

# Remarks to the Supreme Court’s Advisory Committee on the Utah Rules of Evidence

January 14, 2019  
Hon. Judge Derek P. Pullan  
Fourth District Law Clerk Shelby M. Thurgood

## I. The Utah Supreme Court’s Directive

On January 2, 2020, the Utah Supreme Court directed the Advisory Committee on the Utah Rules of Evidence to “consider the possibility of proposed amendments to rule 404(b) that may help advance the law” regarding the application of the Doctrine of Chances and the possible adoption of Rule 413 of the Federal Rules of Evidence.

## II. The Character Bar Generally

### 1. Policy Behind the Character Bar

- a. “One of the oldest principles of Anglo-American law is that a person should not be judged strenuously by reference to the awesome spectre of his past life” but instead by whether the person committed the specific acts with which he was charged. *State v. Murphey*, 2019 UT App 64, ¶ 46, (Harris, J., concurring), quoting, David P. Leonard, *The New Wigmore: A Treatise on Evidence: Evidence of Other Misconduct and Similar Events* §1.2, at 2 (2009). In other words, the defendant “must be tried for what he did, not for who he is.” *United States v. Hodges*, 770 F.2d 1475, 1479 (9<sup>th</sup> Cir. 1985).

### 2. Reasons for the Character Bar:

- a. Character evidence “weigh(s) too much with the jury” and so “overpersuade(s) them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.” *Michelson v. United States*, 335 U.S. 469, 476 (1948).

- b. Evidence of the accused's bad character may cause the jury to find him guilty on less than proof beyond a reasonable doubt, simply because acquitting him lets a bad person off.
- c. Evidence of the accused's bad character may lead the jury to engage in preventative conviction—the defendant may not have committed the charged offense, but he has done or will do other bad things for which he should be punished.
- d. Character evidence lacks real probative value as to whether the accused committed the charged offense.
  - i. People do not always act consistent with their character.
  - ii. Character may be good at predicting conduct over time, but is less reliable in predicting conduct on a particular occasion.
- e. Shifting the jury's focus to uncharged conduct causes confusion and waste of time.

### **III. The Doctrine of Chances**

#### **1. What is the Doctrine of Chances?**

- a. The Doctrine of Chances is “a theory of logical relevance that rests on the objective improbability of the same rare misfortune [or false accusation] befalling one individual over and over.” *State v. Verde*, 2012 UT 60, ¶ 47.
- b. “As the number of improbable occurrences increases, the probability of coincidence decreases, and the likelihood that the defendant committed one or more of the actions increases. An innocent person may be falsely accused or suffer an unfortunate accident, but when several independent accusations arise or multiple similar accidents occur, the objective probability that the accused innocently suffered such unfortunate coincidences decreases. At some point, the fortuitous coincidence becomes too abnormal, bizarre, implausible, unusual or objectively improbable to be believed.” *Id.*, at ¶ 49.

2. The Foundational Requirements to Admit Other Acts Under the Doctrine of Chances:

- a. Materiality
- b. Similarity
- c. Independence
- d. Frequency

3. Impact of the Doctrine of Chances on the Character Bar:

- a. Without precise analysis, the Doctrine of Chances can be easily abused, eliminating the character evidence prohibition.
- b. “In theory, there is a distinction between character reasoning and the use of the doctrine of chances to establish the actus reus. However, in practice the distinction can be a thin, difficult line for the jurors to draw. . . . [T]he lax application of the doctrine of chances can eviscerate the character prohibition. . . . [A]n actus reus is an essential element of each true crime. If uncharged misconduct becomes routinely admissible to prove actus reus, there will be little left of the character evidence prohibition.” 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, 588 (1990).
- c. “The [Doctrine of Chances] theory can be easily abused. Intent is an essential element of every true crime. Whenever the prosecutor has evidence of an uncharged crime similar to the charged offense, the prosecutor can attempt to invoke [the] doctrine of chances; the prosecutor can always argue that a similar uncharged crime triggers the doctrine of chances and is, therefore, logically relevant on a noncharacter theory both to disprove accident and thereby to prove mens rea.” *Id.*, at 595.

