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## Yes or No to Consent? Conforming Rule 404(b) to Society's New Understanding of Acquaintance Rape

Sheri B. Ross

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# Yes or No to Consent? Conforming Rule 404(b) to Society's New Understanding of Acquaintance Rape

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## I. INTRODUCTION

"[F]orced sex between people who already [know] each other" constitutes acquaintance or date rape.<sup>1</sup> Until recently, people did not consider this type of rape as "real" rape.<sup>2</sup> Experts estimate astounding numbers of reported and unreported stranger and acquaintance rapes.<sup>3</sup>

1. Nancy Gibbs, *When Is It Rape?*, TIME, June 3, 1991, at 48.

2. See *id.*; see also Kim L. Scheppele, *The Re-Vision of Rape Law*, 54 U. CHI. L. REV. 1095, 1100 (1987) (reviewing SUSAN ESTRICH, *REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO* (1987)) ("Where the rapist knows his victim, acts alone, and doesn't use a weapon or brutally beat her, the legal system often treats the rape as if it weren't a rape at all.").

3. See, e.g., U.S. BUREAU OF THE CENSUS, *STAT. ABSTRACT OF THE U.S.: 1991*, at 179 (In 1989, 94,500 rapes occurred, whereas only 18,954 murders occurred that year.); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 247 (1987) (In reported rapes, fifty-five percent of the rapists

The United States Department of Justice estimated that in 1991 eighty-three of every 100,000 women in the United States were reported rape victims.<sup>4</sup> In addition, more than ninety percent of rape violations were acquaintance rapes.<sup>5</sup> Approximately fifty-three percent of rape victims do not report rapes to the police.<sup>6</sup>

In the United States, jurisdictions generally define rape as the act of one who has sexual intercourse with another person by force and without the victim's consent.<sup>7</sup> Lack of consent is critical because this requirement "protects women's choice and women's autonomy in sexual relations."<sup>8</sup> Some states avoid the use of "consent" in their statutes by focusing on the actor's behavior.<sup>9</sup> These jurisdictions, however, shift the focus back to the victim by permitting the defendant to assert the victim's consent as an affirmative defense.<sup>10</sup> Regardless of statutory

and victims are strangers, but in all rapes, only seventeen percent are strangers.); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1165 (1986) (In 1978, fifty-six percent of 930 women surveyed in the San Francisco area said that they had been victims of forced intercourse or intercourse obtained by threat; eighty-two percent of these rapes involved acquaintances.); Gibbs, *supra* note 1, at 48 ("[W]hile 1 in 4 women will be raped in her lifetime, less than 10% will report the assault, and less than 5% of the rapists will go to jail."); see also Scheppele, *supra* note 2, at 1096-98.

4. FED. BUREAU OF INVESTIGATIONS, UNIFORM CRIME REP. FOR THE U.S. 1991, at 24. This report defines rape as "carnal knowledge of a female forcibly and against her will." The report indicates that this definition includes assaults and attempted rape but excludes statutory rape. *Id.* at 23.

5. U.S. Dep't of Justice, Sourcebook of Crim. Just. Stat. 1990, at 279 (Lone-offender rapes by well-known individuals accounted for 27.5%, and violations by casual acquaintances accounted for 63.3%).

6. *Id.* at 271.

7. For example, Louisiana's rape statute provides, in pertinent part: "Rape is the act of anal or vaginal sexual intercourse with a male or female person committed without the person's lawful consent." LA. REV. STAT. ANN. § 14.41 (West Supp. 1993); see also, ARIZ. REV. STAT. ANN. § 13-1406 (1989); CAL. PENAL CODE § 261 (West 1988 & Supp. 1993); FLA. STAT. ch. 794.011 (1991); N.Y. PENAL LAW §§ 130.05 - 130.20 (McKinney 1987); TEX. PENAL CODE ANN. § 22.011 (West 1989 & Supp. 1993); UTAH CODE ANN. § 76-5-402 (Supp. 1992); WIS. STAT. ANN. § 940.225 (West 1982 & Supp. 1992). See generally Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1784 (1992) (noting that the two main elements of rape are nonconsent and force).

8. Estrich, *supra* note 3, at 1122.

9. For example, New Jersey's rape statute provides, in pertinent part:

An actor is guilty of sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances:

(1). The actor uses physical force or coercion, but the victim does not sustain severe personal injury . . .

N.J. STAT. ANN. § 2C:14 (West 1982 & Supp. 1992); see also ILL. ANN. STAT. ch. 12-13 (Smith-Hurd Supp. 1992); MICH. COMP. LAWS ANN. §§ 750.520a-d (West 1991). These statutes are based on the Model Penal Code § 213 as adopted in 1962. Dripps, *supra* note 7, at 1784; see generally Leigh Bienen, *Rape III — National Developments In Rape Reform Legislation*, 6 WOMEN'S RTS. L. REP. 170, 181 (1980) ("The purpose behind such definitions is to concentrate on the behavior of the actor rather than that of the victim.").

10. See Dripps, *supra* note 7, at 1783-84 ("Even in reform jurisdictions, force remains an element and consent remains a defense."); Pamela A. Wilk, Comment, *Expert Testimony on Rape*

definitions, courts consider proof of the victim's lack of consent to be central in all rape prosecutions.

When a defendant admits engaging in sexual intercourse with the alleged victim, but argues that it was consensual, proof of nonconsent becomes critical. To prove nonconsent, prosecutors may offer evidence of the defendant's prior crimes, wrongs, or acts under Federal Rule of Evidence 404(b) or its state equivalent.<sup>11</sup> In many stranger rape cases, such evidence is admissible under one of the enumerated exceptions to the evidentiary rule excluding prior bad acts.<sup>12</sup> For example, when the defendant's identity is questioned, evidence of prior acts may be admissible to show that the accused is, in fact, the perpetrator of the crime.<sup>13</sup> In acquaintance rape cases, however, if the accused admits that sexual intercourse occurred, identity is not at issue. In addition, the defendant's admission of the intercourse eliminates the chief element of rape.<sup>14</sup> Thus, the only remaining issue is whether the victim consented?

There is, however, another side to this issue. One may view the question of whether the admitted sexual intercourse was consensual as whether the defendant forced the victim to have intercourse with him. Failure to recognize this side of the issue ignores the *actus reus* of the crime—in other words, the accused's criminal behavior. When courts

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*Trauma Syndrome: Admissibility and Effective Use in Criminal Rape Prosecution*, 33 AM. U. L. REV. 417, 422 (1984) ("Commentators have indicated . . . that the jurisdictions with statutes most heavily oriented toward defendant conduct still do not prohibit the defendant from raising the common law defense of consent."); Wallace D. Loh, *Q: What Has Reform of Rape Legislation Wrought? A: Truth in Criminal Labelling*, 37 J. SOC. ISSUES 28, 45-50 (1981) (arguing that the changes in the laws are only semantic); see also Cynthia A. Wicktom, Note, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399, 415 (1988) (noting that the woman's nonconsent is an implicit element of rape in the Model Penal Code).

11. Rape is generally prosecuted in state court because it is a state crime. State courts, however, apply their own evidentiary rules. For simplicity, this Comment discusses the exclusionary rule of evidence under Rule 404(b) of the Federal Rules of Evidence because most states have codified or use a rule similar to the federal rule. See, e.g., CAL. EVID. CODE § 1101(b) (West 1966 & Supp. 1993); FLA. STAT. ANN. § 90.404(2)(a) (West 1979 & Supp. 1992); LA. CODE EVID. ANN. art. 404(B) (West Supp. 1993); OKLA. STAT. ANN. tit. 12, § 2404 (West 1993). For a complete comparison of the federal and state rules, see 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5231, at 334-39 (1978).

12. See *infra* notes 42-65 and accompanying text; see, e.g., *Oglen v. State*, 440 So. 2d 1172, 1176 (Ala. Crim. App. 1983) (evidence of prior rape admissible to prove defendant's criminal intent or motive or victim's nonconsent where the victim's consent was the only issue); *State v. Searles*, 282 S.E.2d 430, 436 (N.C. 1981) (evidence of prior criminal acts admissible in rape case to show defendant's motive and intent); cf. Robert N. Block, Comment, *Defining Standards for Determining the Admissibility of Evidence of Other Sex Offenses*, 25 UCLA L. REV. 261, 262 (1977) (noting the frequent "seeming violation of the exclusionary rule").

13. See *infra* notes 42-47 and accompanying text.

14. See, e.g., *Lovely v. United States*, 169 F.2d 386, 388 (4th Cir. 1948); *Velez v. State*, 762 P.2d 1297, 1303 (Alaska Ct. App. 1988); *State v. Moore*, 534 So. 2d 1275, 1279 (La. Ct. App. 1988).

characterize the issue as whether the victim consented, rather than whether the defendant applied force, they exclude the accused's prior acts on the ground that one woman's consent, or lack thereof, is not probative of another woman's choice.<sup>15</sup> In acquaintance rape cases, the defendant's prior acts may not be admitted to prove his propensity toward the application of force.

Suppose a man is accused of acquaintance rape.<sup>16</sup> He had taken a fellow student at X University out to dinner. After dinner, the couple went dancing at Club Z and then returned to his dorm room for a drink. The couple kissed on the couch, and heavy petting ensued. When they were fully undressed, he attempted to have sexual intercourse with her. She said no; he did it anyway. At trial, the defendant admits that he engaged in sexual intercourse with the alleged victim but argues that she consented. The prosecution proffers alleged rape evidence of nine other women: five students who attended the same university at the same time as the defendant and four women who lived in the defendant's home town. Each of these women knew the defendant prior to the alleged rape, and each nonconsensual sexual experience occurred after the woman and the defendant were alone together. These "dates" involved different circumstances and occurred in different places, such as dancing first and then going to a park or attending a party and then going to a friend's dorm room.

