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The Character Evidence Rule Revisited

*Kenneth J. Melilli**

I. INTRODUCTION

A long-standing fundamental tenet of the rules of evidence in American jurisdictions has been a general prohibition of character evidence for the purpose of proving an actor's conformity with a character trait on a particular occasion.¹ Although this character evidence rule is not restricted to the circumstance in which the prosecution seeks to introduce negative character evidence concerning a criminal defendant, it is the desire to protect the criminal defendant from the impact of such evidence that accounts for the firm vitality of the rule.²

Recently, the Federal Rules of Evidence have been amended so as to permit the government, in prosecutions for sexual assault or child molestation, to introduce evidence of the criminal defendant's prior offenses of sexual assault or child molestation, respectively.³ These new additions to the Federal Rules of Evi-

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1. See Edward J. Imwinkelried, *A Small Contribution to the Debate Over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions*, 44 SYRACUSE L. REV. 1125, 1129 (1993). For example, the Federal Rules of Evidence, the formulation of the rules of evidence in place in the substantial majority of American jurisdictions, *id.* at 1127, provide that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except" FED. R. EVID. 404(a).

2. 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, 739 (1981) ("It for[bids] the admission of other criminal acts of the accused at trial because of the substantial danger of undue prejudice to the accused arising from inferential proof of the accused's disposition to commit the crime."). In this regard, the Federal Rules of Evidence restate the general character evidence rule in the context in which it is of particular concern: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." FED. R. EVID. 404(b).

3. See FED. R. EVID. 413 and 414, which became effective on July 9, 1995. Rule 415 of the Federal Rules of Evidence, which permits the introduction of similar evidence in civil cases concerning sexual assault or child molestation, was enacted simultaneously along with Rules 413 and 414 of the Federal Rules of Evidence.

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dence received substantial opposition prior to their enactment,⁴ as well as a great deal of criticism since that time.⁵ Not the least of these criticisms has been directed at the new rules' unfounded premise that sex offense cases merit entirely different evidentiary treatment than do prosecutions for other crimes.⁶

But while there might be no justification for a crime-specific adjustment to the rules governing the admissibility of character evidence, it does not follow that the solution is a return to an offense-neutral proscription against the introduction of character evidence. In fact, as will be demonstrated shortly, it does not appear that any such comprehensive adherence to the character evidence rule has ever really existed. Nevertheless, by their assault upon the character evidence rule, the new federal rules have provoked a backlash in defense of this sacred cow of evidence law. A close examination of the rationales advanced for the preservation of the character evidence rule actually lead to the following conclusions.

First, the character evidence rule is more rhetoric than substance; the practice in American courts belies any real commitment to excluding character evidence. An uninitiated observer of our adjudicatory system would be astounded to learn of the character evidence rule, for character evidence is admitted here, there and everywhere.

Second, when stripped of hyperbole, the standard arguments for the character evidence rule are largely speculative and unpersuasive.

Third, the only truly cogent justifications for the character evidence rule are those founded, to some degree or another, upon judicial economy and courtroom efficiency. These concerns do not support a broad exclusionary rule, but rather can be accommodated by presumptively limiting relevant character evidence to the form of prior convictions.

Fourth, when character evidence is admitted under the current rules, it gets in under one or more of a variety of

4. See, e.g., *Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases*, 159 F.R.D. 51, 53 (1995) [hereinafter *Judicial Conference*]; Myrna S. Raeder, *American Bar Association Criminal Justice Section Report to the House of Delegates*, 22 FORDHAM URB. L.J. 343 (1995).

5. See *infra* notes 150–163 and accompanying text.

6. See *infra* notes 164–177 and accompanying text.

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complex theories and exceptions. As a consequence, such evidence is usually accompanied by jury instructions intended to assist the jury in its appropriate use. However, because such instructions are often both hopelessly confusing and contrary to common sense, there is no realistic hope that they will be followed by jurors.

A simpler, more straightforward approach to the admissibility of character evidence would alleviate the above problems. This article will examine the deficiencies in the current approach, and will recommend such a simplified solution.

II. THE TRADITIONAL STATE OF AFFAIRS

The essential characteristic of character evidence is that it requires two steps of logical inference. First, the jury must draw a conclusion from the evidence about an individual's general propensity to behave in a certain way, and second, the jury must measure the likelihood that the same individual behaved in accordance with this general propensity on the particular occasion in question.⁷ Thus, the essential feature of character evidence is that its relevance depends upon a conclusion about an individual's general propensity; if the evidence has relevance without necessarily requiring a conclusion about general propensity, it is not character evidence and is not barred by the character evidence rule.⁸

7. See 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, 580-81 (1990).

8. In some cases, the first step in this process simply involves crediting the testimony of the character witness. This occurs when the witness testifies in the form of opinion (the personal opinion of the witness, based upon the witness's personal knowledge of the individual in question) or reputation (a consensus or collective opinion about the individual in question, as relayed to the jurors by the character witness). Examples of character evidence in these forms would be testimony by a character witness that the relevant individual is a violent person (opinion) or is reputed by members of that individual's social circle to be a violent person (reputation).

In other cases, the first step in the process requires an actual inference to be made by the jury. This occurs when the character witness testifies in the form of one or more specific instances of behavior by the relevant individual. For example, if the character witness were to testify that the relevant individual had physically beaten his spouse on a particular occasion or occasions, the jury might infer the individual's general propensity toward violence based upon such specific behavior.

Essentially, the analytical distinction between character evidence in the form of

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As noted earlier,⁹ the primary concerns underlying the character evidence rule are the consequences of allowing the jury to draw conclusions about the general propensity of a *criminal defendant*. If the introduction of character evidence against the accused in a criminal prosecution can be defended, then the use of character evidence in all other situations is appropriate as well. Consequently, the balance of this article will focus on the most common and most dangerous scenario: the prosecution's introduction of evidence of the defendant's character.

Prior to the recent additions of Rules 413 and 414 to the Federal Rules of Evidence, there already existed a variety of circumstances in which the government could introduce evidence of the defendant's character. These circumstances are embodied at five different points in the Federal Rules of Evidence. Each of these will be addressed in turn.

A. Rules 404(a) and 405(a)

One of the two exceptions to Rule 404(a)'s general proscription against the admission of character evidence is a specific allowance for evidence of the character of the accused.¹⁰ There are, of course, two important restrictions upon this exception to the character evidence rule.

The first, and most important, of these limitations is that the defendant must go first; i.e., the government may not introduce character evidence regarding the defendant unless and until the defendant introduces character evidence about himself or herself.¹¹ Without question, the goal of protecting the defendant from the government's negative character evidence is

opinion or reputation testimony and character evidence in the form of specific instances is that, in the latter circumstance, the jury must take the first step from behavior to general propensity, while in the former situation, the witness (in the case of opinion testimony) or even persons never heard from directly in the courtroom (in the case of reputation testimony) have taken this first step for the jury. In both scenarios, it is for the jury to determine if, and to what degree, the second step (behavior on the occasion in question in conformity with the individual's general propensity) should be taken.

9. See *supra* note 2 and accompanying text.

10. See FED. R. EVID. 404(a)(1).

11. This sequence is apparent from the wording of Rule 404(a)(1), which permits "[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same." *Id.*

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fully advanced by providing the defendant with the only key to the locked door, behind which lies evidence of the defendant's character. But the price that the defendant must pay to keep that door locked is the first demonstration of the law's lack of total commitment to the character evidence rule. In response to a false accusation, a defendant's natural response would be to state, "I would not do such a thing, and the people who know me will tell you that." A defendant who chooses to call witnesses to so testify essentially waives the protection of the character evidence rule.

There is, to be sure, not the slightest unfairness in this arrangement. If there indeed exists negative character evidence behind the now unlocked doors, then perhaps the defendant's own character witnesses are not to be believed, and surely the jury is entitled to more than just half the story. Nevertheless, if character evidence, and in particular, negative character evidence, is so prejudicial, why allow it even under these circumstances? It would seem that either such character evidence has some real value or the rule is a less than genuine attempt to inhibit defendants from introducing positive character evidence concerning themselves.

The second limitation on the introduction of character evidence regarding the defendant is that such evidence must be presented in the form of opinion or reputation testimony only and not as evidence of specific instances of conduct.¹² While this

12. See FED. R. EVID. 405(a). The distinction between opinion and reputation testimony as contrasted with testimony as to specific instances of conduct is discussed *supra* at note 8. The choice made in Rule 405(a) might very well be regarded as an odd one. It requires the jury to trust the judgment of the witness (or those who gossip with the witness) rather than being presented with the actual behavior of the defendant. The preference for opinion and reputation evidence is contrary to the conventional wisdom as to the relative probative superiority of evidence of specific instances of conduct. See, e.g., David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 16 & n.94 (1986-87). Moreover, reputation evidence is thought to be the least reliable and potentially the most dangerous form of character evidence. See H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 885 (1982). Nevertheless, opting to exclude character evidence in the form of specific instances of conduct does avoid potentially time-consuming court battles over the actual prior conduct of the defendant. It is, therefore, one of several specifics in the law governing character evidence, suggesting that such evidentiary rules are driven in substantial part by concerns for courtroom economy and efficiency.

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might appear to be only a matter of form rather than substance, there is one further aspect of the rule that deserves attention.

On cross-examination of a character witness, questions are permitted as to specific instances of the defendant's conduct.¹³ Thus, for example, the character witness who testifies that the defendant is, or is reputed to be, a peaceful person may be cross-examined as to specific instances of violent or aggressive behavior of the defendant. The theory underlying the allowance of such inquiries into specific instances of conduct is not that such questions and answers are admitted to prove the defendant's character, but rather are admitted to enable the jury to determine what weight, if any, should be given to the testimony of the character witness.¹⁴ If the positive character witness does not know or has not heard of the negative behavior of the defendant, then the character witness arguably does not truly know of the defendant's character or reputation; if the positive character witness does know or has heard of the negative behavior of the defendant, then the positive opinion or reputation testimony of the character witness is presumably of lesser or no value.¹⁵ Such inquiries on cross-examination are typically accompanied by a limiting instruction directing the jury to consider such questions and answers, not as negative evidence of the defendant's character, but rather as evidence which, in the judgment of the jury, can only be used in determining what weight, if any, to assign to the character witness's testimony of the defendant's positive character.¹⁶

Here we have the first of several examples of the law's theoretical observance of the character evidence rule by the device of a likely ineffectual jury instruction. The actual evidence presented to the jury on cross-examination—specific instances of bad conduct in the context of testimony as to the defendant's good character—has all the earmarks of character evidence. The defendant is said to be a peaceful, nonviolent person, and it comes to light that he or she has physically assaulted several individuals on several prior occasions. That

13. See FED. R. EVID. 405(a).

14. See 2 JACK B. WEINSTEIN ET AL., WEINSTEIN'S EVIDENCE ¶ 405[04], at 405–50 (1996).

15. See EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE § 191, at 569 & n.28 (3d ed. 1984).

16. See 2 WEINSTEIN ET AL., *supra* note 14, ¶ 405[04], at 405–50 to 405–51.

this is affirmative evidence of a violent propensity cannot seriously be doubted, and, more to the point, it is improbable that the jury will confine its consideration of this evidence to its nominal noncharacter perimeters.¹⁷

In fact, one of the two theories on which such cross-examination is permitted—that the value of the character witness’s testimony is diminished because the character witness is unaware of the negative behavior—depends necessarily upon the actual existence of such behavior on the part of the defendant. It is unremarkable that a character witness is unaware of an event that did not actually take place. Therefore, when the character witness who has testified as to the defendant’s nonviolent character admits on cross-examination to ignorance concerning the defendant’s prior assaults, there can be no diminution of the character witness’s testimony unless the jury accepts that there really were such incidents of prior assaultive behavior on the part of the defendant. This renders it all the more improbable that the applicable limiting instruction will accomplish its stated purpose. The jury, having concluded that the defendant has engaged in assaultive conduct, is now instructed not to consider this as affirmative evidence of the defendant’s character even as it resolves the very question of the defendant’s character for violence or peacefulness.

The unlikelihood that the jury will both comprehend and obey the limiting instruction attendant to this evidence is not premised upon a pejorative assessment of either the intelligence or the good faith of jurors. The problem lies not with the jurors, but with the instruction itself. Lawyers are prone to create theoretical distinctions that are either illusory or impossible to apply practically, especially by jurors who are not participants in the intellectual hair-splitting activities that spawn such distinctions.¹⁸ Children can pretend that the family dog is a lion for the purposes of a party game, but the late-arriving child not involved in the game can hardly be blamed for gazing at the animal and pronouncing, “It’s just a dog.” Although even a thorough indoctrination in the reasons

17. See 2 *id.* ¶ 405[04], at 405–51.

18. See Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135 (1989).

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underlying the limiting instruction might not advance the goal of the instruction, the absence of any explanation virtually insures failure.

So why does the law continue to permit what appears to be character evidence to reach the jury, shielding the defendant with only a feeble jury charge restricting consideration to its noncharacter use? Surely it is not an unwarranted faith in such an instruction; the case for the character evidence prohibition is largely premised upon the claimed ineffectiveness of instructions confining juror consideration of such evidence to a non-prejudicial scope.¹⁹ Perhaps the explanation is that, while the limiting instruction allows us to worship at the altar of the character evidence rule, in reality we are not truly persuaded of the rule's worth. Perhaps we are not terribly bothered by the admission of what has all the appearance of what the character evidence rule categorizes as prejudicial evidence because we believe, or at least suspect, that such evidence, even used "improperly," is really quite relevant.

B. Rule 404(b)

The circumstances governed by Rules 404(a) and 405(a) are by no means the only situation in which this phenomenon occurs. Without a doubt, the most significant area of the law of evidence in which this occurs is the well-ensconced rule, embodied in the second sentence of Federal Rule of Evidence 404(b),²⁰ allowing the introduction of specific instances of bad conduct, having all the indications of character evidence, for what the law deems a noncharacter purpose. To illustrate, suppose that the defendant is on trial for a bank robbery in which the actor created a diversion by placing an explosive in the automatic teller machine and then, posing as an employee of an independently contracted cleaning service, used a vacuum cleaner to collect the cash from the abandoned stations of the distracted tellers. In the likely event that the identity of the

19. See, e.g., Imwinkelried, *supra* note 1, at 1140-41, 1145-46.

20. After restating the general proscription embodied in the character evidence rule, the relevant section of Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts . . . may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FED. R. EVID. 404(b).

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perpetrator is a contested issue at trial, the government would almost surely be permitted to introduce evidence that the particular defendant had used the same *modus operandi* to rob other banks on other occasions. This evidence would be allowed despite the fact that the defendant is not charged with any but the first-mentioned robbery, and despite the fact that the evidence itself has all the qualities of the supposedly dreaded character evidence, i.e., specific acts (prior bank robberies) indicating a general propensity (defendant robs banks) used as evidence of behavior on the occasion in question (robbed this bank).

The theory upon which the admissibility of such evidence is allowed is that it has a legitimate noncharacter relevance (in the example above, to prove the robber's identification by the distinctive method used) that is distinct from the use of such evidence to demonstrate a general propensity. However, this distinction exists in principle only. One can analytically separate how the defendant robs banks from the fact that the defendant robs banks, but in reality one cannot learn how the defendant robs banks without being informed that the defendant robs banks. The evidence of the defendant's character is admitted, and it is only to the extent that we are successful in persuading the jury to view it otherwise that such evidence could be deemed to be noncharacter evidence.

1. *The 404(b) prerequisites*

To be sure, a admission of such evidence is not automatic. First, the proponent must give notice to the accused upon request.²¹ Second, the trial court must be satisfied that a rational jury could find that the uncharged misconduct did occur.²² Third, the trial court must be persuaded that there is a legitimate, noncharacter purpose to such evidence.²³ Fourth, the trial court must balance the usefulness of the evidence against the potential prejudice of the jury using such evidence to determine the general propensity, or character, of the

21. *See id.*

22. *See, e.g.,* Huddleston v. United States, 485 U.S. 681, 689-90 (1988).

23. *See* CLEARY ET AL., *supra* note 15, § 190, at 558; 2 WEINSTEIN ET AL., *supra* note 14, ¶ 404[08], at 404-44 to 404-45.

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accused.²⁴ In making this final determination, the court must consider that such evidence is, seemingly without exception, accompanied by a limiting instruction juxtaposing the permissible noncharacter use and the forbidden character treatment of the evidence.²⁵

In practice, these requirements are often satisfied. The first is solely procedural and limits only those who are simply unprepared for trial. The second requirement is a nominal requirement that there simply exist sufficient evidence to raise a jury question as to the occurrence of the prior bad acts.²⁶ The third prerequisite to admissibility under Rule 404(b) might have been a significant limitation if the permissible noncharacter uses of such evidence had been narrowly circumscribed. But this has not been the case. The decisions resolving Rule 404(b) issues have been quite liberal in sustaining the theories of admissibility advanced by prosecutors.²⁷ Indeed, the frequency with which the exceptions to Rule 404(b)'s general rule of exclusion are successfully invoked has prompted some commentators to suggest that it is the exclusion of such evidence that is truly the exception rather than the rule.²⁸

The practical impact of Rule 404(b) must be understood not only in the proportion of cases in which these issues are resolved, but also in the quantity of such cases in which these issues materialize. Rule 404(b) accounts for a greater number of published judicial opinions than any other provision in the

24. See 2 WEINSTEIN ET AL., *supra* note 14, ¶ 404[08], at 404–45.

25. See Imwinkelried, *supra* note 1, at 1126.

26. In fact, even in a criminal case in which the evidence is offered against the accused, the government need only satisfy the court that the jury could find that the prior bad acts occurred by a preponderance of the evidence. See *Huddleston*, 485 U.S. at 689–90. Consequently, even conduct which has been the subject of a prior acquittal (representing only the failure of the government's evidence to reach the higher threshold of proof beyond a reasonable doubt) may be introduced in a subsequent prosecution under Rule 404(b). See *Dowling v. United States*, 493 U.S. 342 (1990).

27. See Raeder, *supra* note 4, at 348–49; cf. Edward J. Imwinkelried, *Some Comments About Mr. David Karp's Remarks on Propensity Evidence*, 70 CHI.-KENT L. REV. 37, 39 (1994) (reporting that both sides of the debate feel courts are "unduly solicitous" to the other side).

28. See 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, *FEDERAL EVIDENCE* § 136, at 132 (1985); Glen Weissenberger, *Making Sense of Extrinsic Act Evidence: Federal Rule of Evidence 404(b)*, 70 IOWA L. REV. 579, 579–80 (1985).

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Federal Rules of Evidence,²⁹ and the introduction of evidence of uncharged criminal conduct under Rule 404(b) has apparently increased substantially since 1975, when the Federal Rules of Evidence were enacted.³⁰ The volume of cases in which courts are both asked to admit evidence under Rule 404(b) and in fact grant such requests has led to the popular conception that creative prosecutors will usually be successful in generating a theory for introducing evidence of the defendant's prior, uncharged misbehavior before the jury.³¹

That particular piece of plebeian wisdom is undoubtedly overstated, but the fact remains that, in practice, Rule 404(b)'s gate swings open wider and more often than one might expect, given the constant and vociferous incantation of the character evidence rule. Some have suggested that the problem, if it is a problem, can be traced to the nonexclusive language of Rule 404(b)'s second sentence. Specifically, the rule's provision that evidence otherwise inadmissible under the character evidence rule "may . . . be admissible for other purposes, *such as . . .*" followed by a list of noncharacter theories of admissibility, makes clear that this list is intended to be illustrative, and not exhaustive.³² Rather than viewing the Rule 404(b) list of theories of admissibility as a closed universe of possibilities, the prevailing interpretation of Rule 404(b) is that, subject to the other requirements specified above,³³ evidence of prior misconduct is admissible unless its relevance depends solely upon the defendant's general propensity to commit the charged crime.³⁴

29. See Imwinkelried, *supra* note 7, at 577. Professor Imwinkelried has characterized "[t]he admissibility of uncharged misconduct evidence [as] the single most important issue in contemporary criminal evidence law." *Id.* at 576 (citing to Edward J. Imwinkelried, *Uncharged Misconduct: One of the Most Misunderstood Issues in Criminal Evidence*, CRIM. JUST., Summer 1986, at 6, 7).

30. See Ordovery, *supra* note 18, at 142.

31. See Weisenberger, *supra* note 28, at 579.

32. See Imwinkelried, *supra* note 1, at 1136.

33. See *supra* notes 21–25 and accompanying text.

34. See 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 54.1, at 1151–52 (1983); Office of Legal Policy, *Report to the Attorney General on the Admission of Criminal Histories at Trial*, 22 U. MICH. J.L. REFORM 707, 719 (1989) [hereinafter *Admission of Criminal Histories*]; Thomas J. Reed, *Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of Evidence*, 53 U. CIN. L. REV. 113, 115, 158, 161 (1984).

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This inclusionary approach stands in contrast to the “traditional,” exclusionary rule that would only admit what would otherwise be character evidence if its logical relevance fell within a list of well-defined exceptions.³⁵ It has been argued that the exclusionary formulation of the character evidence rule is the only approach that is faithful to the origins of the rule, both in the common law of the United States³⁶ and, even earlier, in the common law of England.³⁷ The arrival of the inclusionary approach of Rule 404(b) in 1975 is supposed to have reversed the then-prevailing exclusionary approach,³⁸ resulting in an objectionable expansion of other crimes evidence introduced against criminal defendants.³⁹ Presumably, then, the large volume of other crimes evidence that makes its way into American courts pursuant to Rule 404(b) and its progeny is simply a recent mistake, represents no failure of the character evidence rule in principle, and can be corrected simply by a return to the traditional, exclusionary character evidence rule. However, neither history nor reason allows the liberal use of Rule 404(b) by prosecutors to be explained away so easily.