4. Questions Raised by the Doctrine of Chances:

a. **Should the Rule 104(b) Conditional Relevance Standard be Elevated to Clear and Convincing Evidence?**

- i. Given the complexities of the theory and the risk of prejudice in admitting acts of misconduct similar to the charged offense, should the proponent of other acts under a doctrine of chances theory be required to prove conditional relevance of those acts by clear and convincing evidence?
- ii. This would be a departure from current Utah law. *See*, *State v. Lucero*, 2014 UT 15, ¶ 19 (In the context of Rule 404(b), “similar act evidence is relevant only if the jury can reasonably conclude [by a preponderance of the evidence] that (1) the act occurred; and (2) the defendant was the actor.”), adopting holding in *Huddleston v. United States*, 485 U.S. 681 (1988).

b. **Is the Probative Value of Other Acts Offered Under the Doctrine of Chances Likely to be Overstated?**

- i. The frequent recurrence of similar unfortunate events or false accusations makes it more likely that one or more of those events were not the result of an accident or coincidence. But it says nothing about whether the charged offense was an accident or coincidence. One commentator concludes that this makes the other acts irrelevant. *See* Andrea J. Garland, *Beyond Probability, The Utah Supreme Court’s “Doctrine of Chances” in State v. Verde Encourages Admission of Irrelevant Evidence*, 3 Utah J. Crim. L. 6 (2018).
- ii. But proof beyond a reasonable doubt does not require the prosecution to prove an event beyond every possible doubt, and not every piece of evidence must be a homerun. The frequent recurrence of rare events or independent accusations does have some tendency to make it more likely that the charged offense is one in the series caused by the defendant. This is all relevance requires. U. R. Evid. 401. While the nexus between

doctrine of chances evidence and the charged offense may be a tenuous one, this fact goes to the probative weight of the evidence and can be addressed when trial courts apply Rule 403.

- iii. The problem is that the limited probative value of doctrine of chances evidence is not intuitive, resulting in judges and jurors giving more weight to the evidence than it merits. Doctrine of Chances reasoning does not eliminate random chance as the cause of the charged offense—all probabilities aside. And this is not intuitively understood. *Id.*, at pp. 21, 24-26. For these reasons, amendments to Rule 404 must guard against overstating the inferences that can be drawn under the Doctrine of Chances. *Id.*

**c. How Should the “Similarity” Analysis be Conducted?**

- i. What degree of “similarity” is required under *State v. Verde*?
  1. The probability reasoning underpinning the doctrine of chances requires proof of similarity. It is the similarity of rare events that makes their recurrence improbable.
  2. But the degree of similarity articulated in *Verde* is vague. Is “rough similarity” enough, or is “significant similarity” required? *Garland*, at 10-13.
- ii. How should the serious risk of prejudice in admitting similar acts under a Doctrine of Chances theory be remedied?
  1. The Doctrine of Chances requires that the other acts be at least “roughly similar” to the charged offense. It is the recurrence of the similar events that underlies the probability reasoning.
  2. But this similarity creates a very high risk that jurors will consider the other acts to draw conclusions about the defendant’s character and propensities. This is especially true because the non-character reasoning at the heart of the doctrine of chances is difficult to understand, and curative instructions may be unlikely to cure this problem.

**d. How Should the “Frequency” Analysis be Conducted?**

i. How should the rare event of misfortune be defined?

1. Rule 404(b) should require the proponent of other acts evidence to clearly articulate the rare event of misfortune before those acts can be admitted under a Doctrine of Chances theory. *State v. Lane*, 2019 UT App 86, ¶ 43.

ii. How should the “Typical Person” be defined?

1. The “frequency” requirement requires the court to determine whether an unfortunate event or false accusation has occurred “more frequently than the typical person” endures such events or is falsely accused. It is a mistake for the trial judge to rely on his or her intuition and life experience to define what is typical. *See*, *State v. Lane*, 2019 UT App 86, ¶ 49, (Harris, J., concurring) (intuition level assessment of how often a person living near the homeless shelter would be involved in a fight requiring self-defense was error). *See also*, *Garland*, at 18-19 (noting that a person charged with any criminal offense is already atypical, and racial minorities “do not necessarily commit more crimes but are more apt to be arrested... than whites”).

iii. When is statistical evidence of frequency required?

