text.

160. As of this writing, thirty-eight states (Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming) have adopted evidence codifications based in substantial part on the Federal Rules of Evidence.

161. It is not unlikely, however, that judges will resist applying rules that so fundamentally alter the principles and standards with which the judges are familiar. California's experience with the so-called "Victims' Bill of Rights" provides a particularly good example. In 1982, the voters approved an amendment to the California constitution that provided for much broader admissibility of damaging evidence against a criminal defendant. One provision, for example, states:

> Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding. When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court.

CAL. CONST. art. 1, § 28. The California Supreme Court read this categorical language was read in a decidedly uncategorical way in People v. Castro, 696 P.2d 111 (Cal. 1985). In *Castro*, the court held that the voters did not intend to abolish the trial court's discretion to exclude prior convictions when their probative value is substantially outweighed by the danger of unfair prejudice.

C. The Proposed Rules' Effect on the Unitary Nature of Evidence Law

In creating specific rules of evidence applicable to certain classes of cases but not others, Congress may have signalled a change in the basic structure of evidence law. Though there are some exceptions under existing law,[162] at present the formal law of evidence does not apply differently in different kinds of cases, whether civil or criminal. In addition, again with limited exceptions,[163] the law does not generally treat differently the two sides in a particular dispute. Instead, a unitary set of rules applies to all cases and to all litigants.

By defining certain classes of cases and permitting one party to offer an especially volatile type of evidence for a purpose that would otherwise be forbidden, Congress arguably has worked a fundamental change in the structure of the evidence law. This change, especially if it marks the beginning of a trend, would have several effects, two of which seem especially important. First, it would make the law of evidence considerably more complex than it already is. It is already difficult enough for courts and counsel to learn the intricacies of the evidence rules; considerably more difficulty, dispute and appellate litigation can be expected if the rules are further complicated by the proposed changes.

Second, the treatment of litigants in different kinds of cases with different evidentiary standards arguably changes the nature and purpose of evidence rules and codes. Evidence law is hardly neutral today from a substantive standpoint,[164] but neither is it pervasively substantive in effect. For the most part, the rules of evidence are designed to facilitate the truth-seeking function rather than serve substantive policy. In the absence of specific support for the value of character evidence in sexual assault and child molestation cases, it is difficult to see how admitting such evidence will enhance truth-determination. It seems equally plausible that truth-determination will suffer.

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162. The most obvious example is the rape shield legislation, discussed *supra* notes 114-140 and accompanying text.

163. An exception is Rule 404(a)(1), which permits the criminal defendant to offer character evidence as circumstantial proof of her innocence of the crime. If the defendant chooses not to do this, the prosecution is forbidden from offering such evidence.

164. *See* Leonard, *supra* note 34.

V. Conclusion

From the outset, the Federal Rules of Evidence have been a curious blend of conservatism about the evidence law and political compromise. The first feature, conservatism, should not be surprising, given the rather human tendency of judges and lawyers to retain the familiar and to resist change. The second feature, political compromise, is inevitable, given the involvement of all three branches of the federal government in the rule-making process. Thus, tension between retaining what appears to work (even if it means adhering to rules of questionable validity) and satisfying political constituencies has always existed. Until now, this tension has kept largely in check the temptation to overemphasize either desire by tipping the rules too much toward either extreme. With the proposal of Rules 413 to 415, however, Congress has asserted its political will too strongly out of a desire to be "tough on crime." The cost has been subordination of the interest in conserving long-standing concepts and allowing change to occur incrementally.

It may well be wise to review the law's current treatment of character evidence as circumstantial proof of extrajudicial behavior.[165] If there is sufficient empirical support for the proposition that certain forms of such evidence are highly probative (particularly specific instances of conduct very similar to the conduct at issue) are especially probative, the law should indeed make such evidence more widely available to the factfinder. But in its zeal to respond to what is perceived (rightly or wrongly) to be an epidemic of sexual assault and child molestation, Congress may have sparked a movement among state courts and legislatures that will be difficult to stop. Whether this eventually will occur will be determined over time, but the danger is very real that an effort to serve a sincerely held position of substantive policy could undermine the delicate balance represented by the rules of evidence.

165. *See* IMWINKELRIED, *supra* note 158, § 4.16, at 45.