2. *Historical absence of an exclusionary rule*

First, any claim that the character evidence rule developed as a general rule of exclusion is simply short sighted. The pervasive belief that the common law ordinarily disallowed evidence of similar crimes is actually refuted by the historical record.⁴⁰ The character evidence rule in this country has actually undergone several transformations during its growth.⁴¹ The rule in the United States was originally based upon the then-existing practice in England.⁴² Neither the early English cases⁴³ nor the early English text writers⁴⁴ specified any general

35. See Reed, *supra* note 2, at 713.

36. See Thomas J. Reed, *The Development of the Propensity Rule in Federal Criminal Causes 1840–1975*, 51 U. CIN. L. REV. 299, 302, 303, 322, 325 (1982).

37. See Reed, *supra* note 2, at 717.

38. See Reed, *supra* note 34, at 113.

39. See Reed, *supra* note 2, at 713–14.

40. See Julius Stone, *The Rule of Exclusion of Similar Act Evidence: America*, 51 HARV. L. REV. 988, 989–91 (1938).

41. See Julius Stone, *The Rule of Exclusion of Similar Act Evidence: England*, 46 HARV. L. REV. 954 (1933).

42. See Stone, *supra* note 40, at 991; Stone, *supra* note 41, at 954.

43. See *id.* at 960–65; 1A WIGMORE, *supra* note 34, at 1213 (“In early English

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rule of exclusion of similar-act evidence. The admissibility of specific acts of conduct was simply determined by the ordinary test of relevance, and a general exclusionary rule would, therefore, actually be unfaithful to the historical roots of the law's approach to evidence of similar bad acts.⁴⁵

By the nineteenth century, the rule had developed to the extent that it essentially previewed the current inclusionary formulation of Rule 404(b). Specifically, if the evidence in question was relevant for any purpose other than, or in addition to, a suggestion of a general propensity to commit the crimes, it was admissible; exclusion of such evidence was the exceptional result, warranted only when the evidence had no relevance other than to demonstrate a general criminal propensity.⁴⁶ It was in this form that the rule regarding evidence of prior crimes made its way into the American courts. The early American cases followed the British inclusionary rule, admitting such evidence except in circumstances in which it would sustain no relevant conclusion except to establish a general propensity.⁴⁷ The purposes for which such evidence was admitted under this inclusionary approach included, among other things, proof of knowledge, intent, and motive.⁴⁸ This list is manifestly the historical origin of the current catalogue of inclusionary purposes for which evidence may be admitted under Rule 404(b).

In the latter half of the nineteenth century, courts in both England and the United States shifted to an exclusionary approach.⁴⁹ Exclusion of character evidence to show general propensity became the stated rule, and the categories of admissibility which had developed under the earlier,

practice, [evidence of bad acts to show the character of the accused] was resorted to without limitation.”)

44. See Stone, *supra* note 41, at 958–60.

45. See T.R.S. Allan, *Similar Fact Evidence and Disposition: Law, Discretion and Admissibility*, 48 MOD. L. REV. 253, 274 (1985).

46. See Jason M. Brauser, *Intrinsic or Extrinsic?: The Confusing Distinction Between Inextricably Intertwined Evidence and Other Crimes Evidence Under Rule 404(b)*, 88 NW. U. L. REV. 1582, 1592 (1994); Stone, *supra* note 41, at 965–66. Essentially, the rule raised the bar for character evidence by requiring that it be more than merely relevant; i.e., that, because of the danger of prejudice, it be especially relevant to some particular point. *Id.* at 983–84.

47. See Brauser, *supra* note 46, at 1593; Stone, *supra* note 40, at 991–1000.

48. See Stone, *supra* note 41, at 966.

49. See Brauser, *supra* note 46, at 1593; Stone, *supra* note 41, at 966.

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inclusionary formulation became the stated exceptions.⁵⁰ Despite this reversal in formulation, it is doubtful that it had any practical consequences.⁵¹ Categories for which such evidence could be relevant (other than to show general propensity) continued to develop; the only distinction was that these categories were added to a list of exceptions to what was theoretically a general rule of exclusion, instead of simply being included among an illustrative list demonstrating a general rule of admissibility. Notwithstanding a change in how the "rule" was articulated, the list of situations in which evidence of uncharged misconduct was found to be relevant continued to expand and develop.⁵²

By the time of the adoption of the Federal Rules of Evidence, most courts were articulating the character evidence rule using the exclusionary formulation.⁵³ But, semantic distinctions aside, the re-adoption of inclusionary language in Rule 404(b), like the nineteenth century switch from the inclusionary to the exclusionary approach, did not give rise to any significant change in the admissibility of such evidence. Even under the prerules common law formulation, the exclusionary rule was avoided easily and often.⁵⁴ Shifting back

50. See Stone, *supra* note 41, at 975-76.

51. See *id.* at 976.

52. See *id.* Any other result would have been remarkable. Why would, or should, the law sustain in perpetuity theories of relevance that had arisen in cases up to a particular moment in time, but permanently shut the door to the identical type of development of theories of relevance in unprecedented circumstances in future cases?

53. See 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5239, at 432 (1978).

54. See 22 *id.* § 5239, at 428. Even Wigmore described the modern common law character evidence rule in inclusionary terms:

The usual black-letter description of the character evidence rule found in the literature and in codes today . . . simply asserts that it is improper for a trier of fact to determine what a person did on a particular occasion by asking and answering the question of whether that person has the sort of disposition that would incline him toward the doing or not-doing of that act. Phrased in this way, the rule seems at first sight to have a wide ambit.

Modern analysis, however, gives the character evidence rule a relatively restricted meaning. It is generally said that the propensity rule does not forbid any use of evidence that reflects badly on the character of a person, and there is no such prohibition even when it happens that the acts of the person shown are not those that are our ultimate concern in the lawsuit in question but serve only as a basis for ascertaining some other matter of fact that does happen to be of more immediate concern. The rule against character evidence, it is thought, prohibits the use of evidence that reflects

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to the inclusionary approach in Rule 404(b) merely states the rule in a manner more faithful to its historical origins, and perhaps states it in a manner more in conformity with actual practice.

Regardless of the true historical derivation of the rule, the attribution of such extraordinary significance to the semantic distinction between the inclusionary and exclusionary approaches also fails to withstand reasoned analysis. One must keep in mind that, regardless of the form of the rule, the distinction present in both Rule 404(b) and its predecessor common law rules between inadmissible "propensity" evidence and admissible "noncharacter" evidence only makes sense if that distinction is real. There must be an articulable, comprehensible boundary between the two; otherwise the plethora of motions, objections, judicial opinions and literature on the subject is truly the modern, legal equivalent of the emperor's new clothes. If the distinction between what is admissible noncharacter evidence and inadmissible character evidence is reasonably clear, then what possible difference can it make which is labeled the rule and which is labeled the exception? Each case should come out correctly regardless of which half of the dichotomy enjoys the status of "the rule." A glass that is filled half way and a glass that is filled completely and then emptied by half both contain the same quantity at the end of the process.

One possible response to this point is that the exclusionary form of the rule, by restricting the theories of relevance to a specified, closed list of possibilities, will result in the exclusion of other crimes evidence in cases where admissibility would have been premised upon a theory of relevance not included in the traditional list embodied in the second sentence of Rule 404(b). The flaw in this response is empirical. An examination of the annotations following Rule 404(b) reveals that decisions admitting evidence under Rule 404(b) do so, almost invariably,

on the character of a person when and only when that evidence is offered in order to show that the person acted in a certain way on a particular occasion because he had a propensity or inclination to act that way. If the evidence that reflects badly on the character of a person is offered for *any* other purpose, it does not offend the prohibition against the use of character evidence.

1A WIGMORE, *supra* note 34, § 54.1, at 1151-52.

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under one of the specified theories of relevance. It seems that after several centuries of experimentation, the universe of possible “noncharacter” theories of relevance has become substantially closed, the inclusionary formulation of the rule notwithstanding.⁵⁵

The real answer to the objection stated above, and in turn the explanation for the attention devoted to what ought to be a trivial distinction as to form, is that the boundary between what Rule 404(b) and like rules allow and disallow could hardly be less clear. The distinction required by Rule 404(b) has been characterized as so perplexing⁵⁶ and vague⁵⁷ that there is little

55. One notable exception to this observation is *United States v. Procopio*, 88 F.3d 21, 29–30 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 620 (1996), and *cert. denied*, 117 S. Ct. 1008 (1997). In *Procopio*, several defendants were charged with various offenses, including conspiracy, arising out of the armed robbery of an armored truck in 1991. The government was able to introduce evidence of guns, handcuffs, a state police uniform and badge, and a police scanner seized in 1993 from an apartment which was the residence of one defendant and the temporary residence of another defendant. Over the objection of these defendants that this was impermissible character evidence because it revealed a propensity to commit robberies, the courts allowed the evidence on the theory that it demonstrated a “criminal association” between these two defendants. Specifically, the theory of admissibility was that the association of these two defendants in 1993 was some evidence of their association two years earlier. The defendants admitted their association with each other in 1991 in the months following the robbery, but the courts ruled that the 1993 association inferred from the physical evidence had special relevance because it, unlike the admitted 1991 association, was a *criminal* association.

Had the case involved the same charges against a single defendant and the physical evidence of other similar crimes been found in that defendant’s apartment two years after the date of the charged offense, the evidence would presumably have been excluded as inadmissible character evidence. The only distinction between this hypothetical scenario and the actual facts of *Procopio* is that the latter situation involved multiple actors. Evidence suggesting the general propensity of a single individual to commit robberies may be character evidence which is inadmissible under the first sentence of Rule 404(b), but apparently the same evidence suggesting the general propensity of two individuals to commit robberies together is noncharacter evidence admissible under the second sentence of Rule 404(b). What the court labels as evidence of a criminal association might just as well be designated as group character evidence.

Arguably, another exception to the observation in the text is the “doctrine of chances,” discussed at *infra* notes 63–65 and accompanying text. As will be seen, however, all or virtually all of the “doctrine of chances” cases have been, or could have been, placed within one or more of the traditional categories of admissibility catalogued in Rule 404(b).

56. See 2 WEINSTEIN ET AL., *supra* note 14, ¶ 404[08], at 404–44.

57. See David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15, 35 (1994).

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consistency in the decisions of courts attempting to apply the rule.⁵⁸ Courts often have difficulty identifying and applying the distinction between the admissible and the inadmissible.⁵⁹

The confusion is easy to understand. The example chosen earlier, regarding proof of identification by means of a unique *modus operandi*, is actually one of the relatively comprehensible examples of allowable Rule 404(b) evidence. For most other examples, the distinction required by Rule 404(b) is far more obscure.⁶⁰ The distinction is particularly elusive, if not illusive, in cases in which the evidence is admitted to prove some level of scienter, such as knowledge, absence of mistake or accident and, in particular, intent.⁶¹ There are countless examples of the introduction of evidence of prior bad acts, ostensibly admitted, not to show a propensity to engage in the specified conduct, but rather to demonstrate the intent to engage in the specified conduct;⁶² this distinction is, at best,

58. *See id.*; Karp, *supra* note 57, at 34-35.

59. *See* 22 WRIGHT & GRAHAM § 5239, *supra* note 53, at 431. This difficulty, in the view of some commentators, has led some courts in some cases to admit evidence that properly should have been excluded. *See, e.g.,* Imwinkelried, *supra* note 7, at 578; *see also* Procopio, 88 F.3d at 29-30.

60. *See, e.g.,* 1A WIGMORE, *supra* note 34, § 54.1, at 1152, 1155-56; Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777 (1981); Lee E. Teitelbaum et al., *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 WIS. L. REV. 1147 (1983); Uviller, *supra* note 12, at 882.

61. *See* 1A WIGMORE, *supra* note 34, § 54.1, at 1152 n.1; Ordovery, *supra* note 18, at 147, 157.

62. For example, in *Carson v. Polley*, 689 F.2d 562 (5th Cir. 1982), a civil rights action against law enforcement officials for the use of excessive force in the conduct of an arrest, the plaintiff appealed from a judgment entered on a jury verdict for the several defendants. On appeal, the court held that it was reversible error for the district court to have excluded a performance evaluation report regarding one of the defendants, containing a comment that the defendant "needed to 'work on controlling [his] temper and personal feelings,' because he 'tends to get into arguments with inmates, lets his temper flare up too quickly.'" *Id.* at 571. The court ruled that this report "tended to show [the defendant's] *intent* to do harm to [the plaintiff] when booking him at the jail, and, therefore, was admissible under the 'intent' exception to the general rule against character evidence." *Id.* at 572. Apparently, prior incidents of angry encounters with inmates is not evidence of a general disposition to such encounters, but is evidence of a specific intent to harm an individual that the defendant had not yet met at the time of the incidents forming the basis for the report.

In *United States v. Hadaway*, 681 F.2d 214 (4th Cir. 1982), a prosecution for aiding and abetting the theft of televisions from an interstate shipment, evidence of the defendant's criminal involvement in three subsequent thefts of interstate shipments of, respectively, 1,000 cases of tuna fish, Goodyear tires, and a trailer

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extremely subtle. Evidence of prior, similar crimes is routinely admitted despite the almost imperceptible distinction between, for example, the propensity to sell drugs and the intent to sell drugs.

containing pipe tobacco and women's boots, was admitted, not to show a general propensity to commit such crimes, but to show that the defendant possessed the requisite "intent, knowledge, motive, plan, and preparation" to aid and abet the commission of the earlier, charged offense. *Id.* at 219. In *United States v. McCollum*, 732 F.2d 1419 (9th Cir. 1984), a prosecution for attempted bank robbery in which the defendant claimed to have acted under hypnosis, the court ruled that evidence of a twelve-year-old armed robbery would have been admissible, not to establish the character of the accused, but rather to prove the defendant's intent to commit the charged offense.

In *United States v. Pollock*, 926 F.2d 1044, 1047-49, (11th Cir. 1991), a prosecution for various drug offenses involving a very large quantity of cocaine found secreted in a car driven by the defendant, the court, after acknowledging that "the margin between [propensity and intent] is not a bright line," *Id.* at 1048, ruled that the defendant's five-year-old conviction for conspiracy to import marijuana was admissible to prove conspiratorial intent. In *United States v. Parziale*, 947 F.2d 123 (5th Cir. 1991), a case in which the defendant was charged with, *inter alia*, conspiring to import, and attempting to import, marijuana, evidence of the defendant's prior attempt to import marijuana was admissible on the issue of the defendant's intent, an issue sufficiently raised solely by the defendant's plea of not guilty. In *United States v. Brown*, 34 F.3d 569 (7th Cir. 1994), a drug prosecution in which the defendant did not dispute intent but rather claimed not to have been involved in the attempted purchase of cocaine from an undercover police officer which was the subject of the charged offenses, the court sustained the admission of testimony as to the defendant's involvement in four prior sales or purchases of drugs, purportedly for the establishment of the defendant's intent.

In *United States v. Hernandez*, 84 F.3d 931 (7th Cir. 1996), the defendant departed from an airplane and retrieved a suitcase later found to contain large quantities of cocaine and heroin, leading to charges of possession with intent to distribute both substances. At trial, the government was permitted to introduce evidence that, on a prior occasion, the defendant was stopped entering the country in an automobile containing a large quantity of marijuana. The appellate court affirmed the defendant's conviction, ruling that the prior crime evidence was admissible, not to show the defendant's general propensity to deal drugs, but rather his intent to do so. The court reasoned that the large quantity of marijuana seized on the prior occasion allowed the inference of an intent to distribute that marijuana, which in turn allowed the inference that the defendant was still of a mind to distribute when he was found with different drugs on a different occasion. *See id.* at 935. Of course, the initial inference in this chain of reasoning was available directly from the large quantity of cocaine and heroin found in the suitcase in question. More persuasive is the court's admission of the evidence on an "absence of mistake" theory, i.e., to refute any claim that the defendant was an ignorant courier. In any event, the distinction between "the defendant is a drug dealer because he has done it before," and "the defendant intended to distribute these drugs because he has done it before," remains paper thin.

3. *The doctrine of chances*

Perhaps the real hinterland of Rule 404(b) metaphysics is the doctrine of chances. The doctrine is premised on the improbability of multiple coincidences.⁶³ In many cases, the doctrine is used to introduce evidence relevant to prove scienter;⁶⁴ such evidence would therefore fall within one or more of the specified, permissible categories of Rule 404(b), such as intent, knowledge, or absence of mistake or accident. For example, suppose that an individual charged with receipt of stolen property defends on the claim that he or she was unaware of the stolen character of the property. It would be a most unlikely coincidence if in fact the defendant was in innocent possession of stolen property on multiple occasions. Therefore, evidence of such other occasions could be admissible under the doctrine of chances to prove the requisite level of mens rea.

In other cases, the doctrine can be used to establish actus reus elements of the charged offense. Suppose, for example, a provider of childcare services is charged with physical abuse of a child and defends on the grounds that the child's injuries resulted from an accidental fall and not from any assault by the defendant. Evidence that a significant number of other children had also sustained an unusual rate of similar injuries while in the defendant's care could be admissible under the doctrine of chances to prove assaultive conduct by the defendant. Such evidence would seem to fit squarely within the "absence of mistake or accident" category of permissible evidence under Rule 404(b). If, in the same circumstances, the defense was instead premised upon the possibility of the injuries having been inflicted by another assailant, the same evidence of similar injuries suffered by other children in the defendant's care could be introduced, consistent with Rule 404(b), to prove identity.

The doctrine of chances, then, is often simply a different way of articulating how evidence might come within one or more of the specified permissible theories of admissibility

63. See Edward J. Imwinkelried, *The Dispute Over the Doctrine of Chances*, CRIM. JUST., Fall 1992, at 16, 18.

64. See 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 302, at 241 (1979).

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contained in the second sentence of Rule 404(b). In any event, it is clear that the doctrine of chances is treated as a viable theory of admissibility under Rule 404(b).⁶⁵ As such, though, it is fraught with all the difficulties that attend the implementation of Rule 404(b) generally. Even the defenders of the doctrine concede that, in many cases, the distinction between permissible "doctrine of chances" evidence and impermissible character evidence is slim.⁶⁶ And, of course, there are the usual complaints that courts use the doctrine of chances to let in much of what should be kept out.⁶⁷

But the problem with the doctrine of chances is a systemic one and is not limited to an occasional misapplication. Take the prototypical case for the doctrine of chances; i.e., the case based upon multiple accusations. A defendant is charged with rape, and defends on the claim that the sexual encounter was consensual. The government wishes to introduce the testimony of other women who will testify that, in separate incidents, each of them was forced to submit to nonconsensual sexual intercourse by the defendant. If offered to prove that the defendant is in fact a rapist, the evidence will be excluded by the character evidence rule. There is a fair chance, however, that such evidence could be admitted under the doctrine of chances.

Because most people are never accused of rape, the probability of an individual being falsely accused of rape is low.⁶⁸ Therefore, it would be an improbable coincidence for an individual to be falsely accused, even once, of rape. The probability of an individual being falsely accused on multiple occasions is increasingly improbable.⁶⁹ Therefore, the argument

65. See Mark Cammack, *Using the Doctrine of Chances to Prove Actus Reus in Child Abuse and Acquaintance Rape: People v. Ewoldt Reconsidered*, 29 U.C. DAVIS L. REV. 355, 407-08 (1996); Imwinkelried, *supra* note 63, at 19-20; Imwinkelried, *supra* note 1, at 1136. The use of the doctrine of chances as a theory of admissibility under Rule 404(b) has been endorsed by the Criminal Justice Section of the American Bar Association. See Raeder, *supra* note 4, at 348.

66. See, e.g., Imwinkelried, *supra* note 7, at 588, 602.

67. See *id.* at 588; Ordover, *supra* note 18, at 168.

68. See Cammack, *supra* note 65, at 396. This proposition does not depend upon there being a high percentage of rape accusations which are well founded. Simply because most people are not accused at all—truly or falsely—it follows that most people are not accused falsely. *Id.*

69. Suppose, for example, that the probability of a false rape accusation being targeted against a particular individual is one in one hundred. Considered

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goes, the mere existence of multiple accusations is relevant in a manner conceptually distinct from the chain of reasoning ordinarily barred by the character evidence rule.⁷⁰ Essentially, the doctrine of chances allows the inference of guilt of rape based upon multiple accusations of rape, provided that, along the way, there is no inference drawn that the defendant is a rapist because he has raped before.

There are several problems with this concept. We can start by stepping back and gazing at the big picture. Is there not something awry with rules of evidence that permit the trier of fact in a rape case to infer guilt based merely on prior accusations of rape, but, at least in principle, ordinarily will not allow the trier of fact to infer guilt based on the fact that the accused is actually guilty of rape on prior occasions?