1. When other acts are offered under a Doctrine of Chances theory to prove that the defendant committed the actus reus of the crime, the issue is the frequency of a particular type of loss such that statistical evidence is likely available and should be required. *State v. Heath*, 2019 UT App 186, ¶¶ 32-34.
2. But when the other acts are offered to prove mens rea, the “relevant frequency is the incidence of the accused’s personal involvement in a type of event.” *Id.*, at ¶ 32. In this circumstance, the court “is more likely to have to rely on [its] commons sense, and knowledge of human experience to determine the level of

frequency. *Id.*, at ¶ 33. *But see, State v. Lane*, 2019 UT App 86, ¶ 49 (Harris, J., concurring) (positing that statistical data should be required when other acts are offered under a doctrine of chances theory to prove that defendant did not act in self-defense).

**e. To Preserve the Character Bar, Should There be Strict Limits on the Purposes For Which Doctrine of Chances Evidence Can be Offered?**

- i. Given the high risk that jurors will use evidence of other acts as evidence of the accused's bad character, and the limited probative value of Doctrine of Chances reasoning, should the Doctrine of Chances be strictly limited to certain types of facts—i.e. to rebutting accident or mistake, or to proving the defendant's knowledge? *See*, Garland, at 26-27, citing, *State v. Vuley*, 70 A.3d 940 (Vt. 2013); *State v. Lane*, 2019 UT App 86, ¶ 39 (Harris, J., concurring) (“where the defendant's claim is that the event in question was an accident, the doctrine can apply to rebut that claim” because “propensity inferences do not pollute this type of probability reasoning”).
- ii. When the Doctrine of Chances is applied not to random events but instead to acts based on human volition, isn't the theory just propensity reasoning dressed up in “probability” clothing? *See*, *State v. Lane*, 2019 UT App 86, ¶¶ 40-41 (Harris, J., concurring) (“In cases like this one, in which a defendant stands accused of a violent act but claims he acted in self-defense, we may be less likely to believe the defendant's claims if presented with evidence that he has made this claim before... But the *reason* we are less likely to credit the defendant's claim in this context has little to do with probability and a lot to do with the easily drawn inference that the defendant might be the type of person who commits violent acts”).

**f. Should Probability Evidence be Admissible to Prove Who is Telling the Truth on a Particular Occasion?**

- i. When other acts are offered under the Doctrine of Chances to rebut a claim of fabrication, probability reasoning is being used to determine who is telling the truth—and that is not permitted for very good reasons. *State v. Murphey*, 2019 UT App. 64, ¶¶ 60-63, (Harris, J., concurring), *citing*, *State v. Rammel*, 721 P.2d 498, 501 (Utah 1986).
- ii. “Probabilities cannot conclusively establish that a single event did or did not occur and are particularly inappropriate when used to establish facts not susceptible to quantitative analysis, such as whether a particular individual is telling the truth.” *Rammel*, 721 P.2d at 501.

**g. Can Limiting Instructions Provide Comprehensible Guidance That Juries Will Follow?**

- i. Given the complexity of Doctrine of Chances reasoning, can understandable limiting instructions be drafted, and will those instructions cure the high risk of prejudice? *See*, *State v. Lane*, 2019 UT App 86, ¶¶ 43-44 (Harris, J., concurring) (calling out ineffective limiting instruction, and recommending both a positive and negative prong for any effective instruction).
- ii. The 404(b) jury instructions from *State v. Heath*, 151402675, could provide a starting point for such limiting instructions.

**IV. Adopting A Variant of Federal Rules of Evidence Rules 413-415**

1. Utah’s Drift Away From the Character Bar in Sexual Assault Cases.

- a) In Utah, propensity reasoning is already expressly allowed in child molestation cases under Rule 404(c).
- b) Propensity reasoning has polluted the Rule 404(b) analysis in other contexts where it is not expressly allowed, substantially undermining the character bar.

This began with the Utah Supreme Court's decisions in *State v. Nelson-Waggoner*, 2000 UT 59, and has persisted without abatement.

