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FOREWORD: DO WE REALLY WANT TO KNOW THE DEFENDANT?

DALE A. NANCE*

The philosopher David Hume may have been right that we cannot logically infer anything about the future from the past.¹ Yet the common sense of the matter is otherwise. And most scientists, not known for naivete in matters of inference, would readily concede that the best indicator of the future is the pattern of the past. Indeed, in some sense it is the *only* indicator. In terms of human behavior, this compelling intuition is reflected in the fact that we commonly speak of a person's traits of character, ideas that are inevitably based on the person's patterns of past behavior and which are used in turn to anticipate future conduct. Put in the context of the allegation of a crime or other serious wrongdoing, the common sense of the matter — and the scientists' working postulate — suggests that one of the best indicators of the likelihood that the defendant committed the alleged act is the person's history of similar misconduct.²

THE RULES GOVERNING OTHER MISCONDUCT EVIDENCE

It is not surprising, therefore, that one of the most controversial aspects of modern Anglo-American evidence law is the rule, or set of rules, that generally prohibits the use of evidence of a person's character to make inferences about the probability that the person has committed a breach of duty.³ To the uninitiated, this rule sounds absurd on its face. And indeed, the law on the subject reflects the tension between the rationales that have been given for the rules and the ordinary understanding of the way we act on our knowledge of someone's

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1. Philosophers continue to wrestle with the problem, which is known in the literature simply as "the problem of induction." Two classics of the modern literature are NELSON GOODMAN, *FACT, FICTION, AND FORECAST* (3d ed. 1979), and A.J. AYER, *PROBABILITY AND EVIDENCE* (1972). For simplicity, I have referred to projections of future events. The philosophical dilemma applies not only to projections about future events, but also to projections about unknown past events from other known past events, a context obviously more common in litigation settings. Inferences at trial are still inductive in character. See generally 1A JOHN H. WIGMORE, *EVIDENCE* § 30 (Tillers' rev. 1983).

2. See 1A WIGMORE, *supra* note 1, § 55. Cf. *id.* § 64 (in many civil controversies, character traits are largely irrelevant).

3. See generally MCCORMICK ON EVIDENCE § 188 (4th ed. 1992).

propensities. Numerous exceptions to, and circumventions of, the prohibition have been developed,⁴ and applied in ways that reflect in part the less than complete confidence we have in the rationales themselves.⁵

One of the most important stress points in this history has been the problem of sexual violence. So compelling has been the belief in character propensities, when it comes to sexual inclinations, that the common law routinely, if somewhat fitfully, has allowed evidence of traits of sexual perversion to show that the defendant engaged in the alleged sexual misconduct. Though sometimes explained as not violating the prohibition of propensity based inferences, more candid opinions, as well as academic commentary, have recognized the category as genuinely exceptional.⁶

This exception was apparently rejected in the adoption of the Federal Rules of Evidence in 1975. Those rules, since used as the basis for codification in most states, provide for the usual list of exceptions to the prohibition, but do not endorse the idea that sexual violence is exceptional. The governing provision is Rule 404, which now states:

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

(1) *Character of accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) *Other crimes, wrongs, or acts.* 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

4. *Id.* §§ 189-195.

5. Those rationales are briefly outlined *infra* at notes 21-25 and accompanying text.

6. See 1A WIGMORE, *supra* note 1, §§ 62.2, 62.3.

cause shown, of the general nature of any such evidence it intends to introduce at trial.

Though not without serious ambiguities, nowhere does this rule suggest any difference between the treatment of sexual misconduct cases and other classes of cases. And some of the appellate case law since adoption of the Rules seems to be taking this omission seriously, eliminating the common-law exception.⁷

The resulting exclusionary rule has come under attack in the wake of several highly publicized cases, and in a context of increasing concern about sexual violence against women and children. With the encouragement of the Department of Justice, Congress recently acted to address these concerns. In the crime bill passed last August, Congress added three new rules to the Federal Rules of Evidence, designed to restore and articulate the common-law exception. Section 320935 of the Violent Crime Control and Law Enforcement Act of 1994,⁸ entitled "Admissibility of Evidence of Similar Crimes in Sex Offense Cases," provides:

