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**A Brief Essay Defending the Doctrine of Objective Chances as a Valid Theory for Introducing Evidence of an Accused's Uncharged Misconduct**

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# A BRIEF ESSAY DEFENDING THE DOCTRINE OF OBJECTIVE CHANCES AS A VALID THEORY FOR INTRODUCING EVIDENCE OF AN ACCUSED'S UNCHARGED MISCONDUCT

Edward J. Imwinkelried\*

Federal Rule of Evidence 404(b) reads:

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.<sup>1</sup>

Rule 404(b) has been described as “the most controversial of the Federal Rules of Evidence.”<sup>2</sup> That description is accurate. The numbers tell the story. In federal practice, Rule 404(b) generates more published opinions than any other provision in the Federal Rules.<sup>3</sup> In many states, errors in the admission of uncharged

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

2. Dora W. Klein, *The (Mis)application of Rule 404(b) Heuristics*, 72 U. MIAMI L. REV. 706, 709 (2018).

3. See, e.g., United States v. Davis, 726 F.3d 434, 441 (3d Cir. 2013) (“Rule 404(b) has become the most cited evidentiary rule on appeal.”); *Rules of Evidence (Supplement): Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 93d Cong. 203 (1973) (letter of Professor Kenneth W. Graham, Jr.) (“[Rule 404(b)] is the issue of evidence most often raised in the federal appellate cases.”); Dora W. Klein, *Exemplary and Exceptional Confusion Under the Federal Rules of Evidence*, 46 HOFSTRA L. REV. 641, 666 (2017) (“According to some commentators, the rule appears in appellate court decisions more than any other rule of evidence.”); Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 TEMP. L. REV. 201, 211 (2005) (“Since 1975, Rule 404(b) has been the most contested Federal Rule of Evidence.”); Byron N. Miller, Note, *Admissibility of Other Offense Evidence After State v. Houghton*, 25 S.D. L. REV. 166, 167 (1980) (“Admissibility of evidence of other acts, wrongs, or crimes is the most frequently litigated question of evidence at the appellate level. . . .”); Klein, *supra* note 2, at 709 (“Rule 404(b) is perhaps the most controversial of the Federal Rules of Evidence.”).

misconduct evidence are the most common ground for reversal in criminal cases.<sup>4</sup> These numbers are hardly surprising. Testimony about an accused's other crimes can be so prejudicial that it is "often virtually decisive of the whole case."<sup>5</sup> As a practical matter, the introduction of such evidence can strip the accused of the presumption of innocence.<sup>6</sup> As one commentator colorfully put the matter, uncharged misconduct evidence can "sink the defense without [a] trace."<sup>7</sup>

Under Rule 404(b), the challenge facing the prosecutor is to articulate a non-character theory of logical relevance—a theory of admissibility that does not entail a forbidden assumption about the accused's personal, subjective bad character. In the past three decades, one purportedly non-character theory, the doctrine of objective chances, has become increasingly prominent. Wigmore's monumental evidence treatise contains a classic illustration of the doctrine:

The argument here is . . . from the point of view of the doctrine of chances,—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. . . . [T]he mind applies this rough and instinctive process of reasoning, namely, that an unusual and abnormal element might perhaps be present in one instance, but the oftener similar instances occur with similar results, the less likely is the abnormal element likely to be the true explanation of them. Thus, if 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 or B's accidental tripping 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 (*i.e.* as a probability, perhaps not a certainty) is that B shot at A deliberately; because the chances of an inadvertent shooting on three successive similar occasions are extremely small.<sup>8</sup>

In the 1959 Ian Fleming novel, *Goldfinger*, the archvillain restates Dean Wigmore's insight in vernacular terms: "Once is happenstance. Twice is coincidence. The third time it's enemy action."<sup>9</sup>

As previously stated, in the past few decades the doctrine of chances has become one of the most common weapons for prosecutors seeking to introduce evidence of an accused's uncharged misconduct. As the first part of this essay points

4. See, e.g., Patrick Wallendorf, Note, *Evidence – The Emotional Propensity Exception – State v. Treadaway*, 116 Ariz. 163, 568 P.2d 1061 (1977), *Special Action from Remand Sub Nom. State v. Corcoran*, \_\_ Ariz. \_\_, \_\_ P.2d \_\_ (1978), 1978 ARIZ. ST. L.J. 153, 156 n.29 (1978).

5. P. B. Carter, *The Admissibility of Evidence of Similar Facts* (pt. 2), 70 L. Q. REV. 214, 215 (1954).

6. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 179 (1971).

7. D.W. Elliott, *The Young Person's Guide to Similar Fact Evidence–I*, 1983 Crim.L.Rev. 284, 284; see also *People v. Smallwood*, 722 P.2d 197, 205 (Cal. 1986) (en banc) ("the most prejudicial evidence imaginable against an accused").

8. 1 JOHN HENRY WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 302 (2d ed. 1923).

9. Quoted in Stephen E. Fienberg & D. H. Kaye, *Legal and Statistical Aspects of Some Mysterious Clusters*, 154 J. ROYAL STAT. SOC'Y 61, 61 (1991).

out, prosecutors frequently employ the doctrine in child abuse prosecutions. In such prosecutions, the accused often argues that there was no actus reus because the child's injuries resulted from an accident. The initial part explains that in cases such as the 1974 *United States v. Woods* decision,<sup>10</sup> numerous courts have allowed the government to introduce evidence of other injuries the child suffered while in the accused's custody to negate the accident claim. The courts reason that the larger the number of injuries suffered by the child, the less probable it is that all the injuries were accidental. In drug prosecutions in which the prosecution evidence establishes the accused's possession of a contraband drug, the accused frequently contends that he or she lacked knowledge of the presence of the drug. In such cases, the courts routinely permit the government to adduce evidence that on other occasions the accused was found with illegal drugs on his or her person or in an automobile that he or she was driving.<sup>11</sup> The rationale is that although innocent persons sometimes find themselves enmeshed in suspicious circumstances, the assumption of innocence weakens as the number of similar incidents increases. Finally, American prosecutors have just begun to press the doctrine into service as a way to establish the identity of a perpetrator as the accused. British courts have long recognized this application of the doctrine.<sup>12</sup> As Lord Salmons wrote, when several independent complaints of similar offenses all identify the accused as the perpetrator, "common sense makes it inexplicable on the ground of coincidence."<sup>13</sup> American courts are also starting to appreciate the doctrine for this purpose.<sup>14</sup> Indeed, in the recent prosecution of Bill Cosby the prosecution invoked the theory.<sup>15</sup> In short, although the doctrine of chances has a relatively short track record in the United States, it has already become a prosecutorial mainstay in several important types of cases, including prosecutions for child abuse, drug possession, and sexual assault.

The rub is that although courts increasingly resort to the doctrine to justify the admission of an accused's uncharged misconduct, there has been a constant drumbeat of criticism of the doctrine. The thrust of the criticism is that the doctrine does not possess genuine non-character relevance. Rule 404(b)(1) prohibits the proponent from "prov[ing] a person's character in order to show that on a particular occasion the person acted in accordance with the character."<sup>16</sup> Simply stated, the rule forbids the prosecution from using the accused's bad character as circumstantial

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10. 484 F.2d 127 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974).

11. See, e.g., Michael H. Graham, *Other Crimes, Wrongs, or Culpable Acts Evidence: The Waning Penchant Toward Admissibility as the Wars Against Crime Stagger on; Part I. The War on Drugs—The Seventh Circuit Crosses Over to the Dark Side*, 49 CRIM. L. BULL. 875, 880–91 (2013); David P. Leonard, *The Use of Uncharged Misconduct Evidence to Prove Knowledge*, 81 NEB. L. REV. 115, 148 (2002).

12. *Director of Public Prosecutions v. Boardman* [1975] AC 421; *R. v. Scarrott* [1978] QB 1016; *R. v. Tricolgus*, 65 Crim.App. 16 (C.A. 1976).

13. *Boardman* at 462.

14. See, e.g., *People v. VanderVliet*, 508 N.W.2d 114, 125, 128–29 (Mich. 1993).

15. See Edward J. Imwinkelried, *The Evidentiary Issue Crystalized by the Cosby and Weinstein Scandals: The Propriety of Admitting Testimony About an Accused's Uncharged Misconduct Under the Doctrine of Objective Chances to Prove Identity*, 48 SW. L. REV. 1 (2019); Chris Francescani & Linsey Davis, *Bill Cosby's Fate Could Turn on a Pivotal Court Decision Expected Next Week*, ABC NEWS (Mar. 1, 2018, 11:08 PM), <https://abcnews.go.com/US/bill-cosbys-fate-turn-pivotal-court-decision-expected/story?id=53450806> [<https://perma.cc/9Z37-ACSZ>].