According to the current legal framework, a court will not admit evidence under the identity exception to Federal Rule of Evidence 404(b) to prove that it was the defendant who committed the act, because this issue is already established where the defendant admits to engaging in consensual sex with the victim. The prosecution also cannot proffer this evidence under the intent exception because if the defendant in a rape trial admits the sexual act, the courts consider the intent to do the act to be conclusively proved because rape is not a specific intent crime.<sup>17</sup> Courts have also found that the defendant's prior acts are not probative of what a different victim said or did in a different situation.<sup>18</sup> Thus, courts that have framed the issue in terms of whether the victim consented have refused to admit evidence of the defendant's prior bad acts.

This framework does not comport with common sense. If a defendant surpasses a woman's "no" and evidence demonstrates that he has not

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15. See *infra* notes 76-79 and accompanying text.

16. This Comment focuses on male defendants and female victims because most prosecuted cases include female victims and male defendants. This does not discount the role of consent in prosecutions of rapes by males of other males or by females of males or other females.

17. See *infra* notes 48-53 and accompanying text.

18. See *infra* notes 76-79 and accompanying text.

responded to "no" in similar situations, the evidence is relevant. It is more likely that the defendant intended to force the alleged victim to have sexual intercourse with him if evidence demonstrates that he also forced nine other women to have sex with him. Moreover, a defendant's conduct raises inferences about the victim's conduct. It is more likely that a victim has been truthful about her lack of consent to sexual intercourse if the defendant repeatedly has forced himself upon other women.

The relevance of the prior acts, therefore, depends upon a court's characterization of the issues. Courts must recognize that the criminal behavior of the accused, the *actus reus*, is the remaining issue in an acquaintance rape case.<sup>19</sup> Courts may not recognize that the crime depends on the defendant's act, partly because of an underlying difference between acquaintance rape cases and other criminal cases. In other criminal cases, the prosecutor focuses on proving that the defendant committed the crime, not that the crime occurred.<sup>20</sup> In acquaintance rape cases, however, the prosecutor has little difficulty proving the identity of the person who committed the act and that the sexual act occurred. Rather, the prosecutor must focus on proving that the act that occurred was criminal.

This Comment argues that the change in the rape statutes to focus on the defendant's behavior is not enough. This change should prompt an actual focus on the defendant's behavior during court proceedings. In this light, prior crimes evidence may be proffered to prove the element of force in the crime of rape.

## II. FEDERAL RULE OF EVIDENCE 404(B)

### A. Generally

At common law, courts did not admit evidence of a defendant's character when introduced by the prosecution to imply that the defendant acted in conformity with his character.<sup>21</sup> The rationale behind this rule was that character would only circumstantially prove the accused's actions. Federal Rule of Evidence 404(b) incorporated this principle

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19. See, e.g., Wicktom, *supra* note 10, at 404 (focus in rape should be on the offender's conduct, not the victim's resistance).

20. See Dripps, *supra* note 7, at 1798 ("So long as a completed sex act is thought to constitute the essence of the crime, attention will be misdirected to whether the woman's submission is attributable to the defendant's force or to the woman's consent."); Wicktom, *supra* note 10, at 399 ("This emphasis on the woman's consent, and the methods of proving it cause rape trials to differ substantially from other criminal trials which focus on the conduct of the defendant.").

21. EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:18 (1984); Jennifer Y. Schuster, Comment, *The Admissibility of Inextricably Intertwined Evidence*, 42 U. MIAMI L. REV. 947, 947 (1988).

with respect to evidence of prior crimes, wrongs, or acts.<sup>22</sup> Rule 404(b) provides that

[e]vidence 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 . . . .<sup>23</sup>

The rule prohibits the prosecution from introducing evidence of a defendant's prior acts to characterize the defendant as a bad person with a general criminal disposition or a person with a propensity to commit the specific crime at issue.<sup>24</sup> The rule, however, permits introduction of prior crimes, wrongs, or acts when relevant for *any* purpose other than propensity.<sup>25</sup> For example, Rule 404(b) states that uncharged misconduct evidence may be admitted to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.<sup>26</sup> Because the list in Rule 404(b) is prefaced by the words "such as," it is not exclusive.<sup>27</sup>

The purpose of Rule 404(b) is to avoid several evidentiary dangers. First, the courts must avoid the prejudice to the defendant that occurs when a jury draws the inference that the defendant is a bad person, an "immoral law-breaker," or a criminal.<sup>28</sup> Second, the jury may overesti-

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22. Michael H. Graham, *Evidence and Trial Advocacy Workshop: Evidence as to Character; Circumstantial Use*, 19 CRIM. L. BULL. 234, 234-35 (1983); Schuster, *supra* note 21, at 947.

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

24. See, e.g., MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE, § 404.5, at 198-200 (3d ed. 1991); Edward J. Imwinkelried, *The Plan Theory for Admitting Evidence of the Defendant's Uncharged Crimes: A Microcosm of the Flaws in the Uncharged Misconduct Doctrine*, 50 MO. L. REV., 1, 3 (1985); Block, *supra* note 12, at 263; Amber Donner-Froelich, Comment, *Other Crimes Evidence to Prove the Corpus Delicti of a Child Sexual Offense*, 40 U. MIAMI L. REV. 217, 219 (1985).

25. GRAHAM, *supra* note 24, § 404.5, at 209-20; Donner-Froelich, *supra* note 24, at 219. There is dispute regarding this issue. Commentators and courts interpret the rule barring propensity evidence in two different ways. First, the "exclusionary" approach, advocated by Dean Wigmore, holds other crimes evidence inadmissible unless relevant to prove the specific enumerated exceptions in Rule 404(b). JOHN H. WIGMORE, CODE OF EVIDENCE 81 (3d ed. 1942). Second, the "inclusionary" approach allows for the admissibility of all relevant evidence except that which is relevant only to show a general disposition to commit the charged crime. Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938). Some courts, particularly the Second Circuit, consider Rule 404(b) a codification of the inclusionary approach. 22 WRIGHT & GRAHAM, *supra* note 11, § 5239 at 435. Many courts, however, still characterize the rule as one of exclusion. *Id.* As Professors Wright and Graham have noted, "[l]ack of uniformity on this point is probably harmless; while the form of the rule may affect the attitude with which the courts approach issues of other crimes evidence, it is doubtful that it will determine the outcome of many cases." *Id.*

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

27. GRAHAM, *supra* note 24, § 404.5, at 209-20; Schuster, *supra* note 21, at 948; see also *supra* note 25.

28. Imwinkelried, *supra* note 24, at 3; see also MCCORMICK'S HANDBOOK ON THE LAW OF

mate the probative value of the evidence, giving it more weight than it deserves.<sup>29</sup> Third, the evidence may confuse the jury by adding additional issues and wasting court time.<sup>30</sup> Finally, the rule protects the defendant from unexpectedly defending his or her prior actions.<sup>31</sup>

The test for admitting prior crimes is similar in most state and federal courts.<sup>32</sup> In *Huddleston v. United States*,<sup>33</sup> the Supreme Court found that, as a threshold inquiry, a court must determine whether similar acts evidence "is probative of a material issue other than character."<sup>34</sup> The Court required that the evidence be relevant to a matter in issue.<sup>35</sup> Moreover, the Court recognized that the incremental probative value of the prior crimes evidence must outweigh the prejudice to the defendant under Federal Rule of Evidence 403.<sup>36</sup> Finally, the Court held that the proffered prior acts must be supported by a foundation of sufficient evidence from which a jury could reasonably determine that the defendant committed the prior acts.<sup>37</sup>

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EVIDENCE § 185, at 439 (Edward W. Cleary ed., 2d ed. 1972) [hereinafter *McCORMICK'S HANDBOOK*]. In discussing the common law rule, Wigmore summarized two policy considerations that are applicable to Rule 404(b) concerns: "The over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts; [and] [t]he tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offenses." 1 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 194, at 650 (3d ed. 1940).

29. See, e.g., *Imwinkelried*, *supra* note 24, at 3.

30. See, e.g., *McCORMICK'S HANDBOOK*, *supra* note 28, § 185, at 439-40; Block, *supra* note 12, at 265.

31. See, e.g., *McCORMICK'S HANDBOOK*, *supra* note 28, § 185, at 440; Block, *supra* note 12, at 265; Schuster, *supra* note 21, at 959.

32. See *supra* note 11.

33. 485 U.S. 681 (1988).

34. *Id.* at 686.

35. See *id.* at 689-91. The relevancy question is one of conditional relevancy; it depends on the fulfillment of a condition of fact. Thus, the court determines whether the jury could reasonably find the conditioned fact by a preponderance of the evidence. *Id.* at 689-90; see also FED. R. EVID. 104(b).

36. *Huddleston*, 435 U.S. at 688, 691. Rule 403 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 misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FED. R. EVID. 403. The Court also noted that an instruction to the jury under Rule 105 to consider the prior acts evidence only for the proper purpose protects the defendant from prejudice. *Huddleston*, 485 U.S. at 691-92.

