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SOME THOUGHTS ON THE SEXUAL MISCONDUCT AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

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There has been a movement in the United States to reconsider the effect of the Federal Rule of Evidence[1] that bans evidence of an accused's character when the accused is charged with a sexual offense.[2] The exclusion of such evidence is achieved through the Rules as they have existed since their proposal in the mid to late 1960s to their adoption in 1975. There is the ban of specific language of FRE 404(a)[3] and the usual application of FRE 404(b)'s "other acts . . . other purposes" language[4] to preclude prosecutorial use of the uncharged other acts of an accused sexual offender for such claimed purposes as intent and motive, on the grounds that to allow such evidence into the trial against the accused would so substantially prejudice him as to require, under FRE 403[5] that the evidence be excluded.[6]

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1. FEDERAL RULE OF EVIDENCE 404(a). Hereinafter, I shall refer to the Federal Rules of Evidence as FRE.

2. I use "sexual offense" here to refer to those instances where persons who have been charged with or convicted of any crime involving allegations of sexual abuse, molestation, assault, or perhaps even implications of titilation for personal gratification with any person. *See* MODEL PENAL CODE § 213.0 (1985).

3. FED. R. EVID. 404(a) reads, in part, "Evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ."

4. FED. R. EVID. 404(b) reads:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

5. FED. R. EVID. 403 reads, "Although relevant, evidence may be excluded if its probative value is subtantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

6. Two years ago, when searching the ALLFEDS and ALLSTATES data bases on Westlaw to find suitable factual scenarios for an examination in my Evidence course, I discovered that seven out of ten reported cases that possessed the character-

Sexual offense prosecutions have become so pervasive,[7] if not popular, that prosecutors, "the public" and the courts have begun pressing for the admission of evidence of past bad sex acts against those accused of sexual misconduct. Politicians eventually had to address the concerns.[8] Thus, the adoption of the current legislative provisions is not surprising.

I am willing to assume that Congress truly made a reasoned policy choice to promote more and better sex offense prosecutions, accepting the "fact" that sexual offenders do have higher recidivistic tendencies.[9] Moreover, I am willing to assume that such a choice is a valid exercise of the legislative power and probably does not violate constitutional or any other fundamental principles.[10] One may be opposed to the use of such evidence for fear that juries (or even judges) will misuse it, but I am willing to assume that the choice is a valid legislative one.

I believe the policy of the proposed rules is more good than bad. The parties take the case as it comes to them. Other acts evidence is relevant to prove such facts as intent, motive or plan, as is other acts evidence offered to prove character. Surely, as the Supreme Court noted in *Michelson v. United States*,[11] reason suggests to ordinary people that the fact of similar acts by the accused should be taken into account by the jury.[12] Ultimately, the only question is

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istics terms I was interested in (relevance, hearsay and some exceptions) involved sex offense charges. *See, e.g.*, United States v. Cross, 928 F.2d 1030 (11th Cir. 1991)(child pornography case); United States v. Porter, 709 F. Supp. 770 (E.D. Mich. 1989)(same).

7. *See* EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 4:14 (1984)(citing cases in which the courts of at least two states have considered reading into their counterparts of FRE 404(b) a use of other acts evidence to show an accused's inclination for sexual offense propensity). Moreover, even McCormick in his Evidence treatise has, since the first edition, listed such sexual offense propensity as a category of other purpose use under what is now FRE 404(b). CHARLES MCCORMICK, MCCORMICK ON EVIDENCE, § 190 (4th ed. 1992).

8. The history of the development of the specific language is traced in IMWINKELRIED, *supra* note 7, § 2:26, at 82 (1994 Supp.). The Bush Administration first submitted the proposal to Congress in 1991.

9. My recollection is that the DOJ drafters of 413-415 claimed that there is social science support for the proposition that sex offenders have higher recidivist tendencies. I, however, have never seen sufficient data to support this claim.

10. I suspect that the "status" argument for consitutional violation claims—i.e., that treating a sex offender, as FRE 413-415 does, is akin to punishing a person for drug addiction and thus would violate the principles of Robinson v. California, 370 U.S. 660 (1962)—presents an interesting analytical diversion, but does not present a serious threat to the amendments' validity.

11. 335 U.S. 469 (1948).

12. Although issues related to the "Doctrine of Chances" are also raised by such a question, a discussion of these is beyond the scope of this Essay. *See* Edward J. Im-

one of choice of policy for exclusion on grounds other than relevance. The character evidence rule is not absolute, and the determination of the policy of exclusion is clearly within the power of the legislature. I do not think that we law professors can convince the Congress of the United States to change its position on the wisdom of the admissibility of other sexual offense acts, nor am I sure it is wise to do so.

Nonetheless, in its rush to give the public a tough, law and order, bill, the last Congress did not consider the niceties of drafting. The current version of proposed FRE 413-15, has some very troublesome drafting deficiencies. It is ambiguous at best, wrong at worst.

Some of the ambiguities include whether the FRE 403 balancing test applies, whether the hearsay rule is inapplicable to such evidence, therefore allowing admissibility of police reports to prove such acts, whether the best evidence rule applies, and what methods of proof are allowable to prove the accused committed such other acts.