16. FED. R. EVID. 404(b)(1).

proof of conduct, that is, the perpetration of the charged offense. A number of commentators have argued that the doctrine of chances is merely bad character evidence in disguise. Professor Paul Rothstein stated that “[i]t is inescapable” that the doctrine rests on a verboten propensity inference.<sup>17</sup> Mr. Andrew Morris asserted that the doctrine fails unless you posit that the defendant has a “constant,”<sup>18</sup> “continuing,”<sup>19</sup> and “unchanging”<sup>20</sup> character “across time.”<sup>21</sup> For her part, Ms. Lisa Marshall insists that the doctrine “is propensity based.”<sup>22</sup> Most recently, Professor Frederic Bloom contended that the doctrine’s logic requires that the accused’s propensity or penchant “holds steady” during all the acts, both charged and uncharged.<sup>23</sup>

The thesis of this essay is that those criticisms are misconceived. This essay argues that rather than continuing to criticize the doctrine itself, evidence law reformers should shift their attention to the manner in which the courts administer the doctrine. The first part of the essay describes the doctrine of objective chances and distinguishes it from character reasoning. The second part of the essay surveys the criticisms of the doctrine while the third part explains why those criticisms are unsound. The fourth and final part elaborates on steps that should be taken to improve the administration of the doctrine: more rigorous enforcement of the foundational requirements for the doctrine, more widespread adoption of a requirement for pretrial notice of the intent to offer Rule 404(b) evidence, and the revision of Rule 105 limiting instructions given when uncharged misconduct evidence is admitted pursuant to the doctrine of chances.

#### **A DESCRIPTION OF THE DOCTRINE OF CHANCES AS A NON-CHARACTER THEORY OF LOGICAL RELEVANCE**

As the introduction suggested, whenever the prosecution offers testimony about an accused’s uncharged misconduct, the proffer implicates the distinction between two fundamentally different theories of logical relevance. On the one hand, as we shall see, the common law and the Federal Rules of Evidence forbid the prosecution from relying on verboten character reasoning. As Rules 404–05 teach, the prosecution may not use prior misconduct to prove the accused’s law-breaking character and then invite the trier of fact to treat that bad character as circumstantial proof of the accused’s guilt. On the other hand, both the common law and the Rules may allow the prosecution to introduce the misconduct evidence under a non-character theory of logical relevance, that is, a chain of reasoning which does not posit the accused’s subjective bad character as an essential assumption.

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17. Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 LOY. L. A. L. REV. 1259, 1261 (1995).

18. Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 194, 201 (1998).

19. *Id.* at 195, 201.

20. *Id.* at 201.

21. *Id.* at 194.

22. Lisa Marshall, Note, *The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits*, 114 YALE L.J. 1063, 1072 n.28 (2005).

23. See Frederic Bloom, *Character Flaws*, 89 U. COLO. L. REV. 1101, 1144 (2018).

What precisely does the character prohibition, codified in Rule 404(b)(1), forbid? By its terms, the Rule forbids a proponent from relying on the following chain of reasoning as a theory of admissibility:

**FIGURE 1**

THE ITEM OF <u>EVIDENCE</u>	----->THE INTERMEDIATE-----> <u>INFERENCE</u>	----->THE FINAL <u>INFERENCE</u>
The accused's other misdeed(s)	The accused's subjective bad character	On the occasion alleged in the pleadings the accused acted "in character," consistently with his or her subjective bad character

As Figure 1 indicates, a character theory of admissibility requires the trier of fact to draw two inferences, each of which poses a significant probative danger. Under a character theory, the trier's first task is to decide whether to infer the accused's subjective bad character from the evidence about the accused's uncharged misdeeds. That task necessitates that the trier consciously address this question: What type of person is the accused? What is his or her character? However, in our system of jurisprudence, we criminalize conduct, not status.<sup>24</sup> Indeed, the Supreme Court ruled that it offends the Eighth Amendment prohibition on cruel and unusual punishment to criminalize status.<sup>25</sup> We punish persons for what they do, not for who they are.<sup>26</sup> If we force jurors to concentrate on the question of an accused's character, there is a substantial risk they will be subconsciously tempted to punish the accused for his or her uncharged misdeeds. That risk is especially acute if there is no indication that the accused was convicted of, or punished for, those misdeeds.<sup>27</sup> In short, the first step in a character theory poses what the English philosopher Jeremy

24. See, e.g., Thomas J. Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidenced in Federal Criminal Trials*, 50 U. CIN. L. REV. 713, 731 (1981); Kathleen E. Weidner, *Evidence - State v. Ellis: The Other Wrongful Acts Rule*, 15 CREIGHTON L. REV. 281, 284 (1981).

25. See *Robinson v. California*, 370 U.S. 660, 666-67 (1962).

26. See, e.g., *United States v. Linares*, 367 F.3d 941, 945 (D.C. Cir. 2004) ("[A] concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." (quoting *United States v. Daniels*, 770 F.2d 111, 1116 (D.C. Cir. 1985))); *People v. Allen*, 420 N.W.2d 499, 504 (Mich. 1988) ("[I]n our system of jurisprudence, we try cases, rather than persons.").

27. See *Dowling v. United States*, 493 U.S. 342, 362 (1990) (Brennan, J., dissenting) ("This danger is particularly great where . . . the extrinsic activity was not the subject of a conviction; the jury may feel the defendant should be punished for that activity even if he is not guilty of the offense charged." (quoting *United States v. Beechum*, 582 F.2d 898, 914 (5th Cir. 1978) (en banc))); *Brown v. Commonwealth*, 763 S.W.2d 128, 130 (Ky. 1989) ("[T]he jury may be persuaded that the defendant escaped justice in the earlier case and resolve to see that it does not happen again."); Calvin W. Sharpe, *Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof*, 59 NOTRE DAME L. REV. 556, 561 (1984) (jurors may subconsciously desire to "sanction the defendant for another crime he seems to have 'got away with'" (quoting R. LEMPERS & S. SALTZBURG, *A MODERN APPROACH TO EVIDENCE* at 219 (2d ed. 1982))); Joan L. Larsen, Comment, *Of Propensity, Prejudice, and Plain Meaning: The Accused's Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404(b)*, 87 NW. U. L. REV. 651, 669 (1993) (the accused has evidently "escaped unpunished" for the other act (quoting 1A JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 58.2 (Peter Tillers ed., 1983))).

Bentham referred to as the risk of “misdecision.”<sup>28</sup> Even if jurors would otherwise find a reasonable doubt as to the accused’s guilt for the charged offense, jurors may be tempted to convict as a way to punish the accused for his or her prior misconduct. In the words of the Advisory Committee Note to Rule 403, jurors may succumb to the temptation to “deci[de the case] on an improper basis.”<sup>29</sup>

Now consider the relationship between the intermediate inference and the final inference. Drawing that inference requires the jury to use the accused’s subjective character as a predictor of conduct on a specific occasion, that is, at the time of the charged offense. The available psychological research becomes relevant here. On one hand, the research tends to show that jurors are likely to attach a good deal of weight to the accused’s character in forecasting his or her conduct.<sup>30</sup> To make this forecast, jurors may rely on an oversimplified assessment of the accused’s character.<sup>31</sup> On the other hand, the same body of research indicates that a generalized construct of a person’s character is a poor predictor of their conduct on a particular occasion. Case-specific factors tend to be more influential than the person’s character.<sup>32</sup> A prediction is especially hazardous when it is based on only one instance of conduct. “At best, behavior on one occasion predicts behavior on another occasion at around the .30 level”<sup>33</sup>—far worse than random chance. The bottom line is that the second inferential step presents the danger of overvaluation: the juror may give the accused’s subjective character far more weight than it deserves in deciding how the accused behaved.<sup>34</sup> Like the risk of misdecision, the danger of overvaluation can lead to a wrongful conviction. Hence, character reasoning poses two significant probative dangers and the concurrence of those dangers represents the policy rationale for the general character prohibition.

Now, contrast this with the theory of logical relevance underlying the doctrine of objective chances:

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28. 6 JEREMY BENTHAM, *An Introductory View of the Rationale of Evidence; For the Use of Non-Lawyers as Well as Lawyers*, in *THE WORKS OF JEREMY BENTHAM* 1, 105 (John Bowring ed., William Tait 1843).

29. FED. R. EVID. 403 advisory committee’s note to 1972 proposed rules.

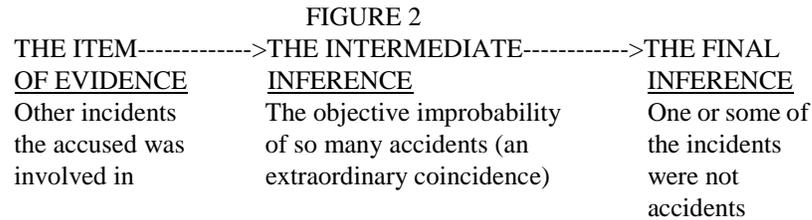
30. See Robert G. Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 *NOTRE DAME LAW.* 758, 776 (1974).