- c) The propensity reasoning is best illustrated in the Utah Court of Appeals recent decision in *State v. Gasper*, 2018 UT App 164. Absent Doctrine of Chances reasoning, a “pattern of behavior that is distinctly similar” is the textbook definition of character evidence.

i. Facts:

1. Charged Crime: Gasper was charged with raping a teenage girl at a house party. He repeatedly tried to get her to drink shots with him. She initially refused but eventually relented. After drinking one shot, she immediately became nauseated and tired. Gasper—a licensed massage therapist—offered to give her a massage. Victim fell asleep with Gasper massaging her back. She remembers being moved to the couch. Victim awoke to realize that Gasper was raping her. She had somehow been moved from the couch to a bedroom. She left and reported the rape.
2. Other Crime: The trial court admitted the testimony of Witness. Witness testified that she met Gasper for the first time in 2013 when he came home with her brother. Gasper touched her buttocks and offered to give her a massage. At some point Gasper gave her an open beer, which she drank. She immediately felt dizzy, sick, and tired. She went to her room and did not awake until 4:00 pm the next day. She was nude and had been raped.

ii. Appeal:

1. Gasper was convicted of the charged crime. On appeal, he challenged the admissibility of the other crime.
2. The Court ruled that the other crime was admissible to show lack of consent and intent. The Court explained: “Historically, evidence that a defendant raped others has been viewed solely as impermissible character evidence and has not been considered probative of whether a current victim was raped. However, in

recent years, courts have admitted such bad acts evidence for the noncharacter purpose of proving the element of lack of consent in certain rape cases.”

3. Turning to Gasper’s case, the Court ruled: “The two incidents represent a ***pattern of behavior that is distinctively similar*** and therefore admissible to show intent . . . to engage in sexual activity without Victim’s consent.” *Id.*, at ¶ 21. Emphasis added.

## 2. Possible Adoption of FRE Rule 413

- a) If Utah courts are already using propensity evidence in this context, shouldn’t we stop giving sanctimonious lip-service to the character bar and simply adopt a variation of Federal Rule of Evidence 413? There are good reasons to refrain from this course of action.

## 3. The History of FRE Rules 413-415.

- a) What do FRE Rules 413-415 do?
  - i. The rules permit a party to introduce evidence of other acts of child molestation or sexual assault to prove that Defendant committed the charged offense (or acts in a civil case). The rules permit the “character to conduct” inference expressly forbidden by Rule 404(a).
- b) How did FRE 413-415 become part of the Federal Rules of Evidence?
  - i. The Violent Crime Control and Law Enforcement Act of 1994.
    1. In what came to be known as the Dole-Molinari amendment, the Act added Rules 413, 414 and 415 to the Federal Rules of Evidence. The Act provided that the rules would take effect within 150 days of the President signing the Act, unless the Judicial Conference made alternative recommendations. If Congress failed to act on the Judicial Conference’s alternative recommendations within 150 days, the rules would take effect as originally drafted.

2. The Act by-passed the rules vetting process established by Congress in the Rules Enabling Act. The standard process is for rule amendments to originate in the Judicial Conference where they are subjected to careful scrutiny. The amendments are then submitted to the U.S. Supreme Court for approval before being sent to Congress.
- ii. After Congress enacted The Violent Crime Control and Law Enforcement Act of 1994, the Judicial Conference determined to make recommendations to Congress. The Judicial Conference sought recommendations from:
1. Advisory Committee on the Federal Rules of Evidence
  2. Standing Committee on the Rules of Practice and Procedure
  3. Advisory Committee on the Federal Civil and Criminal Rules of Procedure.
- iii. Recommendations from the Advisory Committee on the Federal Rules of Evidence:
1. The Committee solicited public comment on FRE Rules 413-415. The “overwhelming majority” of lawyers, judges, evidence professors, and organizations who responded were negative.
    - a. Opposed: 11 lawyers, 56 evidence professors, 19 judges, and 12 organizations (including the ABA).
    - b. Support: 0 lawyers, 3 evidence professors, 1 judge, and 3 organizations.
  2. Reasons Given for Opposition to FRE Rules 413-415:
    - a. The process circumvented the vetting required by the Rules Enabling Act.
    - b. The Rules are Unconstitutional.
      - i. Tension between Rule 412 (which bars admission of a victim’s other sexual behavior or sexual

predisposition) and Rules 413-415 (which admit evidence of the accused's other sexual behavior to prove predisposition).