In addition, consider the extent to which the doctrine of chances has pushed Rule 404(b)'s supposed distinction between inadmissible character evidence and admissible noncharacter evidence. For example, one of the issues which must be resolved in a "doctrine of chances" scenario is the number of prior incidents or accusations necessary to raise a reasonable inference that they are unlikely accounted for by innocent coincidence.⁷¹ Suppose that, in our hypothetical rape case, the court determines that a minimum of two prior accusations of rape is necessary to qualify the evidence as noncharacter evidence. On the basis of a proffer from the government, the court determines to allow the testimony of two witnesses as to two independent accusations of rape committed by the defendant. On the first day of trial, the first of these witnesses testifies as promised, concluding her testimony with the close of the trial until the next day. Given the court's pretrial determination that two such accounts are necessary to qualify for the doctrine of chances, as the case stands at that point, the

independently, the probability of a second false rape accusation being targeted against that individual would also be one in one hundred. Considered together, the probability of both false accusations being made against the same individual would be the product of the two ratios, which would be one in ten thousand.

70. See Cammack, *supra* note 65, at 397.

71. See *id.* at 397-98; Imwinkelried, *supra* note 63, at 52; Paul Rothstein, *Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259, 1263 (1995); see also *State v. Allen*, 725 P.2d 331 (Or. 1986) (admitting evidence in an arson prosecution of a prior arson, under theory of doctrine of chances, as proof that the fire was not started accidentally, even though there was only one prior incident).

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defendant has been enormously prejudiced by the introduction of character evidenced barred by Rules 404(a) and 404(b).

The next morning, the second witness appears in court and testifies as anticipated. Not only is the testimony of the second witness not character evidence, but the testimony of the first witness from the previous day has now been magically converted to noncharacter evidence as well. A premise of the doctrine of chances specifically, as well as of Rule 404(b) generally, is that character evidence and noncharacter evidence are mutually exclusive categories of evidence. Yet here we have a testimonial account that jumps from one category to the other based solely upon the testimony of another witness whose testimony relates to an entirely independent occurrence.⁷²

Ultimately, the flaw in the doctrine of chances is that it collapses the slim barrier separating character and noncharacter evidence as supposedly distinguished in Rule 404(b). There are really only two possible explanations that arguably account for the persuasive influence of the multiple-accusers scenario. The first must start with the assumption that accusers are probably telling the truth.⁷³ Arguably, then, multiple accusers corroborate each other and increase the probability that each is telling the truth.⁷⁴

This explanation is not generally inaccurate; it simply does not get us anywhere. Even if we credit each of the multiple accusers, that does not explain how they cross over and corroborate each other. If the only impact of the multiple-accusers scenario is that we credit the specific testimony of each, then the only thing we learn from multiple accusations is that the defendant committed multiple crimes. There would be no reason why the second accuser's testimony increases the

72. If, in this scenario, we imagine that the second witness does not materialize at trial on the second day, the trial court would presumably have to choose among (1) instructing the jury to disregard the testimony of the first witness from the previous day, (2) declaring a mistrial, or (3) revising its pretrial order lowering the threshold for the doctrine of chances to one prior accusation.

73. See Cammack, *supra* note 65, at 399.

74. Even this hypothesis assumes that the defendant's innocence can only be consistent with a conclusion that the accuser is lying. But this is not necessarily the case. The accuser might be mistaken as to any number of issues, including identification. Moreover, the accuser's testimony could be flawlessly accurate and still not account for a reasonable mistake or ignorance on the part of the defendant that would negate the requisite level of scienter.

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likelihood that the defendant committed the first crime.⁷⁵ Indeed, if this is all there is to the doctrine of chances in the multiple-accusers scenario, then accusations of uncharged criminal incidents would not even be relevant.

The second, and only genuine, explanation of the persuasive influence of the multiple-accusers situation is that we credit precisely the character inference that is supposedly barred by the character evidence rule.⁷⁶ In fact, the explanation for the doctrine of chances in the multiple-accusers context is simply a convoluted explanation of the general propensity inference. Each separate accusation would have no bearing upon the accuracy of another allegation but for the conclusion that the multiple accusations demonstrate a cross-situational pattern of behavior, which is but a variation on the taboo inference of a general propensity or character trait. We connect one accusation to another accusation of a similar crime precisely because we credit, at least to some extent, the notion that people do behave consistently with personal character traits.⁷⁷ That is the only reasonable explanation for why even the doctrine of chances is limited to multiple accusations of identical or similar crimes. It is the reason why there is little or no corroborative effect when the multiple accusations involve significantly discrete crimes. The doctrine of chances may in fact be truly consistent with Rule 404(b), but unfortunately that consistency stems from the fact that, at least in some cases, the doctrine of chances is the latest theory for allowing character

75. This corroborative impact would only be true if the multiple accusers were testifying as to the same incident, which of course, is never the case in a Rule 404(b) situation.

76. See Cammack, *supra* note 65, at 399.

77. See *id.* at 400. Professor Rothstein has expressed this conclusion most succinctly:

The essence of this probable guilt argument is that there is a disparity between the chances, or probability, that an *innocent* person would be charged so many times and the chances, or probability, that a *guilty* person would be charged so many times. If there is such a disparity, however, it is only because a guilty person would have the *propensity* to repeat the crime. If it were not for the propensity to repeat, the chances, or the probability, that an innocent person and a guilty person would be charged repeatedly would be identical. Hence, the argument hinges on propensity and runs afoul of the first sentence of Rule 404(b). The effort to reconcile the permission in the Rule with the prohibition in the Rule has failed.

Rothstein, *supra* note 71, at 1262–63.

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evidence to reach the jury while maintaining the pious fiction that we follow the character evidence rule.

4. *Another look at the substantive 404(b) prerequisites*

As has been discussed,⁷⁸ the third prerequisite to the admissibility of evidence under Rule 404(b) is that the trial court must be persuaded that there is a legitimate, noncharacter purpose to such evidence. The current morass that this task has engendered has arisen precisely because the distinctions allowed by the rule, and thus required of the courts, are either barely perceptible or entirely illusory.⁷⁹ We admit what essentially is character evidence by labeling it otherwise, engaging sometimes in the most contorted analytical gymnastics to preserve an entirely theoretical adherence to the character evidence rule.⁸⁰ The scholarly pursuit of such noncharacter theories as the doctrine of chances is not unlike the individual who, after hours of gazing upon an ordinary painting, pronounces that if one stands at a particular angle at a particular time of day using very particular lighting, the painting will reveal itself to be something quite extraordinary. The problem is that judges must, in the ordinary light of common sense and experience, attempt to implement theories that are often only operative in the artificial light of the scholar's laboratory. It should not be surprising that the application of Rule 404(b) has not resulted in a coherent and consistent body of law.

One remaining question is whether the misadventures that attend the case law implementing Rule 404(b) are entirely the results of the difficult subject matter, or whether they are in part the products of willful disregard of the limitations upon admissibility specified in Rule 404(b). Some insight into this question might be attained by exploring the fourth prerequisite

78. See *supra* note 23 and accompanying text.

79. For this reason, some commentators have advocated abandoning the "admissible categories" approach of Rule 404(b) in favor of a case-by-case determination based upon the assessment and balancing of the probative value and potential prejudicial effect of the prior crimes evidence. See, e.g., Allan, *supra* note 45, at 271-74; Stone, *supra* note 41, at 984. This appears to be the current direction of the character evidence rule in England. See *Director of Pub. Prosecutions v. Boardman*, [1995] App. Cas. 421; see also Allan, *supra* note 45, at 253.

80. See 1A WIGMORE, *supra* note 34, § 54.1, at 1152-56.

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to admissibility under Rule 404(b). Specifically, the trial court must balance the probative, noncharacter value of such evidence against the potential prejudice of the jury using such evidence to determine the general propensity, or character, of the accused, taking into consideration that such evidence is, seemingly without exception, accompanied by a limiting instruction juxtaposing the permissible noncharacter use and the forbidden character treatment of the evidence.⁸¹

One of the inherent difficulties in striking the required balance for admission of evidence under Rule 404(b) is that there is frequently a parallel relationship between what the rule designates as relevant and what the rule designates as prejudicial.⁸² For many of the theories of admissibility under Rule 404(b), the strength of the claim for admissibility increases in proportion to the similarity between the charged crime and the prior crime.⁸³ Unfortunately, the greater the similarity between the two crimes, the more compelling the forbidden conclusion that the accused is predisposed to commit that very crime. It is paradoxical, then, but not surprising, that the circumstance in which the danger of prejudice is greatest—i.e., when such evidence is offered against the criminal defendant⁸⁴—is also the circumstance in which such evidence is most probative and significant.⁸⁵ Consequently, despite the fact that the character evidence rule is designed primarily to protect the criminal defendant, a perusal of the annotations to Rule 404(b) reveals that the vast majority of Rule 404(b) cases involve evidence offered by the prosecution against the accused. And because the competing values vary

81. See *supra* notes 24–25 and accompanying text. Because the language in Rule 404(b) is permissive (“may . . . be admissible for other purposes”), even if evidence fits within one of the categories of admissibility, it must still be excluded if the “danger of unfair prejudice” “substantially outweigh[s]” “its probative value.” FED. R. EVID. 403; See also 2 WEINSTEIN ET AL., *supra* note 14, ¶ 404[18], at 404–108 to 404–109.

82. See Stone, *supra* note 41, at 954.

83. For example, the more similar the *modus operandi* in the two crimes, the stronger the inference that the identity of the actor in the second crime is the already identified actor in the first crime.

84. See Stone, *supra* note 41, at 983.

85. As the similarity of the multiple crimes increases, the distinction between the character and noncharacter uses of the evidence arguably disappears. See *supra* notes 79–80 and accompanying text.

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proportionally rather than inversely, it is not merely the cases at the margin that present difficult issues.

So how do courts actually resolve the required balancing test? There are some limitations upon the information that can be gathered from the published opinions. Because the Double Jeopardy Clause effectively eliminates government appeals from trial court rulings disallowing the introduction of evidence under Rule 404(b),⁸⁶ the reported appellate decisions are invariably cases in which the trial court admitted the challenged evidence under Rule 404(b). Moreover, the balancing test required by Rule 403, even in the Rule 404(b) context, is one as to which there is a great deal of appellate court deference to the discretion of the trial courts.⁸⁷ Consequently, what appears anecdotally to be a high percentage of appellate decisions affirming the allowance of evidence under Rule 404(b) might not represent the actual success rate of prosecutors seeking to introduce such evidence.

Nevertheless, some observations can be made. First, appellate courts readily defer to trial court discretion. Perhaps because the required balancing test is often so difficult, there is a conspicuous willingness of at least some appellate courts to ground their decisions predominantly, if not singularly, upon the deference accorded to the trial courts.⁸⁸ This suggests a virtual abdication of any meaningful appellate authority on this issue. In some cases, the repudiation of meaningful appellate review is express, and not merely implied.⁸⁹

86. In any case in which the evidence is excluded and the defendant is acquitted, no appeal can be heard because double jeopardy would bar a retrial. In any case in which the evidence is excluded and the defendant is nevertheless convicted, the government has no reason to appeal at all, and the defendant has no cause to raise the Rule 404(b) issue on appeal.

87. See 2 WEINSTEIN ET AL., *supra* note 14, ¶ 404[18], at 404–21.

88. See, e.g., *United States v. Cunningham*, 103 F.3d 553, 557 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1481 (1997); *United States v. Procopio*, 88 F.3d 21, 30 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 620 (1996), and *cert. denied*, 117 S. Ct. 1008 (1997); *United States v. Hernandez*, 84 F.3d 931, 935 (7th Cir. 1996); *United States v. Parziale*, 947 F.2d 123, 129 (5th Cir. 1991); *Oregon v. Allen*, 725 P.2d 331, 336 (Or. 1986).

89. For example, in *United States v. Brown*, 34 F.3d 569, 574 (7th Cir. 1994), the court stated that, absent “a categorical rule” requiring exclusion of the Rule 404(b) evidence, “we must defer to the judgment of the trial court.” And in *United States v. Hadaway*, 681 F.2d 214, 217 (4th Cir. 1982), the court announced that, “[g]iven the wide discretion permitted the district judge, it is fruitless to contend that the evidence was improperly admitted.”

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This hands-off approach used by appellate courts in reviewing the seemingly endless parade of appeals by convicted defendants who suffered the revelation of their uncharged criminal conduct before the juries which convicted them hardly suggests a deep and abiding commitment to the character evidence rule, which is supposed to protect defendants from such exposure. It often seems as though once a so-called noncharacter use for the prior crimes evidence has been identified and adequately defended, the contest is, as a practical matter, over. It is as if character evidence is ordinarily excluded, not because it is prejudicial, but rather because it is just not relevant enough. But if its probative value can be enhanced incrementally by advancing a theory of relevance in addition to the suggestion of a general propensity, the bar has been exceeded and the balancing test is rarely an obstacle to admissibility.

Second, there is a flip side of this phenomenon in cases in which the court has been persuaded that there is a real noncharacter use for the prior crimes evidence. In these circumstances, to the extent that the potential prejudice in the equation is merely the danger of the jury inferring a defendant's general propensity to engage in such criminal conduct, the arguments for exclusion often fail to carry the day. Many judicial opinions seem to require more than this ever-present danger, such as something particularly inflammatory about the prior crimes evidence.⁹⁰ Again, the devotion to guarding against the danger of the general propensity inference is unimpressive.

90. *See, e.g.*, *United States v. Boyd*, 53 F.3d 631, 637 (4th Cir. 1995) (finding that the evidence of the defendant's prior drug use was not unduly prejudicial in a drug prosecution "because the evidence of [the defendant's] personal use of marijuana and cocaine did not involve conduct any more sensational or disturbing than the crimes with which he was charged"); *United States v. Meling*, 47 F.3d 1546, 1557 (9th Cir. 1995) (finding that tapes of the defendant attempting to hinder an investigation were not unfairly prejudicial because "the profanity in the tapes was relatively mild by today's standards"); *Carson v. Polley*, 689 F.2d 562, 573 (5th Cir. 1982) (finding that, in a civil rights action for the use of excessive force in effecting an arrest, admission of the defendant's performance evaluation report indicating the defendant's prior losses of temper and expressions of hostility toward detainees was not unjustly prejudicial because "there were no horrifying details that would predictably inflame the jury's passion").

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Third, there are many cases in which Rule 404(b) evidence is admitted, despite an apparently weak case for the probative value of the evidence in connection with its proffered, "noncharacter" use.⁹¹ As noted earlier, this is particularly apparent in some decisions admitting evidence under Rule 404(b) to show intent or other levels of mens rea.⁹² But the examples of this phenomenon are by no means so limited. For example, notwithstanding the fact that it is the exceptional person who could not use some additional cash, evidence of the defendant's uncharged, costly criminal appetites sometimes finds its way to the jury on the improbable theory that it supplies a motive for the defendant's charged crime, where the latter is one having the allure of some pecuniary (and sometimes even nonpecuniary) benefit.⁹³ In many of these cases, one is left with the impression that, not only is the general ban against character evidence not a priority, but, to the contrary, the courts often embrace opportunities to allow character evidence in under the guise of treating such evidence as something else entirely.

Fourth, there often is no serious attention to what the character evidence rule deems to be prejudicial because of a

91. Apparently, even some defenders of the character evidence rule would agree with this observation. *See, e.g.*, Imwinkelried, *supra* note 7, at 577-78.

92. *See supra* notes 61-62 and accompanying text.

93. In *Meling*, 47 F.3d at 1557, a prosecution in which the defendant was charged with various offenses arising from his attempt to kill his wife in order to collect \$700,000 on a life insurance policy, evidence of the defendant's purchase of an expensive firearm was deemed to be more probative of the defendant's motive (greed) than prejudicial (propensity for violence). In *Boyd*, 53 F.3d at 636-37, a prosecution for conspiracy and possession with intent to distribute marijuana, testimony that the defendant used marijuana and cocaine was found to be more probative of the defendant's motive to finance and supply his own drug use than it was prejudicial in linking the defendant to criminal drug activities. Moreover, in *Cunningham*, 103 F.3d 553, the defendant, a nurse, faced criminal charges based on her alleged theft of Demerol from hospital syringes. The prosecution was permitted to introduce evidence that, four years earlier, the defendant had been addicted to Demerol, that her nursing license had been suspended because of her prior theft of Demerol and that she had subsequently falsified drug test results in order to maintain the reinstatement of that nursing license. With barely a passing reference to the requisite balancing test, the court determined that the value of the evidence to prove a motive for the theft (the defendant's addiction) exceeded any prejudicial suggestion of a propensity to steal Demerol. Even assuming this to be true, given the explicit evidence of the defendant's addiction, it is unclear what the incremental value of the evidence of the prior theft of Demerol was for the stated purpose, especially as balanced against its tendency to suggest a propensity to pilfer the drug. *See id.* at 556-57.

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mechanical, and arguably disingenuous, faith in the efficacy of limiting instructions to the jury. Of course, the entire jury system is predicated on the assumption that jurors can, and will, follow the instructions from the trial judge.⁹⁴ This assumption extends to limiting instructions, i.e., instructions restricting jurors' consideration of evidence to its correct scope in circumstances in which the evidence could be used for both a proper and an improper purpose.⁹⁵ Judges who admit evidence under Rule 404(b) routinely assume (or so they say) that any potential prejudice from such evidence is controlled by an instruction directing the jury's consideration of such evidence to its specified "noncharacter" context and prohibiting consideration of that evidence as bearing upon the character of the accused.⁹⁶

But on what possible basis does this assumption rest? Any meaningful consideration of prejudice must focus, not on the theory constructed by the law and contained in the jury instructions, but rather on the actual use to be made of such evidence by the jury.⁹⁷ So the question one must ask is, "How probable is it that jurors will understand and follow instructions?" For example, are juries capable of considering evidence of the defendant's prior drug sales as bearing on the defendant's intent to sell drugs but not on the defendant's propensity to do so?⁹⁸ Can a jury likewise consider the defendant's prior theft of drugs from hospital inventory as bearing on the defendant's motive for stealing drugs from hospital inventory but not on the defendant's propensity to

94. See *Parker v. Randolph*, 442 U.S. 62, 73 (1979); Edward J. Imwinkelried, *The Right to "Plead Out" Issues and Block the Admission of Prejudicial Evidence: The Differential Treatment of Civil Litigants and the Criminal Accused as a Denial of Equal Protection*, 40 EMORY L.J. 341, 378 (1991).

95. See *Spencer v. Texas*, 385 U.S. 554, 562 (1967). The authority for such a limiting instruction is contained in the Federal Rules of Evidence. See FED. R. EVID. 105.

96. See, e.g., *United States v. Hernandez*, 84 F.3d 931, 935 (7th Cir. 1996) ("[T]he district court instructed the jury both before and after the 404(b) evidence was admitted that it could be considered 'only on the question of the defendant's intent, knowledge, absence of mistake, or accident as it relates to the charges in the indictment.' Absent any substantial evidence to the contrary, we presume that the jurors followed their instructions.")

97. See Kuhns, *supra* note 60, at 796.

98. See, for example, the decisions discussed *supra* at note 62.

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steal drugs from hospital inventory?⁹⁹ The answer is that the chance that such instructions accomplish their intended purpose is practically nil.

The intensity of the struggle between prosecutors and defense counsel over the admissibility of prior crimes evidence under Rule 404(b) exists because both sides recognize that so much more is at stake than just proof of motive or intent. Privately, many judges acknowledge that their limiting instructions accompanying Rule 404(b) evidence are almost certainly futile. Occasionally, this judicial candor ascends to a public forum as well:

The *undue* prejudice [evidence admitted under Rule 404(b)] engenders may be guarded against in only one way: by an instruction . . . to the effect that the jury is not to consider the evidence as going to the character of the accused but only as going to identity. It may well be that the jury cannot make this distinction in its collective mind. If that is so it is unfortunate, but it happens all the time¹⁰⁰

Even scholars who generally support the current rule acknowledge that there is little confidence in the utility of the accompanying limiting instructions.¹⁰¹

This conclusion should not be in the least surprising. There is some support for the proposition that jurors have difficulty understanding instructions generally.¹⁰² Here, the problem is much more acute. As discussed above, the law's distinctions between the character and noncharacter treatments of prior crimes evidence are frequently obscure, occasionally imperceptible, and arguably, sometimes nonexistent.¹⁰³ Scholars disagree over the actuality of at least some of the distinctions engendered by Rule 404(b).¹⁰⁴ It has been suggested

99. See *United States v. Cunningham*, 103 F.3d 553 (7th Cir. 1996), discussed *supra* at note 93.

100. *United States v. Danzey*, 594 F.2d 905, 915 (2d Cir. 1979).

101. See, e.g., Imwinkelried, *supra* note 1, at 1140–41; Imwinkelried, *supra* note 94, at 379.

102. See Imwinkelried, *supra* note 1, at 1140–41; Geoffrey P. Kramer and Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401, 402, 429 (1990).

103. See *supra* notes 57–80 and accompanying text.

104. Compare Imwinkelried, *supra* note 63, at 18–20 (defending the doctrine of chances as a noncharacter theory of relevance), with Rothstein, *supra* note 71, at

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that some judges do not fully appreciate the distinctions.¹⁰⁵ Those of us who teach Evidence know that, when the syllabus rolls around to Rule 404(b), considerable time and effort are required to remove even a portion of the perplexed expressions that stare back at us in the classroom. Yet jurors, with no background in the law and no information as to the theory and purpose of Rule 404(b), are supposed to understand the distinction on the basis of a one or two sentence conclusory direction buried among a barrage of other complex instructions? The proposition is really quite preposterous.