In the remainder of this Essay, I shall address some aspects of the ambiguities surrounding the issue of what standard of proof might be applied to decide the admissibility of such other, uncharged sex crimes offered against the accused.

The proposed Rules, as drafted, do not specify what form the other acts evidence may take, and this has engendered some severe criticism. Some of the detractors assert that only evidence of a conviction should be permitted for such uncharged acts to be admissible.[13] Other detractors suggest that if not limited to evidence of convictions, the uncharged acts evidence must pass the test of "clear and convincing."[14] Moreover, critics state that the ambiguity in failing to specify any standard of proof is problematic.

I agree there is an ambiguity, but I think it is one of classification which makes no difference to the effect on the applicable standard of proof. I refer to whether the proposed Rules amend FRE 404(b) or create a new subdivision of FRE 404(a). The latter

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winkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines That Threaten to Engulf the Character Evidence Prohibition*, 130 MIL. L. REV. 41, 54 (1990).

13. Internet message from Professor Laird Kirkpatrick of University of Oregon School of Law, to the Evidence discussion group (Sept. 19, 1994). The archives of this discussion may be viewed by sending the text message "Index Evidence" to listserver chicagokent.kentlaw.edu. Another criticism is that the proposed rule is ambiguous as to application of FRE 403's balancing test. *Id.*

14. Internet message from Professor David Leonard of Loyola Law School, to Laird Kirkpatrick of Oregon School of Law (Sept. 23, 1994).

makes more sense, as the ABA Committee has proposed.[15] In any event, the specific instances of conduct that are sought to be proved could take the form of evidence of a conviction or any other evidence that the acts were committed by the accused.

Either way, the uncharged other sex acts evidence should be subject to the principles developed to test the admissibility of evidence dependent upon the finding of the existence of a conditional relevant preliminary fact, namely FRE 104(b).[16] That is, per decisions such as that of the United States Supreme Court in *Huddleston v. United States*,[17] such evidence of other acts is admissible under FRE 104(b) if there is evidence sufficient to support a jury finding of the preliminary fact that the accused committed the uncharged act. This is often called a prima facie showing, which connotes that the judge, sifting the evidence, believes the jury may, on the evidence, reasonably conclude by a preponderance that the act was done by the accused.

Even if one were of the view that the preliminary fact question whether the accused committed the uncharged other acts was one for the judge under FRE 104(a), one would expect the determination by the judge to be governed by the preponderance standard. Surely if the Supreme Court's decision that the preliminary fact of the voluntariness of a confession, a "constitutional preliminary fact," is governed by the preponderance standard,[18] the standard for admissibility for character purposes, "a mere evidentiary preliminary fact," should be governed by no higher standard of proof. Moreover, even if the fact question were one for the judge, I question the wisdom of adopting such a standard because I doubt that judges uniformly distinguish "clear and convincing" evidence. Moreover, in criminal cases in the United States, this standard has all but been eliminated—I think because it is too amorphous.

Assuming the question whether the defendant did the other acts is one for the jury, we must remember that juries do not find facts on a standard of "clear and convincing," nor should they. My objection to the injection of the clear and convincing standard (or any

15. *See* REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (Feb. 1995).

16. FED. R. EVID. 104(b) reads, "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

17. 485 U.S. 681 (1988).

18. *See* Lego v. Twomey, 404 U.S. 477, 488 (1972).

other form of words invoking some "other" standard) is that the trier of fact does not use it and should not be expected to.

Furthermore, in the context of criminal cases, we assume juries either do find the fact to exist or do not. This is so because juries should not be and are not instructed on more than one standard of proof, and therefore the jury may only be instructed as to that standard.[19] Thus, when a jury is instructed to consider evidence only when they find a preliminary fact to exist, and they function in a general verdict setting (which most, if not all jury trials are), it is not possible to tell the jury anything but to "find" the fact. No one really knows for sure, but we assume that the jury only "finds" a fact when they believe the fact more likely than not exists. In any event, it would be a mistake to give the jury an instruction as to some standard of proof other than beyond a reasonable doubt. People trained in the law have enough trouble distinguishing between various standards of proof.

The "real" question lurking in all of this is the one of prejudice—will the jury, upon hearing the other acts evidence decide, improperly, to convict the accused because of the allegation that he did the other acts and for that reason alone or primarily? In response to that question I respond with another: how likely is it that the jury will at all consider evidence of an act (charged or uncharged) that they do not believe the accused committed when determining that he committed some other act? If the jury stopped to consider seriously the questions presented by evidence of multiple acts of the accused, I think that in most instances they can be trusted to decide whether they believe the accused did those acts or not. In fact, if the jury comes to the conclusion that the prosecution has attempted to convict the accused of acts he did not commit (because the evidence is weak), then the jury might be inclined to hold that against the prosection, not the accused.

19. I believe that the only time that evidence is, measured by the clear and convincing standard in criminal cases is in the finding of a preliminary fact of nonsuggestiveness of an out-of-court identification under either Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967); or Stovall v. Denno, 388 U.S. 293 (1967). The Supreme Court recently reconsidered the standard in Schlup v. Delo, No. 93-7901, 1995 U.S. LEXIS 701, *53-57 (Jan. 23, 1995) (rejecting the "clear and convincing" standard adopted by the appellate court).