31. See generally Miguel Angel Mendez, *California’s New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 *UCLA L. REV.* 1003 (1984); Roderick Munday, *Stepping Beyond the Bounds of Credibility: The Application of Section 1(f)(ii) of the Criminal Evidence Act of 1898*, 1986 *CRIM. L. REV.* 511, 513 (“Psychologists have reported for several decades on the tendency of people to judge one another on the basis of one outstanding ‘good’ or ‘bad’ characteristic. This is popularly known as the ‘halo effect.’ . . . This tendency to exaggerate the representativeness of particular conduct is especially dangerous in the case of the misconduct and bad character of the accused.”).

32. See Edward J. Imwinkelried, *Reshaping the “Grotesque” Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 *SW. U. L. REV.* 741, 749 (2008).

33. William Fleeson, *Toward a Structure- and Process-Integrated View of Personality: Traits as Density Distributions of States*, 80 *J. PERSONALITY & SOC. PSYCHOL.* 1011, 1013 (2001).

34. See D. W. Elliott, *The Young Person’s Guide to Similar Fact Evidence-I*, 1983 *CRIM. L. REV.* 284, 287.



The theory depicted in Figure 2 is not only superficially different than the theory depicted in Figure 1. More importantly, it is distinguishable from the theory depicted in Figure 1 in terms of the policy considerations that inspire the character prohibition. In Figure 2, the intermediate inference is the objective improbability of so many accidents. To draw that inference, the jurors need not consciously advert to the question of the accused's personal, subjective bad character.<sup>35</sup> Of course, whenever a judge admits evidence of an accused's other misdeeds, there is a danger that a lay juror may independently engage in forbidden character reasoning. However, at least on request by the defense counsel, the judge will give the jury an instruction forbidding them from relying on that type of reasoning.<sup>36</sup> Although in the past academic commentators often generalized that limiting instructions are ineffective, that generalization may be badly overstated.<sup>37</sup>

Next, consider the second inferential step in Figure 2. Under a character theory, the jurors must use the accused's personal, subjective character as a predictor of conduct on a particular occasion. Figure 2 differs in this respect as well. Now the jurors must use their common sense to determine which contention is more plausible—the defense's contention that all the incidents are accidents or the prosecution's contention that at least one or some of the incidents amount to crimes. Of course, that is exactly what the pattern instructions in every jurisdiction direct jurors to do, namely, draw on their experience and common sense to evaluate the relative reasonableness of the competing theories of the facts.<sup>38</sup>

The seminal case announcing the doctrine of chances is a 1915 English decision, *Rex v. Smith*,<sup>39</sup> the famous "Brides in the Bath" case which is excerpted or

35. See *United States v. Aguilar-Aranceta*, 58 F.3d 796, 799 (1st Cir. 1995) ("The justification . . . is that no inference as to the defendant's character is required."); *United States v. York*, 933 F.2d 1343, 1350 (7th Cir. 1991) (explaining that under the doctrine of chances, the "inference is purely objective, and has nothing to do with a subjective assessment of [the accused's] character"); *People v. VanderVliet*, 508 N.W.2d 114, 125, 128–29 (Mich. 1993).

36. See FED. R. EVID. 105.

37. See *infra* notes 114–23 and accompanying text.

38. See, e.g., 1A KEVIN F. O'MALLEY, JAY E. GREINIG & WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS—CRIMINAL § 10.01, at 29 (5th ed. 2000) (a pattern Seventh Circuit instruction tells the jury that in evaluating a witness's credibility, the jurors should "use [their] common sense . . . and consider the evidence in light of [their] own observations in life"); 1 LEONARD B. SAND, JOHN S. SIFFERT, WALTER P. LOUGHLIN & STEVEN A. REISS, MODERN FEDERAL JURY INSTRUCTIONS § 7.01 (1997) ("In deciding the question of credibility, remember that you should use your common sense . . . and your experience."); See also *United States v. Troop*, 890 F.2d 1393, 1397 (7th Cir. 1989) ("[J]uries, in reaching their verdicts, are allowed and expected to draw on their common sense in evaluating what is reasonable to infer from circumstantial evidence").

39. *R. v. Smith* [1914–15] All ER 262 (Eng.).

at least cited in virtually every American evidence coursebook. The accused, George Smith, had recently married a woman named Bessie Mundy in a purportedly legal union. Bessie had inherited a large sum of money from her father. She was soon discovered drowned in her own bathtub. The accused alleged that her death was accidental and denied any involvement in it. In other words, the accused claimed there was no *actus reus*. To rebut that claim, the prosecution offered testimony that two other women the accused had purportedly married were “found drowned in their baths in houses where they were living with” the accused.<sup>40</sup> The defense protested that the admission of the testimony would be a blatant violation of the restrictions on bad character evidence. However, the trial judge admitted the testimony.

On appeal, the court sustained the trial judge’s ruling. The court agreed with the defense that the prosecution could not offer the testimony to show the defendant’s bad character and then invite the jury to treat that character as proof that George had murdered Bessie.<sup>41</sup> However, the court ruled that the testimony was logically relevant on an alternative theory that would shed light “upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental.”<sup>42</sup> The court focused on the objective improbability of so many accidents befalling the accused.<sup>43</sup> Either one or some of the deaths were the product of an *actus reus*, or George Smith was one of the unluckiest persons on the face of the earth.<sup>44</sup>

Using *Smith* as a benchmark, it was relatively easy for later courts to identify the essential elements that the prosecution must prove in order to invoke the doctrine: (1) the accused was involved in the uncharged incident; (2) the uncharged incident was similar to the charged incident; and (3) considering both charged and uncharged incidents, the accused has been involved in that type of incident more frequently than the typical person.<sup>45</sup> For element (1), in federal practice, Federal Rule of Evidence 104(b) governs the preliminary fact of the accused’s personal involvement in the other incident.<sup>46</sup> According to the text of 104(b), the prosecutor need present only enough foundational testimony “to support a finding that” the accused was involved.<sup>47</sup> The judge does not make a final decision whether the accused was personally involved. Rather, the judge plays a limited screening role, inquiring only whether the prosecution has presented enough credible evidence to allow the jury to rationally find that the accused was personally involved. In Wigmore’s view, in deciding whether the prosecution has satisfied foundational element (2), a judge need not find that the incidents are identical. Rather, the

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40. *Id.* at 262.

41. *Id.*

42. *Id.* at 263-64 (quoting *Makin v. Attorney-General for New South Wales* [1894] AC 57).

43. See ZELMAN COWEN & P. B. CARTER, *ESSAYS ON THE LAW OF EVIDENCE* 138 (1956); RUPERT CROSS & NANCY WILKINS, *AN OUTLINE OF THE LAW OF EVIDENCE*, at 233-34 (6<sup>th</sup> ed. 1986); RICHARD EGGLESTON, *EVIDENCE, PROOF AND PROBABILITY*, 92-93 (2d ed. 1983).

44. See Elliott, *supra* note 34, at 289.

45. See Edward J. Imwinkelried, *The Use 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. 594, 595-97 (1990).

46. See FED. R. EVID. 104(b); see also *Huddleston v. United States*, 485 U.S. 681, 682 (1988).

47. FED. R. EVID. 104(b).

incidents need only be similar in their “gross” features.<sup>48</sup> Finally, for element (3) the issue is not the absolute number of incidents. Rather, the issue is the relative frequency of the occurrences: Has the accused been involved in such incidents more frequently than the average, innocent person?<sup>49</sup> What is the baseline frequency for such events in the general population? Does the combination of the charged and uncharged incidents involving the accused amount to an extraordinary coincidence, exceeding that baseline frequency? In some cases, the judge can reasonably assume that the baseline frequency is one. Some events are obviously “once in a lifetime” occurrences: one can ordinarily expect to find one’s spouse drowned in the bathtub only once.

### THE THREE USES OF THE DOCTRINE OF CHANCES

When the prosecution can lay the three-element foundation described above, American courts have been willing to apply the doctrine. As the introduction noted, the courts have allowed prosecutors to introduce uncharged misconduct under the doctrine to establish the occurrence of an actus reus, prove the accused’s mens rea, and even demonstrate the accused’s identity as the perpetrator. We shall now briefly examine each of those three uses.