Moreover, even if the jurors were somehow to comprehend the limiting instruction applicable to evidence admitted under Rule 404(b), there would still be a considerable question as to whether the instruction would be obeyed. Unremarkably, jurors are much less likely to follow instructions that contradict their own good sense and experience.¹⁰⁶ Consequently, one of the major impediments to the efficacy of the Rule 404(b)-prompted limiting instruction is that the prohibited use of the evidence flies in the face of what jurors know to be true: that character is relevant to behavior.¹⁰⁷

If limiting instructions in this context are so manifestly inadequate (a conclusion that has not escaped the apprehension of those voluntarily connected with the conduct of criminal trials in this country), then the steady allowance of evidence of the accused's prior crimes under Rule 404(b) is yet another telling indication that the commitment to the character evidence rule in practice falls a good deal short of the rhetoric. In fact, the considerable extent to which evidence of the criminal defendant's character manages to meet Rule 404(b)'s criteria for admissibility

reflect[s] a half-hearted and unprincipled compromise between

an interest in truthseeking and a belief that we should not judge people or their acts by their character (Refusal by some courts to even acknowledge the extent of the effective

1262-63 (attacking the distinction between the doctrine of chances and ordinary character evidence as illusory).

105. See *supra* note 59 and accompanying text.

106. See Kramer & Koenig, *supra* note 102, at 429-30.

107. See Imwinkelried, *supra* note 94, at 379; Susan Marlene Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 511 (1991).

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repudiation of the character evidence rule is surely the most unprincipled compromise of all; this compromise may be fairly described as hypocritical.)¹⁰⁸

C. *Rule 608(a)*

The extent to which the character evidence rule is compromised is not limited to the Rule 404(b) context. As to any witness who testifies at trial, the opponent may call a character witness to testify, in the form of opinion or reputation testimony,¹⁰⁹ regarding the witness's propensity for telling the truth.¹¹⁰ Thus, should a criminal defendant testify in his own behalf, the prosecution may call one or more witnesses to testify that, in the opinion of the witness or of the community, the defendant is dishonest. Because this type of attack upon the defendant's credibility does not require that the defendant open the door by first introducing evidence of his or her own character, there is nothing that the defendant can do to forestall this attack except to remain off the witness stand. In this particular, then, the rules of evidence hardly demonstrate a commitment to protecting the defendant from such character evidence. To the contrary, the law either allows evidence of the defendant's dishonesty or at least tolerates a predictable disincendive to the exercise of the defendant's right to testify.¹¹¹

It is true that such character evidence is almost always accompanied by a limiting instruction restricting the jury's consideration of such evidence to the issue of the defendant's credibility as a witness. Once again, however, the law would appear to demonstrate an unwarranted faith in such instructions.¹¹² Particularly in cases in which the defendant is charged with a crime involving dishonest conduct, the connection between a general propensity for dishonest conduct and a particular act of dishonesty might be too obvious to ignore.

Should the defendant testify, and should the defendant's character for truthfulness then be attacked, the defendant may

108. 1A WIGMORE, *supra* note 34, § 54.1, at 1156.

109. The explanations of, and distinctions between, opinion and reputation evidence can be found *supra* at note 8.

110. *See* FED. R. EVID. 608(a).

111. *See* 3 WEINSTEIN ET AL., *supra* note 14 ¶ 608[01], at 608-10.

112. *See id.*

then call a positive character witness to testify, in the form of opinion or reputation testimony, that the defendant is a truthful person.¹¹³ However, just as in the situation in which the defendant calls a positive character witness regarding his own character pursuant to Rules 404(a) and 405(a),¹¹⁴ calling a character witness to testify to the defendant's character for truthfulness opens the door to cross-examination of the character witness as to specific instances of dishonest acts of the defendant.¹¹⁵ Thus, in cases in which the defendant is charged with a crime involving dishonest conduct, the jury might learn of similar, prior acts of the defendant. The theory of admissibility is, once again, that this evidence is not direct evidence of the defendant's character, but is, rather, simply relevant to the weight to be given to the conclusory testimony of the character witness,¹¹⁶ and the jury will be instructed to that effect. But the efficacy of such a limiting instruction in this context is indistinguishable from the dubious circumscription accomplished by the parallel instruction accompanying cross-examination of character witnesses under Rule 405(a).¹¹⁷

Rule 608(a), then, provides yet another illustration of the law's glaring neglect of the supposedly important character evidence rule.

D. Rule 608(b)

Any witness, including the criminal defendant, may potentially be cross-examined concerning the witness's own specific acts evidencing an untruthful character.¹¹⁸ This form of impeachment is limited to the cross-examination itself, and any extrinsic evidence that might be necessary to complete the impeachment of the reluctant witness is disallowed.¹¹⁹ Nevertheless, a testifying defendant might well be compelled, for reasons of conscience, potential perjury prosecution or

113. See FED. R. EVID. 608(a)(2).

114. See *supra* notes 13–19 and accompanying text.

115. See FED. R. EVID. 608(b)(2).

116. See 3 WEINSTEIN ET AL., *supra* note 14, ¶ 608[06], at 608–100.

117. See *supra* notes 16–18 and accompanying text.

118. See FED. R. EVID. 608(b)(1).

119. See FED. R. EVID. 608(b). The reasons for this limitation are primarily to avoid the allocation of significant trial time allowing conflicting evidence to resolve disputes as to uncharged conduct, and to prevent unfair surprise to the defendant forced to defend against allegations of uncharged conduct. See 3 WEINSTEIN ET AL., *supra* note 14, ¶ 608[05], at 608–45.

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otherwise, to admit prior acts of dishonesty. Moreover, the questions themselves, even if followed by denials, might have a damaging impact.¹²⁰

Aside from this difference as to form, all that was stated in the previous section regarding Rule 608(a) applies here as well. The accused might be further deterred from testifying in the face of unleashing evidence of specific instances of dishonest conduct.¹²¹ Such impeachment will trigger the usual limiting instruction, but, particularly in cases in which the impeaching conduct bears some similarity to the charged crimes, the direction to the jury will be of suspect utility.

E. Rule 609

Any witness who testifies may be impeached by the introduction of his or her prior convictions. Under the federal rules, admission of prior convictions for crimes of dishonesty—such as perjury, bribery or fraud—is allowable without possibility of exclusion for prejudice, even in circumstances in which the witness subject to impeachment is the criminal defendant.¹²² All other felony convictions may be admissible to impeach the witness, provided the balance of probative value against unfair prejudice is resolved in favor of admissibility.¹²³ The federal rule, which generally conforms to the practice in other American jurisdictions¹²⁴ and longstanding practice under the common law,¹²⁵ is actually premised upon a

120. See 3 WEINSTEIN ET AL., *supra* note 14, ¶ 608[05], at 61–62.

121. See 3 *id.* ¶ 608[05], at 62–63.

122. See FED. R. EVID. 609(a)(2).

123. See FED. R. EVID. 609(a)(1). For all witnesses other than the criminal defendant, the ordinary balancing test of Rule 403, which presumes admissibility unless the “probative value is substantially outweighed by the danger of unfair prejudice,” applies. FED. R. EVID. 403. In 1990, Rule 609 was amended to accommodate the special concerns regarding potential prejudice when the impeached witness is the accused. See 3 WEINSTEIN ET AL., *supra* note 14, ¶ 609[04], at 609–42 & n.3. If the prior conviction is not a crime of dishonesty automatically admissible under Rule 609(a)(2), the defendant may only be impeached “if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.” FED. R. EVID. 609(a)(1). For all impeachable convictions, there is a strong presumption that a conviction is stale and inadmissible if more than ten years have passed from the later of the date of conviction or the date of release from incarceration. See FED. R. EVID. 609(b).

124. See 3A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 926, at 750 (1970).

125. See Karp, *supra* note 57, at 29.

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theory which blatantly disregards the reasons underlying the character evidence rule. Specifically, the reasoning underlying Rule 609 is that prior crimes indicate a generally poor character, which in turn supports an inference that the individual would testify falsely.¹²⁶

There are several problems with this hypothesis. First, the connection between the existence of a prior conviction and testimonial dishonesty is tenuous at best.¹²⁷ Because the impeaching conviction need not be for dishonest conduct, and further because it is not limited to the case in which the defendant testified falsely¹²⁸ at a previous trial, the Rule 609 premise is simply based upon the defendant's general bad character. This inference of perjurious behavior based solely upon general criminal conduct is actually far less reasonable than the more specific logic (i.e., that a person who commits particular crimes is more likely than other persons to commit that same, particular crime again) supposedly barred by the character evidence rule. Even in cases in which the prior conviction is one based upon dishonest conduct, the prior conduct might be unrelated to testimonial untruthfulness except for the very general propensity toward dishonesty. Small wonder, then, that studies suggest that jurors do not vary their assessment of the defendant's credibility with the presence or absence of impeachable prior convictions.¹²⁹

Second, despite the often unimpressive impact of the impeachable conviction upon the assessment of the defendant's credibility as a witness, evidence admitted under Rule 609 does appear to have an unintended impact. One simulated study suggests that evidence of prior convictions does increase conviction rates, especially where the prior convictions are for

126. See 3 WEINSTEIN ET AL., *supra* note 14, ¶ 609[02], at 609–28.

127. See Uviller, *supra* note 12, at 886–87.

128. Arguably there would be much greater relevance to a conviction resulting from a trial in which the defendant testified. See *id.* at 888. We can infer from the conviction itself that the defendant's testimony at the earlier trial was found to be untruthful.

129. See Davies, *supra* note 107, at 506, 520; Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions*, 9 LAW & HUM. BEHAV. 37, 41, 43–44 (1991). One possible explanation for this is that, given the defendant's motive to lie in his or her own defense, the defendant's credibility is inherently suspect. See *id.* at 43, 47. Consequently, prior convictions might produce little or no incremental damage to the defendant's credibility.

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crimes similar to the charged crime.¹³⁰ And, although the similarity between the proffered impeachable conviction and the charged crime should ordinarily counsel against admissibility in cases in which the balancing test of Rule 609(a)(1) controls, such similar-crimes evidence still occasionally finds its way to the jury under this provision.¹³¹ Moreover, if the prior conviction is for a crime of dishonesty, it must be allowed for impeachment under Rule 609(a)(2) even if the defendant is currently charged with the identical crime. Thus, a testifying defendant charged with, for example, perjury, can be impeached with his or her prior perjury conviction.

Once again, the only shield protecting the testifying defendant from the very evil supposedly prohibited by the character evidence rule is the limiting instruction. A prior conviction of the defendant admitted under Rule 609 is invariably accompanied by an instruction that such evidence is to be considered in evaluating the defendant's credibility as a witness, but not as evidence of the defendant's propensity to have committed the charged crime.¹³² But empirical studies confirm that these instructions are hopelessly powerless to prevent jurors from using the prior convictions in assessing the defendant's guilt.¹³³

The fact that jurors do not consider prior convictions in accordance with the limiting instructions that accompany Rule 609 impeachment does not reflect poorly on either the good sense or the good faith of jurors. Consider, first of all, whether the instruction itself is sensible. For example, suppose a defendant, on trial for perjury, takes the stand and is impeached with a prior conviction for perjury. The requisite limiting instruction would essentially direct the jury to make the following distinction:

You may not consider the defendant's prior perjury conviction as evidence that the defendant is guilty of the crime of perjury with which he is charged. You may, however, consider the

130. See Wissler & Saks, *supra* note 129, at 41-46.

131. See, e.g., *United States v. Alvarez*, 833 F.2d 724, 727 (7th Cir. 1987) (admitting evidence of prior cocaine conviction to impeach defendant's testimony in cocaine prosecution).

132. See 3 WEINSTEIN ET AL., *supra* note 14, ¶ 609[05], at 609-84 to 609-85.

133. See Robert G. Spector, *Rule 609: A Last Plea for its Withdrawal*, 32 OKLA. L. REV. 334, 352-53 (1979); Wissler & Saks, *supra* note 129, at 44.

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defendant's prior perjury conviction in evaluating the credibility of the defendant as a witness.

The latter half of the dichotomy essentially permits the jury to use the defendant's prior perjury conviction to determine whether the defendant committed perjury in the instant case in which the defendant denied committing perjury on the occasion which is the subject of the prosecution. How can jurors be expected to even understand, never mind follow, such a convoluted direction?

Take a more straightforward example. Suppose the defendant is on trial for robbery and is impeached with a prior robbery conviction. The juror thinks that the prior robbery is relevant to the issue of whether the defendant commits robberies. The law says that the prior robbery means no such thing, but only means that the defendant lies while testifying under oath. It hardly seems conscionable to say that the problem here lies with the juror.

The heart of the matter is that the limiting instruction given in this context "fails to correspond to the actual effect of the evidence even in the minds of the most sober and conscientious jurors."¹³⁴ Prosecutors and defense lawyers are keenly aware of this reality. This explains why a defendant's prior convictions—especially for crimes similar to the charged crime—heavily influence the defendant's decision as to whether to testify.¹³⁵

Thus, even before the recent amendments to the Federal Rules of Evidence allowing character evidence in sex offense prosecutions,¹³⁶ the character evidence rule was already so fraught with gaping exceptions, the most subtle distinctions, and impossible jury instructions so as to be practically eviscerated in numerous circumstances. In the words of one commentator, "the windings and twistings of the character evidence rule and its various exceptions are largely without rational explanation," and the existing practice as to the rule is an "effort[] to make sense out of nonsense."¹³⁷

134. Uviller, *supra* note 12, at 882.

135. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 146–47 (1966); *Admission of Criminal Histories*, *supra* note 34, at 741.

136. See FED. R. EVID. 413 and 414.

137. 1A WIGMORE, *supra* note 34, § 54.1, at 1156 (footnote omitted).

III. RECENT EXPANSION

Do recent additions to the Rules of Evidence remedy or compound the problem? As detailed earlier,¹³⁸ the character evidence rule has undergone a reversal of fortunes in sex offense and child molestation prosecutions by the additions of Rules 413 and 414 to the Federal Rules of Evidence. As to criminal prosecutions for sexual assault¹³⁹ or child molestation,¹⁴⁰ the new rules simply provide that evidence of the defendant's prior commission of the same offense "is admissible."¹⁴¹ Despite the mandatory language of the Rules, the case law quite sensibly indicates that the virtually omnipresent balancing formula of Rule 403 retains its vitality even in the context of the new rules.¹⁴² But the new rules have triggered a realignment of the potential probative and prejudicial uses of prior crimes evidence.¹⁴³ The inference of criminal conduct from similar uncharged conduct—formerly a potential misuse of the evidence which had to be factored into the "prejudice" side of the Rule 403 equation—is now a proper and endorsed deduction in the circumstances governed by the new rules. The new rules then (unlike some of the well-established evidentiary rules which at least pay homage to the character evidence rule even while failing to observe it in practice) represent an overt rejection of the character evidence rule as it relates to the specified crimes.

Rules 413 and 414 can be attacked and defended by marshaling arguments for and against the character evidence rule generally. But such arguments miss the mark because, even if accepted, they prove either too much or too little. If the general propensity conclusion makes sense generally, then there is no principled reason for limiting this use of character

138. *See supra* notes 3–6 and accompanying text.

139. *See* FED. R. EVID. 413(a).

140. *See* FED. R. EVID. 414(a).

141. FED. R. EVID. 413(a) and 414(a).

142. *See, e.g.*, *United States v. Sumner*, 119 F.3d 658, 661 (8th Cir. 1997); *United States v. Meacham*, 115 F.3d 1488, 1492 (10th Cir. 1997); *United States v. Larson*, 112 F.3d 600, 604–05 (2d Cir. 1997).

143. "The practical effect of the new rules is to put evidence of uncharged offenses in sexual assault and child molestation cases on the same footing as other types of relevant evidence that are not subject to a special exclusionary rule." *Sumner*, 119 F.3d at 662.

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evidence solely to cases involving sexual assaults or child molestation. On the other hand, if the objection to the new rules is the predicted cataclysm that will attend the reversal of the character evidence rule, even for certain crimes only, then it is difficult to understand the defense of the law as it existed prior to the new rules, with its permeable resistance to the introduction of such character evidence.

The truly notable feature of the new rules is the exclusive focus upon sexual offenses. While it may seem odd that evidence otherwise deemed to be prejudicial should become relevant based solely upon the specific crime charged, there is a fair amount of historical support for this proposition. Crime-specific exceptions to the character evidence rule date at least as far back as 1871.¹⁴⁴ In many jurisdictions, there developed a “lustful disposition” exception to the common law character evidence rule, specifically allowing evidence of prior sexual crimes to demonstrate a disposition to commit such offenses.¹⁴⁵ Of course, Rule 404(b) of the Federal Rules of Evidence contains no “lustful disposition” exception to the character evidence rule, and, with the adoption of state rules of evidence patterned after Rule 404(b), the “lustful disposition” exception has arguably been abandoned.¹⁴⁶ Nevertheless, courts have continued to avoid the character evidence rule and to admit character evidence against the accused in sex crimes prosecutions.¹⁴⁷ In many cases, such evidence is admitted under the questionable rationale that it proves intent or a common scheme or plan, or for some other authorized purpose under Rule 404(b).¹⁴⁸ But whether such evidence is allowed by a perpetuation of the “lustful disposition” exception or by the creative manipulation of the exceptions authorized by Rule 404(b), the fact remains

144. In that year, a British statute provided (contrary to the general common law rule) for the admission of evidence to establish a general propensity to receive and possess stolen property in prosecutions for that very offense. *See Stone, supra* note 41, at 978–80.

145. *See* 1 CHARLES E. TORCIA, WHARTON’S CRIMINAL EVIDENCE § 188, at 795 & n.17 (1985); 1A WIGMORE, *supra* note 34, § 62.2, at 1335.

146. *See* Imwinkelried, *supra* note 1, at 1127.

147. *See* 1A WIGMORE, *supra* note 34, at 1334–35; Imwinkelried, *supra* note 1, at 1127.

148. *See* 1A WIGMORE, *supra* note 34, at 1335–36.

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that the “lustful disposition” notion is far from dead in actual practice.¹⁴⁹

So why the need, or even the desire, to revitalize, or at least restate, the repudiation of the character evidence rule in sex offense cases? It has been suggested that the new rules constitute a first step in a scheme to eradicate the character evidence rule in criminal prosecutions.¹⁵⁰ In any event, the measures, as parts of more comprehensive bills, failed to emerge from Congress in both 1991 and 1992.¹⁵¹ In 1994, the relatively few supporters of the new rules of evidence were able to secure passage of these provisions in exchange for providing the necessary margin of support for a larger crime bill in which the new rules became incorporated.¹⁵² The new rules, considered independently, never commanded unfettered support in Congress,¹⁵³ and, as mentioned earlier,¹⁵⁴ have suffered extensive criticism since they emerged from Congress.¹⁵⁵

Oddly, then, Rules 413 and 414 enjoy the imprimatur that accompanies historical roots, but suffer the stigma of owing their existence to a political deal. But these facts alone do not dictate the result of our appraisal of the new rules. Not all that can claim a long history is worthwhile, just as not everything that is born of political back scratching is worthless. An evaluation of the merit of the additions to the Federal Rules requires an examination of the proffered justifications for these rules. That examination reveals the following two conclusions: first, that both the attackers and defenders of Rule 413 and 414 have done an excellent job of demonstrating that the new rules may make very little difference as a practical matter, and

149. See Thomas J. Reed, *Reading Goal Revisited: Admission of Uncharged Misconduct Evidence in Sex Offense Cases*, 21 AM. J. CRIM. L. 127, 159 & n.181, 189 (1993).

150. See 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5411, at 263 (Supp. 1997).

151. See 23 *id.* § 5411, at 263–64.

152. See 23 *id.* § 5411, at 264; James Joseph Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95, 95–97 (1995).

153. See Duane, *supra* note 152, at 96.

154. See *supra* notes 4–6 and accompanying text.

155. See 23 WRIGHT & GRAHAM, *supra* note 150, § 5411, at 264–65; Duane, *supra* note 152, at 96–97.

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second, that the new rules constitute an entirely unprincipled addition to an area of the law already brimming with disingenuous foolishness.

To begin, many of the proffered justifications for Rules 413 and 414 are premised on the notion that the evidence allowed by those rules is needed to establish many of the very issues for which prior crimes evidence is permitted under Rule 404(b). For example, one argument for the new rules is that evidence of the defendant's desire for nonconsensual sexual gratification is essentially akin to proof of motive.¹⁵⁶ But on that theory, the evidence would have been admissible to prove "motive" under Rule 404(b).¹⁵⁷ A second reason put forth for the new rules is that the admitted evidence is necessary to disprove the defendant's claim of consent,¹⁵⁸ but the concepts of "intent" and "absence of mistake" in Rule 404(b) have been stretched to allow prior crimes evidence to disprove a claim of consent and thus to demonstrate a propensity toward intentional assaults.¹⁵⁹ A third claim for the necessity of Rules 413 and 414 is that such evidence will establish a pattern of conduct identifying the defendant as the assailant.¹⁶⁰ A variation of this theory is based on the doctrine of chances: the improbability of an individual suffering multiple false accusations of sexual assaults.¹⁶¹ But again, Rule 404(b) already allows evidence of prior crimes to prove "identity" in this context,¹⁶² and no additional rule seems necessary to apply the doctrine of chances to such evidence.¹⁶³

156. See 137 CONG. REC. 3240 (daily ed. Mar. 13, 1991).

157. Of course, under Rule 404(b), the trial court might have excluded such evidence on the ground that the potentially prejudicial use of the evidence to establish a general propensity to commit sexual assaults outweighed the probative value of the evidence to prove motive. Under Rule 413, a balancing test must still be applied, see *supra* note 142 and accompanying text, but the general propensity conclusion need no longer be avoided. Nevertheless, either this proffered justification for the rule is disingenuous, or it suggests that the rule, for the stated purpose of proving motive, is an entirely unnecessary duplication of Rule 404(b).