37. See *Huddleston*, 485 U.S. at 687-89; see also *United States v. Penson*, 896 F.2d 1087, 1091-92 (7th Cir. 1990) (restating *Huddleston* four-part test). Other federal decisions using a similar test include: *United States v. Houser*, 929 F.2d 1369, 1373 (9th Cir. 1990); *United States v. Cordell*, 912 F.2d 769, 775 (5th Cir. 1990); *United States v. Martinez*, 890 F.2d 1088, 1093-94 (10th Cir. 1989), *cert. denied*, 494 U.S. 1059 (1990); *United States v. Rodriguez*, 882 F.2d 1059, 1064 (6th Cir. 1989), *cert. denied*, 493 U.S. 1084 (1990); *United States v. Butler*, 792 F.2d 1528, 1535 (11th Cir.), *cert. denied*, 479 U.S. 933 (1986); *United States v. Lewis*, 780 F.2d 1140, 1142



### B. *Stranger Rape Cases*

In stranger rape cases, courts apply a variation of the *Huddleston* test for admitting a defendant's prior sexual acts.<sup>38</sup>

#### 1. MATERIAL ISSUE

In a rape prosecution where the defendant and victim were not acquainted, the defendant's intent, motive, plan or scheme, or identity may be at issue.<sup>39</sup> The defendant's prior sexual acts may be relevant to prove one of the enumerated exceptions to Rule 404(b). Some overlap exists among these exceptions, but they are not mutually exclusive.<sup>40</sup> Many courts relax the requirement that the exception be an issue in the case in order to admit evidence in sex crimes cases.<sup>41</sup> The enumerated exceptions most relevant in rape cases are identity, intent, motive, and plan or scheme. In addition, some courts have created exceptions for lustful disposition, consent, and corroboration.

##### a. Identity

Identity is an ultimate issue in a stranger rape case. Frequently, the prosecution offers motive, plan, knowledge or opportunity evidence to raise an inference of identity. In order for evidence of prior crimes to demonstrate identity, "[t]he pattern and characteristics of the crime must be so unusual and distinctive as to be like a signature."<sup>42</sup> A court, therefore, will not admit prior act evidence proffered to prove identity unless the defendant committed the prior act in a sufficiently similar manner as the current crime appears to have been committed.

In *Bighames v. State*,<sup>43</sup> the defendant abducted a college woman

(4th Cir. 1986); *United States v. DeLuna*, 763 F.2d 897, 912-13 (8th Cir.), *cert. denied*, 474 U.S. 980 (1985).

In state courts the test is essentially the same. *See, e.g.*, *Spicer v. State*, 799 S.W.2d 562, 563 (Ark. App. 1990); *People v. Spoto*, 795 P.2d 1314, 1318 (Colo. 1990) (en banc); *Holmes v. State*, 511 N.E.2d 1060, 1061 (Ind. 1987); *Cook v. State*, 578 A.2d 283, 287-88 (Md. Ct. Spec. App.), *cert. denied*, 583 A.2d 276 (Md. Ct. App. 1991); *People v. Ortiz*, 142 A.D.2d 248 (N.Y. App. Div. 1988).

38. *See, e.g.*, *United States v. Azure*, 801 F.2d 336 (8th Cir. 1986); *Lovely v. United States*, 169 F.2d 386, 388-89 (4th Cir. 1948); *Thomas v. State* 599 So. 2d 158, 161 (Fla. 1st DCA), *rev. denied*, 604 So. 2d 488 (Fla. 1992); *State v. Goebel*, 240 P.2d 251, 253 (Wash. 1952).

39. *See* 2 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 357, at 334 (Chadbourn rev. 1979 & Supp. 1992).

40. GRAHAM, *supra* note 24, § 404.5, at 211.

41. Block, *supra* note 12, at 262.

42. MCCORMICK ON EVIDENCE § 190, at 559-560 (Edward W. Cleary ed., 3d ed. 1984). McCormick refers to this type of evidence as proving a *modus operandi*; the jury can infer from the evidence a method of the particular defendant that proves that the defendant committed the crime charged. *Id.* at 559 n.17.

43. 440 So. 2d 1231 (Ala. Crim. App. 1983).

from the University of Alabama and raped her.<sup>44</sup> Two days before this incident, the defendant abducted two other women from the same university and raped them.<sup>45</sup> Affirming the admission of prior crimes evidence, the court found it "hard to imagine more identical offenses."<sup>46</sup> The court further stated that "[e]vidence that the accused has committed other rapes in a novel or peculiar manner is clearly admissible to show the identity of the now-charged [defendant]."<sup>47</sup>

### b. Intent

Intent, like identity, is an ultimate issue in a stranger rape case and covers the mental elements of the crime. Intent is the state of mind that negates "accident, inadvertence, or casualty."<sup>48</sup> Intent will theoretically be in issue where the defendant asserts that the intent was of another kind than to commit rape.<sup>49</sup> Courts have treated intent in rape cases inconsistently because "if the act is proved, there can be no real question as to intent."<sup>50</sup> Many jurisdictions refuse to admit prior crimes on the issue of intent and label the intent conclusively presumed.<sup>51</sup> Other courts find that when the sexual act is proven, intent is not in issue because the defendant intended to have sexual intercourse if the act occurred.<sup>52</sup> One court that has admitted prior acts evidence on the issue of intent reasoned that "[b]ecause the victim's consent was the only issue in [the] case, the evidence of the prior rape was admissible, under an exception to the general exclusionary rule, to prove the defendant's criminal intent or motive, or the nonconsent of the victim."<sup>53</sup>

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44. *Id.* at 1233.

45. *Id.*

46. *Id.*

47. *Id.* For a list of prior crimes evidence admitted by state courts for the purpose of identity, see Timothy E. Travers, Annotation, *Admissibility, in Rape Case, of Evidence that Accused Raped or Attempted to Rape Person Other Than Prosecutrix*, 2 A.L.R. 4th 330, § 5[a] (1980).

48. M.C. Slough, *Relevancy Unraveled*, 6 KAN. L. REV. 38, 48 (1957).

49. WIGMORE, *supra* note 39, § 357, at 334.

50. *Id.*

51. See, e.g., *Caldwell v. State*, 477 S.W.2d 877, 878 (Tex. Crim. App. 1972) (intent to do the act conclusively presumed); see also *Coler v. State*, 418 So. 2d 238, 239 (Fla. 1982), *cert. denied*, 459 U.S. 1127 (1983) (intent is not in issue in action for sexual battery); *State v. Cantrell*, 673 P.2d 1147, 1154 (Kan. 1983), *cert. denied*, 469 U.S. 817 (1984) (rape does not require specific intent).

52. WIGMORE, *supra* note 39, § 357, at 334; see, e.g., *Alford v. State*, 266 S.W.2d 804 (Ark. 1954) (reasoning that the jury must determine whether the acts described by the victim occurred, foreclosing an analysis of the defendant's intent); *State v. Moore*, 534 So. 2d 1275 (La. Ct. App. 1988), *cert. denied*, 560 So. 2d 21 (La. 1990) (intent is not an issue in prosecution for rape); *People v. Bruce*, 256 Cal. Rptr. 647, 650 (Cal. Ct. App. 1989), *rev. granted*, 823 P.2d 621 (Cal. 1992).

53. See, e.g., *Oglen v. State*, 440 So. 2d 1172, 1176 (Ala. Crim. App.), *cert. denied*, 440 So. 2d 1177 (Ala. 1983); see also *infra* notes 71-79 and accompanying text.

### c. Motive

Motive is "an emotion or state of mind that prompts a person to act in a particular way . . . ."<sup>54</sup> Motive is not an ultimate issue in a rape case. Generally prosecutors proffer and courts admit prior acts evidence under the motive exception to prove an ultimate issue in the case such as intent or identity.<sup>55</sup> The jury must, therefore, make an additional inference when considering evidence admitted under the motive exception.<sup>56</sup> The jury first infers that the evidence proves the existence of a particular motive and then infers that the motive proven translates to proof of intent or identity—that a particular defendant committed a particular crime or that because a defendant had a motive to commit a crime he indeed intended to commit that crime.

### d. Plan or Scheme

Plan or scheme "connotes a prior mental resolve to commit a criminal act, and implies preparation, and the working out of particulars—time, place, manner, means and so forth."<sup>57</sup> A state's proffer of prior crimes evidence to prove a defendant's plan does not raise an inference about a defendant's character.<sup>58</sup> Instead, a defendant's plan demonstrates "a conscious commitment to a course of conduct of which the charged crime is only a part."<sup>59</sup> Plan is not an ultimate issue in a rape case. Such evidence, therefore, must be relevant to another issue in the case such as identity or intent.<sup>60</sup>

In *Williams v. State*,<sup>61</sup> for example, the Supreme Court of Florida affirmed the admissibility of prior crimes evidence to prove the defendant's plan or scheme.<sup>62</sup> Williams hid in the victim's car, stabbed her in the chest with an ice pick, and raped her.<sup>63</sup> The trial court admitted testimony that the defendant previously had hidden in the another woman's car.<sup>64</sup> After both incidents, the defendant told police that "he thought [the car] belonged to his brother and crawled in the back to take

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54. 22 WRIGHT & GRAHAM, *supra* note 11, § 5240, at 479.

55. GRAHAM, *supra* note 24, § 404.5, at 202 nn.7-8.

56. Without motive evidence, a jury infers intent or identity directly from evidence of a defendant's prior crimes, wrongs, or acts.

57. GRAHAM, *supra* note 24, § 404.5, at 206 n.12 (quoting 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, *FEDERAL EVIDENCE* § 140, at 257 (1985)).

58. 22 WRIGHT & GRAHAM, *supra* note 11, § 5244, at 500.

59. *Id.*

60. For cases admitting prior crimes evidence under the plan or scheme exception, see Travers, *supra* note 47, at 350-60.

61. 110 So. 2d 654 (Fla.), *cert. denied*, 361 U.S. 847 (1959).

62. *Id.* at 663.

63. *Id.* at 656.