ii. Due process rights demand that the accused be permitted to offer character evidence in rebuttal—including sexual assaults committed by a third-party to prove that the third-party, not the accused, was the perpetrator.

c. Insufficient empirical data on propensity

d. Unfair

e. Unnecessary

f. Disparate impact on Native Americans

g. Significant drafting problems.

iv. Formal Resolution from the Advisory Committee on the Federal Rules of Evidence.

1. In a formal resolution passed with only one dissenting vote (from the member from the Department of Justice), the Advisory Committee concluded: “We believe with these commentators, that the existing Rules of Evidence are adequate to deal with the concerns expressed by members of Congress. Furthermore, we are concerned that the enacted rules may work to diminish significantly the policies established by long standing rules and case law guarding against undue prejudice to persons accused in criminal cases and parties in civil cases.”

v. The Advisory Committee Proposed amendments to improve FRE Rules 413-415 if Congress chose to reject the Judicial Conference's recommendation that the Rules were ill-advised:

1. Create an exception to Rule 404(a).

2. Make the rules subject to other evidentiary rules, including Rule 403.
  3. Consider specific factors to determine probative value.
  4. Avoid constitutional concerns by permitting rebuttal character evidence that might otherwise be barred.
  5. Amend Rule 405 to allow for this new method of introducing character evidence.
  6. Eliminate the creation of a rule of evidence for civil cases alone.
- vi. The Judicial Conference's Report to Congress
1. The Judicial Conference submitted its report to Congress within 150 days. For the same reasons the Standing and Advisory Committees opposed the new rules, the Judicial Conference "urged Congress to reconsider its decision on the policy questions underlying the new rules." *Report of the Judicial Conference on Admission of Character Evidence In Certain Sexual Misconduct Cases*, 56 Crim. L. Rep. 19 (February 15, 1995).
  2. In making this recommendation, the Judicial Conference noted "the highly unusual unanimity of the members of the Standing and Advisory Committees, composed of more than 40 judges, practicing lawyers, and academicians, in taking the view that Rules 413-415 are undesirable. Indeed the only supporters of the Rules were representatives of the Department of Justice." *Id.*
- vii. Congress made no amendments and despite almost unanimous opposition by lawyers, judges, and evidence professors, FRE Rules 413-415 became the law.

**V. Observations and Recommendations Regarding Amending Rule 404 or Adopting FRE 413-415.**

1. Rule 403 Balancing Provides Little Protection Against Prejudice In This Context.

- a) Proponents of the Violent Crime Control and Law Enforcement Act of 1994 asserted that FRE 413-415 “allows, [but] does not mandate” admission of other acts to prove propensity in sexual assault and child molestation cases.<sup>1</sup> Rep. Molinari, 140 Cong. Rec. H5437-03, 1994 WL 374984.
- b) This has turned out to be a false promise. When it comes to other crimes, wrongs, or acts, the prejudice Rule 403 guards against is the character to conduct inference. Rules 413-415 expressly permit this inference. With the primary risk of prejudice removed from the Rule 403 balance, it is the rare case in which probative value will be substantially outweighed by prejudicial risk.

2. Further Study Needed

- a. A study should be conducted to gather empirical evidence regarding the propensity of sex offenders to reoffend (as compared to other offenders).
- b. The Committee should consider whether other empirical data—including sexual assault statistics—is relevant to its work.

3. Recommended Considerations: If the Court decides to refine the rules on the Doctrine of Chances or adopt a variation of Rule 413, consideration should be given to measures designed to guard against the clear risks of confusion and prejudice. Such considerations include:

- a) Elevating the Rule 104(b) standard to clear and convincing evidence.

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<sup>1</sup> See also, Rep. Kyl, 140 Cong. Rec. H5437-03, 1994 WL 374984 (judge “ought to have the discretion to admit the evidence. It is not automatic. . . . The trial court retains the total discretion to include or exclude this type of evidence.”); Sen. Hatch, 140 Cong. Rec. S12250-02, 1994 WL 455051 (new rules “simply gives a presumption in favor of bringing it in. The court still has the protective Rules of Evidence to keep it out if it is not fair.”).