158. See 140 CONG. REC. 12,990 (daily ed. Sept. 20, 1994); 137 CONG. REC. 3238 (daily ed. Mar. 13, 1991).

159. See Duane, *supra* note 152, at 98-99.

160. See 140 CONG. REC. H2433 (daily ed. Apr. 19, 1994).

161. See 137 CONG. REC. 3240-41 (daily ed. Mar. 13, 1991); Imwinkelried, *supra* note 1, at 1130-35; Karp, *supra* note 57, at 20.

162. See Duane, *supra* note 152, at 97-98.

163. See Imwinkelried, *supra* note 1, at 1136.

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To the extent that the debate over Rules 413 and 414 has focused on the overlap with Rule 404(b), numerous paradoxes have materialized. First, in an apparent effort to demonstrate that the new rules are “not so bad,” their proponents have likened these rules in practice to Rule 404(b), thereby unwittingly supporting the opposition argument that the new rules are entirely unnecessary. Second, in an apparent effort to demonstrate that Rule 413 and 414 are entirely unnecessary, their opponents have hastened to emphasize that such evidence will frequently, if not normally, get in under the preexisting Rule 404(b), thereby unintentionally documenting that the new rules are “not so bad.” Third, the opponents of Rules 413 and 414, while pointing to Rule 404(b) in theory in order to protest this supposedly dramatic new violation of the character evidence rule, also point to Rule 404(b) in practice to advance the argument that the government has no need for the new rules.

Be that as it may, we are still left with the question of why there should be a separate—indeed a converse—rule for sex offenses. Any practical similarity between the results under Rules 413 and 414 and the results under Rule 404(b) proves nothing except the extent to which Rule 404(b) falls woefully short of vindicating the character evidence rule. If the similarity to Rule 404(b) in practice is all that commends the change in the new rules, then there is certainly no principled distinction between these new rules and comparable rules for robbery, drug offenses, or any other crimes.

One argument for Rules 413 and 414 that at least addresses the right question is that sex crimes (including child molestation) are particularly difficult to prove because there is often no corroborating evidence to support the victim’s testimony, and because, in child molestation cases, the child’s testimony is often regarded with skepticism.¹⁶⁴ There are, however, several fatal problems with this position.

First, if the purpose of the new rules is to assist the government in cases built exclusively upon the testimony of the victim, then the rules should say exactly that. But currently,

164. See 140 CONG. REC. 12,990 (daily ed. Sept. 20, 1994); 140 CONG. REC. H8991–92 (daily ed. Aug. 21, 1994); 140 CONG. REC. 10,276 (daily ed. Aug. 2, 1994); 137 CONG. REC. 3238–39 (daily ed. Mar. 13, 1991); Karp, *supra* note 57, at 20–21.

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the robbery prosecution based solely upon the victim's testimony falls outside the rules, while the rape case in which the victim's testimony is confirmed by DNA evidence, a videotaped confession and twenty disinterested bystanders falls within the rules.

Second, the claim that sex offenses are singularly difficult to prove is unsubstantiated. Many other crimes (such as homicides, burglaries of unoccupied premises, thefts of unguarded property and so-called victimless crimes) do not offer the government even the testimony of the victim, and sex offense prosecutions are frequently aided by medical and scientific evidence.¹⁶⁵

Third, and most important, if character evidence truly is prejudicial, then why allow it only in the cases in which the government's case is presumably weakest?¹⁶⁶ If the idea is to give the government a little extra assistance in cases in which it needs the help, what is the limitation on this operating principle? If we make the government's task a little easier when it only has a little evidence, should we make its job a lot easier when it has no evidence at all? One very plausible explanation for a lack of strong evidence of guilt is actual innocence. It is simply counterintuitive to expose only the most plausibly innocent to supposedly dangerously prejudicial evidence.

The truth is that Rules 413 and 414 cannot be premised upon a desire to correlate the admission of prejudicial evidence with a weak government case. Even the staunchest anticrime legislator would not purposely vote to permit convictions on the basis of evidence not fairly correlated to factual guilt. Whether stated explicitly or not, the necessary premise of the new rules is that the character evidence at issue is seen as probative, not prejudicial. Consequently, a much more genuine defense of Rules 413 and 414 should focus on what it is that is particularly probative about character evidence in sex offense cases.

165. See Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment off on the Right Foot*, 22 FORDHAM URB. L.J. 285, 299-300 (1995); Raeder, *supra* note 4, at 350-51.

166. See Dale A. Nance, *Foreword: Do We Really Want to Know the Defendant?*, 70 CHI.-KENT L. REV. 3, 13 (1994).

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Some efforts have been made to justify the new rules along these lines. It has been suggested, for example, by one of the Congressional sponsors of the new rules that “a history of [child molestation] tends to be exceptionally probative because it shows an unusual disposition of the defendant—a sexual or sado-sexual interest in children—that simply does not exist in ordinary people.”¹⁶⁷ It has also been suggested that persons who have a history of sexual crimes possess a “combination of [uninhibited and undeterred] aggressive and sexual impulses” not shared by people generally.¹⁶⁸

Once again, however, these arguments for Rules 413 and 414 do not take us where we need to go. No doubt many people who commit all sorts of crimes possess certain desires and dispositions that are different from those people who manage not to run afoul of the penal codes. There is nothing in principle unique about sex offenders. Drug users may be addicted, thieves greedy, assailants violent, and so on. It is simply not very difficult to identify character traits associated with particular categories of criminal conduct. To do so does not explain why a different rule for character evidence should control for one such category.¹⁶⁹

On this point, the opponents of Rules 413 and 414 have taken the offensive. The counter argument is that, because recidivism for sexual offenses is not higher than for other crimes,¹⁷⁰ and indeed is actually lower than for many other crimes,¹⁷¹ the special value of character evidence in sex crime offenses is thereby disproved.¹⁷²

It is true that the absence of a higher rate of recidivism for sexual offenses removes one possible argument for special

167. 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).

168. See Karp, *supra* note 57, at 20.

169. See 1A WIGMORE, *supra* note 34, § 62.2, at 1345; Reed, *supra* note 149, at 219.

170. See Raeder, *supra* note 4, at 350; Reed, *supra* note 149, at 149 & n.117.

171. See 23 WRIGHT & GRAHAM, *supra* note 150, § 5412, at 274; Katherine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 578 (1997); Duane, *supra* note 152, at 113; David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305, 339 (1995).

172. See 23 WRIGHT & GRAHAM, *supra* note 150, § 5412, at 274; Baker, *supra* note 171, at 578-79; Duane, *supra* note 152, at 113; Leonard, *supra* note 171, at 339.

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treatment of such crimes. It is not, however, true that the only way that a showing of a relatively greater probative value for character evidence in sex crime prosecutions can be established is by showing a greater degree of recidivism for such offenders. Suppose, for example, that the recidivism rate for both rape and theft is fifty percent, but that the rate for each crime committed by same-crime repeat offenders is twenty percent for thefts and eighty percent for rapes. In this circumstance, prior crimes evidence for rapes would be relatively more probative than prior crimes evidence for thefts because the former gives us a relatively much greater likelihood of identifying the criminal in a particular case based upon prior conduct. Or suppose that fifty percent of all crimes (including both rape and theft) are committed by prior offenders who have previously committed the same crime. Suppose also that there are 100,000 prior theft offenders and only ten prior rape offenders. Entirely independent of the relative recidivism rates, as well as the above-hypothesized repeat offender ratios, prior crimes evidence in the rape case would be more probative than the same evidence in the theft case simply because the raw numbers enable us to narrow down more substantially a plausible group of suspects in the rape scenario.

Be this as it may, these alternative possible methods for demonstrating the superior probative value of character evidence in the prosecutions covered by Rules 413 and 414 are of no avail in defense of these provisions because there is no actual data yielding any of the above conclusions. In fact, the new rules are simply devoid of any empirical support.¹⁷³ There is no basis whatsoever for believing that prior crimes evidence is more probative in the situations governed by Rules 413 and 414 than it would be in the prosecutions of other crimes governed by the preexisting, contrary (in theory) character evidence rule.¹⁷⁴

But even if recidivism rates or other data supported an inference of heightened probative value in sex crime prosecutions, the crime-specific amendments in Rules 413 and 414 would be unacceptable. First, a difference in degree ought not to account for a completely converse rule. If character

173. See *Judicial Conference*, *supra* note 4, at 53.

174. See 1A WIGMORE, *supra* note 34, § 62.2, at 1345.

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evidence were marginally more probative in sex offense cases, one should expect at most a relative relaxation of the character evidence rule, not what appears from the face of the rules to be a complete about-face from a rule of exclusion to a complete rule of inclusion.

Second, the virtue and success of the Federal Rules of Evidence can be attributed precisely to their universal application, generally making no distinctions among litigants and subject matter, and impervious to variable political agendas and shifting statistics.¹⁷⁵ Rules 413 and 414 are wrong for all the reasons that the Federal Rules of Evidence are generally right. Consistency and integrity dictate that our rule on character evidence not vary from crime to crime with the winds of today's particular *cause celebre*.¹⁷⁶

Finally, as has been detailed above,¹⁷⁷ the state of the law of evidence regarding character evidence prior to the enactment of Rules 413 and 414 was already a hopelessly complex, unworkable and largely disingenuous morass. Like the top floor of a structurally unsound building, the new rules not only do nothing to remedy the preexisting disorder, they also compound the problem by adding yet another unprincipled and indefensible distinction to the character evidence rules.

If we are to do better than this, we need to pursue two goals. First, deconstruction is in order. Nothing significant is to be gained by further building upon the present disarray. And second, we need to discover the true, worthwhile justifications, if any, for the character evidence rule, and thus identify what is worth preserving and what is in need of discarding.

IV. REASONS FOR THE CHARACTER EVIDENCE RULE

Perhaps no single rationale accounts for the character evidence rule.¹⁷⁸ Various explanations for the rule have been advanced, including the suggestion that the rule is, at least in part, "a senseless product of history."¹⁷⁹ But before retreating to that conclusion, an examination of the more flattering proffered

175. See Leonard, *supra* note 171, at 341.

176. See Duane, *supra* note 152, at 112.

177. See *supra* notes 7-137 and accompanying text.

178. See 1A WIGMORE, *supra* note 34, § 54.1, at 1150-51.

179. 1A *id.*, § 54.1, at 1151.

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justifications for the rule is required. These defenses of the character evidence rule can be described in the following five formulations:

1. character evidence is excluded because it is essentially irrelevant;¹⁸⁰
2. character evidence is excluded because of the likely danger that such evidence will be afforded too much weight by juries;¹⁸¹
3. character evidence is excluded, at least when offered against the accused, because of the likely danger that the jury will convict the defendant to exact punishment for the prior, uncharged misconduct;¹⁸²
4. character evidence is excluded, at least when offered against the accused, because otherwise the accused will not have been provided fair notice as to the allegations of misconduct as to which a defense needs to be prepared;¹⁸³ and
5. character evidence is excluded because it involves time-consuming ventures into collateral matters.¹⁸⁴

Each of these rationales will be discussed in turn.

180. See 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, 1041 (1984) (“[S]cientists question whether character evidence has any probative value at all.”).

181. See *Old Chief v. United States*, 519 U.S. 172, 180-82 (1997); *Michelson v. United States*, 335 U.S. 469, 475-76 (1948); 2 LOUISELL & MUELLER, *supra* note 28, § 136, at 128-29; 1A WIGMORE, *supra* note 34, § 29a, at 979, § 58.2, at 1212-15; 23 WRIGHT & GRAHAM, *supra* note 150, § 5416, at 307; *Admission of Criminal Histories*, *supra* note 34, at 730-31; Imwinkelried, *supra* note 63, at 18; Imwinkelried, *supra* note 1, at 1138; Imwinkelried, *supra* note 165, at 289-90; Imwinkelried, *supra* note 7, at 581-82; Mendez, *supra* note 180, at 1044; Raeder, *supra* note 4, at 349; Stone, *supra* note 41, at 957.

182. See 2 LOUISELL & MUELLER, *supra* note 28, § 136, at 130; 1A WIGMORE, *supra* note 34, § 29a, at 979, § 57, at 1185, § 58.2, at 1212-15; *Admission of Criminal Histories*, *supra* note 34, at 730-31; Duane, *supra* note 152, at 110; Imwinkelried, *supra* note 165, at 290-91; Imwinkelried, *supra* note 7, at 580, 582; Nance, *supra* note 166, at 11; Raeder, *supra* note 4, at 349; Reed, *supra* note 34, at 166.

183. See 2 LOUISELL & MUELLER, *supra* note 28, § 136, at 130-31; 1A WIGMORE, *supra* note 34, § 58.2, at 1212-15; Edward J. Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465, 1489 (1985); Karp, *supra* note 57, at 27; Reed, *supra* note 34, at 167; Stone, *supra* note 41, at 957-58.

184. See 1A WIGMORE, *supra* note 34, § 58.2, at 1213 n.2; Kuhns, *supra* note 60, at 777; Nance, *supra* note 166, at 11.

A. Relevance

The argument that character evidence is irrelevant is just plain wrong; an exhaustive list of authorities on this point—many supportive of the general ban on character evidence¹⁸⁵—is in accord. The notion that character traits influence behavior is so much a part of common sense and everyday experience¹⁸⁶ that the contrary suggestion is really quite remarkable.¹⁸⁷

Imagine returning home from work to find a shattered living room window and a brick resting amid broken glass on the living room floor. Without more, there would be a world of equally plausible culprits. But suppose that the neighborhood contained an individual who had been apprehended on several occasions in the recent past throwing bricks through the living room windows of other homes. While by no means dispositive of that individual's complicity on the occasion in question, such information would unquestionably be relevant.¹⁸⁸ Only a fool would fail to include such information in a report to the police, and only the disingenuous would claim that they would not report it because of their commitment to the fancy that character evidence is irrelevant.

In fact, the law's treatment of character evidence is confirmation of the relevance of such evidence.¹⁸⁹ The criminal defendant is unqualifiedly permitted to introduce opinion and reputation evidence of his or her own character,¹⁹⁰ as well as that of the crime victim,¹⁹¹ and surely such evidence would be

185. See, e.g., *Old Chief*, 519 U.S. at 180-82; *Michelson*, 335 U.S. at 475-76; 2 LOISELL & MUELLER, *supra* note 28, § 135, at 117; 1A WIGMORE, *supra* note 34, § 54.1, at 1212; *Admission of Criminal Histories*, *supra* note 34, at 709; Imwinkelried, *supra* note 165, at 289.

186. See Davies, *supra* note 107, at 511; Imwinkelried, *supra* note 94, at 379; Uviller, *supra* note 12, at 883.

187. See Nance, *supra* note 166, at 3.

188. The test of relevance is simply whether the evidence has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. On the question of relevance, it is simply immaterial whether or not the evidence in question, by itself, is sufficient to establish the objective of its proponent.

189. See Nance, *supra* note 166, at 3-4.

190. See FED. R. EVID. 404(a)(1); see *supra* notes 10-12 and accompanying text.

191. See FED. R. EVID. 404(a)(2).

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disallowed if it was irrelevant.¹⁹² Character evidence is admitted to establish or attack the credibility of a witness.¹⁹³ Prior conduct evidence admitted under Rule 404(b) may technically fall outside the law's definition of character evidence, but its relevance is nevertheless premised upon the assumed consistency of an individual's behavior.¹⁹⁴ The same is true of evidence of habit, admitted under Federal Rule of Evidence 406.¹⁹⁵ Evidence of past conduct to establish propensity is routinely considered in determining pretrial release and sentencing.¹⁹⁶

Evidence excluded by the character evidence rule is no less relevant than the evidence admitted pursuant to the various exceptions to, and distinctions from, the rule of exclusion.¹⁹⁷ Whether based upon common anecdotal experience or statistical evidence of high recidivism rates,¹⁹⁸ we quite sensibly assign significance, for example, to the prior brick tosses of the above-hypothesized neighbor because he or she has demonstrated a disposition to cross a line that most people will not cross.¹⁹⁹

Nevertheless, some commentators have suggested that the nonexistent, or at least trivial, probative value of character evidence is established by psychological studies suggesting that character is a poor predictor of behavior, which is determined to a greater extent by situational factors.²⁰⁰ There are three flaws in this position.

192. See 1A WIGMORE, *supra* note 34, § 55, at 1157-59.

193. See *supra* notes 109-137 and accompanying text.

194. See Rothstein, *supra* note 71, at 1264-65.

195. See 1A WIGMORE, *supra* note 34, § 54.1, at 1156; Rothstein, *supra* note 71, at 1264-65.

196. See *Admission of Criminal Histories*, *supra* note 34, at 735-36; Karp, *supra* note 57, at 51.

197. See 1A WIGMORE, *supra* note 34, § 54.1, at 1157 n.2.

198. See Baker, *supra* note 171, at 578-79 & n.80; Raeder, *supra* note 4, at 350.

199. For this reason, contrary to what Mendez suggests, it should not be "troubling . . . that jurors may give greater weight to evidence of misconduct and dishonesty than to favorable evidence." Mendez, *supra* note 180, at 1045. It is a happy circumstance that most people do not commit crimes. Therefore, criminal, rather than noncriminal, conduct is distinctive and especially relevant. Moreover, it is perfectly sensible to focus upon negative conduct as a true indicator of character. People we know to be honest do not generally lie, but people we know to be dishonest do often tell the truth. It is the pattern of even occasional fabrication that, in common experience, can qualify one for the latter reputation.

200. See Imwinkelried, *supra* note 7, at 582; Mendez, *supra* note 180, at 1052.

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First, the more recent psychological literature supports the proposition that character evidence is indeed relevant.²⁰¹ It suggests that character traits do have predictive value,²⁰² even in cross-situational circumstances.²⁰³

Second, the citation of psychological literature in this context has all the flavor of a welcome discovery of a new justification for traveling on a ship that actually left the shore a very long time ago. The character evidence rule, in one form or another, has been around for a few centuries.²⁰⁴ It seems unlikely that it originated from a prescient anticipation of late twentieth century psychological theories suggesting that the concept of behavior based on character traits is all premised upon misconception. Moreover, the shifting consensus among psychologists has made it rather precarious to premise one's position upon this literature.²⁰⁵

Third, even if empirical research did suggest that character traits are poor indicators for predicting human behavior, it would shed little light on the question of the legal relevance of character evidence. This is because it is not the task of the jury to predict the defendant's behavior. If we could predict human behavior, we could presumably dispense with our current after-the-crime system of adjudication and instead devise some preemptive method of crime control. But we cannot predict behavior, and consequently what may be of enormous interest to psychologists as theories of human behavior has itself little relevance to the evidentiary issue of relevance.²⁰⁶

201. See Davies, *supra* note 107, at 506, 516–17, 533; Imwinkelried, *supra* note 27, at 37.

202. See Davies, *supra* note 107, at 516–17; Lynn McLain, *New Federal Rules in Sex Offense Cases*, 25 Md. B.J. 34, 37 (1995).

203. See Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1, 33 (1993).

204. See *supra* notes 42–52 and accompanying text.

205. Compare Imwinkelried, *supra* note 7, at 582 (writing in 1990: “[T]he empirical studies indicate that the general construct of character is a relatively poor predictor of a person's conduct on a given occasion. . . . In light of the available studies, we can have little confidence in the construct of character as a predictor of conduct.” (footnotes omitted)) with Imwinkelried, *supra* note 27, at 45 (writing in 1994: “[T]he prevailing . . . interactionist theory . . . cuts in favor of liberalizing the [admission of] character evidence,” but “we should perhaps be hesitant to legislate on the basis of the current popularity of the interactionist theory.”).

206. In this respect, what Professor Imwinkelried has cautioned in 1994 about relying upon a currently popular psychological theory is absolutely correct. See Imwinkelried, *supra* note 27, at 45. It was also correct at the time of Professor

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To illustrate, we can return to our hypothetical brick-thrower. The fact that our suspect has thrown bricks through living room windows on several prior occasions hardly enables us to predict when he or she will do so again. In fact, we can add to our hypothesis that, during the same period of time that our suspect threw four bricks through four windows, he or she passed by some four thousand windows without flinging anything in their direction. Even assuming that past performance is an accurate indicator of future behavior, a prediction that a particular window will suffer a shattering fate on a particular occasion at the hands of our suspect would have only about a one in one thousand chance of being correct.