64. *Id.* at 657-58.

a nap.”<sup>65</sup>

e. Other

i. Lustful Disposition. Some courts create an exception outside of the exclusionary rule to admit prior crimes evidence in rape cases.<sup>66</sup> One such exception is called the “lustful disposition” exception.<sup>67</sup> This exception admits prior crimes evidence to demonstrate a defendant’s propensity for unusual or abnormal sexual behavior.<sup>68</sup> Examples of the lustful disposition exception exist in child sex abuse, incest, or sodomy cases.<sup>69</sup> Courts and commentators have criticized the lustful disposition exception because it takes sex crimes out of the purview of Rule 404(b).<sup>70</sup>

ii. Consent. Rule 404(b) does not expressly include an exception for consent.<sup>71</sup> Because nonconsent is critical in rape cases and difficult to prove,<sup>72</sup> prosecutors have attempted to proffer prior crimes evidence to prove nonconsent. In *Lovely v. United States*,<sup>73</sup> the Fourth Circuit Court of Appeals explained the general rule that when the sole issue in the case is whether a victim consented to an admitted sexual act, evidence of the accused’s prior acts is not admissible.<sup>74</sup> After analyzing the intent, identity, and plan or scheme exceptions to the exclusionary rule, the court stated that “[t]he fact that one woman was raped . . . has no tendency to prove that another woman did not consent.”<sup>75</sup> Most

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65. *Id.*

66. See e.g., *Austin v. State*, 319 N.E.2d 130, 132 (Ind. 1974) *cert. denied*, 421 U.S. 1012 (1975) (refusing to apply the exclusionary rule to prior crimes “where the chief element of the offense is illicit intercourse between the sexes . . .”).

67. GRAHAM, *supra* note 24, § 404.5b, at 212 n.17; Slough, *supra* note 48, at 51. Courts also refer to this exception as “depraved sexual instinct” or “lewd disposition.” See *Velez v. State*, 762 P.2d 1297, 1301 (Alaska Ct. App. 1988) (discussing cases that applied exception to sexual crimes within immediate family or upon same victim); *State v. Jerousek*, 590 P.2d 1366, 1373 (Ariz. 1979) (sexual aberration); *Reichard v. State*, 510 N.E.2d 163, 165 (Ind. 1987) (depraved sexual instinct); cf. *State v. Spaulding*, 313 N.W.2d 878, 881 (Iowa 1981) (unnatural sex crimes).

68. MCCORMICK ON EVIDENCE, *supra* note 42, § 190, at 560.

69. See, e.g., *Davis v. State*, 598 N.E.2d 1041, 1049 (Ind. 1992) (child sex); *State v. Moore*, 748 P.2d 833, 838 (Kan. 1988) (child sex); *State v. Schut*, 429 P.2d 126, 128 (Wash. 1967) (incest); *Gezzi v. State*, 780 P.2d 972, 977-78 (Wyo. 1989) (incest).

70. See RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 230 (2d ed. 1982); GRAHAM, *supra* note 24, § 404.5, at 212. The lustful disposition exception does take the evidence out of the purview of Rule 404(b). This alternative, however, has admitted prior acts evidence.

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

72. The essence of the issue of consent is the defendant’s word against the victim’s word because there seldom are witnesses to the alleged rape.

73. 169 F.2d 386 (4th Cir. 1948).

74. *Id.* at 388.

75. *Id.* at 390.

jurisdictions follow this rule.<sup>76</sup>

Some courts, however, have recognized the victim's inability to prove consent without prior acts evidence. These courts, sympathizing with the outrageousness of rape cases, volley back and forth between admitting and excluding prior crimes evidence on the issue of consent.<sup>77</sup> Courts frequently use the intent exception to admit the evidence on the issue of consent. These courts reason that when a defendant admits that sexual intercourse occurred but claims the victim consented, the defendant specifically places in issue his intent to have criminal sexual intercourse.<sup>78</sup> This reasoning is controversial because rape is not a specific intent crime, and thus the prosecution need not separately prove intent.

Under the current framework, a prosecutor must fit the evidence into an enumerated exception in order for a court to admit this evidence.<sup>79</sup> Finding another exception, such as identity, is not a difficult task in stranger rape cases.

iii. Corroboration. As with consent, some courts admit prior acts evidence to corroborate the victim's testimony when the prior act is

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76. See, e.g., *People v. Bruce*, 256 Cal. Rptr. 647, 650 (1989), *rev. granted*, 823 P.2d 621 (Cal. 1992) ("The evidence of the prior rape was therefore irrelevant to the ultimate fact of consent or lack of it."); *Ross v. State*, 516 N.E.2d 61 (Ind. 1987); *Meeks v. State*, 234 N.E.2d 629, 632 (Ind. 1968) (other alleged rape irrelevant when consent is only issue); *State v. Hatcher*, 372 So. 2d 1024 (La. 1979) (lack of consent by other victims is not probative of lack of consent of present victim); *State v. Bullock*, 651 S.W.2d 173, 175 (Mo. Ct. App. 1983); *State v. Pace*, 275 S.E.2d 254 (N.C. Ct. App. 1981); *State v. Beaulieu*, 359 A.2d 689 (R.I. 1976); *Caldwell v. State*, 477 S.W.2d 877 (Tex. Crim. App. 1972); *Foster v. Commonwealth*, 362 S.E.2d 745 (Va. Ct. App. 1987); *State v. Irving*, 601 P.2d 954 (Wash. Ct. App. 1979), *rev. denied*, 93 Wash. 2d 1007 (1980).

77. See, e.g., *People v. Key*, 203 Cal. Rptr. 144 (Cal. Ct. App. 1984) (discussing rape cases where courts admitted prior crimes evidence, but ultimately excluding this evidence). In a recent case, the California Court of Appeals, Fourth District, declined to follow *People v. Key* and other precedent on the issue of consent and found that there is a question of criminal intent when the defendant admits that consensual sexual intercourse occurred. *People v. Balcom*, 1 Cal. Rptr. 2d 879, 885-86 (Cal. Ct. App. 4th Dist. 1991), *rev. granted*, 823 P.2d 621 (Cal. 1992).

78. See *O'Neal v. State*, 318 S.E.2d 66, 67 (Ga. Ct. App. 1984) ("Thus, evidence of the earlier rape was material on the issue of consent or lack thereof, and had a direct bearing on appellant's bent of mind."); see also *Davis v. State*, 635 P.2d 481, 485 (Alaska Ct. App. 1981). But see *Velez v. State*, 762 P.2d 1297, 1305 (Alaska Ct. App. 1988) (disapproving of this reasoning).

79. See, e.g., *Oglen v. State*, 440 So. 2d 1172, 1176 (Ala. Crim. App.), *cert. denied*, 440 So. 2d 1177 (Ala. 1983) (noting that when consent is the only issue, prior crimes evidence is admissible to show the accused's "criminal intent or motive, or nonconsent of the victim"). But see *Jones v. State*, 580 So. 2d 97 (Ala. Crim. App.), *cert. denied*, 1991 Ala. LEXIS 1240 (May 24, 1991) (calling into question *Oglen* and other cases that admit uncharged misconduct evidence on the issue of consent under the intent exception and admitting the evidence under the plan or scheme exception, which requires an inference to intent or identity); *Williams v. State*, 592 So. 2d 350 (Fla. 3d DCA 1992) (affirming admission of evidence establishing common scheme or plan when only issue in case was consent).

also relevant to show another enumerated exception.<sup>80</sup> The evidence, however, must be crucial to the prosecution's case. Corroboration must be direct and the matter corroborated must be significant.<sup>81</sup> Courts apply this standard strictly because the corroboration theory may justify the admission of evidence of questionable relevance.<sup>82</sup> In stranger rape cases, the prosecution can usually ground its proffer of evidence in an enumerated exception to Rule 404(b), such as identity or intent.<sup>83</sup> The need for a corroboration exception is thus greatly reduced when the defendant and victim are strangers.

## 2. SIMILARITY REQUIREMENT

Most of the exclusionary rule exceptions require a threshold level of similarity to the charged offense for admissibility, because prior acts must be logically relevant to some issue in the case.<sup>84</sup> This threshold level varies depending upon which exception to the exclusionary rule a court uses to admit the evidence. For example, in cases that admit prior acts evidence under the identity exception, there must be a high degree of similarity, akin to a signature.<sup>85</sup> Identity "requires an inference to the conduct of the defendant; therefore, great care must be taken to insure that the theory of admissibility does not involve any inference as to the defendant's character."<sup>86</sup>

Categories to which courts have looked in rape cases to find similarity include:

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80. See *Crook v. Henderson*, 310 F. Supp. 200, 202 (E.D. La. 1970) (admitting similar fact evidence under Louisiana law to show intent, corroboration, and licentious disposition of defendant); *People v. Pendleton*, 599 P.2d 649, 653 (Cal. 1979) (en banc) (intent and corroboration); *State v. Stegmann*, 213 S.E.2d 262, 273 (N.C. 1975), *vacated in part*, 428 U.S. 902 (1976) (identity and corroboration).

81. See, e.g., *United States v. Everett*, 825 F.2d 658, 660 (2d Cir. 1987), *cert. denied*, 484 U.S. 1069 (1988) (evidentiary issue arose in context of armed robbery).

82. 22 WRIGHT & GRAHAM, *supra* note 11, § 5177, at 145.

83. *Id.* § 5248, at 522. Professors Wright and Graham state that evidence may be admitted in some situations to corroborate without the impermissible inference but caution that "[i]f the evidence would not be independently admissible to prove the commission of the crime, it is difficult to see why it becomes admissible because the prosecution has a witness who will testify to the act." *Id.* § 5248 at 521-22.

84. See FED. R. EVID. 401. The plan or preparation exception does not require similarity because it divulges the defendant's steps leading up to the alleged crime. See *supra* notes 57-65 and accompanying text.