It should come as no surprise that American courts permit prosecutors to use the doctrine to prove the occurrence of an actus reus. After all, that was the purpose for which the landmark decision, *Rex v. Smith*, allowed the prosecutor to introduce the testimony about the drowning of the other two women George purportedly married. The American courts frequently uphold the application of the doctrine for that purpose in child abuse cases. The introduction mentioned the *Woods* case,<sup>50</sup> the leading American authority on this variation of the doctrine of chances. In *Woods*, the accused was charged with infanticide. The victim, a child in the accused’s custody, died after exhibiting symptoms of respiratory difficulty and cyanosis, a distinctive bluish discoloration of the skin. Like George Smith, Martha Woods denied that there was an actus reus; she contended that the child had accidentally suffocated. To rebut that contention, the prosecution offered evidence that over a 25-year period, children in the accused’s custody had suffered 20 cyanotic episodes. The trial judge admitted the evidence over a defense character objection, and the Court of Appeals for the Fourth Circuit affirmed. The court cited *Smith*.<sup>51</sup> The record contained competent evidence that the accused was personally involved in all 21 incidents; all the children were in her custody at the time of their episode. There were sufficient similarities among the incidents—she was the custodian of all the children, and all suffered cyanotic episodes. Finally, the total number of episodes—21—was so staggering that the third element of the doctrine was undeniably satisfied. The court found it objectively “unlikel[y]” that so many

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48. 2 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 304 (2d ed. 1923).

49. See Imwinkelried, *supra* note 45, at 597.

50. United States v. Woods, 484 F.2d 127 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974).

51. *Id.* at 133 n.8.

children in Martha's custody would "accidental[ly]" experience the same sort of cyanotic problem.<sup>52</sup>

Significantly, the *Woods* court understood the limited nature of the inference supported by the applicability of the doctrine of chances. The doctrine's applicability does not dictate the inference that all of the incidents are non-accidental or even that the charged incident is non-accidental. There is nothing about the logic of the doctrine that singles out the charged incident as a crime. The only warranted inference from the doctrine's applicability is that one or some of the incidents are likely not accidents. In *Woods*, the court stressed that the lower court record contained testimony by a distinguished forensic pathologist, Dr. Vincent DiMaio, that there was a 75 percent chance that the charged death was a homicide.<sup>53</sup> The opinion strongly suggests that absent Dr. DiMaio's testimony, the prosecution's case would have been legally insufficient to sustain a conviction.<sup>54</sup>

After approving the use of the doctrine to prove the occurrence of an actus reus, the courts moved on and accepted the use of the doctrine to establish the accused's mens rea. While the actus reus often arises in child abuse cases, drug prosecutions are the most common setting in which prosecutors invoke the doctrine to justify the introduction of uncharged misconduct to prove mens rea. Treating uncharged misconduct as proof of intent is the most common use of uncharged misconduct evidence.<sup>55</sup> The existence of a mens rea is often the central battleground in drug prosecutions. As a practical matter, the accused may be unable to deny that he or she had the drugs in their luggage or an automobile they were driving, but they can still claim that they were unaware of the drug's presence because a third party had secreted the drugs in the luggage or automobile. Confronted with that claim, prosecutors often turn to uncharged misconduct to prove the accused's guilty knowledge.<sup>56</sup> More specifically, they frequently invoke the doctrine of objective chances to justify admitting the uncharged misconduct. Suppose, for example, that on the charged occasion the police lawfully found cocaine hidden behind a panel in a car driven by the accused. The accused might deny any knowledge that there was cocaine in the car. However, assume that on a prior occasion when the police stopped the accused's driving a different automobile, they also found cocaine in a hidden panel. The trial judge might have the same reaction as the judge in *Smith*: that misfortune might happen to an innocent person once in his or her lifetime, but the occurrence of such a similar event twice to the same person is an extraordinary

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52. *Id.* at 134.

53. *Id.* at 130.

54. *See id.* at 135.

55. *See* 22B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE and PROCEDURE § 5242 (Supp. 2016); Thomas J. Reed, *The Development of the Propensity Rule in Federal Criminal Causes 1840-1975*, 51 U. CIN. L. REV. 299, 306-07 (1982).

56. *See* Edward J. Imwinkelried, "Where There's Smoke, There's Fire": Should the Judge or the Jury Decide the Question of Whether the Accused Committed an Alleged Uncharged Crime Proffered Under Federal Rule of Evidence 404?, 42 ST. LOUIS U. L.J. 813, 838 (1998).

coincidence that defies common sense. Today, invocation of the doctrine to prove mens rea is a commonplace occurrence in criminal trials.<sup>57</sup>

The final step in the evolution of the doctrine of chances in the United States has been its recent extension to prove the accused's identity as the perpetrator.<sup>58</sup> There are far fewer American cases on this use of the doctrine, but once again American courts are following the English example. The leading English precedent is the House of Lords' celebrated decision in *R. v. Boardman*.<sup>59</sup> The accused was a school headmaster. Several students accused him of sexual misconduct. The speeches by all five Lords invoked the doctrine to justify admitting one student's accusation to prove the truth of another student's accusation.<sup>60</sup> In Lord Morris' speech, he asserted that "it [is] unlikely that two people would tell the same untruth" while "having considerable features of similarity."<sup>61</sup> Lord Halisham stated that the strikingly similar, unusual features "common to the two stories" constituted "a coincidence which is against all the probabilities. . . ." <sup>62</sup> For his part, Lord Cross reasoned that "[t]he likelihood of such a coincidence obviously becomes less and less the more people there are who make the similar allegations and the more striking the similarities in the various stories."<sup>63</sup> However, the Lords appeared to agree that the accusations must be truly independent. Lord Morris noted there was no evidence in the record below that the two boys had "conspired" or "collaborated."<sup>64</sup> Lord Wilberforce also cautioned against applying the doctrine in any fact situation in which there was evidence of "collaboration or concoction."<sup>65</sup>

There are less than a handful of American decisions putting the doctrine to this use.<sup>66</sup> However, in the process of advocating for the legislative provisions that later became Federal Rules of Evidence 413–15,<sup>67</sup> the Office of Policy Development (OPD) of the Department of Justice endorsed the use of the doctrine to prove identity:

It is inherently improbable that a person whose prior acts show that he is in fact a rapist or child molester would have the bad luck to be later hit with a false accusation of committing the same type of

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57. See generally Edward J. Imwinkelried, *Criminal Minds: The Need to Refine the Application of the Doctrine of Objective Chances as a Justification for Introducing Uncharged Misconduct Evidence to Prove Intent*, 45 HOFSTRA L. REV. 851 (2017).

58. See Imwinkelried, *supra* note 15, at 3.

59. [1975] AC 421 (Eng.).

60. *Id.* at 427–38, 439–40, 443–44, 446–47, 449–50.

61. *Id.* at 441–42.

62. *Id.* at 446, 453.

63. *Id.* at 459.

64. *Id.* at 441–42.

65. *Id.* at 444.

66. See *People v. Balcom*, 867 P.2d 777, 785 (Cal. 1994) (en banc) (Arabian, J., concurring) ("If . . . two people claim rape, and if their stories are sufficiently similar, the chance that *both* are lying, or that one is truthful and that the other invented a false story that just happens to be similar, is greatly diminished."); *People v. VanderVliet*, 508 N.W.2d 114, 128 n.35 (Mich. 1993) ("[W]e can intuitively conclude that it is objectively improbable that three out of thirty clients would coincidentally [falsely] accuse defendant of sexual misconduct."); *State v. Lopez*, 2018 UT 5, 417 P.3d 116.

67. These provisions carve out special exceptions to the general character prohibition in the case of allegations of sexual assault and child molestation.

crime, or that a person would fortuitously be subject to multiple false accusations by a number of different victims.<sup>68</sup>

In the recent *Cosby* prosecution, there was only one charged victim, Ms. Andrea Constand.<sup>69</sup> To persuade the trial judge to admit testimony of some of Mr. Cosby's 19 other accusers, the prosecution relied in part on the doctrine of chances.<sup>70</sup>

### THE CRITICISM THAT THE DOCTRINE OF CHANCES IS NOT A LEGITIMATE, NON-CHARACTER THEORY OF LOGICAL RELEVANCE

At the same time that the doctrine of chances has been gaining momentum in the United States as a theory for admitting evidence of an accused's uncharged misconduct, the doctrine has come under sharp criticism. Although the critics differ on some points, they tend to concur in contending that on close scrutiny, the doctrine does not qualify as a non-character theory—thus, it is a pretext for admitting inadmissible evidence of an accused's bad character. There have been numerous critics, but four are especially noteworthy.