(a) The Federal Rules of Evidence are amended by adding after Rule 412 the following new rules:

"Rules 413. Evidence of Similar Crimes in Sexual Assault Cases

"(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

"(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

"(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as

7. See, e.g., *Getz v. State*, 538 A.2d 726 (Del. 1988); *State v. Zybach*, 761 P.2d 1334 (Or. Ct. App. 1988), *rev'd on other grounds*, 775 P.2d 318 (Or. 1989). To be sure, other courts have not found the omission to be so determinative. See, e.g., *State v. Day*, 715 P.2d 743, 747 (Ariz. 1986); *State v. Charles L.*, 398 S.E.2d 123, 131-33 (W. Va. 1990). States that have not formally adopted the Federal Rules may have been affected by them nonetheless, as some have since rejected the exception in question by decisional law. See, e.g., *Lannan v. State*, 600 N.E.2d 1334 (Ind. 1992); *Pendleton v. Commonwealth*, 685 S.W.2d 549 (Ky. 1985). The continuing controversy over the issue is reflected in occasional legislative intervention. See, e.g., IND. CODE ANN. § 35-37-4-15 (1994) (overruling *Lannon*); Mo. REV. STAT. § 566.025 (1994) (inclusionary rule for child molestation).

8. Pub. L. No. 103-322, 108 Stat. 1796 (Sept. 13, 1994).

defined in section 513 of title 18, United States Code) that involved—

“(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 paragraph (1)-(4).

“Rule 414. Evidence of Similar Crimes in Child Molestation Cases

“(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant’s commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

“(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

“(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

“(d) For purposes of this rule and Rule 415, “child” means a person below the age of fourteen, and “offense of child molestation” means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

“(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 of 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).

“Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

“(a) In a civil case in which a claim for damages or other relief is predicated on a party’s alleged commission of conduct constitut-

ing an offense of sexual assault or child molestation, evidence of that party's commission or 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.

"(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule."

(b) IMPLEMENTATION.—The amendments made by subsection (a) shall become effective pursuant to subsection (d).

(c) RECOMMENDATIONS BY JUDICIAL CONFERENCE.—Not later than 150 days after the date of enactment of this Act, the Judicial Conference of the United States shall transmit to Congress a report containing recommendations for amending the Federal Rules of Evidence as they affect the admission of evidence of a defendant's prior sexual assault or child molestation crimes in cases involving sexual assault and child molestation. The Rules Enabling Act shall not apply to the recommendations made by the Judicial Conference pursuant to this section.

(d) CONGRESSIONAL ACTION.—

(1) If the recommendations described in subsection (c) are the same as the amendments made by subsection (a) then the amendments made by subsection (a) shall become effective 30 days after the transmittal of the recommendations.

(2) If the recommendations described in subsection (c) are different than the amendments made by subsection (a), the amendments made by subsection (a) shall become effective 150 days after the transmittal of the recommendations unless otherwise provided by law.

(3) If the Judicial Conference fails to comply with subsection (c), the amendments made by subsection (a) shall become effective 150 days after the date the recommendations were due under subsection (c) unless otherwise provided by law.

(e) APPLICATION.—The amendments made by subsection (a) shall apply to proceedings commenced on or after the effective date of such amendments.

Several points are worth noting. First, the new rules confirm the common-law exception only with respect to prior acts constituting an "offense," a defined term; other forms of evidence of character, such as the defendant's reputation or the opinions of others with regard to his character, remain subject to the Rule 404 exclusion. Second, the new rules cover only sexual assault and sexual molestation of children under the age of 14 years, thus leaving prosecutions for criminal acts

between consenting adults to be governed by the pre-existing system of rules. Third, the new rules allow the admission of "prior act" character evidence in both criminal and civil cases.⁹ And fourth, the effective date for the new rules is delayed for up to 300 days in order to obtain and evaluate a report of the Judicial Conference on the issue.