One commentator argued that "[t]he test should be logical relevance rather than similarity." IMWINKELRIED, *supra* note 21, § 2:12, at 35-36. "[T]he prevailing view in the United States is that even dissimilar acts can be logically relevant and admissible on an uncharged misconduct theory." *Id.* (citation omitted).

85. IMWINKELRIED, *supra* note 21, § 2:12, at 35-36; 22 WRIGHT & GRAHAM, *supra* note 11, § 5246, at 513.

86. 22 WRIGHT & GRAHAM, *supra* note 11, § 5246, at 512-13.

the time of day in which the offenses occurred, the geographical proximity of the various offenses, the ages of the victims, the type of clothing worn by the assailant, the language used by the assailant, the type of building or area in which the assaults took place, the method of entry and exit from the victim's residence, the type of vehicle driven by the assailant, whether other types of sexual assaults were committed on the victims, whether the assailant had a weapon, and if so, the type of weapon, whether bodily harm was used or threatened, the manner in which the accused became familiar with the victims, and the manner in which the victim was initially accosted.<sup>87</sup>

### 3. FEDERAL RULE OF EVIDENCE 403

Courts must apply the probative value test of Rule 403 to admit evidence of a defendant's uncharged misconduct.<sup>88</sup> "Rule 403 permits the judge to exclude logically relevant evidence when the accompanying [prejudicial] dangers outweigh the probative value of the evidence."<sup>89</sup> Danger of unfair prejudice is great with evidence of prior rapes.<sup>90</sup> Therefore, the incremental probative value of the evidence must be significant in order to admit prior acts evidence. Courts consider

the strength of the evidence as to commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.<sup>91</sup>

It is important to note that the level of similarity between the prior acts and the charged crime increases proportionately to both the probative value and prejudicial effect of the evidence.<sup>92</sup> In addition, when balancing the probative value of the evidence against its prejudicial effect to the defendant, courts take into account protections of a limiting instruction under Federal Rule of Evidence 105 and instruct the jury to consider the evidence only for its relevant purpose.<sup>93</sup>

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87. Travers, *supra* note 47, at 341-42 (citations omitted).

88. See, e.g., *Huddleston v. United States*, 485 U.S. 681, 688, 691 (1988).

89. Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575, 592 (1990).

90. See *State v. Collins*, 698 P.2d 969, 973 (1985); see also Ronald N. Boyce, *Evidence of Other Crimes or Wrongdoing*, 5 UTAH B.J. 31, 41 (1977).

91. MCCORMICK ON EVIDENCE, *supra* note 42, § 190, at 565.

92. See IMWINKELRIED, *supra* note 21, § 8:07, at 15 ("The high degree of similarity increases the probative value of the evidence.") (citation omitted).

93. Courts consider these instructions effective. *Huddleston v. United States*, 485 U.S. 681, 691-92 (1988). The limiting instruction, however, is of "little practical significance since logic and experience indicate that the jury will be incapable of considering the evidence solely for the purpose offered and not as evidence of the guilt of the defendant for the crime charged." GRAHAM, *supra* note 24, § 404.5, at 233 n.38 (citation omitted). For an extreme view, see Abraham P.

### III. ACQUAINTANCE RAPE CASES

#### A. Generally

Although prosecuted under similar statutes as stranger rape but with lesser punishments, acquaintance rape is different from stranger rape.<sup>94</sup> "[T]he tell tale characteristics of 'stranger rape', frequently accompanied by savage and gratuitous violence, would [not] necessarily be present in cases of 'acquaintance-rape' or 'date rape'."<sup>95</sup> Moreover, police officers, prosecutors, juries and judges are more sympathetic to stranger rape than acquaintance rape.<sup>96</sup> "[B]ecause [acquaintance rape] does not involve physical injury, and because physical injury is often the only criterion that is accepted as evidence that the *actus reus* is nonconsensual, what is really sexual assault is often mistaken for seduction."<sup>97</sup> Therefore, juries fail to convict in acquaintance rape cases.<sup>98</sup>

Courts perhaps are becoming more aware of the severity of the acquaintance rape problem. In *Deborah S. v. Diorio*,<sup>99</sup> the court defined date or acquaintance rape "as a form of male assault rather than female error."<sup>100</sup> The court further stated that acquaintance rape "causes incalculable injury to society as well as private interests."<sup>101</sup> Considered in this light, police officers, prosecutors, juries, and judges cannot continue to disregard the crime of acquaintance rape. The legal community's new emphasis on this problem should continue.

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Ordoover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135, 175 (1989) ("The empirical research demonstrates that jurors are deeply affected by prejudicial comments and evidence and that curative instructions tend to increase the prejudice rather than decrease it.").

94. See, for example, the Model Penal Code, which provides in pertinent part:

(1) *Rape*. A male who has sexual intercourse with a female not his wife is guilty of rape if:

(a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; . . .

Rape is a felony in the second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) *the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties, in which cases the offense is a felony of the first degree.*

Model Penal Code § 213.1 (Official Draft 1962) (emphasis added). Acquaintance rape "is distinguished from: incest, authority rape (doctors & teachers), spousal rapes and [rapes of] children under 14." *Deborah S. v. Diorio*, 583 N.Y.S.2d 872, 877 (N.Y. Civ. Ct. 1992) (citation omitted).

95. *Rhodes v. State*, 539 A.2d 1160, 1160 (Md. Ct. Spec. App. 1988).

96. Scheppele, *supra* note 2, at 1100.

97. Lois Pineau, *Date Rape: A Feminist Analysis*, 8 LAW & PHIL. 217, 217 (1989).

98. See, e.g., Scheppele, *supra* note 2, at 1100.

99. 583 N.Y.S.2d 872 (N.Y. Civ. Ct. 1992).

100. *Id.* at 877.

101. *Id.* at 878.



### B. *Federal Rule of Evidence 404(b)*

Prior uncharged misconduct evidence is generally inadmissible in acquaintance rape cases.<sup>102</sup> Several reasons exist for this unrecognized, or perhaps recognized but unarticulated, rule. First, the victim and the accused knew each other before the alleged rape; therefore, the defendant's identity in an acquaintance rape trial is not a material issue. Moreover, in acquaintance rape cases, as in stranger rape cases, intent is generally not in issue unless the defendant maintains that the sexual act never occurred.<sup>103</sup> Because these two ultimate facts, intent and identity, are usually not in issue, other exceptions to Rule 404(b) such as motive, plan, knowledge, or opportunity are also inapplicable in rape cases.<sup>104</sup> Moreover, when the defendant concedes that the sexual act occurred but claims the victim consented, courts perceive the victim's lack of consent as the only issue in the case.

#### 1. MATERIAL ISSUE

The case law in acquaintance rape cases parallels the case law in stranger rape cases in which consent is the only controverted issue.<sup>105</sup> The law is both confused and erratic.<sup>106</sup> The courts excluding evidence of a defendant's prior acts do so because when consent is the only issue, prior crimes evidence has no probative value relative to the victim's consent. "The fact that one woman was raped . . . has no tendency to prove that another woman did not consent."<sup>107</sup>

On the other hand, some courts pigeonhole prior crimes evidence

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102. See, e.g., *Velez v. State*, 762 P.2d 1297 (Alaska Ct. App. 1988) (inadmissible propensity evidence); *Hodges v. State*, 403 So. 2d 1375 (Fla. 5th DCA 1981); *Malone v. State*, 441 N.E.2d 1339 (Ind. 1982); *State v. Saltarelli*, 655 P.2d 697 (Wash. 1982) (en banc); *State v. Cox*, 787 P.2d 4 (Utah Ct. App. 1990);

103. *Thornton v. State*, 376 N.E.2d 492, 494 (Ind. 1978) (Prior crimes evidence was logically relevant to establish that the charged and disputed act of sexual intercourse had occurred.).

104. 22 *WRIGHT & GRAHAM*, *supra* note 11, §§ 5240, 5244-45. But see, e.g., *Jones v. State*, 580 So. 2d 97 (Ala. Crim. App.), *cert. denied*, 1991 Ala. LEXIS 1240 (May 24, 1991) (Defendant admitted consensual sexual intercourse with victim. Court admitted uncharged misconduct evidence under the "plan or scheme" exception even though it stated that intent was not in issue.).

105. See *supra* notes 71-79 and accompanying text.

106. See, e.g., *Jones*, 580 So. 2d at 97. (discussing the confused state of Alabama law, ultimately casting doubt on four cases that admitted prior crimes evidence on the issue of intent as revived by a defense of consent, and admitting the prior crimes evidence under the plan or scheme exception).