The first was Professor Paul Rothstein, a highly respected evidence authority, who examined the doctrine in a 1995 article.<sup>71</sup> He acknowledged that Dean Wigmore had championed the theory and had claimed that it was a legitimate, non-character theory.<sup>72</sup> He also noted that decisions such as *Rex v. Smith* appeared to approve of the doctrine as a non-character theory.<sup>73</sup> However, he contended that Wigmore was wrong and that *Smith* was wrongly decided. In his view, “[i]t is inescapable” that the doctrine requires a propensity inference.<sup>74</sup> Professor Rothstein concluded that in order to apply the doctrine, the trier must assume that the accused has a propensity to repeat this type of crime.<sup>75</sup>

The next critic was Mr. Andrew Morris, who presented his analysis in a 1998 article.<sup>76</sup> At several points Mr. Morris cites Professor Rothstein's article.<sup>77</sup> Like Professor Rothstein, Mr. Morris concedes both that there are precedents approving the doctrine and that in those precedents, the courts characterize the doctrine as a non-character theory.<sup>78</sup> However, he professes that he cannot discern any non-character relevance in the theory.<sup>79</sup> Quite to the contrary, he repeatedly asserts that it makes no sense for the trier to infer intentional misconduct unless the trier posits

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68. 137 CONG. REC. 6033 (1991).

69. See Francescani & Davis, *supra* note 15.

70. *Id.*

71. See Rothstein, *supra* note 17.

72. See *id.* at 1262, 1262 n.19.

73. See *id.* at 1260–61.

74. *Id.* at 1261.

75. See *id.* at 1262, 1264.

76. See Morris, *supra* note 18.

77. See *id.* at 189 n.33, 200 n.73, 201 n.75.

78. See *id.* at 191–93.

79. See *id.* at 191.

that the accused possesses a “constant,”<sup>80</sup> “continuing,”<sup>81</sup> and “unchanging”<sup>82</sup> bad character “across time,”<sup>83</sup> that is, at the time of all the incidents. In Mr. Morris’s view, the only possible conclusions are that all the incidents were accidents or that all were intentional misdeeds.<sup>84</sup> According to Mr. Morris, “[i]n the end,” “we cannot dislodge propensity from [the] center” of the logic of the doctrine of chances.<sup>85</sup>

Although Mr. Morris endorses Professor Rothstein’s view, Mr. Morris adds an alternative argument:

Even if [it] were correct that the use of the doctrine of chances to eliminate the odds of an accident did not involve propensity reasoning, it bears such close similarity to propensity reasoning that we could not seriously have faith that limiting instructions could prevent a jury from crossing over the thin line between eliminating the probability of accident and directly reasoning about propensity. As a result, evidence used on this theory would often fall to the Rule 403 balancing test.<sup>86</sup>

That is an attractive argument. After all, “[t]here is near-consensus in evidence scholarship that limiting instructions are especially unproductive in the context of uncharged act evidence given the highly prejudicial nature of such evidence.”<sup>87</sup>

The next significant article in this line is a 2005 student note dealing with evidence of uncharged misconduct in civil employment discrimination actions.<sup>88</sup> In the note, Ms. Lisa Marshall observes that such evidence is absolutely vital in civil rights cases in general and employment discrimination actions in particular. In these cases, the plaintiff must prove the defendant’s discriminatory intent. Since the defendant rarely makes direct admissions of that intent, the plaintiff usually desperately needs to introduce other acts reflecting the same discriminatory animus.<sup>89</sup> She observes that in such actions, plaintiffs often rely on the doctrine of chances to justify admitting evidence of other acts. However, she finds that reliance to be misplaced. Like Professor Rothstein and Mr. Morris, she believes that the logic of the doctrine does not render the evidence relevant unless one posits the defendant’s bad, discriminatory character.<sup>90</sup> In her view, when the trier of fact turns to the doctrine of chances, the trier’s “logic” is necessarily “propensity-based.”<sup>91</sup> The

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80. *Id.* at 194, 201.

81. *Id.* at 195, 199, 201.

82. *Id.* at 201.

83. *Id.* at 194.

84. *See id.* at 203.

85. *Id.* at 192, 203.

86. *Id.* at 200 n.74.

87. Demetria D. Frank, *The Proof Is in the Prejudice: Implicit Racial Bias, Uncharged Act Evidence & the Colorblind Courtroom*, 32 HARV. J. RACIAL & ETHNIC JUST. 1, 37 (2016).

88. *See* Marshall, *supra* note 22, at 1064.

89. *See id.* at 1066, 1080–83.

90. *See id.* at 1071–72.

91. *Id.* at 1081.

evidence is absolutely irrelevant unless the trier assumes that the defendant employer has an “enduring propensity to act in a given way” across time.<sup>92</sup>

The most recent article in this line is a 2018 article by Professor Frederic Bloom.<sup>93</sup> Professor Bloom concurs with Professor Rothstein.<sup>94</sup> Professor Bloom states that the doctrine of chances works only if there is something that “connect[s] the acts: the fires, the bruises, the lotteries, the tubs.”<sup>95</sup> Like Professor Rothstein, Mr. Morris, and Ms. Marshall, Professor Bloom concludes that the “something” must be propensity. “It must be the intentional, repeated scheming of the defendant—the penchant of that defendant to commit similar crimes in similar ways over and over: to set similar fires, to inflict similar bruises, to contrive similar lotto victories, to drown similar victims.”<sup>96</sup> The bottom line for Professor Bloom is that the doctrine of chances rests on nothing more than “improper character reasoning.”<sup>97</sup>

In sum, the criticism of the doctrine is reducible to two basic objections. One is that the doctrine does not possess legitimate non-character relevance. The second is that even if the doctrine does possess some minimal non-character relevance, when uncharged misconduct testimony is admitted under the theory there is an intolerable risk that the lay jurors will disregard the judge’s limiting instruction and misuse the testimony as character evidence. As we shall now see, neither objection warrants the rejection of the doctrine.

#### THE UNSOUNDNESS OF THE CRITICISMS OF THE DOCTRINE OF CHANCES

To begin with, the doctrine does rest on a solid non-character theory of logical relevance. As Professor David Leonard has pointed out, the doctrine of objective chances rests on probability reasoning.<sup>98</sup> There has been a formal demonstration that the theory of logical relevance underlying the doctrine is consistent with conventional statistical reasoning. When the proponent can lay a proper foundation, the result of the doctrine’s applicability is a reduction of the probability that random, innocent chance accounts for the other death, the instance of possessing illegal drugs, or the accusation.<sup>99</sup> Furthermore, the statistical reasoning does not entail any assumption about the accused’s subjective bad character.<sup>100</sup> None of the formulae includes a variable for the accused’s character.

However, that technical statistical argument has not halted criticism of the theory. Perhaps the following two hypotheticals, based on variations of the *Woods* fact situation, will suffice. In both hypotheticals, like Mrs. Woods, the accused takes

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92. See *id.* at 1080–81.

93. See Frederic Bloom, *Character Flaws*, 89 U. COLO. L. REV. 1101 (2018).

94. See *id.* at 1143–44.

95. *Id.* at 1144.

96. *Id.*

97. *Id.*

98. David P. Leonard, *The New Wigmore: Evidence of Other Misconduct and Similar Events* § 6.3.1, at 432 (2d ed. 2019).

99. See Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, the Doctrine of Chances*, 40 U. RICH. L. REV. 419, 448–57 (2006).

100. *Id.*

children into his or her custody—perhaps as the operator of a large daycare center. And, as in *Woods*, the children in the accused’s custody suffer a number of cyanotic episodes.

In the first hypothetical, the operator of the day care center is none other than Jeffrey Dahmer, one of the most notorious serial killers in the history of the United States.<sup>101</sup> Dahmer is believed to have murdered 17 men and boys between 1978 and 1991. Roughly a third of his victims were teenagers, several as young as 14. He was called the “Milwaukee Cannibal” and the “Milwaukee Monster” because many of his murders involved necrophilia, dismemberment, and cannibalism. For purposes of this variation of the hypothetical, make the following assumptions:

- Dahmer is charged with attempted infanticide, the attempted murder of a child who suffered symptoms of respiratory difficulty and cyanosis at the daycare center.

- While Dahmer claims the episode was an accident, the prosecution counters that Dahmer suffocated the child.

- Fifteen years earlier, just after Dahmer opened his day care center, a previous child in Dahmer’s custody suffered a similar fate.

- Data from the state agency overseeing day care centers indicates that on average, during the typical 15-year period among the children at day centers as large as Dahmer’s, there would be two cyanotic episodes.

- The prosecution has competent evidence that outside the day care center, Dahmer committed the 17 murders, again many involving necrophilia, dismemberment, and cannibalism.

How would the character evidence rules codified in Federal Rules 404–05, apply in this hypothetical?

The general prohibition would preclude the prosecution from offering the testimony about the 17 other gruesome murders. Without additional facts, the only evident relevance of that testimony is to support the simplistic character argument “he did it once, therefore he did it again.” It is true that the majority of the 17 victims were adult males. However, even if all the victims had been young boys, it would not change the outcome of the character analysis. Decreasing the age of some of the earlier 17 victims would strengthen the character inference in the pending attempted infanticide prosecution, but that would not alter the nature of the inference. Unless the prosecution could invoke the doctrine of chances, the prosecution cannot escape from relying on a character theory.