THE SYMPOSIUM PAPERS

This Symposium consists of four, relatively short papers. Its genesis indicates its justification. In 1992, while an earlier effort to enact this legislation was working its way through Congress, I was elected Chair of the Evidence Section of the Association of American Law Schools. In that capacity, I asked David Karp, principal drafter of the new rules on behalf of the Department of Justice, to speak to the Evidence Section at the annual meeting of the Association in January 1993. The paper then presented by Mr. Karp is reproduced here for its value in considering the new rules.¹⁰ That value is considerably heightened by the fact that the principal legislative sponsors of the new rules, Senator Robert Dole and Representative Susan Molinari, subsequently referred to Mr. Karp's address as "a detailed account of the views of the legislative sponsors and the Administration concerning the proposed reform," which "should also be considered an authoritative part of its legislative history."¹¹

Also presented here is the response that was invited from Professor Edward Imwinkelried, of the University of California, Davis. Professor Imwinkelried is the author of numerous articles and a thorough treatise on the subject of "other misconduct" evidence.¹² He argues that the new rules go too far toward one extreme, failing to give adequate weight to the legitimate interests of the defendant.¹³ The third

9. Similarly, the crime bill also extended to civil cases the "rape shield" rule, protecting alleged victims of sexual misconduct from the admission of evidence of the *victim's* prior sexual conduct or predisposition. See *id.* § 40141.

10. See David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15 (1994).

11. Floor Statement of Principal Senate Sponsor, Senator Robert Dole, concerning Prior Crimes Evidence Rule for Sexual Assault and Child Molestation Cases, 140 CONG. REC. S12,990 (daily ed. Sept. 20, 1994) [hereinafter Statement of Sen. Dole]; Floor Statement of Principal House Sponsor, Representative Susan Molinari, concerning Prior Crimes Evidence Rules for Sexual Assault and Child Molestation Cases, 140 CONG. REC. H8991-92 (daily ed. Aug. 21, 1994) [hereinafter Statement of Rep. Molinari].

12. See EDWARD J. IMWINKELRIED, *UNCHARGED MISCONDUCT EVIDENCE* (1984).

13. See Edward J. Imwinkelried, *Some Comments about Mr. David Karp's Remarks on Propensity Evidence*, 70 CHI.-KENT L. REV. 37 (1994).

piece is a brief reply by Mr. Karp, as befitted the circumstances.¹⁴ Except as indicated, the three articles are reproduced here essentially in the form originally presented, without taking into account subsequent thoughts or events.

As the reader will discover, Professor Imwinkelried's discussion of the new rules is informed by his study of the evolution of English rules dealing with character propensity evidence. The comparative focus suggested a further extension, addressing the treatment of this kind of evidence in continental European jurisprudence. Interestingly, there turns out to be very little written on the continental treatment of uncharged misconduct evidence generally, much less on the narrower category of sexual misconduct evidence. Consequently, I invited Mirjan Damaška, Professor of Law at Yale University, to provide some insight on this point. Unfortunately, competing commitments precluded his attendance at the AALS meeting, but Professor Damaška graciously agreed to provide written comments to supplement the presentations made by Mr. Karp and Professor Imwinkelried. Thus, the fourth piece in this Symposium is Professor Damaška's paper, in which he explains the much greater exposure of continental judges to character and propensity evidence.¹⁵

PRELIMINARY COMMENTS ON THE MERITS OF THE NEW RULES

Even a casual reading of the new rules suggests a host of questions about their interpretation. For example, the rules are phrased so that the described evidence "is admissible, and may be considered for its bearing on any matter to which it is relevant." The rules do *not* say simply that such evidence is excepted from the propensity ban of Rule 404. That seems to imply that the evidence may not be excluded for any reason except perhaps irrelevance,¹⁶ which would, in particular, preclude exclusion under Rule 403, the rule allowing discretionary exclusion of excessively prejudicial or cumulative evidence.¹⁷ However, according to their supporters, the new rules are not to be read this

14. David J. Karp, *Response to Professor Imwinkelried's Comments*, 70 CHI.-KENT L. REV. 49 (1994).

15. Mirjan R. Damaška, *Propensity Evidence in Continental Legal Systems*, 70 CHI.-KENT L. REV. 55 (1994).

16. Actually, the rule says that such evidence is admissible even if it is completely irrelevant, although it also implies, for example, that a judge could instruct the jury not to consider such evidence for any purpose once it is admitted. That, of course, would be quite silly; if it may not be used for any purpose, it certainly should be excluded, though the rule does not permit this as worded.