107. *Lovely v. United States*, 169 F.2d 386, 390 (4th Cir. 1948); see also *Velez v. State*, 762 P.2d 1297, 1303 (Alaska Ct. App. 1988); *Hodges v. State*, 403 So. 2d 1375, 1378-79 (Fla. 5th DCA 1981); *Brown v. State*, 459 N.E.2d 376, 379 (Ind. 1984); *Malone v. State*, 441 N.E.2d 1339, 1346-47 (Ind. 1982); *State v. Cox*, 787 P.2d 4, 5-6 (Utah Ct. App. 1990); *State v. Saltarelli*, 655 P.2d 697, 699-701 (Wash. 1982) (en banc) ("The evidence should not be admitted to show intent . . . if intent is of no consequence to the outcome of the action.").

into an exception to Rule 404(b) in an effort to admit that evidence.<sup>108</sup> For example, in *Jones v. State*,<sup>109</sup> an Alabama court held that evidence of prior crimes was not admissible on the issue of intent or consent but found that the evidence was admissible to show a common plan or scheme.<sup>110</sup> Identity, however, was not in issue. Because plan or scheme requires a second inference to an issue in the case, such as identity or intent, this court effectively re-reasoned the precedent using circular logic and admitted the evidence under the intent exception.<sup>111</sup>

Other courts construe the defendant's admission that consensual sex occurred as placing in issue the defendant's intent. For example, in *State v. Moore*,<sup>112</sup> a Louisiana appellate court defined the issue as "intent to perform the act without the victim's consent."<sup>113</sup>

## 2. SIMILARITY REQUIREMENT

Traditional notions of similarity do not work in acquaintance rape cases because of an underlying difference between stranger rape and acquaintance rape.<sup>114</sup> This difference stems from the behavior of both the victim and the accused during an acquaintance rape. "[T]he 'date rape' victim does not generally fear for her life and run screaming from the scene."<sup>115</sup> The alleged rapist does not hide in the bushes and attack the victim in the street or hold a gun to the victim's head. Thus, the nonconsensual sexual act of each defendant occurs in different times, places, and manners. Therefore, the criteria for the similarity test do not afford acquaintance rape victims the opportunity to present prior crimes evidence.<sup>116</sup>

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108. See, e.g., *State v. DeBaere*, 356 N.W.2d 301, 305 (Minn. 1984) (Prior crimes evidence is highly relevant to consent because it shows "a pattern of similar aggressive sexual behavior by defendant against other women in the community.").

109. 580 So. 2d 97 (Ala. Crim. App.), cert. denied, 1991 Ala. LEXIS 1240 (May 24, 1991).

110. *Id.* at 99-101. This case is representative of the confusion in the prior crimes rape case law. The *Jones* court discussed the major cases in Alabama on consent but reached an opposite conclusion.

111. See 22 WRIGHT & GRAHAM, *supra* note 11, § 5244, at 500. But see *Oliphant v. Koehler*, 451 F. Supp. 1305, 1311 (Mich. 1978), *aff'd*, 594 F.2d 547 (6th Cir. 1979) (treating proof of plan or scheme as an ultimate issue in the case).

112. 534 So. 2d 1275 (La. Ct. App. 1988).

113. *Id.* at 1279. This court originally decided, before rehearing, that admission of other crimes evidence constituted reversible error when consent was the only issue. *Id.* at 1278-79; see also *Carey v. State*, 715 P.2d 244, 248 (Wyo.), cert. denied, 479 U.S. 882 (1986).

114. See, e.g., *Peek v. State*, 488 So. 2d 52, 55 (Fla. 1986) (traditional notions of similarity require similar fact evidence to be similar in every respect).

115. *Rhodes v. State*, 539 A.2d 1160, 1161 (Md. Ct. Spec. App. 1988).

116. See *supra* notes 80-83 and accompanying text. For example, if a man takes a woman to a bar, brings her to his home in Virginia and subsequently rapes her at night, this behavior is not sufficiently similar to an incident involving the same man who meets a woman at a party, takes

3. *STATE V. SMITH*

The confusing treatment of prior crimes evidence in acquaintance rape cases is illustrated by the Florida case of *State v. Smith*.<sup>117</sup> The State of Florida charged William Kennedy Smith with sexual battery.<sup>118</sup> The prosecution alleged that the defendant met the victim, Patricia Bowman, at a bar.<sup>119</sup> After they spent time together, Mr. Smith asked Ms. Bowman for a ride to the Kennedy Estate in Palm Beach, Florida.<sup>120</sup> She drove him to the house and accepted his invitation to go inside.<sup>121</sup> Later, they walked along the beach.<sup>122</sup> While on the beach, Mr. Smith undressed and asked Ms. Bowman if she wanted to swim.<sup>123</sup> She declined and turned to walk toward the house. The prosecution alleged that Ms. Bowman,

[h]aving reached the top of the stairs, . . . was suddenly tripped by the defendant grabbing her ankle. Breaking free she ran but a short distance before the defendant tackled her on the lawn. Holding her hands above her head with his hand the defendant pinned her to the ground with his weight and violently raped Patricia. . . . [When the victim confronted the defendant, he] denied the rape and told her that no one would believe her.<sup>124</sup>

Mr. Smith admitted that he had consensual sexual intercourse with the Ms. Bowman. The only perceived issue in the case was whether Ms. Bowman consented.

The prosecution proffered prior acts evidence of three earlier events: (1) In 1983, Lisa Lattes attended a party in New York where she met Mr. Smith, her boyfriend's cousin.<sup>125</sup> At the party, Mr. Smith

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her to a hotel room in California and subsequently rapes her in the afternoon. See, e.g., *Edmond v. State*, 521 So. 2d 269 (Fla. 2d DCA 1988).

117. No. 91-5482-CF-A02 (Fla. Cir. Ct. Dec. 11, 1991).

118. The Florida sexual battery statute provides, in pertinent part:

(1) Definitions:

(a) The term "consent" means intelligent, knowing, and voluntary consent and shall not be construed to include coerced submission. . . .

(5) A person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof uses physical force and violence not likely to cause serious personal injury is guilty of a felony of the second degree . . . .

FLA. STAT. ch. 794.011 (1991).

119. Prosecution's Memorandum of Law on William's Rule Evidence at 6-7, *State v. Smith*, No. 91-5482-CF-A02 (Fla. Cir. Ct. Dec. 11, 1991) [hereinafter Prosecution's Memorandum].

120. *Id.* at 7.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Motion to Exclude William's Rule Evidence at 18, *State v. Smith*, No. 91-5482-CF-A02 (Fla. Cir. Ct. Dec. 11, 1991) [hereinafter Motion to Exclude].

invited her to stay in the guest room of his house. Once there, "he grabbed her by her shoulders, pushed her onto the bed, covered her body with his, and tried kissing her."<sup>126</sup> He also touched her underwear. She struggled and Mr. Smith stood up and apologized.<sup>127</sup> A few minutes later, he attacked her again. She struggled in response, he allowed her to get up, apologized and tried to convince her to stay.<sup>128</sup> When Ms. Lattes tried to leave, he grabbed her again telling her that he only made a pass at her.<sup>129</sup> Subsequently, she left.<sup>130</sup>

(2) In 1988, Lynn Gullledge, a medical student, attended a party in Washington, D.C.<sup>131</sup> Mr. Smith, a fellow medical student, also attended this party and invited Ms. Gullledge and others to his apartment to swim.<sup>132</sup> The two walked to the pool, but no one else arrived.<sup>133</sup> Mr. Smith took off his clothes and went swimming; Ms. Gullledge, however, declined to undress and swim.<sup>134</sup> The couple then returned to Mr. Smith's apartment where they talked for a few minutes.<sup>135</sup> Mr. Smith grabbed Ms. Gullledge's wrists, pushed her to the floor, and kissed her.<sup>136</sup> She struggled while Mr. Smith held her down. She then told him she wanted to go home.<sup>137</sup> Mr. Smith asked Ms. Gullledge to come upstairs. After she went up a couple of stairs, Mr. Smith escorted her to the door, unlocked it and let her leave.<sup>138</sup> Shaking and crying, Ms. Gullledge walked to her car and left.<sup>139</sup>

(3) In 1988, Michelle Meyer, a medical student, attended a picnic in Washington D.C.<sup>140</sup> Mr. Smith also attended.<sup>141</sup> Ms. Meyer and Mr. Smith both went to a local bar after the picnic.<sup>142</sup> Ms. Meyer became intoxicated and Mr. Smith, who was also drunk, offered her a ride

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126. *Id.*

127. *Id.* at 19.

128. *Id.*

129. *Id.* at 75, 77.

130. *Id.* at 80.

131. *Id.* at 23.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 23-24.

137. *Id.* at 24.

138. Prosecution's Memorandum, *supra* note 119, at 5.

139. *Id.* The Motion to Exclude, however, does not state that Ms. Gullledge went upstairs or that she left crying. See Motion to Exclude, *supra* note 125, at 24.

140. Motion to Exclude, *supra* note 125, at 20; Prosecution's Memorandum, *supra* note 119, at 6.

141. Motion to Exclude, *supra* note 125, at 20-21; Prosecution's Memorandum, *supra* note 119, at 6.

142. Prosecution's Memorandum, *supra* note 119, at 6.

home.<sup>143</sup> He took her to his apartment rather than to her own.<sup>144</sup> Mr. Smith insisted she sleep upstairs in his loft.<sup>145</sup> Once there, he began kissing her.<sup>146</sup> She told him to stop; but Mr. Smith undressed and got into bed with her.<sup>147</sup> Though she again told him to stop, he removed her clothes, put on a condom, and had sex with her.<sup>148</sup> She then passed out and left in the morning after breakfast.<sup>149</sup>

The prosecution proffered these prior acts as evidence under the following exceptions to the exclusionary rule: (1) plan, scheme, or modus operandi; (2) lack of consent; (3) corroboration; and/or (4) opportunity.<sup>150</sup> The defense argued that none of these exceptions represented a material fact in issue and none of the incidents was relevant to the victim's consent.<sup>151</sup>

For the similarity prong of the *Huddleston* test, the prosecution argued that (1) all four victims met the defendant at social gatherings;<sup>152</sup> (2) all of the victims noticed a sudden change in the defendant's personality;<sup>153</sup> (3) three of the victims were attacked and pushed onto a bed or the ground;<sup>154</sup> (4) the defendant had a drink or had been drinking in all four cases;<sup>155</sup> (5) the defendant enticed all of the victims to his home at the time under false pretenses;<sup>156</sup> and (6) the defendant told three of the victims that nothing happened.<sup>157</sup> The defense argued that the traditional requirements of similarity such as location, time of day, sexual penetration, or injury were not present in the case. "In short, the pur-

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143. Motion to Exclude, *supra* note 125, at 21.