In addition, the prosecution could not justify introducing that testimony under the doctrine of chances. As previously stated, the second element of the foundation for invoking the doctrine is that the uncharged act be generally similar to the charged offense. However, the dissimilar charged offense lacks any of the features—necrophilia, dismemberment, or cannibalism—that became the hallmarks of the handiwork of the Milwaukee Monster.

Next, what if the prosecution eschewed the testimony about the 17 murders and proffered only the testimony about the second cyanotic episode? The prosecution could not offer the testimony about the other incident simply to show that Dahmer

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101. See John Philip Jenkins, *Jeffrey Dahmer: American Serial Killer*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Jeffrey-Dahmer> [https://perma.cc/Q8YU-RLY9].

has a propensity to harm children. That theory would run directly afoul of the general character prohibition.

However, finally we reach the critical question: could the prosecution invoke the doctrine to justify admitting that testimony? The answer is clearly “no.” The third element of the foundation is proof of an extraordinary coincidence. By aggregating the charged and uncharged incidents, the prosecution can show that the accused was personally involved in such incidents more frequently than the average, innocent person. Here the state data establishes that the baseline for similar day care centers during a 15-year period is two incidents. Even if the prosecution points to the second cyanotic episode, the prosecution showing falls short of establishing an extraordinary coincidence, exceeding the ordinary frequency. Jeffrey Dahmer may be the Milwaukee Monster—the epitome of evil—but the prosecution cannot rely on the doctrine to rationalize admitting the testimony about the second incident. Simply stated, without the required showing of extraordinary coincidence, Dahmer’s depraved personal character is an insufficient condition for triggering the doctrine.

Now consider the second variation of the hypothetical. In this variation, the accused is Mother Teresa. Like Dahmer, Mother Teresa operates a large day care center. Like Dahmer, in the instant hypothetical case she is charged with the attempted infanticide of a child in her custody. Like Dahmer, she contends that the cyanotic episode was an accident. However, in this variation of the hypothetical, during the preceding 15-year period three other children at Mother Teresa’s center experienced cyanosis. How would the character evidence rules apply here?

First, if the prosecution offered the testimony about the other children to show that Mother Teresa had a tendency to harm children, the prosecution would suffer the same fate as when it urged that contention against Dahmer. Mother Teresa would win because that the theory is classic character reasoning: “she did it once, therefore she did it again.”

Next, the prosecution turns to the doctrine of chances—the theory the Milwaukee Monster successfully opposed. Mother Teresa’s case, though, is readily distinguishable; all three elements of the doctrine are present here. First, assume that the prosecution has enough evidence of her involvement in the second incident to satisfy the minimal standard of Federal Rule 104(b). Second, unlike Dahmer’s depraved murders, the second cyanotic episode could easily be sufficiently similar to the charged crime. In *Woods*, the court found sufficient similarity among all 21 incidents. Third and most importantly, now the prosecution can establish the extraordinary coincidence that triggers the doctrine of chances. The baseline frequency in the corresponding part of the population is two incidents, but as the operator of this day care center Mother Teresa has had four incidents. Mother Teresa’s otherwise saintly character does not negate any element of the foundation for the doctrine of chances. Dahmer’s variation of the hypothetical demonstrates that a personal bad character is an insufficient condition for applying the doctrine, and Mother Teresa’s variation proves that a subjective bad character is not a necessary condition for applying the doctrine. In both variations, the decisive question is the accused’s involvement in a certain number of incidents—not whether the accused has a monstrous or saintly character. Hence, the doctrine of objective chances does rest on a legitimate non-character theory of logical relevance—rebutting the critics’ first objection to the use of the doctrine.

However, that conclusion does not end the analysis. Remember Mr. Morris's second objection that even if the doctrine is technically a non-character theory, the distinction between reliance on the doctrine and improper character reasoning is so thin that under Rule 403 the judge should bar the evidence. Does that objection warrant rejecting the doctrine of chances? When in fact there is an intolerable risk that a jury will disregard a limiting instruction, under Rule 403 the judge can exclude otherwise admissible evidence.<sup>102</sup> If the jury disregarded the instruction and misused the evidence, there would often be a risk that they could decide the case on an improper basis—again the probative danger Bentham termed “misdecision.”<sup>103</sup> This objection appears plausible given the “near-consensus in evidence scholarship”<sup>104</sup> that uncharged misconduct evidence poses an acute risk that the jury will be tempted to punish the accused for the uncharged misdeeds, not because the prosecution has proven guilt of the charged offense beyond a reasonable doubt.

However, there are three retorts to this objection. To begin with, the objection based on Rule 403 cannot support a categorical ban on the use of the doctrine of chances. Rule 403 must be construed in context and reconciled with Rule 402.<sup>105</sup> Rule 402 has the effect of depriving the courts of the power to enunciate and enforce categorical, uncodified exclusionary rules of evidence.<sup>106</sup> Rule 402 provides that:

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed the Supreme Court.<sup>107</sup>

In turn, Rule 101(b)(5) states that “a ‘rule prescribed by the Supreme Court’ means a rule adopted by the Supreme Court under statutory authority,”<sup>108</sup> such as the formally promulgated Federal Rules of Civil and Criminal Procedure. Conspicuously absent is any mention of case or decisional law. In a passage that the Supreme Court has twice approvingly cited,<sup>109</sup> the late Professor Edward Cleary, Reporter for the original Advisory Committee that drafted the Rules, declared: “In principle, under the Federal Rules no common law of evidence remains.”<sup>110</sup> The only way to

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102. See FED. R. EVID. 403.

103. BENTHAM, *supra* note 28.

104. Frank, *supra* note 87, at 37.

105. See generally Edward J. Imwinkelried, *Federal Rule of Evidence 402: The Second Revolution*, 6 REV. LITIG. 129 (1987).

106. See *id.* at 130–38; Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879 (1988).

107. FED. R. EVID. 402.

108. FED. R. EVID. 101(b)(5).

109. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587–88 (1993); *United States v. Abel*, 469 U.S. 45, 46–49 (1984).

110. Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 915 (1978).

harmonize Rule 403 with Rule 402 is to construe Rule 403 as authorizing the judge to make only ad hoc, case-specific rulings rather than categorical pronouncements.<sup>111</sup> On the facts in a given case, a trial judge well might conclude there was an unacceptable risk that a jury would be unwilling or unable to follow a limiting instruction based on the doctrine of chances. However, given Rules 402–03, the judge cannot rule that there is always such a risk that the prosecution can never rely on the doctrine.

The second retort to the objection is that the argument tends to prove too much. Without more, the existence of a risk that the jury will disregard a Rule 105 limiting instruction does not justify invoking Rule 403. Whenever the prosecution attempts to introduce testimony about a “crime” or civil “wrong”<sup>112</sup> logically relevant under the doctrine, the testimony has dual relevance. Testimony about a crime or wrong other than the charged offense is necessarily relevant to show the accused’s bad character as well as to trigger the doctrine. There would thus be a Rule 105 limiting instruction at the accused’s timely request.<sup>113</sup> Even if the limiting instruction restricted the jury to use the evidence to decide whether to apply the doctrine, there is at least a possibility that the jury would disregard the instruction and treat the evidence as proof of the accused’s bad character. Whatever theory the prosecution used to satisfy Rule 404(b), that possibility would always exist. If the courts took the position that mere possibility is enough to warrant exclusion under Rule 403, the courts would render Rule 404(b) nugatory. In effect, the courts would have abolished Rule 404(b) because 403 would always override 404(b).

Finally, although there may indeed be a near-consensus belief “in the evidence scholarship,” that widespread belief may be incorrect. In 2013, Professor David Sklansky published a comprehensive review of the empirical studies of the effectiveness of jury charges such as limiting instructions.<sup>114</sup> He was not content to survey the articles describing the beliefs of attorneys or evidence scholars. Rather, he collected the literature describing the extant psychological research into the question—33 studies *in toto*. In his view, the negative assessments of jury instructions are “at best greatly exaggerated.”<sup>115</sup> He concluded that “[t]he conventional wisdom about evidentiary instructions—’of course they don’t work’” is “unduly pessimistic.”<sup>116</sup>

In a 2017 interview, Daniel Kahneman, the Princeton University psychologist who won the Nobel Prize in 2002, argued that even curative instructions to disregard are often effective.<sup>117</sup> If anything, curative instructions have been ridiculed even more roundly than limiting instructions.<sup>118</sup> That skepticism is

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111. See Imwinkelried, *supra* note 105, at 137; Imwinkelried, *supra* note 106.

112. See FED. R. EVID. 404(b).

113. FED. R. EVID. 105.

114. See David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 410, 414–19, 424–30, 451 (2013).

115. *Id.* at 407.

116. *Id.* at 409–10.