17. That rule provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or mislead-

way. "Admissible" is to be read as "may be admitted," not "must be admitted," so that exclusion under Rule 403 or on other grounds remains a possibility.¹⁸

This, however, is contrary to the usual understanding of the term "admissible." Ordinarily, when a judge or trial lawyer says evidence is "admissible," she means that a judge may not refuse admission. For example, when Rule 402 says that relevant evidence "is admissible, except as otherwise provided," it does not mean that the trial judge *may* admit relevant evidence not otherwise excluded by some rule, but rather that the trial judge *must* admit such evidence. And when a judge has discretion under Rule 403 to admit a given piece of evidence, depending upon the balance of probative value and prejudicial potential, we do not say that evidence is "admissible" because of the existence of discretion, even though it may or may not be admitted. Rather, we say that it is admissible or inadmissible as a conclusion after the indicated balance between probative value and prejudice has been determined. Until that judgment is made, and indeed until all other necessary judgments about the applicability of admissibility rules have been made, the evidence cannot be said to be either admissible or inadmissible.¹⁹ Given the stated goals of the drafters, the new rules should be worded simply as exceptions to the propensity prohibition in Rule 404(b).²⁰

Presumably, this kind of problem will be handled by the Judicial Conference in its consideration of the new rules. Our concern here is less technical. The essential question is whether such an exception for sexual assaults should be incorporated in the rules, assuming that the

ing the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

18. Karp, *supra* note 10, at 19 ("these rules are rules of admissibility, and not mandatory rules of admission"). This point is reiterated by Senator Dole, *see* Statement of Sen. Dole, *supra* note 11, and Representative Molinari. *See* Statement of Rep. Molinari, *supra* note 11.

19. There is, of course, a sense in which the word "admissible" denotes permissiveness, but that is because there is more than one person involved. When we say evidence is admissible, we do not mean that it must be placed in evidence, only that it *must* be admitted (by the judge) *if* it is offered (by an appropriate party). There is a choice here, but it is that of the offering party, not the judge.

20. It must be acknowledged that the Federal Rules of Evidence are not entirely clear or consistent in their mode of expression, but those contexts in which the "is admissible" locution does *not* denote a mandatory admission more obviously represent only exceptions to designated exclusionary rules. *See, e.g.,* FED. R. EVID. 1004 (exceptions to original document rule; secondary evidence said to be "admissible"). Even here, it would be better if the confusion were avoided. Similar, but more serious, problems can be found elsewhere. *See, e.g.,* FED. R. EVID. 609(a) (evidence of conviction of crime "shall be admitted" under certain circumstances, suggesting the ridiculous result that hearsay evidence of criminal conviction satisfying Rule 609 requirements cannot be excluded under Rule 802).

exception can be appropriately worded. This requires us to examine the rationales of the usual prohibition, instantiated by Rule 404, and the extent to which the special context of sexual assault presents possibilities for defeating those rationales. Fortunately, the rationales of the general exclusion, and the question of their application to sexual assault cases, are taken up directly in the papers that follow. For present purposes, I want only to point out that the arguments fall into three broad categories.²¹

First, and most commonly, there are arguments based on the danger of other misconduct evidence to the truth-finding function of the tribunal. These arguments come in two analytically distinct forms: those concerning the probatively misleading nature of character trait evidence, and those concerning the potential for prejudice against the defendant because of the trier's hostile reaction to other misconduct. The former address the possibility that the trier will inaccurately assess the probability that the defendant committed the charged offense, whereas the latter address the possibility that the trier will not apply the correct standard of proof to the probability it determines, even if it determines it accurately.²²

Second, there are arguments based on the distraction and waste of time that is inherent in disputing the claims of other misconduct. This is distinct from the first category because it does not depend upon the notion that an additional risk of inaccuracy is thereby injected into the present proceeding. Even if any unwarranted prejudice against the defendant, and any misleading inferences from the uncharged acts, can be eliminated, the net result is to spend much time considering matters that may be of little probative value to the present case.²³

21. For an excellent yet brief account, see RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, *A MODERN APPROACH TO EVIDENCE* 216-19 (2d ed. 1982).