144. *Id.*

145. Prosecution's Memorandum, *supra* note 119, at 6.

146. Motion to Exclude, *supra* note 125, at 21.

147. *Id.*

148. *Id.*

149. *Id.* at 21-22.

150. Prosecution's Memorandum, *supra* note 119, at 10-32.

151. Defendant's Reply to State's Memorandum of Law on William's Rule Evidence at 3-12, *State v. Smith*, No. 91-5482-CF-A02 (Fla. Cir. Ct. Dec. 11, 1991) [hereinafter Defendant's Reply]. The test in Florida is similar to that of other jurisdictions. The party offering the prior crimes evidence, known as William's rule evidence, must show that the evidence is relevant to prove a material fact in issue and that these matters are similar to the charged offense, sharing "some unique characteristics or combination of characteristics which sets them apart from other offenses." *Heuring v. State*, 513 So. 2d 122, 124 (Fla. 1987). The *Heuring* court noted that in cases of sexual battery within the familial context, courts relax the similarity requirement. *Id.*; see also *Calloway v. State*, 520 So. 2d 665 (Fla. 1st DCA), *rev. denied*, 529 So. 2d 693 (Fla. 1988) (relaxing the rigidity of the similarity requirement where identity is not an issue).

152. Prosecution's Memorandum, *supra* note 119, at 8.

153. *Id.*

154. *Id.* (Ms. Bowman, Ms. Gullede, and Ms. Lattes).

155. *Id.*

156. *Id.*

157. Prosecution's Memorandum, *supra* note 119, at 3, 5, 9 (Ms. Bowman, Ms. Gullede, and Ms. Lattes).

ported similarities that the State points to are factors that are fairly descriptive of any 'acquaintance' rape and are insufficient to meet the 'strikingly similar' requirement."<sup>158</sup>

The court refused to admit the evidence.<sup>159</sup> Mr. Smith's prior acts, especially those with Ms. Meyer, were arguably relevant to show whether he intended to force the Ms. Bowman to have nonconsensual sexual intercourse with him and to corroborate Ms. Bowman's testimony. The following theoretical framework details how those acts are relevant and why the court should have admitted at least Mr. Smith's prior act with Ms. Meyer consistent with Florida's enactment of the prior acts rule.<sup>160</sup>

#### IV. A SOLUTION TO THE PROBLEM

The plain language of Rule 404(b) bars evidence of prior crimes, wrongs, or acts when the prosecution proffers the evidence to prove the defendant's propensity to commit the act charged. In acquaintance rape cases, the state may not use the defendant's prior sexual conduct to imply that because the defendant previously had nonconsensual intercourse with four other women, he is a rapist and thus committed the charged rape.<sup>161</sup> The defendant's prior sexual behavior is admissible, however, to prove any other relevant fact in issue, subject to the limitations of Rule 403.<sup>162</sup>

##### A. *Material Issue*

###### 1. ACTUS REUS

When a defendant admits that he had sexual intercourse with a victim, courts shift the emphasis from the defendant and concentrate on the victim's behavior and mental state. "[T]he cases prematurely conclude that the defendant, by claiming consent, has admitted both the *actus reus*

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158. Defendant's Reply, *supra* note 151, at 11. The defense also argued, albeit incorrectly, that the strikingly similar standard followed by Florida courts in cases admitting prior acts under the identity exception also applies for other exceptions. Motion to Exclude, *supra* note 125, at 15.

159. State v. Smith, No. 91-5482-CF-A02 (Fla. Cir. Ct. December 11, 1991). There is no opinion on this ruling; the court's ruling is, however, stated in the trial transcripts.

160. Florida Rule 90.404(2)(a) is essentially the same as Federal Rules of Evidence 404(b). It provides:

Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

FLA. STAT. ANN. § 90.404(2)(a) (West 1979 & Supp. 1992).

161. See *supra* notes 23-37 and accompanying text.

162. See *id.*

and the culpable mental state for the offense.”<sup>163</sup> This conclusion stems from an incorrect definition of the criminal act and forces courts to focus on the victim’s mental state rather than the defendant’s conduct. Courts cannot treat the defendant’s claim of consensual sexual intercourse as an admission of the completed act, because rape is defined as forced non-consensual sexual intercourse.<sup>164</sup> Similarly, the prosecution cannot prove the *actus reus* by merely proving that sexual intercourse occurred. Thus, courts must recognize all of the relevant issues when a defendant admits that sexual intercourse occurred:

- (1) the mental state and conduct of the victim (recognized as the only issue by the courts);
- (2) the defendant’s awareness of the victim’s conduct and state of mind; and
- (3) the defendant’s subjective and physical response to that awareness—whether forced nonconsensual intercourse occurred.

The third issue clearly includes the defendant’s mental and physical response to the victim’s actions.

In the typical scenario, the prosecutor offers evidence of prior acts of forced sexual intercourse to prove that the defendant intended to force the victim to have sexual intercourse, regardless of her lack of consent. This evidence calls for a pattern of inferences that does not violate Rule 404(b). The intent to use force, as demonstrated by the defendant’s prior acts, proves that the act of forced sexual intercourse occurred, at least as a reasonable inference based on probability. The distinction between the illegal inference and the legal one is the change in the jury’s inference pattern. The jury should infer from a defendant’s prior rapes that he intended to force the victim to have sexual intercourse with him. From this intent, the jury infers that it is unlikely that the current alleged rape did not occur. The unlikelihood of the non-occurrence stems from the principle that with each act of forced intercourse it is more likely that the defendant intended to surpass the victim’s “no.” Thus, the ultimate inference that the jury has made was the objective unlikelihood of mis-

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163. *Velez v. State*, 762 P.2d 1297, 1312 (Alaska Ct. App. 1988) (Bryner, C.J., dissenting). A crime includes *actus reus*, the criminal act, and *mens rea*, the culpable mental state. The actor must have both the physical conduct and the mental state to violate a particular statute. WAYNE LAFAVE & AUSTIN SCOTT, *CRIMINAL LAW* § 3:1, at 194 (2d ed. 1986). Rape is sexual intercourse in which the actor compels the victim to submit by force or by threat. MODEL PENAL CODE § 213.1(1)(a) (Official Draft 1962). Rape is also defined as sexual intercourse without the victim’s consent, where the actor uses physical force and violence. *See, e.g.*, FLA. STAT. ANN. § 794.011(5) (1991). Therefore, the *actus reus* of rape is forced sexual intercourse or forced nonconsensual sexual intercourse.

164. *See, e.g.*, *People v. Balcom*, 1 Cal. Rptr. 2d 879, 885 (Cal. Ct. App. 1991), *rev. granted*, 823 P.2d 621 (1992) (quoting *People v. Burnham*, 222 Cal. Rptr. 630 (1986) (alterations in original)) (“[T]he ‘wrongful intent’ is the intent to sexually penetrate the victim and the intent to accomplish that act by force or fear.”).

take. Under this framework, the probative value of the evidence increases proportionately to the number of incidents, because the probability that the act was criminal increases.

This theory is called the doctrine of chances. Wigmore characterized the doctrine as "the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all."<sup>165</sup> Another commentator explained:

The courts reason that as the number of incidents increases, the objective probability of accident decreases. . . . The coincidence defies common sense and is too peculiar. . . . [T]he intermediate inference is objective unlikelihood under the doctrine of chances rather than the defendant's subjective character.<sup>166</sup>

One example of the doctrine of chances is the wife found dead in the bathtub of her home.<sup>167</sup> The state charges defendant, her husband, with murder, and he claims that his wife drowned accidentally.<sup>168</sup> Evidence of similar deaths of the defendant's other wives is admissible to show that the charged offense occurred, as it is improbable that all the deaths were accidental.<sup>169</sup>

Suppose the defendant from the introductory hypothetical,<sup>170</sup> charged with rape, claims the sexual act was consensual. If nine women offer testimony that he forced them to have sexual intercourse with him without their consent, the doctrine of chances holds that it is unlikely

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165. WIGMORE, *supra* note 39, § 302, at 241.

166. IMWINKELRIED, *supra* note 21, § 4:01.

167. *Id.*

168. *Id.*

169. *Id.* See also WIGMORE, *supra* note 39, § 302, at 241-45. Wigmore provides another example:

[I]f A while hunting with B hears the bullet from B's gun whistling past his head, he is willing to accept B's bad aim . . . as a conceivable explanation; but if shortly afterwards the same thing happens again, and if on the third occasion A receives B's bullet in his body, the immediate inference . . . is that B shot at A deliberately; because the chances of an inadvertent shooting on three successive similar occasions are extremely small; or . . . because inadvertence or accident is only an abnormal or occasional explanation for the discharge of a gun at a given object, and therefore the recurrence of a similar result . . . excludes the fair possibility of such an abnormal cause and points out the cause as probably a more natural and usual one, i.e., a deliberate discharge at A. In short, similar results do not usually occur through abnormal causes; and the recurrence of a similar result . . . tends . . . to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish . . . the presence of the normal, i.e. criminal, intent accompanying such an act; and the force of each additional instance will vary in each kind of offense according to the probability that the act could be repeated, within a limited time and under given circumstances, with an innocent intent.

*Id.* at 241.

170. See text accompanying note 16.



that all the incidents of sexual intercourse, including the charged crime, were consensual. Simply stated, the defendant's prior misconduct is offered to prove that he intended to force her into sexual intercourse.