- b) Reversing Rule 403 balancing for admission, requiring the proponent to show that probative value substantially outweighs unfair prejudice.
- c) Requiring the proponent to articulate the inferential chain between other acts and a non-character purpose. The proponent of other act evidence must do more than state a non-character purpose—she must also show that the underlying reasoning is not grounded in the character to conduct inference that Rule 404(a) forbids.
- d) Clarifying the level of similarity required to invoke the Doctrine of Chances.
- e) Limiting the purposes for which the Doctrine of Chances can be used. For example, limiting applicability to intent or lack of mistake.
- f) Requiring the proponent to clearly state the rare event that has been repeated.
- g) Clarifying the “frequency” analysis. Who is the “typical person” and under what circumstances is statistical evidence of frequency required?
- h) Requiring that only prior convictions be admitted.
- i) Directing the development of clear limiting instructions for juries.
- j) Assessing the degree to which lifting the character bar will undermine the policies that drove adoption of Rule 412. And assessing how Rule 412 and Rule 413 would work in conjunction with or against each other.
- k) Avoiding the error of creating new rules when exceptions to the character bar are clearly at home in Rule 404.

# Remarks to the Supreme Court's Advisory Committee on the Utah Rules of Evidence

January 14, 2019  
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## Reference Materials

### I. Written Remarks to the Supreme Court's Advisory Committee on the Utah Rules of Evidence

### II. Doctrine of Chances

#### a. Articles

1. Andrea J. Garland, *Beyond Probability: The Utah Supreme Court's "Doctrine of Chances" in State v. Verde Encourages Admission of Irrelevant Evidence*, 3 Utah J. Crim. L. 6 (2018); and executive summary of same.
2. Edward J. Imwinkelried, *Criminal Minds: The Need to Refine the Application of the Doctrine of Objective Chances as a Justification for Introducing Uncharged Misconduct Evidence to Prove Intent*, 45 Hofstra L. Rev. 851 (2017); and executive summary of same.
3. 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 (1990).

#### b. Case Examples

1. State v. Heath Trial Court Ruling on 404(b) Evidence.
2. State v Heath Trial Court 404(b) Jury Instructions.
3. State v Heath Utah Court of Appeals Opinion, 2019 UT App 186.

### III. Federal Rules 413-415

#### a. Advisory Committee Notes

1. Judicial Conference Letter to Congress Re: Rules 413-415, February 1995.
2. Committee on Rules of Practice and Procedure Meeting Minutes, January 1995.
3. Advisory Committee on Criminal Rules Meeting Minutes Excerpts, April 1995.
4. Advisory Committee on Evidence Rules Report to the Standing Committee on Rules, November 1994.
5. Advisory Committee on Civil Rules Meeting Minutes, October 1994.
6. Advisory Committee on Evidence Rules Conference on Possible 404(b) Amendments, March 2017.

#### b. Legislative History

1. Floor Debates on Rules 413-415, H.R. 3355, Summer 1994
2. Proposal to Amend Rules 413-415, S. 1094, July 1995.

#### c. American Bar Association Comments

1. American Bar Association Criminal Justice Section Report to the House of Delegates, 22 Fordham Urb. L.J. 343 (1995).

# BEYOND PROBABILITY: THE UTAH SUPREME COURT’S “DOCTRINE OF CHANCES” IN *STATE V. VERDE* ENCOURAGES ADMISSION OF IRRELEVANT EVIDENCE

by Andrea J. Garland<sup>1</sup>.

## I. Introduction

When a criminal defendant is in an unusual situation over and over, is that admissible as non-propensity evidence pursuant to Utah Rule of Evidence 404? Is it fair to share such claimed improbability with a jury? When can a prosecutor ask “What are the odds?” when trying to introduce a defendant’s prior alleged bad actions? Under what circumstances should a trial court admit such evidence?