22. Addressing the former argument raises in turn two distinguishable empirical issues, one having to do with recidivism rates, psychological theories of character traits, and other indicia of the probative value of the misconduct evidence, the other having to do with the predictability of jury misuse of the misconduct evidence. It is, after all, one thing to say that social scientists overestimate the value of character evidence, quite another to say that lay jurors do. Professor Imwinkelried seems to conflate these issues in his discussion. See Imwinkelried, *supra* note 13, at 43-46.

23. The argument, often encountered, that raising the issue of uncharged misconduct might "unfairly surprise" the defendant at trial may be either an argument about wasting resources of the tribunal and the parties, as the defendant takes appropriate steps to meet the issue, or as an argument about induced inaccuracy, assuming the defendant is unable to present appropriate and extant counter evidence in the limited time available at trial. It will be noticed that the latter concern is addressed in section (b) of each of the new rules by a requirement of notice to the defendant.

Third, there are arguments based on the liberal premise that once a person has been prosecuted for a crime, and punished if the result is a judgment of guilty, he has "paid his debt to society" and should not be plagued further by the history of the offense. This kind of argument, though occasionally articulated,²⁴ is decidedly weak, since it begs the question of what the punishment is to be. It is entirely plausible to say that various adverse consequences, beside formal punishment by the state, attach to conviction of crime, including exclusion from certain professions, loss of the right to carry weapons, and so on. Similar, though less serious, consequences may attach to mere suspicion of crime. One of these consequences may well be that the police are likely to use one's criminal history, including mere allegations of wrongdoing, as the basis for shaping their search for the culprit. And it is arguable that the same reasoning should permit the trier of fact to use such information without violating some political right of the defendant.²⁵

In the papers that follow, one should attend to the nature of the arguments presented with regard to sexual assault and attempt to understand them in terms of some such taxonomy of arguments. That may prove difficult at times, but the struggle to understand the arguments in these terms can be illuminating. To take one example, running through Mr. Karp's arguments is a theme to the effect that there is a special *need* for evidence of prior sexual assaults. One should be especially careful about such arguments. They can mean at least two different things.

On the one hand, they can mean that there is a special need to suppress sexual assault. Before that can be accepted as an argument for admitting evidence, one must answer the question of why the best way to suppress a given type of crime is by making it easier to convict that class of defendants, as opposed, for example, to stiffening penalties or otherwise encouraging prosecutions. Unless the social need argument is tied in some way to countering one or more of the three types of arguments for exclusion articulated above, it may be morally equivalent to an argument that the burden of proof for conviction

24. See LEMPERT & SALTZBURG, *supra* note 21, at 219.

25. Of course, using the information in this way, in view of the fact that the police will have also so used it, may pose a danger to accuracy by virtue of a kind of double counting. See *id.* at 217-18 (suggesting reasons that criminal record may be given too much weight unless effects of plea bargaining are taken into account). But this is a different type of argument, aimed at the question of the balance between probative value and potential to mislead.

should be lowered for allegations of sexual violence.²⁶ This conclusion might be circumvented to the extent that the general rationale for exclusion is thought to be avoiding the waste of resources rather than avoiding risks of inaccuracy, since one can then argue that even a small probative value in the evidence of prior offenses is worth the expense and effort of consideration.²⁷

On the other hand, the argument from special need can be aimed at the peculiar epistemic features of the cases under consideration. Mr. Karp's argument seems focused primarily in this direction, as he addresses the special problems of the availability of probative evidence that occur in many sexual assaults and child molestation cases. But even here, we must press ourselves to answer why it is that the weakness of other available evidence is a reason to admit evidence that would otherwise be considered too prejudicial or misleading. Does the paucity of other evidence somehow make propensity evidence less prejudicial, less misleading? If anything, one would expect the opposite relation, since the trier will be forced to dwell all the more upon the alleged prior offenses. But again, one way to avoid this conclusion would be to see the special need argument as linked to the proposition that the general exclusionary rule is based on efficiency concerns.²⁸