117. See David A. Wenner, *Under the Surface*, TRIAL, Apr. 2017, at 22, 26.

118. See Paul Marcotte, ‘The Jury Will Disregard . . .’, 73 A.B.A. J. 34, 34–35 (1987) (describing an American Foundation study); Nicole M. Priolo, *Evidence—Can a Curative Instruction Effectively Remedy*

understandable: the jury has already been exposed to the evidence, but the judge is telling the jury to put it completely out of mind—“Remember to forget that testimony.”<sup>119</sup> Kahneman’s research has identified a difference between System 1 reasoning, which is intuitive and sometimes subconscious, and System 2 reasoning, which is a controlled, conscious mental process.<sup>120</sup> If the jurors voted immediately after entering the deliberation room, their System 1 reasoning could dominate. They might well disregard or overlook an instruction about the limited use of evidence admitted under the doctrine of chances. However, in most cases, jurors have a discussion before they take the initial vote.<sup>121</sup> That delay gives slow, reflective System 2 reasoning time to operate. As Professor Kahneman points out, even if many or most of the jurors would be inclined to slight the instruction, during discussion a conscientious juror is likely to remind them of the judge’s charge.<sup>122</sup> At least one of the 12 is likely to pay enough attention to the judge’s instruction and be scrupulous enough to call the charge to the attention of the other jurors. Professor Kahneman concludes that as a group, a jury may be more capable of following such instructions than an individual juror would be.<sup>123</sup> In short, the near-consensus in “evidence scholarship” may reflect an inaccurate, unduly pessimistic view of the jury’s ability to follow limiting instructions. To be sure, there will be cases in which the trial judge should realistically conclude that on the specific facts, there is a grave risk that the jury will disregard the Rule 105 instruction and misuse the evidence.<sup>124</sup> However, the empirical record does not support a general ban on resort to the doctrine, much less a categorical ban.

### IMPROVING THE JUDICIAL ADMINISTRATION OF THE DOCTRINE

Although it would be a mistake to repudiate the doctrine, it is undeniable that the judicial administration of the doctrine should be improved. Reform efforts should be redirected from attacking the doctrine to advocating for three changes.

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*Impermissible References to a Defendant’s Past Criminal Behavior?*—State v. Gallagher, 645 A.2d 1206 (R.I. 1995), 30 SUFFOLK U. L. REV. 583, 583–84 (1997).

119. Virginia Cope, *Can Jurors Ignore Inadmissible Evidence*, 24 Trial 80, 81 (Sept. 1988).

120. See Wenner, *supra* note 117, at 22.

121. LAWRENCE J. SMITH, ART OF ADVOCACY: SUMMATION § 1.04[1][d].

122. See Wenner, *supra* note 117, at 26.

123. See *id.* (distinguishing between juror decision-making and jury decision-making).

124. See RONALD L. CARLSON & EDWARD J. IMWINKELRIED, DYNAMICS OF TRIAL PRACTICE: PROBLEMS AND MATERIALS § 15-3(A), at 511–12 (5th ed. 2017). The authors note that on several occasions the Supreme Court itself has rejected the assumption that the jury would be capable of following a particular type of instruction: *Bruton v. United States*, 391 U.S. 123 (1968) (a limiting instruction as to party), *Jackson v. Denno*, 378 U.S. 368 (1964) (a curative instruction to disregard), and *Shepard v. United States*, 290 U.S. 96 (1933) (a limiting instruction as to purpose, the very type of Rule 105 instruction that the judge gives under Rule 404(b)). In these cases, three factors concurred to create a probability that the instruction would be ineffective: the declarant had personal knowledge of the fact asserted; the declarant’s statement was directly relevant to a central issue in the case; and the declarant was either the opposing party or someone with a close relationship to the opposing party.

First, whenever the prosecution explicitly relies on the doctrine,<sup>125</sup> the judge should directly address the question of the baseline frequency of the event, such as the frequency of cyanotic episodes in the relevant portion of the general population. Sadly, in many cases, the lower courts apply the doctrine in a loose, unprincipled manner. In many cases in which the prosecution offers uncharged misconduct evidence to prove intent and, in which on close examination, the doctrine is the only potential non-character theory, neither the prosecution nor the judge expressly mentions the doctrine.<sup>126</sup> That is a failing in both federal and state practice. Likewise, the analysis of the relative frequency issue is superficial. It is not enough that there is testimony about “numerous” or “several” other incidents. That testimony misses the mark. The testimony suffices only if, collectively with the charged offense, the other incidents amount to an extraordinary coincidence, exceeding the ordinary incidence or baseline. Of course, there are cases such as “the Brides in the Bath” in *Smith* when, without other evidence such as epidemiological data about the incidence of pediatric cyanosis episodes, the judge can be relatively confident that the type of event in question is a “once in a lifetime” experience for the typical, innocent person. However, if the question is the incidence of pediatric episodes in a large children’s hospital over a multi-year period, it is not evident that the event falls into the “once in a lifetime” category. Evidence reformers should strongly urge that the trial judge demand a showing of the baseline.<sup>127</sup>

Although the first reform is substantive in character, the second is procedural. If the prosecution intends to offer uncharged misconduct evidence at trial, the prosecution ought to be obliged to give the defense pretrial notice of its intent to do so.<sup>128</sup> Although the original version of Federal Rule 404(b) did not impose that obligation, in 1991 the rule was amended to do so.<sup>129</sup> The 1991 amendment requires the prosecution to disclose “the general nature of any such evidence,”<sup>130</sup> and there is a pending amendment to expand the notice obligation and require the prosecution to identify the non-character theory that it intends to rely on to justify the admission of the evidence.<sup>131</sup> A notice requirement is especially useful when that theory is the doctrine of chances. Given the doctrine’s foundational requirements, after receiving notice, the defense can profitably conduct a pretrial

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125. The prosecution must do so whenever there is no other tenable non-character theory. In that event, the doctrine of chances becomes the prosecution’s last resort. See Leonard, *supra* note 11, at 164; Imwinkelried, *supra* note 57, at 870.

126. See Imwinkelried, *supra* note 57, at 870.

127. See *id.* at 875–76.

128. See generally Edward J. Imwinkelried, *The Worst Surprise of All: No Right to Pretrial Discovery of the Prosecution’s Uncharged Misconduct Evidence*, 56 *FORDHAM L. REV.* 247 (1987).

129. See FED. R. EVID. 404(b) advisory committee’s note to 1991 amendment.

130. FED. R. EVID. 404(b)(2)(A).

131. See COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, AND CIVIL PROCEDURE, AND THE FEDERAL RULES OF EVIDENCE 43–46 (2018), [https://www.uscourts.gov/sites/default/files/2018-08-15-preliminary\\_draft\\_rev\\_8-22-18\\_0.pdf](https://www.uscourts.gov/sites/default/files/2018-08-15-preliminary_draft_rev_8-22-18_0.pdf) [<https://perma.cc/9GGL-VDEU>] (the amendment would:

- 1) eliminate the need for the defense to request discovery; and
- 2) require the prosecution to disclose “the reasoning that supports the purpose” for admitting the evidence).

investigation of (1) the sufficiency of the evidence that the accused committed the other act, (2) the similarity between that act and the charged offense, and (3) the baseline frequency of such events in the general population. The 1991 Rule 404(b) amendment is eminently sensible because it is ridiculous to expect the defense to effectively attack the adequacy of the proof of these foundational elements if the prosecution springs the evidence as a surprise on the defense at trial. A few handfuls of states have followed the lead of the 1991 Rule 404(b) amendment and adopted a pretrial notice requirement by rule or case law.<sup>132</sup> However, in the vast majority of states there is no precedent, rule, or statute recognizing a notice requirement. Evidence reformers should call on these states to follow the example of the 1991 Rule 404(b) amendment.

Like the second reform, the third is procedural in nature. At trial when the judge admits the prosecution evidence only pursuant to the doctrine, the judge should give the jury a clearer instruction that (1) mentions only the doctrine and (2) explains the reasoning underlying the doctrine, especially the key requirement to show an extraordinary coincidence. Mr. Morris is correct in stating that there can be a very “thin line” between jury use of uncharged misconduct evidence under the doctrine and jury treatment of the evidence as proof of the accused’s bad character.<sup>133</sup> In a 1991 decision, *Estelle v. McGuire*, the Supreme Court reviewed the instructions in a child abuse prosecution implicating the doctrine of chances.<sup>134</sup> While none of the justices questioned the legitimacy of the doctrine, in their concurring and dissenting opinion Justices O’Connor and Stevens argued there was a due process violation warranting federal habeas corpus relief.<sup>135</sup> They both thought the trial judge’s vague instruction blurred the distinction between the doctrine and character reasoning to the point of confusing a typical lay juror.<sup>136</sup>

Research reveals no jurisdiction, federal or state, which has a special limiting instruction devoted to the doctrine of objective chances.<sup>137</sup> Worse still, although there is an incipient trend to the contrary,<sup>138</sup> many state appellate courts still countenance the trial judge’s administration of “shotgun” instructions—instructions which do not single out the non-character theory the judge finds applicable but rather list several non-character uses of uncharged misconduct evidence.<sup>139</sup> By way of example, if a state has adopted a version of Rule 404(b), consider a case where the doctrine is used to introduce evidence to prove actus reus and negate a claim of “accident.” A judge might track the language of the rule and instruct the jury that they may use the evidence as proof of the accused’s “motive, opportunity, intent,

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132. These states include Alabama, Colorado, Connecticut, Florida, Georgia, Kentucky, Louisiana, Minnesota, Montana, New Mexico, Pennsylvania, Texas, and Wyoming. See 2 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 9:10 (rev. ed. 1998, Supp. 2018).