Does this render evidence of our actor's prior adventures irrelevant? Of course not. To insist that evidence have predictive value as a condition of relevance is to impose upon such evidence at the admissibility stage a requirement of sufficiency that need only be met by the cumulative total of a party's evidence when that party rests its case.²⁰⁷ The question should not be whether the character evidence is sufficient to establish guilt; invariably that will not be the case. The real issue is whether the character evidence could be a contributing piece of evidence in a case establishing guilt.²⁰⁸

For example, in a prosecution of our brick-chucking suspect for the most recent incident, without more than the defendant's history of similar crimes, the government could not survive the defendant's motion for judgment of acquittal at the close of its case. But suppose that the government's case also included testimony that the defendant was, minutes before the crime, seen heading in the direction of the relevant home, carrying a brick and muttering threats against the resident of that home. In addition, imagine testimony that, minutes after the crime, the defendant was seen running in a direction away from the relevant home carrying nothing. Now the government's case is surely one that will reach the jury, which might well convict on such evidence. And although the eyewitness accounts of the

Imwinkelried's article four years earlier when a different theory of human behavior was then in vogue. *See supra* note 205.

207. *See* Davies, *supra* note 107, at 518.

208. *See* David J. Karp, *Response to Professor Imwinkelried's Comments*, 70 CHI.-KENT L. REV. 49, 52 (1994).

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defendant's conduct immediately before and after the crime are most important, the prior crimes evidence is also plainly relevant, as it logically strengthens the government's case.

As a final variation on our hypothetical, suppose that the defendant is only one of three suspects with a track record of throwing bricks through windows. This alters the analysis not at all. Because the character evidence makes it incrementally more likely that one of the three prior offenders (as contrasted with the general population of those who have historically abstained from throwing bricks through windows) committed this crime, such evidence is relevant. The fact that there are two others equally damaged by such character evidence goes only to the weight assigned by the jury to this evidence and merely increases the significance of the eyewitness accounts, testimony which incriminates only the particular defendant.²⁰⁹

Character evidence, then, is manifestly relevant. Or, perhaps a better way to state the proposition is as follows: evidence which is sensibly and logically relevant does not become irrelevant simply because it is character evidence. If there is a good reason to exclude such evidence, it will have to be for some reason other than the bogus claim that such evidence is not relevant.

B. Danger of Overvaluation

The second (and more sophisticated) argument for the character evidence rule is that jurors tend to overvalue the significance of such evidence.²¹⁰ The initial question that must be answered in evaluating the merit of this argument is: How

209. See Taslitz, *supra* note 203, at 68. Professor Taslitz also hypothesizes the situation in which, because of distinct, individual aggregates of character traits, the likelihood of the defendant having committed the charged crime is only 4.5%, while the likelihood of another individual having committed the charged crime is only 0.9%. Even though the character evidence does not make it likely that the defendant committed the crime, it is clearly relevant because this evidence does make it five times more likely that the defendant committed the crime than that the other individual committed the crime. See *id.* As in the circumstances hypothesized in the text, the government would require more than just this character evidence to establish a prima facie case.

210. See *supra* note 181. In particular, the argument is that jurors, having concluded that an individual has a propensity toward a particular behavior, will overestimate the value of such evidence in resolving the question of whether or not that same individual behaved in accordance with that general propensity on the occasion in question. See, e.g., Imwinkelried, *supra* note 7, at 581.

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do we know that this is true? Perhaps we should inquire even more fundamentally: How *could* we know that this is true?

The starting point for addressing these inquiries is the often-asserted proposition that jurors are influenced by character evidence and, in particular, by evidence of prior similar crimes committed by the accused in a criminal case.²¹¹ This proposition is almost certainly true and, in any event, can be accepted as true for the purpose of our inquiry. But to state that jurors are persuaded by character evidence, without more, is merely to state that such evidence is relevant. Jurors are undoubtedly also persuaded by DNA evidence, fingerprints, confessions, eyewitness accounts, and the film from surveillance cameras, but it would be ludicrous to exclude such evidence solely on account of its persuasive effect. To state the matter in a different fashion, evidence is not unfairly prejudicial simply because it tends to improve the government's chances of obtaining a conviction.²¹²

The problem is that it is a huge leap from the proposition that jurors assign value to character evidence to the conclusion that jurors overvalue character evidence. One way to bridge this gap is to insist that character evidence has no probative value at all, in which case the assignment of any weight to such evidence would constitute "overvaluation."²¹³ But that analysis fails for the simple reason that, as discussed above,²¹⁴ character evidence often does have probative value.

Nevertheless, there is no shortage of scholarly authority in support of the proposition that jurors tend to overvalue character evidence.²¹⁵ Consequently, the proposition has acquired the status of a certain conventional wisdom, with commentators often either blithely assuming it to be true or citing to each other in what might be no more than a tautological house of cards.

Consider first of all the paradox of the role of popular opinion in the equation supporting the proposition that

211. See Imwinkelried, *supra* note 1, at 1138; Imwinkelried, *supra* note 7, at 581; Ordover, *supra* note 18, at 144.

212. See *Admission of Criminal Histories*, *supra* note 34, at 731; Karp, *supra* note 57 at 22.

213. See, e.g., Mendez, *supra* note 180, at 1041-44.

214. See *supra* notes 185-209 and accompanying text.

215. See *supra* note 181.

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overvaluation occurs. If the danger of overvaluation is significant, it must be that most, if not all, jurors overvalue character evidence. To illustrate, suppose that the value of evidence could be measured on a scale of one to ten, with ten being the greatest value. If the danger of overvaluation is real, it must be that there is a correct value of character evidence (assume "three" on our hypothetical scale), but that most, if not all, jurors will assign such evidence a higher value (assume "five" on our hypothetical scale). Now, if it is true that most jurors believe that the correct value of character evidence is "five," and if a consensus of opinion is a valid proxy for accuracy, then the actual correct value of the character evidence is "five," and there is no overvaluation whatsoever. For the danger of overvaluation to be real, then it must be the case that what most people believe to be true (i.e., that character evidence has a value of "five") is in reality false.

If popular opinion is thus discredited as a measure of reality in the above context, then how can the proposition that jurors overvalue character evidence be justifiably premised on the notion that the stated proposition is commonly believed to be true? The exclusion of relevant evidence ought to be based upon something more than popular myth. But the fact is that, popular rhetoric aside, there is no basis for the conclusion that jurors overvalue character evidence.²¹⁶ Moreover, if the focus is

216. See Karp, *supra* note 57, at 27. One authority sometimes cited as empirical support for the proposition that jurors overvalue character evidence is *The American Jury*. See KALVEN & ZEISEL, *supra* note 135. For example, Professor Imwinkelried has written:

As part of the Chicago Jury Project, researchers attempted to determine the impact of a defendant's prior criminal record on the probability of conviction. The researchers found that conviction rates were significantly greater after a jury learned that the defendant had a criminal record or had been charged with even a minor crime. The researchers concluded that juries aware of prior misconduct employ an entirely "different . . . calculus of probabilities" to determine the defendant's guilt or innocence.

Imwinkelried, *supra* note 183, at 1487-88 (footnotes omitted). In fact, Professor Imwinkelried is incorrect as to what the researchers were intending to determine, what they did determine, and what inferences can be drawn from what they did determine.

Gathering information from surveys completed by judges who presided over criminal jury trials, Professors Kalven and Zeisel actually sought "to answer two basic questions: First, what is the magnitude and direction of the disagreement between judge and jury? And, second, what are the sources and explanations of such disagreement?" KALVEN & ZEISEL, *supra* note 135, at 55. The authors found that

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placed on the question of whether jurors *overvalue* character evidence (as opposed to the almost meaningless question of whether jurors *value* character evidence), there simply is no empirical support for the overvaluation hypothesis.²¹⁷

The fact that the overvaluation hypothesis is without any demonstrable support should not really be surprising. For the hypothesis to be true, we would need to be able to determine

judge and jury agreed on the verdict in 75.4% of criminal trials and that a hung jury resulted in another 5.5% of such trials. *See id.* at 56. Thus, excluding hung juries, judge-jury disagreement on guilt or innocence occurred in only 19.1% of all trials. This 19.1% is divided between the 16.9% of trials studied in which the judge would have convicted in cases in which the jury actually acquitted, and the 2.2% of the trials in which the judge would have acquitted in cases in which the jury actually convicted. *See id.* Even when cases in which the juries hung and cases in which the judge and jury disagreed only as to the charge were included in the quantification of judge-jury disagreements, such disagreements occurred in only 30% of all cases. *See id.* at 110. This disagreement was found to be "massively in one direction," with the jury acquits/judge convicts split occurring more than six times as often as the jury convicts/judge acquits split. *Id.* at 58. The authors thus defined the cases resulting in the former split as "normal disagreements" and the cases resulting in the latter split as "cross-over disagreements." *Id.* at 110. The bulk of the book, including the portion erroneously relied upon by Professor Imwinkelried, is an attempt to discover "reasons for the normal disagreement . . ." *Id.* at 119.

In the portion of the book relied upon by Professor Imwinkelried, the authors concluded from the empirical data that there existed a strong correlation between normal disagreements and close cases involving serious charges in which the defendant testified and had no criminal record. *See id.* at 177–81. (Professor Imwinkelried's reference to the impact of the jury learning that the defendant "had been charged with even a minor crime," Imwinkelried, *supra* note 183, at 1487, completely misreads the data in *The American Jury*. Professors Kalven and Zeisel do distinguish between "serious crimes" and "minor crimes," but the distinction refers to the crime for which the defendant was then on trial, not to the nature of the defendant's prior criminal record. *See* KALVEN & ZEISEL, *supra* note 135, at 180.) What this means is that the *absence* of a criminal record, in combination with other factors, influenced the juries to acquit in cases in which the judges would have convicted. The corollary of this conclusion is that, in some cases (depending upon the alignment of the other factors mentioned above) in which the jury does learn of the defendant's criminal record, the jury is more likely to behave as does the judge. If we accept the judge's view as the "correct" valuation of the evidence, then the empirical data, far from demonstrating that the jury overvalues prior crimes evidence, actually shows that the jury overvalues the absence of prior crimes evidence. If this were true, then a rule which excludes prior crimes evidence actually creates the supposedly undesirable danger of overvaluation, albeit in the defendant's favor in most cases.

Of course, one might quite reasonably quarrel with the premise that the judge assigns the "correct" value to such character evidence. But if the judge does not know the "correct" value of this evidence, then who does? And if no one knows the "correct" value of character evidence, then on what possible basis can it be asserted that jurors overvalue such evidence?

217. *See Admission of Criminal Histories*, *supra* note 34, at 710; Davies, *supra* note 107, at 533.

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two things. First, we would need to be able to determine how jurors actually assess character evidence.²¹⁸ Second, we would need to be able to determine the correct valuation of character evidence as a benchmark for measuring the appropriateness of the assessment of such evidence by jurors.²¹⁹ Unremarkably, we simply lack the ability to make either one of these necessary determinations.

As to the first requirement—the determination of how jurors assess character evidence—the immediate problem is the unstated assumption that jurors are fairly homogeneous in their appraisal of such evidence.²²⁰ Jurors, however, represent virtually the entire range of human attitudes and perceptions, so it is hardly unexpected that empirical studies indicate that jurors have very diverse reactions to, and interpretations of, items of evidence.²²¹ And even if this rather presumptuous stereotyping of jurors were true, judges or legal scholars would still have to determine what the juror assessment of character evidence would actually be.²²² There is, however, nothing about a legal education that qualifies one to predict human reactions to evidence,²²³ and again the empirical data does not suggest that lawyers and judges are particularly capable of accurately assessing the reactions of jurors to evidence.²²⁴

As to the second requirement—the determination of the correct valuation of character evidence—similar problems exist. Empirical data suggests that there is no more agreement among lawyers and judges as to how to assess evidence than exists among people in general.²²⁵ And even if there were some consensus among those with a legal education about the correct value of character evidence, what reason would there be to believe that assessment to be superior to that of those individuals with different training and experience?

218. See Teitelbaum et al., *supra* note 60, at 1153, 1193.

219. See 1 WIGMORE, *supra* note 34, § 10a, at 688.

220. See Teitelbaum et al., *supra* note 60, at 1153, 1193.

221. See *id.* at 1163.

222. See *id.* at 1153, 1193.

223. See Victor J. Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59, 85 (1985).

224. See Teitelbaum et al., *supra* note 60, at 1166, 1176, 1193–95.

225. See *id.* at 1165, 1172, 1193.

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[T]he claim that the judge has superior experience or insight is usually simply gratuitous and unsupported. How does sitting in a courtroom, as opposed to, for example, working in a factory or reading novels or raising a family or anything else confer such superior experience and insight? Might one not say with equal force that courtroom “experience” or legal practice or training distorts insights into human motivation and character?²²⁶

In the end, the proposition that jurors overvalue character evidence is unsupported and unsupportable. No empirical data suggests that jurors overvalue such evidence. Moreover, there is no quantification of the value that jurors assign to such evidence, and there is no reason, or even consensus, as to the value that ought to be assigned to such evidence.

The flaws in the overvaluation hypothesis do not end there, however. What is fundamentally unacceptable about the overvaluation hypothesis is the premise that the valuation of relevant evidence should not be exclusively within the province of the jury. This premise is one of the last vestiges of an antiquated distrust of the jury and its ability to perform its essential fact-finding function.

If, as is often the case with character evidence, evidence is relevant and the sole issue is the weight to be attributed to such evidence, it is axiomatic that such evidence is admissible, and it is for the jury to determine what weight to assign to the evidence.²²⁷ Many older, common law evidentiary rules (particularly those related to the competency of interested witnesses) excluded evidence for fear that jurors would not appreciate the reduced value such evidence should be given, but the history of the law of evidence is a movement away from such exclusionary rules.²²⁸

It is true, of course, that courts have authority to exclude relevant evidence if the probative value of such evidence is substantially outweighed by the danger of unfair prejudice.²²⁹

226. 1 WIGMORE, *supra* note 34, § 10a, at 688 n.22.

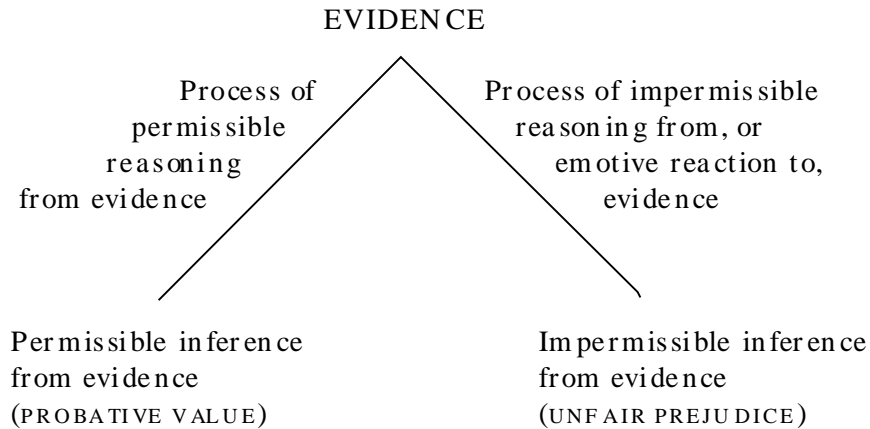
227. *See* 1A WIGMORE, *supra* note 34, § 29, at 976–78.

228. *See* CLEARY ET AL., *supra* note 15, § 61, at 155, § 71, at 168; Karp, *supra* note 57, at 29.

229. *See* FED. R. EVID. 403. In addition to “unfair prejudice,” Rule 403 also specifies “the danger[s] of . . . confusion of the issues [and] misleading the jury” as

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But, at least ordinarily, this authority is not understood to justify the exclusion of relevant evidence in cases in which the only possible harm is the potential for the jury affording the evidence too great a significance. The notion of balancing probative value against unfair prejudice inherently presupposes that there exist two separate uses to which the evidence might be put, one legitimate and one illegitimate, and the question is whether the danger of the latter outweighs the value of the former.²³⁰ The matter can be illustrated as follows:



In this two-pronged scheme, the danger of unfair prejudice arises from a potential misuse (as opposed to a misweighing) of the evidence. Once this potential misuse is identified, the court is required to gauge the significance of, and the likely jury reaction to, such evidence, but only for the purpose of performing the unavoidable task of balancing the value of the evidence in supporting the permissible inference against the

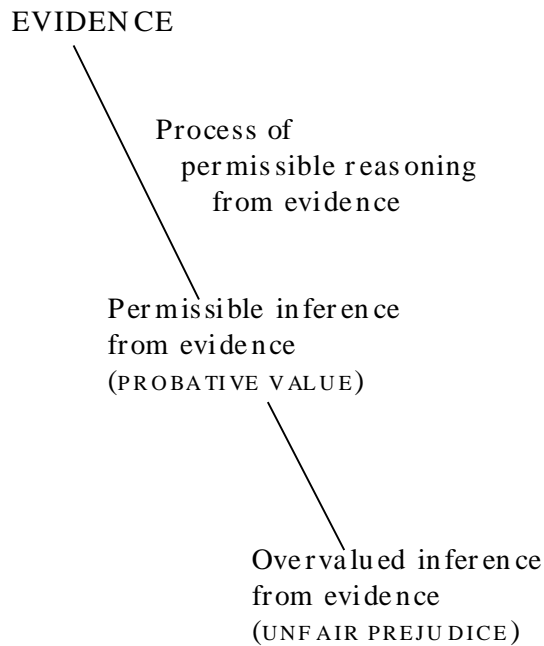
grounds for excluding relevant evidence if the balance so dictates. *Id.* In practice, “unfair prejudice” is understood to include all three grounds for exclusion, see 22 WRIGHT & GRAHAM, *supra* note 53, § 5215, at 273–74, and that same parlance is used here.

230. For example, evidence of design changes made to an allegedly dangerous product following an injury resulting from that product is not admissible to prove that the product was defective as originally designed, but that same evidence can be admissible to prove the feasibility of a safer design if the manufacturer claims that the superior design was not possible. *See* FED. R. EVID. 407. In such an instance, a single item of evidence could be employed for two distinct purposes. Hence, the value and significance of the evidence for the latter, permissible purpose must be balanced against the danger of the evidence for the former, impermissible purpose.

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danger of its use in suggesting the entirely distinct impermissible inference.

By contrast, if the only claimed potential for prejudice is the danger that such evidence will be overvalued, there is but one use to which the evidence could be put, and the “balancing” suggested by the language of Rule 403²³¹ is no more possible than is the use of a seesaw by a single child. Unlike the preceding, two-pronged illustration representative of the true Rule 403 balancing process, the overvaluation hypothesis can be illustrated by a single-pronged scheme, as follows:



It is extremely questionable that the authority to exclude relevant evidence because its probative value is substantially outweighed by a danger of unfair prejudice (the two-pronged model) should include the power to exclude relevant evidence solely because that evidence might be overvalued (the single-pronged scheme). As noted above, the process of exclusion in the single-pronged situation does not involve any “balancing”

231. See also FED. R. EVID. 403 advisory committee’s notes (“Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission.”).

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whatsoever, and it is only a balancing of distinct uses of evidence which is the authorized judicial function under Rule 403. Some further clue on this point might be gathered by looking to the definition of "unfair prejudice" to discover whether that concept includes the danger of overvaluation. Unfortunately, "unfair prejudice" is not defined in the Federal Rules of Evidence,²³² its meaning is rarely discussed by the courts,²³³ and consequently its exact meaning is unclear.²³⁴ When "unfair prejudice" is discussed, the discussion almost invariably seems to envision the two-pronged scenario,²³⁵ although this observation is by no means universal.²³⁶

In any event, actual judicial practice "rarely, if ever, exclud[es] evidence of substantial probative value simply because the jury appears likely to give the evidence even more weight than it deserves or because the precise weight to be given is unclear."²³⁷ This is surely the correct practice, for it preserves the jury's prerogative to assign whatever weight it chooses to relevant evidence, and it curbs the occasionally encroaching temptation of some trial judges to exclude evidence solely because they personally are not persuaded by such evidence.

Even if there existed a sound basis for believing that character evidence is in reality less probative than what is commonly believed, the solution should not be the infringement of the jury's autonomy by the keeping of such evidence from its consideration. The appropriate remedy—the one selected in

232. See Gold, *supra* note 223, at 60, 73.

233. See 22 WRIGHT & GRAHAM, *supra* note 53, § 5215, at 277.

234. See Gold, *supra* note 223, at 65.

235. See, e.g., FED. R. EVID. 403 advisory committee's notes ("Unfair prejudice" within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.); *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (improper basis); 22 WRIGHT & GRAHAM, *supra* note 53, § 5215, at 231 (illegitimate, as opposed to legitimate, inference); 22 WRIGHT & GRAHAM, *supra* note 53, at 274–76 (persuasion by illegitimate means, such as inappropriate logic or undesirable emotion); Gold, *supra* note 223, at 67 ("Rule 403 can advance truth and fairness by excluding evidence that tends to induce the jury to think illogically or employ an improper bias.").

236. See 1 WIGMORE, *supra* note 34, § 10a, at 684 ("The primary aim of the prejudice rule is to prevent jury 'misdecision,' including 'the jury attribut[ing] greater evidential value to the evidence than is warranted.'" (footnote omitted)).

237. Richard O. Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1030 (1977).

almost all comparable circumstances—would simply be to provide the jurors with the information necessary to adjust their evaluation of such character evidence.

For example, there now exists a body of literature calling into question the reliability of eyewitness identifications, suggesting that these identifications might not be as accurate as commonly supposed.²³⁸ It would be ludicrous to suggest that, as a result of this literature, eyewitness identification testimony should be disallowed. At most, the sole reaction has been to permit expert testimony in appropriate cases concerning the foibles of eyewitness identifications.²³⁹ Even if it were supported by more than mere speculation, the overvaluation hypothesis as to character evidence would merit no greater accommodation than that allowed in the eyewitness identification context.