These considerations point to a more general problem. If the law is to have integrity, the proposal to exempt other misconduct evidence in sexual offense cases must assume that the rationales of the *general* exclusion are correct, at least in the sense of justifying on balance the prohibition of other misconduct evidence when used to set up a pro-

26. This could be articulated as a call for either lowering the standard of proof to some level below the usual, and still constitutionally mandated, "beyond reasonable doubt" standard, or—more subtly—for modifying the usual meaning of "reasonable" in that standard. For a discussion of the ultimate source of the constitutional guarantee, see Dale A. Nance, *Civility and the Burden of Proof*, 17 HARV. J.L. & PUB. POL'Y 647 (1994).

27. In the last part of Mr. Karp's address, he relies on the history of the general prohibition to argue, seemingly, that it has less to do with avoiding prejudice than with avoiding unfair surprise and unnecessarily protracted trials. See Karp, *supra* note 10, at 27-30.

28. Of course, the matter is different if the "other evidence," though available, is not presented to the trier of fact. Another way to avoid the dilemma indicated in the text would be to see the exclusionary rule as designed, at least in part, to induce prosecutors to develop and present more particular evidence about the charged crime, and not to rely on the trier of fact to convict simply because of the defendant's criminal history. Such an argument has been used in support of the suggestion of an inclusionary exception limited to acquaintance rapes, in the context of which prior offense evidence is claimed to be both more probative and less prejudicial than in other types of cases. See David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 MINN. L. REV. 529, 575-82 (1994). It is thought that in such cases, there may be no need to try to induce the presentation of better evidence by an exclusionary rule, because commonly none will exist. *Id.* at 578-79.

propensity inference; otherwise, the proper response is to repeal the prohibition entirely. Of course, it is quite plausible to see the new rules as reflecting a political alliance between anti-crime political forces, favoring total repeal of Rule 404 (or at least of 404(b)), and political forces we might call interest group feminist, concerned only (or primarily) with crime as it adversely affects women and their children. But such a compromise does not generate a law consistent in principle unless a reasonable theoretical difference can explain the resulting distinction between sexual violence and other serious crime, such as clandestine murder, where the social need and paucity of evidence factors are also in play.²⁹

In the final analysis, it may be that the new rules are simply inconsistent in underlying principle with the general prohibition. Even so, it is still possible to argue for the new rules as a kind of experiment. That is, liberalized admissibility for a politically accessible category of cases may be found, in the wake of experience, to be a workable and satisfactory arrangement. That would make it easier at a still later date to repeal, or substantially water down, the whole propensity inference prohibition. This may be a laudable goal, one European jurisdictions have largely achieved already. However, on the assumption of incoherence in principle, it is not obvious that alleged sexual offenders, however unsympathetic they may be, have no plausible complaint about unequal treatment.³⁰ On the other hand, perhaps it is pointless to look for a principled scheme here. The pre-existing scheme, at least as it has been applied, may already be so arbitrary and incoherent that the addition of the sexual propensity exception will have little impact on the integrity of the system as a whole.³¹

29. I do not mean to say that proponents of the new rule are being inconsistent unless they also believe that the general prohibition is justified in cases not covered by these or other exceptions. They can consistently believe that the general prohibition is unjustifiable, but that the prohibition as applied to sexual assaults is even *less* justifiable. The problem here is not with hypocrisy within the contending factions, but with the implications of different kinds of political compromise. See Bryden & Park, *supra* note 28, at 572-75 (criticizing the inconsistency of a sexual assault exception). See generally RONALD DWORKIN, *LAW'S EMPIRE* 176-84 (1986) (describing integrity of underlying principle as an account of the basic mandate to "treat like cases alike," and differentiating between compromises that do and those that do not preserve the integrity of the resulting scheme of law).

30. Cf. Dworkin, *supra* note 29, at 185-86 (contrasting inconsistency among discrete jurisdictions, as among states in a federal system, with inconsistency within a particular jurisdiction's laws).

31. See 1A WIGMORE, *supra* note 1, § 54.1 (lamenting the hypocrisy and unprincipled nature of the compromises represented by the character evidence rules).