133. Morris, *supra* note 18, at 200 n.74.

134. 502 U.S. 62 (1991).

135. *Id.* at 484 (O’Connor, J., concurring in part and dissenting in part).

136. *Id.* at 485.

137. See Imwinkelried, *supra* note 57, at 874 n.153 (collecting the pattern instructions on uncharged misconduct evidence in both federal and state jurisdictions).

138. See LEONARD, *supra* note 98, § 4.5.1, at 280–85; see also Imwinkelried, *supra* note 132, § 9:74.

139. Imwinkelried, *supra* note 132, § 9:74.

preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”<sup>140</sup> Mentioning the other theories is objectionable. In the example case above, the uncharged misconduct might be relevant to proving the accused’s identity as the perpetrator—but only if the jury engages in character reasoning to reach that conclusion.<sup>141</sup> A “shotgun” instruction virtually invites the jurors to engage in character reasoning. If we are to take the character evidence prohibition seriously, judges cannot be allowed to take a “kitchen sink” or “smorgasbord” approach to drafting the limiting instruction.<sup>142</sup>

When the judge decides to permit the prosecution to rely on the doctrine, the judge must give the jury a carefully crafted, forceful instruction. The instruction should include a negative prong, forbidding the jury from inferring the accused’s bad character and then treating his or her character as circumstantial proof of their conduct on the charged occasion. The judge must tell the jury in no uncertain terms that they may not simplistically reason “he did it once, therefore he did it again.”<sup>143</sup> However, the real challenge facing the trial judge is drafting the affirmative prong of the instruction, identifying the permissible use of the evidence. Rather than drafting the instruction at a high level of abstraction, the instruction should incorporate the case-specific facts highlighting the extraordinary coincidence issue. The following language has been proposed:

[I]n deciding this case, you may rely on your knowledge of the way things happen in the real world. You may ask yourself: How likely is it that an innocent person would twice be found driving a car containing cocaine in the trunk? Innocent people sometimes find themselves in suspicious circumstances. However, use your common sense and decide whether it is likely that that would happen to an innocent person twice. If you find that that is at odds with everyday experience, you may conclude that on one or both of those occasions the defendant had the intent to possess the cocaine.<sup>144</sup>

## CONCLUSION

It would be a mistake to jettison the character evidence prohibition altogether. The risk of misdecision has exceptional significance in the United States. That risk may be of general policy concern to a British or Australian court, but the United States has a unique, constitutional guarantee against criminalizing status offenses.<sup>145</sup> Moreover, although some claim that character evidence can be highly probative in certain types of prosecutions,<sup>146</sup> that claim is overstated. The current

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140. FED. R. EVID. 404(b)(2).

141. See Imwinkelried, *supra* note 132, § 9:74.

142. See Leonard, *supra* note 11, at 149 n.140.

143. See Imwinkelried, *supra* note 132, § 9:74.

144. Imwinkelried, *supra* note 57, at 878.

145. See, e.g., *Robinson v. California*, 370 U.S. 660, 666 (1962).

146. See David J. Karp, *Evidence of Propensity and Probability and Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15, 20–21 (1994). Mr. Karp was one of the drafters of what would eventually become Federal Rules of Evidence 413–15, creating exceptions to the character evidence prohibition in sexual assault and child abuse cases. *Id.* at 15.

state of the empirical research indicates that character can serve as a reliable predictor of conduct only when the inference of character is supported by a large number of very similar instances of behavior.<sup>147</sup> As previously stated, a meta-analysis of the available studies found that when the inference is supported by only one other instance of behavior, the predictive reliability of the inference is “at best .30”<sup>148</sup>—under random chance. Federal Rules of Evidence 413–15 have carved out exceptions to the character prohibition for cases involving allegations of sexual assault and child abuse.<sup>149</sup> One of the major weaknesses of such rules is that they permit the trier of fact to infer the accused’s character from a single other instance of conduct—an inference that seems utterly indefensible.

However, it would also be a mistake to repudiate the doctrine of objective chances as a non-character theory for introducing uncharged misconduct evidence. It is true that throughout its development in the United States, the doctrine has been sharply criticized as nothing more than a pretext for admitting evidence of an accused’s bad character. Critics have repeatedly asserted that evidence introduced under the doctrine lacks genuine non-character relevance. As we have seen, the critics contend that the logic of the doctrine must posit the accused’s subjective bad character at the time of all the incidents. This essay has hopefully exposed the unsoundness of that criticism. To begin with, if the doctrine’s logic assumed the accused’s bad character at the time of all the incidents, one would think that the final inference would be that all the incidents were accidents or that all were crimes. However, as the *Woods* court correctly concluded, the only necessary inference from the doctrine’s application is that one or some of the incidents are crimes. Furthermore, the analysis of the Dahmer hypothetical shows that the accused’s evil character is certainly not a sufficient condition for invoking the doctrine. Most importantly, the Mother Teresa variation of the hypothetical has demonstrated that the accused’s bad character is not a necessary condition for triggering the doctrine.

The stakes are higher than the survival of the doctrine of objective chances. Despite the serious questions raised by the related empirical research, Rules 413–15 took effect. Their enactment reflects the strength of the political movements to combat sexual offenses and child abuse. Congress enacted the rules as legislation over the strenuous objection of both the United States Judicial Conference and the American Bar Association.<sup>150</sup> The rejection of the doctrine would strengthen the political forces attacking the character evidence prohibition.<sup>151</sup> Consider the fact situations in both *Smith* and *Woods*. Put yourselves in the shoes of a typical lay juror.

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147. See Imwinkelried, *supra* note 32, at 752–59.

148. See Fleeson, *supra* note 33, at 1013; see also Justin Sevier, *Legitimizing Character Evidence*, 68 EMORY L. J. 441, 460 (2019) (urging the liberalization of the ban on character evidence. However, the author acknowledges that “[i]n the 1960s, psychologist Walter Mischel stunned personality theorists when he performed a meta-analysis of the effects of personality on subsequent behavior and found only a moderate correlation ( $r = .30$ )—meaning that personality provides little predictive ability of subsequent behavior. A series of classic experiments examining the role of character traits on subsequent behavior supported Professor Mischel’s meta-analysis. Researchers found, almost uniformly, no effects of a person’s personality characteristics on her subsequent behaviors; instead, they found effects of . . . situational variables.”).

149. FED. R. EVID. 413–15.

150. See 1 IMWINKELRIED, *supra* note 132, § 2:25.

151. See generally Imwinkelried, *supra* note 99.

How would you have felt in *Smith* if, after voting to acquit, you learned that the judge denied you evidence that two other women purportedly married to the accused were also found drowned in their bathtubs? Or how would you have felt in *Woods* if, after an acquittal, you discovered that the judge had excluded evidence that other children in the accused's custody had suffered 20 other cyanotic episodes? It is submitted that you would be shocked to the point of anger. You probably would have a classic Dickensian reaction: "[i]f the [evidence] law supposes that, . . . the law is a[n] ass."<sup>152</sup> Or, in the words of *Rex v. Smith*, you well might regard that result an "affront" to your common sense.<sup>153</sup> In the United States, the character evidence rule has been under siege since the early 1990s.<sup>154</sup> If the courts bar valuable evidence that possesses legitimate non-character relevance under the doctrine in child abuse and drug prosecutions, the negative public may hasten the demise of the general character evidence prohibition. In the long run, continued attacks on the doctrine of objective chances will only play into the hands of the opponents of restrictions on evidence of the accused's subjective bad character. The upshot is that evidence reformers should focus on improving the administration of the doctrine of objective chances rather than seeking its abolition.

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152. CHARLES DICKENS, *OLIVER TWIST* 448 (Barnes & Noble Books 2004) (1867).

153. *Dir. of Pub. Prosecutions v. Kilbourne* [1973] AC 729 at 759.

154. *See Sevier, supra* note 148 (explaining and countering the modern consensus that character evidence is illegitimate). The bill, which eventually became Federal Rules 413-15, was first introduced in 1991. *See* 137 CONG. REC. 5915 (1991).