Ultimately, the overvaluation hypothesis confesses a fundamental mistrust of the jury in its assigned function in the criminal justice system. But if the jury cannot adequately determine the proper weight to accord to evidence—especially evidence requiring no legal or technical expertise to comprehend and evaluate—then the problem we face is a much larger one than can be addressed by the character evidence rule. In truth, the jury system is too well established and too valuable to justify the contrary premise of the overvaluation hypothesis. And our faith in that jury system is not grounded on the presumption that twelve jurors will typically see the evidence just as twelve lawyers would perceive it. To the contrary, the fact that jurors may see the evidence in a manner dissimilar to the way lawyers would view it demonstrates an acceptable, even desirable, infusion of the community's perceptions and values into the criminal justice system.

Ultimately, there is neither empirical data nor any sound reason to conclude that juries overvalue character evidence. The supposition that we as lawyers nevertheless know how all—or at least most—jurors perceive character evidence, and

238. See, e.g., BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* (1995); ELIZABETH F. LOFTUS & JAMES M. DOYLE, *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* (1992).

239. See, e.g., MICHAEL H. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* § 702.4 (1996 & Supp. 1998).

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further that we as lawyers have the singularly correct view of such evidence, is not only baseless, it is also arrogant. Thus the search for a viable justification for the character evidence rule continues.

C. Danger of Unjust Punishment

The theory of this rationale is that the jury, having learned of the prior misconduct of the defendant, will convict the defendant of the charged crime as a means of punishing the defendant for his or her prior misconduct.²⁴⁰ Unlike the danger of overvaluation discussed in the previous subsection,²⁴¹ the concern articulated here unquestionably qualifies as “unfair prejudice” within the meaning of Rule 403.²⁴² Even assuming that the jury is permitted to use evidence of the defendant’s uncharged misconduct as evidence of the defendant’s guilt of the charged crime, using that evidence for the purpose of punishing the defendant for such uncharged misconduct is clearly a distinct and impermissible use of that evidence.²⁴³

The fundamental problem that the unjust punishment hypothesis shares with the overvaluation hypothesis is an absence of any sound basis for believing that the projected danger is a real one. The fact that evidence of the defendant’s prior misconduct *might* influence jury verdicts proves nothing in this regard. Once it is accepted (as it should be) that similar crimes evidence is relevant,²⁴⁴ any correlation of such evidence with convictions is no more cause for concern than the correlation of convictions with scientific evidence or confessions or any other form of relevant inculpatory evidence.²⁴⁵ And aside from this meaningless correlation, there is simply no empirical basis for the speculative assertion that jurors will convict persons believed to be not guilty of the charged crimes in order

240. See *supra* note 182. Consequently, the concern underlying this rationale is of particular, and possibly exclusive, interest regarding character evidence offered against the criminal defendant.

241. See *supra* notes 227–239 and accompanying text.

242. See Imwinkelried, *supra* note 7, at 581.

243. The argument for prejudice in this subsection thus clearly fits within the two-pronged scheme discussed above. See *supra* note 230 and accompanying text.

244. See *supra* notes 185–209 and accompanying text.

245. See *Admission of Criminal Histories*, *supra* note 34, at 731.

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to impose sanctions for uncharged crimes.²⁴⁶ In fact, the most that can be said in support of the unjust punishment hypothesis is that it “has widely been presumed” that jurors will convict as a sanction for uncharged misconduct.²⁴⁷

In the absence of any documentation that jurors behave in accordance with the unjust punishment hypothesis, one would expect at least some sensible intuitive support for the presumption underlying the unjust punishment hypothesis. But in fact, the idea that every juror in a particular case (or at least a commanding majority of jurors sufficient to coerce acquiescence from a principled minority of the jury) would be willing to convict a defendant those jurors believe to be not guilty of the charged crime solely to punish for uncharged conduct is counterintuitive. The notion that it is unfair to punish someone for something other than the matter at issue is so straightforward and so fundamental that it is difficult to fathom that an entire jury would agree to do just that, even in the absence of the nominal safeguard of the standard cautionary instruction to this effect. Moreover, whatever criticisms may be leveled at jurors, it is not generally suggested that an entire jury is so lacking in conscientiousness that it will violate its oath and fabricate its verdict in order to inflict an illegal and very serious punishment upon an individual.

But perhaps the premise underlying the unjust punishment hypothesis is the vision of a more subtle influence. Perhaps it is not that the jurors would willfully manipulate their *verdict* to exact extralegal retribution, but rather that the antagonism engendered by knowledge of prior criminal conduct could effect an unconscious sanction. Here, of course, we have entered the world of pure speculation. By definition, each of us is incompetent to know what is in his or her own unconscious, so one wonders how we are to know what is in the unconscious of others (or even if such a thing as an unconscious exists).

Moreover, this entirely conjectural variation is a further, and indeed aggravated, manifestation of the patronizing attitude underlying the overvaluation hypothesis. Under this theory, most if not all jurors (which essentially amounts to the

246. See *Admission of Criminal Histories*, *supra* note 34, at 710; Karp, *supra* note 57, at 27.

247. Duane, *supra* note 152, at 110.

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general population) are consolidated into the single image of a group of persons not only lacking the capacity to exercise fundamental fairness but also the aptitude to appreciate what they are doing. Jurors, it is suggested, do not realize that they are actually punishing the defendant for uncharged misconduct; lawyers, however, by virtue of attending law school, mysteriously know that this unjust punishment is really taking place. But if jurors believe instead that they are simply using the uncharged misconduct evidence in evaluating the defendant's guilt or innocence of the charged crime—a perfectly rational thought process—and there is absolutely no evidence to contradict that self-assessment, why should we not accept this tacit assurance as true?

Furthermore, we must be reasonably secure against the contrary possibility or we would never allow other crimes evidence to make its way to the jury as often as we do, such as through cross-examination of the defendant's own character witnesses,²⁴⁸ through Rule 404(b)²⁴⁹ and to impeach the defendant as a witness.²⁵⁰ If we really believe that the jury is powerless to focus upon the crime at issue once it learns of the defendant's uncharged misconduct, then the well-established range of opportunities for the prosecutor to deliver such apparently intoxicating information to the jury under existing law makes no sense whatsoever.

Be that as it may, there is one measure which would guard against the conjectural danger of unjust punishment without forfeiting an entire class of perfectly relevant evidence. Because the concern is that the jury might be tempted to punish the defendant for prior, uncharged crimes, any such inclination should only occur (if at all) if the jury believes the defendant has somehow escaped sanctions for these prior transgressions.²⁵¹ To the extent that prior crimes evidence is limited to conduct which has been the subject of prior convictions, such danger ought to be completely or substantially eliminated. The counterintuitive notion that jurors would be

248. *See supra* notes 13–19 and accompanying text.

249. *See supra* notes 20–108 and accompanying text.

250. *See supra* notes 118–137 and accompanying text.

251. *See Admission of Criminal Histories, supra* note 34, at 734; *see also* Imwinkelried, *supra* note 165, at 290–91.

irresistibly influenced to convict an innocent defendant to punish for uncharged crimes is all the more implausible in cases in which the jurors are well aware that the accused has already suffered the law's sanctions for the prior misdeeds.

The unjust punishment hypothesis thus merits some consideration because, at least in theory, it does isolate a legitimate concern. There is, however, no basis for believing that this concern is substantial in actuality. Nevertheless, that concern can be accommodated short of embracing the character evidence rule in its full scope, by overruling the rule as to relevant uncharged conduct which resulted in criminal convictions. Consequently, the search for a persuasive justification for the character evidence rule continues.

D. Fair Notice

If a criminal defendant's character may be attacked by proof of all sorts of misdeeds, real or imagined, then it might be unfair to saddle the accused with the task of preparing to defend against a lifetime of allegations.²⁵² Especially because such allegations may be false, it could be impossible for the defendant to anticipate, and to arrange to rebut, such accusations.²⁵³ Such worries are legitimate. Indeed, one author has suggested that, unlike recent concerns about overvaluation and unjust punishment, the problem of unfair notice actually accounts in part for the genesis of the character evidence rule.²⁵⁴

Of course, to the extent that the objection is solely the absence of notice, the solution would simply be a notice requirement rather than a broad exclusionary rule.²⁵⁵ Even with a notice requirement, defendants might complain that it is unduly burdensome to be required to defend against both charged and uncharged misconduct in cases in which the defendant disputes both. Whether such a burden would be unfair or not, the burden is entirely relieved if the uncharged

252. See 2 LOUISELL & MUELLER, *supra* note 28, § 136, at 130–31; Stone, *supra* note 41, at 958.

253. See 1A WIGMORE, *supra* note 34, § 58.2, at 1212–13.

254. See Karp, *supra* note 57, at 27.

255. For example, Rule 404(b) was amended in 1991 to add a pretrial notice requirement when the prosecution intends to offer evidence against the accused under that provision. See FED. R. EVID. 404(b) and advisory committee's notes.

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misconduct has been the subject of a prior conviction.²⁵⁶ First, the defendant ought to be on notice as to his or her own prior convictions, and in any event, this information is routinely provided in discovery.²⁵⁷ Second, by virtue of the fact that the defendant's prior misconduct has been the subject of a prior conviction, the defendant would be precluded from disputing that he or she committed the prior crime.²⁵⁸ Thus, limiting prior crimes evidence to conduct which has resulted in prior convictions essentially eliminates both the unsupported concern about the danger of unjust punishment as well as the relatively plausible concern about the danger of unfair notice.

E. Collateral Issues

The final rationale frequently offered in support of the character evidence rule is that allowing the parties to litigate whether or not uncharged misconduct actually occurred could be extremely time consuming²⁵⁹ and could distract the jury from the relevant issue of whether or not the accused committed the charged crime.²⁶⁰ This consideration is the primary reason that impeachment of a witness by specific acts of misconduct not resulting in conviction is limited to cross-examination, with proof of such misconduct by extrinsic evidence being disallowed.²⁶¹ As with the unfair notice rationale discussed above,²⁶² there is some suggestion that this theory, rather than the currently popular theories about the dangers of overvaluation and unjust punishment, explains the origins of the character evidence rule.²⁶³ Once again, however, if the character evidence is limited to misconduct which resulted in an earlier conviction, the concern is eliminated.²⁶⁴ There can be

256. See 3A WIGMORE, *supra* note 124, § 980, at 828; *Admission of Criminal Histories*, *supra* note 34, at 709–10, 729.

257. See FED. R. CRIM. P. 16(a)(1)(B).

258. See, e.g., *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568–69 (1951); *United States v. Podell*, 572 F.2d 31, 35 (2d Cir. 1978).

259. See *Kuhns*, *supra* note 60, at 777; *Nance*, *supra* note 166, at 11.

260. See *Nance*, *supra* note 166, at 11.

261. See FED. R. EVID. 608(b); 3 WEINSTEIN ET AL., *supra* note 14, ¶ 608[05], at 608–45.

262. See *supra* notes 252–258 and accompanying text.

263. See *Karp*, *supra* note 57, at 27.

264. See 3A WIGMORE, *supra* note 124, § 980, at 828; *Admission of Criminal Histories*, *supra* note 34, at 709–10, 730.

no dispute as to the fact that the defendant committed the prior crime,²⁶⁵ and even in the rare instance in which there might be a dispute as to the specific conduct that supported the prior conviction, the record from the earlier guilty plea or trial should provide an expeditious resolution of the controversy. In all but the most unusual circumstances, proof of relevant prior criminal conduct for which the defendant has been convicted should be most economical and not the least likely to divert the jury's focus from the pending charges.

An examination of the five rationales offered in support of the character evidence rule thus reveals that these supposed justifications are either erroneous, unsupported by anything but speculative mistrust of the jury, or are at most plausibly legitimate only to the extent of limiting character evidence to conduct which has resulted in criminal convictions. However, the case for the character evidence rule does not end here. Apparently unwilling to defend the rule solely on the grounds that it *should* be preserved, some proponents of the rule have argued that it *must* be preserved. Specifically, there have been various contentions that the character evidence rule is constitutionally mandated. As will be shown, none of these constitutional theories is at all meritorious.

V. CONSTITUTIONAL CONSIDERATIONS

The various attempts to cloak the character evidence rule with a constitutional veil have included claims predicated upon due process, double jeopardy, the privilege against self-incrimination and Sixth Amendment notice requirements. Each of these will be addressed in turn.

A. *Due Process*

There is some judicial support for the proposition that due process has some application to character evidence, but the analysis is spurious. As a theoretical possibility, any evidentiary ruling by a trial judge (including rulings on the admissibility of character evidence) could be so fundamentally unfair that due process could be implicated.²⁶⁶ But the United

265. See *supra* note 258 and accompanying text.

266. See, e.g., *Tucker v. Makowski*, 883 F.2d 877, 881 (10th Cir. 1989).

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States Supreme Court has never suggested that the admission of prior crimes evidence to establish the defendant's general propensity to engage in criminal conduct of the type charged would violate due process.²⁶⁷ In fact, the Court has held that the admission of prior crimes evidence under a state counterpart to Rule 404(b) does not offend due process.²⁶⁸ If evidentiary rules permit the introduction of the prior convictions of the accused for some specified purpose, due process is not a license for judicial second-guessing of such rules.²⁶⁹ Moreover, the possibility that the jury will disregard limiting instructions and use prior crimes evidence to unjustly punish the defendant for uncharged misconduct does not present a constitutional issue.²⁷⁰

Notwithstanding these admonitions, the United States Court of Appeals for the Ninth Circuit has seen fit to hold that the introduction of character evidence in a state prosecution can violate the defendant's federal "constitutional right to a fundamentally fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment."²⁷¹ In *McKinney v. Rees*,²⁷² a case which entered the federal court system on a petition for a writ of habeas corpus following a state prosecution which resulted in the conviction of the petitioner for the murder of his mother by slitting her throat with a knife of unspecified dimensions, the state had introduced evidence that the petitioner had possessed knives that could have inflicted the wounds in question; that the petitioner was proud of his knife collection; that he had occasionally strapped a knife to his body while wearing camouflage pants (the same type of pants worn by the murderer); and that he had used a knife to scratch the words "Death is His" on a closet door.²⁷³ The state had argued successfully before the state trial and appellate courts that the evidence was admissible under the state counterpart to Rule 404(b) to refute the petitioner's claim that he was not in possession of a knife at the time of the murder

267. See *Estelle v. McGuire*, 502 U.S. 62, 75 n.5 (1991).

268. See *Lisenba v. California*, 314 U.S. 219, 227-28 (1941).

269. See *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983).

270. See *Spencer v. Texas*, 385 U.S. 554, 562-64 (1967).

271. *McKinney v. Rees*, 993 F.2d 1378, 1380 (9th Cir. 1993).

272. *Id.*

273. See *id.* at 1381-82.

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and to show that the petitioner had an opportunity to commit the crime.²⁷⁴ Lacking any authority to disturb the state courts' conclusions that the evidence in question was not general propensity character evidence but rather fit within a so-called noncharacter theory of admissibility under the state rules of evidence, the *McKinney* court did essentially the same thing by recasting the identical issue as one of federal constitutional significance. The court concluded that much of this evidence was "offered to prove character, not evidence of opportunity,"²⁷⁵ and was "thus, irrelevant."²⁷⁶ Working backwards from the premise that character evidence is inadmissible to the conclusion that such evidence is therefore legally irrelevant, the court concluded that "McKinney's trial was impermissibly tainted by irrelevant evidence."²⁷⁷

The decision can be viewed in one of two ways. First, to the extent that the court simply concluded that the evidence in question was inadmissible character evidence, the court blatantly acted without jurisdiction as a superappellate court on a question of purely state evidence law. Second, to the extent that the court was really intending to constitutionalize the character evidence rule, it did precisely what the United States Supreme Court had directed it not to do.²⁷⁸ It so happens that the state in question had in place the character evidence rule as a matter of state evidence law. But if a state evidence code were instead to allow character evidence to establish general propensity, and if the Ninth Circuit is truly serious about the *McKinney* decision, then presumably such rules of evidence would be unconstitutional on their face.

That conclusion would be wholly fantastic, as is the *McKinney* decision itself. If it is truly the United States Constitution, and not just evidentiary rules, which renders character evidence legally irrelevant, and if due process cannot

274. *See id.* at 1382.

275. *Id.* at 1383.

276. *Id.* at 1384. The evidence in question was certainly not factually irrelevant. In a case in which the murderer wielded a knife, evidence that the petitioner was within that portion of the population which, even occasionally, carried and used a knife, certainly had a tendency to make the identification of the petitioner as the murderer more probable than it would have been without such evidence. *See* FED. R. EVID. 401.

277. *McKinney*, 993 F.2d at 1385.

278. *See supra* notes 271–278 and accompanying text.

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tolerate a prosecution containing such legally irrelevant evidence, then even the Federal Rules of Evidence would enjoy no exemption from this constitutional mandate. Presumably, then, Rules 413 and 414²⁷⁹ are unconstitutional. But also Rule 609, which allows prior convictions as evidence of the defendant's character for truthfulness as a witness,²⁸⁰ must violate due process. The same would be true for Rules 608(a)²⁸¹ and 608(b).²⁸² To the extent that Rule 404(a) allows the government to introduce character evidence concerning the defendant once the defendant introduces character evidence concerning himself or herself,²⁸³ surely it violates due process, at least in the Ninth Circuit. If *McKinney* is to be taken seriously, then every decision of every court attempting to apply the often barely perceptible (or, depending upon the particular case and the reader's particular point of view, illusory) distinction between inadmissible character evidence and evidence which is admissible under one of the various theories listed in Rule 404(b)²⁸⁴ or an equivalent state rule is actually resolving a constitutional issue. Can something as fundamental as due process really turn on whether the evidence is more likely to demonstrate an intent to deal drugs or a propensity to deal drugs? It is hardly surprising that the Supreme Court warned the Ninth Circuit not to open that Pandora's box,²⁸⁵ and it should not be surprising when, given a future opportunity, the Court chastises the Ninth Circuit for trespassing onto the states' interpretation and application of their own rules of evidence.

The simple truth is that there is no reason why due process should require the exclusion of such factually relevant²⁸⁶ evidence. The basic fact that the character evidence rule, at

279. See *supra* notes 138–177 and accompanying text.

280. See *supra* notes 122–137 and accompanying text.

281. See *supra* notes 109–117 and accompanying text.

282. See *supra* notes 118–121 and accompanying text.

283. See *supra* notes 11–19 and accompanying text.

284. See *supra* notes 20–108 and accompanying text.

285. See *supra* notes 267–270 and accompanying text.

286. See *supra* notes 185–209 and accompanying text.

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least in theory, has been around a long time²⁸⁷ does not alone establish it as a fundamental right of constitutional proportion.

The usual explicit or implicit assumption underlying the case for due process protection is the familiar one that juries will convict to punish for uncharged misconduct,²⁸⁸ resulting in a fundamentally unfair trial. To be sure, if the unjust punishment premise were established, the conclusion of fundamental unfairness would be beyond peradventure. There would be no need to drag the Constitution into the fray, for no policy consideration could justify such a result even in the absence of constitutional limitations. But, as previously discussed,²⁸⁹ there is no reasoned or empirical support for the premise of unjust punishment, especially when admitted evidence is limited to prior convictions. That being the case, a due process argument based entirely upon the same faulty assumption adds nothing to the equation. Unless the actual consequence of admitting relevant evidence would be to deny the accused a fair trial, there can hardly be a constitutional entitlement to exclude such evidence.

One imaginative—and truly imaginary—variation on the due process theme is the claim that character evidence violates due process because it is inconsistent with the presumption of innocence.²⁹⁰ Relying upon *Leary v. United States*,²⁹¹ the proponents of this argument have reasoned that due process requires that evidence offered against the accused must render the fact to be established more likely to be true than not,²⁹² that prior crimes evidence does not make it more likely than not that the defendant has committed the instant offense,²⁹³ and

287. See Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57, 79–80 (1995) (suggesting that the historical sturdiness of the character evidence rule is one factor entitling it to constitutional status under the Due Process Clause).

288. See, e.g., Sheft, *supra* note 287, at 79–81.

289. See *supra* notes 240–251 and accompanying text.

290. See Louis M. Natali, Jr. & R. Stephen Stigall, “Are You Going to Arraign His Whole Life?: How Sexual Propensity Evidence Violates the Due Process Clause,” 28 LOY. U. CHI. L.J. 1, 32 (1996); see also Weissenberger, *supra* note 28, at 608 n.87.

291. 395 U.S. 6 (1969).

292. See Natali & Stigall, *supra* note 290, at 25.

293. See *id.* at 27–28.

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that therefore the admission of such evidence violates due process.²⁹⁴

The argument is specious on its face. The argument illegitimately substitutes a sufficiency of the evidence standard for the appropriate standard for admissibility of evidence. It suggests that each item of evidence introduced by the government in a criminal prosecution must meet a “preponderance of the evidence” standard simply to cross the threshold of admissibility. Apparently, then, the government may not introduce any piece of evidence unless that evidence, considered in isolation, would convince the trier of fact of the ultimate issue in a civil case. No matter how overwhelming the cumulative effect of the government’s evidence, under this requirement it is entirely possible that no single item of evidence in the government’s case would even be allowed for the jury’s consideration.