Critics of the *actus reus* theory of admissibility "argue that this use of uncharged misconduct is the very theory of logical relevance forbidden by the first sentence of the Federal Rule of Evidence 404(b): The prosecutor is offering uncharged misconduct 'to prove the character of a person in order to show that *he acted* in conformity therewith.'"<sup>171</sup> On the other hand, commentators note that the forbidden logical relevance to the defendant's action consistent with his character does not exist.<sup>172</sup>

## 2. CORROBORATION

A second theory of admissibility of prior acts evidence rests on corroboration of the victim's testimony. This theory addresses the issue of whether the victim actually said "no." Questions of credibility inhere in acquaintance rape cases.<sup>173</sup> The incident occurs in the presence of only two people: the victim and the defendant. The case hinges on whether the jury believes the victim's or the defendant's testimony. This renders corroboration of the victim's testimony crucial to the prosecution's case.<sup>174</sup> Corroborative evidence both reduces the possibility that the victim is lying and increases the probability that the defendant committed the crime.<sup>175</sup> One commentator discovered that a standard to admit circumstantial corroborative testimony already exists in some jurisdictions.<sup>176</sup>

Under this standard, the defendant's prior conduct says something about the victim's present conduct—that she is not lying.<sup>177</sup> If the nine witnesses testify that the defendant ignored their "nos," the normal inference that a man would respect a woman's refusal is contradicted. Thus,

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171. IMWINKELRIED, *supra* note 21, § 4:01, at 2 (quoting FED. R. EVID. 404(b)); *see also* William Roth, *Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach*, 9 PEPPERDINE L. REV. 297, 312 (1982); Note, *Admissibility of Evidence of Similar Offenses in Criminal Prosecutions in West Virginia*, 54 W. VA. L. REV. 142, 148-49 (1951).

172. *See, e.g.*, IMWINKELRIED, *supra* note 21, § 4:01, at 3-5.

173. Glanville Williams, *Corroboration-Sexual Cases*, 1962 CRIM. L. REV. 662, 662 (false sexual charges are common); Block, *supra* note 12, at 285 n.113 (noting controversy over need for corroboration in rape cases).

174. *See supra* notes 80-83 and accompanying text.

175. Williams, *supra* note 173, at 666 ("There is always a possibility that a witness is lying, and the possibility is rather pronounced in sexual cases. But the possibility becomes greatly reduced if there are two witnesses . . ."); Block, *supra* note 12, at 286.

176. *See* Block, *supra* note 12, at 285-290; *see also*, *State v. Thornton*, 376 N.E.2d 492, 494 (Ind. 1978) (admitting evidence to prove that act occurred and corroborate victim's testimony); *State v. Plaster*, 424 N.W.2d 226, 230 (Iowa 1988) (finding that prior sexual conduct makes it more probable that the victim was telling the truth).

177. Block, *supra* note 12, at 288.

it is more likely that this victim did not concoct her story. This inference does not imply that simply because one woman refused, this woman also refused. It is *his* prior conduct that makes it more likely that she did not consent to sexual intercourse.

### 3. SIMILARITY REQUIREMENT

In acquaintance rape cases there should be some similarity between occurrences because, as the *actus reus* doctrine of chances theory suggests, it is improbable that the same chance circumstance would occur repeatedly.<sup>178</sup> Because of the acute differences between acquaintance rape and stranger rape, courts must redefine similarity in the acquaintance rape context.<sup>179</sup> Public awareness of acquaintance rape and social science literature on the problem have recently caused courts to recognize the differences between these two types of rape.<sup>180</sup> The real hallmark of similarity between prior sexual acts and the rape at issue is not where it occurred and at what time. The inquiry must be more focused:

- (1) what happened after the accused and the victims were alone;
- (2) what happened after the victims allegedly said no; and
- (3) whether the victim and the defendant had sexual intercourse.

Consider again the rape hypothetical in the introduction as compared with one of the hypothetical defendant's prior rapes: In 1990, the man took a woman he met in a graduate math class at X University out to dinner. At 11:00 p.m., they went dancing at Club Z. At 1:00 a.m., he took her to his dorm room at the university and kissed her passionately. He attempted to undress her; she told him "no." Nevertheless, he succeeded in undressing her and heavy petting ensued. He attempted to have intercourse with her; she again told him "no." He pinned her arms down and told her she wanted him. After the sexual act was completed she said, "You should not have done that." He replied, "You wanted it." She left his dorm in the morning.

Now compare this with a prior event: In the summer of 1989, the defendant worked as a mathematician in Pennsylvania. His friend introduced him to a woman, a math teacher from a local high school. The defendant took the woman to an afternoon movie at 2:00 p.m. After the movie, they went back to her apartment for a drink and decided to play strip poker. The woman lost and was wearing only her undergarments by 5:00 p.m. Then the defendant, who was fully dressed, undressed and pushed the woman onto the floor in the living room. Next, he attempted to have sex with her. She pushed him off of her, stood up, and began to

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178. WIGMORE, *supra* note 39, § 302, at 245.

179. See *supra* notes 94-101, 114-16 and accompanying text.

180. E.g., *Rhodes v. State*, 539 A.2d 1160, 1160-61 (Md. Ct. Spec. App. 1988).

dress. He pushed her back down, took off her underwear, and had intercourse with her. Afterward, he got dressed and left her apartment.

The times at which these events occurred and their locations are irrelevant. What the victims and the defendant were wearing, where they went, and how they got there are also irrelevant. These cases are sufficiently similar, however, to meet the proposed test because:

- (1) the defendant attacked the women after they were alone for some time;
- (2) he continued the sexual act after the victim said or intimated "no;" and
- (3) he completed the sexual act.

The *Smith* case provides a second example.<sup>181</sup> Mr. Smith's prior sexual conduct with Ms. Meyer is sufficiently similar to the charged crime. In both instances, the defendant allegedly forced the victims into sexual intercourse after he was alone with them and they had said or intimated "no." The prior sexual intercourse with Ms. Meyer was relevant to prove that Mr. Smith forced Ms. Bowman to have sexual intercourse with him. When combined with other acts, the probability that these similarities are not merely coincidental increases the probative value of this evidence.<sup>182</sup>

#### B. *Federal Rule of Evidence 403*

Trial courts must balance the probative value of the uncharged misconduct evidence against the prejudice to the defendant.<sup>183</sup> This is a discretionary standard that excludes highly prejudicial evidence to ensure a fair trial. When consent is the only issue, the prior acts evidence is highly probative of the defendant's act and the victim's testimony. Few other methods of proof exist. The entire case hinges on the defendant's word against that of the victim. A limiting instruction would direct the jury to consider the evidence only for its proper purpose.<sup>184</sup> On the other hand, prior acts evidence may also be highly prejudicial to the defendant. The jury may consider the defendant a rapist. In addition, the prosecution would expend a significant amount of time presenting evidence from nine witnesses that the defendant had raped them. Moreover, the jury may attempt to penalize the defendant for his prior acts in addition to the present crime. Weighing these issues against the probative value of the evidence is a difficult task. The scales, how-

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181. *State v. Smith*, No. 91-5482-CF-A02 (Fla. Cir. Ct. Dec. 11, 1991).

182. Mr. Smith did not have sexual intercourse with Ms. Gullledge or Ms. Lattes, the other two potential witnesses. It is questionable, therefore, whether these acts would be similar enough to the charged crime to be admissible under Rule 404(b).

183. See *supra* notes 88-93 and accompanying text.

184. See *supra* note 93.

ever, tip in favor of admissibility in light of the importance of this evidence to the prosecution's case.<sup>185</sup>

## V. CONCLUSION

Acquaintance rape is a difficult subject. Courts and individuals generally do not want to believe such grotesque incidents occur during everyday life. It is difficult to conceive of the severity of this problem. Moreover, other societal issues and norms, such as morality, jealousy, male domination, and women's rights, impact acquaintance rape cases. Victims often do not file complaints because they believe that no one will believe them or that rape cannot occur between two "friends."<sup>186</sup>

Presently, acquaintance rape crimes are arduous to prosecute because there are usually no witnesses. The case pits one person's word against another's. Such problems make prior crimes evidence important to validate the accusation. Other problems, such as the victim's possible fabrication of the rape or a past victim's fabrication of a prior rape, may weigh against using prior acts to prove the *actus reus* or to corroborate.

Uncharged misconduct evidence is also a complicated issue.<sup>187</sup> Use of such evidence is one of the most litigated evidentiary issues.<sup>188</sup> Concerns remain that "the distinction between character and noncharacter theories of relevance is illusory; . . . even the purportedly noncharacter theories entail assumptions about the accused's tendencies and disposition."<sup>189</sup> Moreover, commentators suggest that some noncharacter theories of relevance threaten to engulf the entire exclusionary rule.<sup>190</sup>

Subject to these considerations and questions of the appropriateness of the entire character evidence prohibition, this Comment provides a new framework for considering prior acts evidence in acquaintance rape cases. Under this framework courts may admit relevant evidence that would have been excluded because the "only" disputed issue in the case is consent. Prosecutors may concentrate on the issue that prior acts evidence proves the *actus reus* of the crime and, at the same time, avoid characterizing the evidence under the rubric of an enumerated exception.

This Comment does not suggest that courts provide a special

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185. "So long as the trial court retains the discretion to exclude evidence of other offenses, after weighing the probative value of the . . . evidence against its potential prejudicial effect, the court's determination of admissibility would not seem to violate any principles of justice or fairness toward the defendant." Block, *supra* note 12, at 290.

186. See *supra* note 5 and accompanying text.

187. See *supra* notes 28-31 and accompanying text.

188. See Imwinkelried, *supra* note 89, at 577.

189. *Id.* (citations omitted).

190. See *supra* note 171 and accompanying text; see also Imwinkelried, *supra* note 89.

“acquaintance rape disposition” exception to allow admission of evidence of prior acquaintance rapes. Nevertheless, perhaps re-evaluation of rape law would lead to the separation of acquaintance rape and stranger rape, thereby making the body of law on the “new” crime of acquaintance rape a little more coherent.

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