The fatal misstep in the argument is the confusion of the law governing the use of presumptions against the criminal defendant with the ordinary test of relevance for the admission of evidence. A presumption is not itself evidence but is rather “a procedural rule which requires the existence of fact B (presumed fact) to be assumed when fact A (basic fact) is established unless and until a certain specified condition is fulfilled.”²⁹⁵ Ordinarily, a party with the burden of establishing fact B (presumed fact) may take advantage of an available presumption by introducing evidence of fact A (basic fact) and thereby satisfying its burden. Because due process requires that the government in a criminal case prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime,²⁹⁶ the question has arisen whether the use of a presumption against a criminal defendant unconstitutionally relieves the government of its burden of proving the presumed fact. In *Tot v. United States*,²⁹⁷ the Court approved the use of presumptions against the accused, but only where there is a rational connection between the basic fact and the presumed

294. *See id.*

295. 1 WEINSTEIN ET AL., *supra* note 14, ¶ 300[01], at 300–1.

296. *See In re Winship*, 397 U.S. 358, 364 (1970).

297. 319 U.S. 463 (1943).

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fact.²⁹⁸ The Court further refined this requirement in *Leary v. United States*²⁹⁹ by specifying that the rational connection test means that the presumed fact must be more likely than not true as a conclusion derived from the basic fact.³⁰⁰

The ill-conceived notion that due process requires evidence to meet the “more likely to be true than not” test for admissibility is premised on a misinterpretation of this *Leary* test.³⁰¹ But character evidence is not a presumption, and it involves no use of presumptions. It is simply evidence. As such, its admissibility turns on the ordinary rules governing the admissibility of evidence and not some extraordinary constitutional prerequisite.

One related defense of the character evidence rule is Professor Reed’s claim that the rule “had its roots in the accusative, as opposed to inquisitorial, nature of the Anglo-American criminal process,”³⁰² and the charge that a contrary rule would “transform[] the American criminal justice system from an accusative to an inquisitorial process.”³⁰³ “Under an accusative system,” states Professor Reed, “the state must establish that the accused did some act forbidden by law.”³⁰⁴ An inquisitorial system, on the other hand, “assumes the accused committed the crime and imposes upon him the burden of establishing his innocence.”³⁰⁵

Professor Reed’s analysis earns high marks for hyperbole but not for much else. First, the essential historical distinction between the accusatorial and inquisitorial systems of procedure

298. *See id.* at 467–68.

299. 395 U.S. 6 (1969).

300. *See id.* at 36. The constitutional limitations upon the use of presumptions against the criminal defendant have undergone additional modifications since *Leary*. A mandatory (but rebuttable) presumption, as distinguished from a permissive inference, must pass the rational connection test on the face of the presumption, and not merely as applied to the particular circumstances of the case. *See Ulster County Court v. Allen*, 442 U.S. 140, 157–60 (1979). Moreover, a presumption that is either irrebuttable or that shifts to the defendant the ultimate burden of persuasion (as distinguished from merely shifting the burden of producing some evidence contrary to the presumed fact to defeat the effect of the presumption) is unconstitutional notwithstanding a rational connection between the basic fact and the presumed fact. *See Sandstrom v. Montana*, 442 U.S. 510, 523–24 (1979).

301. *See Natali & Stigall*, *supra* note 290, at 25.

302. Reed, *supra* note 2, at 713.

303. *Id.* at 714.

304. *Id.* at 713.

305. *Id.*

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had nothing at all to do with character evidence or the rules governing the admissibility of evidence in general for that matter. The essential features of the inquisitorial system were the combination of the prosecutorial and adjudicative functions in a single individual or institution, with proceedings typically being written and secretive.³⁰⁶ By contrast, the accusatorial system separated the accusatory and investigative functions from the adjudicative function, and proceedings were typically oral and public.³⁰⁷

Second, even under Professor Reed's definitions of the two systems of criminal justice, it is difficult to comprehend the relationship of the character evidence rule to the posed juxtaposition. The perceived distinction appears to be one which focuses on the assignment of the burden of persuasion, but the allowance of a certain type of evidence does not alter the obvious requirement that the government prove the defendant guilty beyond a reasonable doubt. Apparently the argument is that the effective consequence of allowing character evidence is to place the defendant at such a disadvantage as to practically assign to him or her the burden of proving his or her innocence. In this respect, Professor Reed illustrates that the climb is always easier if one starts at the top, for he has assumed precisely what is at issue with regards to the character evidence rule.

The fact that the government is assigned the burden of persuasion does not mean that the government is forbidden from meeting that burden. Whenever the government introduces substantial evidence in satisfaction of its burden, the defendant might, as a practical matter, find himself or herself hard pressed to introduce some exculpatory evidence. That does not mean that the days of the Inquisition are once again upon us. The fact that the case put on by the government includes character evidence involves no systemic permutation from the typical case in which the government attempts to meet, and often succeeds in meeting, its burden. The real question—the only question—is whether the probative value of such evidence is outweighed by any unfair prejudice, as discussed above.³⁰⁸

306. See JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 132–38 (1969).

307. See *id.*

308. See *supra* notes 178–265 and accompanying text.

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There is no useful shortcut for resolving the issue of the character evidence rule.

B. Double Jeopardy

A second constitutional provision occasionally suggested as a possible linchpin for the character evidence rule is the proscription against double jeopardy.³⁰⁹ The superficial appeal of the argument is that an accused who is convicted because the jury seeks to punish him or her for uncharged misconduct which had been the subject of a prior prosecution has been “subject for the same offense to be twice put in jeopardy of life or limb.”³¹⁰ There are, however, two flaws in this argument.

First, once again the constitutional argument is entirely dependent upon the nonconstitutional premise that juries will unjustly punish the accused for uncharged misconduct. If that premise were correct, the defense of the character evidence rule would be complete with no assistance required from the Constitution. But in fact the unjust punishment hypothesis fails for want of any nonspeculative basis,³¹¹ and consequently the double jeopardy analysis does not advance the cause of the character evidence rule.

Second, like the due process argument, the double jeopardy claim, if it says anything at all, says far too much. If it is truly the Constitution, and not just lawmakers’ prerogative, that dictates the character evidence rule, then all of the well-established rules allowing for character evidence under various circumstances³¹² would also be constitutionally invalidated.

C. Privilege Against Self-Incrimination

The claimed connection between the character evidence rule and the privilege against self-incrimination is that prior crimes evidence may compel the defendant to testify to refute the uncharged allegations, which may emphasize his or her failure

309. See, e.g., 23 WRIGHT & GRAHAM, *supra* note 150, § 5412, at 275; Brauser, *supra* note 46, at 1583.

310. U.S. CONST. amend. V.

311. See *supra* notes 240–251 and accompanying text.

312. See *supra* notes 280–284 and accompanying text.

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to testify as to the charged offense.³¹³ The argument is flawed in several particulars.

First, the argument is certainly not a viable defense of the historical character evidence rule, because whatever force it has is equally applicable to prior crimes evidence admitted, for example, under a Rule 404(b)-type theory. Second, a defendant may feel strategically compelled to testify because of the strength of the government's evidence, but this is not a compulsion that is of any constitutional significance.³¹⁴ The fact that the evidence, the use of which influences the defendant's voluntary tactical decision to testify, is character evidence is of no special importance.³¹⁵ Finally, to the extent that the uncharged crimes resulted in a prior conviction, the argument is inapposite because the defendant would be estopped by the judgment of conviction from denying the prior criminal conduct.³¹⁶

D. Notice

The last constitutional window dressing that has sometimes adorned the character evidence rule is the argument that a contrary rule would violate the requirement that the accused "be informed of the nature and cause of the accusation."³¹⁷ The short answer is that there is no inherent relationship between character evidence and inadequate notice. To the extent that notice might be required, and even to the extent that notice would be desirable, it is a very easy matter to impose that obligation upon the government.³¹⁸

The constitutional and related arguments for the character evidence rule add nothing of any significance to the fate of the character evidence rule. The rule must stand or fall on its own, and, as discussed above,³¹⁹ so viewed there is little to commend it, at least in its present form. What follows is a proposal for revamping the rules of evidence governing character evidence in accordance with what has been discussed thus far.

313. See Brauser, *supra* note 46, at 1583 & n.1.

314. See *Williams v. Florida*, 399 U.S. 78, 83-84 (1970).

315. See *Admission of Criminal Histories*, *supra* note 34, at 749-50.

316. See *supra* note 258 and accompanying text.

317. U.S. CONST. amend. VI; see Reed, *supra* note 34, at 167.

318. See *supra* notes 252-258 and accompanying text.

319. See *supra* notes 178-265 and accompanying text.

VI. PROPOSAL

The primary purpose of the rules of evidence is to allow the trier of fact to discover the truth concerning the matters at issue.³²⁰ Consequently, all relevant evidence should be allowed absent some plain and forceful reason not to do so.³²¹ The Federal Rules of Evidence represent the modern trend toward "relaxation of the barriers to admitting relevant evidence."³²² The character evidence rule is entirely at variance with the modern view of facilitating the search for the truth by admitting all relevant evidence whenever possible.³²³ To the extent that, as sometimes happens by the process of objections, jurors become aware that such evidence is being kept from them, they quite naturally become frustrated at the apparently inexplicable interference with their performance of their assigned task.³²⁴ And to the extent that such evidence is never mentioned in the presence of jurors, they might reasonably but erroneously conclude that the accused has engaged in no prior criminal conduct, quite rationally concluding that such evidence is so patently relevant that the prosecutor would have presented it if it in fact existed.³²⁵

We have discovered that, while there is still widespread support for the character evidence rule, the reasons advanced

320. See Leonard, *supra* note 171, at 341; Uviller, *supra* note 12, at 845.

321. See Imwinkelried, *supra* note 183, at 1485 ("The admission of all relevant evidence ordinarily promotes the public interest in discovering the truth in litigation, and that interest is weightier than any of the competing interests listed in rule 403." (footnote omitted)).

322. *Id.* at 1478.

323.

The rule excluding uncharged misconduct is contrary to the trend in evidence law toward free proof. For centuries, the movement has been toward abolition of those exclusionary rules that have as their basis the danger of misleading the fact-finder. Jurists and scholars alike increasingly have agreed with Bentham that technical rules of evidence designed to prevent fact-finders from making mistakes are, at best, more trouble than they are worth.

David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 MINN. L. REV. 529, 561 (1994) (footnotes omitted).

324. See Teitelbaum et al., *supra* note 60, at 1196.

325. See Karp, *supra* note 57, at 52. This result is arguably a significant distortion of the truth. If there is any conclusion on this point that can be drawn from the data collected and analyzed by Professors Kalven and Zeisel, it is that the absence of a criminal record is a significant factor in explaining why the jury acquits in cases in which the judge would have convicted. See *supra* note 216.

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for its continuing existence do not withstand serious examination and analysis. Moreover, while there continues to be a zealous commitment to the rule as a theoretical model, the rule in practice is often honored in the breach. The rules of evidence explicitly permit the introduction of character evidence in several circumstances. Furthermore, the behavior of the courts in liberally allowing character evidence to reach the juries under a variety of exceptions and guises confesses a recognition of the true value of such evidence.

What is needed is a complete reconstruction of the rules governing character evidence. The rules should recognize the true worth of such evidence and should more genuinely describe what we actually do with it. Tinkering at the margins of these rules will not be sufficient, and adding more unprincipled, ad hoc "exceptions" such as Rules 413-415 simply contributes to the problem. As a starting point, Federal Rules of Evidence 404, 405, 413, 414, 415, 608 and 609 should be abolished in their entirety.³²⁶ These should be replaced with the following four relatively straightforward rules.

PROPOSED RULE ONE: Evidence of specific crimes, wrongs or acts that have resulted in criminal convictions is admissible for any purpose for which such evidence is relevant, subject to Rule 403.

Proposed Rule One is the crux of the matter. Several features of this proposed rule deserve comment. First, the rule governs only prior misconduct which has resulted in conviction of a crime. This limitation prevents potentially inefficient and distracting commitments of time to collateral matters.³²⁷ It also substantially reduces whatever unlikely temptation the jury might have to convict solely to sanction the defendant for what the jury may perceive to be unpunished, prior misconduct.³²⁸

Second, Proposed Rule One is not a rule of automatic admissibility for prior convictions, for several reasons. The fact

326. The only rule governing character evidence left undisturbed in this proposal is Rule 412, the rape shield law. *See* FED. R. EVID. 412. To the extent that this rule is based on the dual policies of removing the tribulations of testifying as a victim of a sex offense and encouraging the reporting of such crimes by victims, the rule is beyond the scope of any of the issues addressed in this article.

327. *See supra* notes 259-265 and accompanying text.

328. *See supra* note 251 and accompanying text.

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of a prior conviction is a prerequisite for admissibility under Proposed Rule One, but it is the conduct underlying the prior conviction that will determine whether the evidence of the prior crime is relevant. To the extent that the evidence is offered to demonstrate a greater likelihood that the actor behaved on the occasion in question consistently with his or her prior behavior, the probative value of such evidence logically correlates to the degree of similarity between the prior misconduct and the pending allegations.³²⁹ To the extent that the evidence is offered to attack the credibility of a witness, the probative value of such evidence logically correlates to the degree to which the prior crime evidences a dishonest character. Thus for example, in a perjury prosecution, the defendant's prior drug conviction should ordinarily be immaterial. And, in a drug prosecution in which the defendant does not take the stand, the defendant's prior perjury conviction ordinarily should be completely irrelevant. Moreover, in circumstances in which the conduct underlying the prior conviction has only minimal probative value, the trial court might well exclude the evidence because of the presence of any of the exclusionary criteria specified in Rule 403.³³⁰

Third, no automatic time limit has been placed upon the age of the prior conviction in Proposed Rule One. Under the current law, there is a presumptive age limit for prior convictions used to impeach the credibility of a witness.³³¹ Proposed Rule One, however, is not limited to the use of prior convictions for impeachment only. One can certainly envision conduct resulting in a conviction long ago which bears such a striking similarity to the charged crime so as to be extremely relevant despite the intervening passage of time. Consequently, the time between the prior misconduct and the current allegations should be treated as one of the factors for the trial judge's consideration under Rule 403.

Fourth, if evidence is admitted against the accused under this provision, the defendant would still be entitled to a limiting

329. See, e.g., Uviller, *supra* note 12, at 882-85.

330. The danger of unfair prejudice would not include the possibility that the jury would draw the general propensity inference from the prior criminal misconduct. To the extent that the evidence logically suggests such a general propensity, this is precisely what makes the evidence relevant.

331. See FED. R. EVID. 609(b).

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instruction cautioning the jury not to convict the defendant in order to punish him or her for the prior misconduct.³³² But this instruction does not carry with it the significant dangers of misunderstanding or disobedience that accompanies several of the instructions that are currently employed under the existing character evidence rules.³³³

Jurors ordinarily are conscientious in attempting to comply with directions received from the trial judge.³³⁴ It is unreasonable, however, to expect jurors to comprehend instructions which are extremely complex and appear to be delivered solely for the legal pretense that the instructions were technically correct.³³⁵ Further, it is unreasonable to expect jurors to comply with instructions that are contrary to what they know to be true.³³⁶ One reason why the current character evidence instructions hurled at jurors are so hopelessly ineffectual is that jurors know from their own common sense and experience that truly similar crimes evidence is relevant precisely to demonstrate a general character trait, which in turn is relevant to the likelihood of repeated similar conduct.³³⁷

By contrast, there is no popular commitment to the notion that people should be punished for crimes for which they are not on trial. Quite to the contrary, the cautionary instruction accompanying evidence admitted under Proposed Rule One is not only easy to understand, it is also perfectly consistent with common, intuitive notions of fundamental fairness. Even to the unsubstantiated extent that a juror might be unconsciously tempted to punish for prior crimes, an instruction that alerts the juror to guard against this possibility is very likely to have its intended effect.³³⁸

PROPOSED RULE TWO: Evidence of specific crimes, wrongs

or acts which have not resulted in a criminal conviction, and not including conduct which is the subject of a charge, claim or defense which is the subject of the proceeding, shall not be admissible unless the court determines that the probative

332. See Imwinkelried, *supra* note 1, at 1144–46.

333. See *supra* notes 13–18, 94–108, 112, 132–135 and accompanying text.

334. See Imwinkelried, *supra* note 94, at 379–80.

335. See Kramer & Koenig, *supra* note 102, at 433.

336. See *id.* at 429–30.

337. See Davies, *supra* note 107, at 511; Imwinkelried, *supra* note 94, at 379.

338. See Teitelbaum et al., *supra* note 60, at 1196.

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value of such evidence outweighs any danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time or needless presentation of cumulative evidence.

Proposed Rule Two would govern all specific instances of conduct not resulting in a criminal conviction offered as character evidence. It is envisioned that this rule would also, therefore, cover evidence having special relevance because of a striking similarity to the conduct at issue (such as some of the evidence currently allowed under Rule 404(b) under the mislabel of noncharacter evidence), even though such conduct did not result in a criminal conviction. Because this evidence lacks the safeguards and virtues of evidence of conduct which has resulted in criminal convictions,³³⁹ Proposed Rule Two contains a presumption of exclusion, as distinguished from the presumption of admissibility in Proposed Rule One. The burden is placed upon the proponent of such evidence to satisfy the trial court that the probative value of the character evidence outweighs any dangers of unjust punishment or undue attention to collateral matters.

PROPOSED RULE THREE: Evidence of specific crimes, wrongs or acts of the accused offered by the prosecution in a criminal case, other than the crimes or acts which are subject of the charges in the case, shall not be admissible unless, upon request by the accused, the prosecution shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

The language of this Proposed Rule Three is taken verbatim from the 1991 amendment to Rule 404(b) adding a pretrial notice requirement to that rule. Proposed Rule Three completely accommodates any concern, constitutional or otherwise, about providing the criminal defendant with a fair opportunity to prepare a defense. Moreover, it provides the defendant with sufficient information to move *in limine* to exclude evidence of prior misconduct, thus avoiding the danger of unfair prejudice that can occur when objections are made and

339. See *supra* notes 327–328 and accompanying text.

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sustained only after the jury has heard the impermissible, yet nevertheless potentially damaging, question.

A case can be made that such a pretrial notice requirement should apply to all evidence of uncharged misconduct and not just that of the criminal defendant. This would include, then, evidence of prior misconduct by the victim of the crime, by the parties in a civil action, and by witnesses (which might be introduced to attack credibility). I have not included such a broad notice requirement in Proposed Rule Three because the special protections to be afforded to the criminal defendant are manifest, and because in other contexts a pretrial notice requirement might be too burdensome. For example, a party might not know the identity of all of the witnesses to be called by the opponent, and therefore the circumstances might be too fluid reasonably to require a party to specify, in advance of trial, the character evidence it expects to use to attack the credibility of the opposition witnesses.

PROPOSED RULE FOUR: Evidence of the character of a person is not admissible by testimony as to reputation or by testimony in the form of an opinion, except that the accused in a criminal prosecution may introduce such evidence concerning his or her own character.

The general ban on character evidence in the form of opinion or reputation testimony is justified because such evidence is the weakest, least reliable and relatively most misleading form that character evidence can take.³⁴⁰ The exception for the criminal defendant's proof of his or her own good character is warranted for two reasons. First, the consequences of a criminal prosecution warrant special precautions against an erroneous conviction. Second, it is especially difficult to demonstrate good character solely by introducing specific instances of good conduct. A defendant accused of serial killings does not advance his or her defense significantly by calling individuals to testify only that when each of them encountered the defendant, the defendant did not kill each of them.

340. See *CLEARY ET AL.*, *supra* note 15, § 186, at 550; Leonard, *supra* note 12, at 16; Uviller, *supra* note 12, at 885.

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There is no provision in Proposed Rule Four for the cross-examination of character witnesses as to specific instances of bad conduct of the person about whom the character witness is testifying. The omission is by design. If specific instances of misconduct qualify for admissibility under either Proposed Rule One or Proposed Rule Two, then there is no reason not to allow their use in cross-examination of a character witness called by the accused pursuant to Proposed Rule Four. However, if the alleged specific acts of misconduct by the defendant do not qualify for admissibility under either Proposed Rule One or Proposed Rule Two, the government should not be permitted to present the same information to the jury under the pretext of testing the weight to be given to the testimony of the positive character witness.

There is also no provision for permitting the government to call a character witness to offer a negative opinion or reputation concerning the defendant's character once the defendant has put on a positive character witness as there is under the current law.³⁴¹

Finally, nothing in Proposed Rule Four restricts the ability of the defendant (or any other party) to introduce opinion or reputation testimony for a purpose other than to establish the character of a person. Thus, for example, a defendant charged with a crime of violence who claims to have acted in self-defense would be free to put on evidence that he or she (the defendant) was aware of the reputation for violence of the victim of the alleged crime, because such evidence would not be offered and received to prove the character of the victim, but rather to prove the reasonableness of the defendant's behavior under the circumstances as he or she reasonably perceived them to be.

VII. CONCLUSION

The character evidence rule cannot be justified by any sound policy. It exists because of an entirely unjustified mistrust of the jury. The rule as written allows for many complicated exceptions that are inconsistent with the supposed reasons for the rule itself, and the rule in practice is observed

341. *See supra* note 11 and accompanying text.

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sporadically at best. The present approach to the character evidence problem is entirely unfair to jurors, as it requires them to master and comply with obscure and counterintuitive rules. A superior, streamlined and more honest approach can be obtained by substituting four simple, comprehensible, and workable rules for the current morass.