The Utah Rules of Evidence exclude prior act evidence to prove a defendant has acted in conformity with bad character.<sup>1</sup> However the Rules permit introducing such evidence to prove “motive, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”<sup>2</sup>

Mr. James Verde was charged with child sexual abuse for putting his hand down the pants of N.H., a twelve year old boy, and fondling his genitals.<sup>3</sup> At trial, N.H. testified that he met Mr. Verde in 2001 when Mr. Verde moved to his neighborhood.<sup>4</sup> N.H. said Mr. Verde took him to a carnival and on subsequent occasions they played videogames or basketball at Mr. Verde’s home.<sup>5</sup> In addition, Mr. Verde took N.H. ATV riding and paid him to do yard work.<sup>6</sup> In

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<sup>1</sup> Utah R. of Evid. 404(a)(1) and (b)(1).

<sup>2</sup> Utah R. of Evid. 404(b)(2).

<sup>3</sup> *State v. Verde*, 2012 UT 60, ¶ 2, 269 P.3d 673, *abrogated on other grounds*, *State v. Thornton*, 2017 UT 9, ¶ 44, 391 P.3d 1016, 1024 (holding trial courts need no longer conduct “scrupulous examination” of proffered 404(b) evidence).

<sup>4</sup> *Id.*, at ¶4.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

2003, Mr. Verde sat N.H. on a couch, put his hand down N.H.'s pants, and "touched [his] penis and testicles."<sup>7</sup>

The trial court admitted evidence of two previous alleged uncharged sexual assaults as prior bad acts.<sup>8</sup> J.T.S. testified he met Mr. Verde at age fifteen while working as a grocery bagger; Mr. Verde gave him sunglasses and invited him to play basketball.<sup>9</sup> They met again, three years later, when Mr. Verde asked J.T.S. to come to his house so he could test drive a car J.T.S. was selling.<sup>10</sup> J.T.S. was eighteen.<sup>11</sup> When he went to Mr. Verde's home, Mr. Verde pulled on his leg, refusing to let go, unbuttoned his jeans, and groped his genitals.<sup>12</sup> M.A. testified he met Mr. Verde at a gym when he was eighteen.<sup>13</sup> Mr. Verde invited M.A. to his house and then groped M.A.'s groin, "close enough to his genitals to arouse him."<sup>14</sup> Although Mr. Verde denied at trial any sexual contact with J.T.S., M.A., or N.H., the jury found him guilty of sexual abuse of a child.<sup>15</sup>

On appeal, the Utah Court of Appeals affirmed Verde's conviction, upholding the admission of the prior acts evidence under Utah Rule of Evidence 404(b).<sup>16</sup> The Utah Supreme Court reversed. In doing so, the Court carefully analyzed both the materiality of the evidence and whether the evidence was more prejudicial than probative.<sup>17</sup>

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<sup>7</sup> *Verde, supra*, note 3, ¶ 5.

<sup>8</sup> *Verde, supra*, note 3, ¶ 1.

<sup>9</sup> *Verde, supra*, note 3, ¶ 6.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Verde, supra*, note 3, ¶ 7.

<sup>13</sup> *Verde, supra*, note 3, ¶ 8.

<sup>14</sup> *Id.*

<sup>15</sup> *Verde, supra*, note 3, ¶¶ 1, 10.

<sup>16</sup> *Verde, supra*, note 3, ¶ 11.

<sup>17</sup> *Verde, supra*, note 3, ¶¶ 17-43.

The Court also introduced the “Doctrine of Chances” as a means of using probability principles to admit claimed prior act evidence. The Court stated that relevance can hinge on the “objective improbability of the same rare misfortune befalling one individual over and over” because “evidence of past misconduct may ‘tend to corroborate on a probability theory’ that a witness to a charged crime has not fabricated testimony because it is [un] likely . . . that [several] independent witnesses would concoct similar accusations.”<sup>18</sup> The Court outlined the purpose and application of the Doctrine and set forth its four foundational requirements.<sup>19</sup> Those requirements are materiality, similarity, independence, and frequency.<sup>20</sup> The Court, though creating a new way for litigants to introduce evidence at trial, specifically disavowed any intention of expanding the admissibility of other crimes, wrongs, or acts under Rule 404(b). “[A]ny liberalizing trend toward greater admissibility of prior bad acts evidence may be accomplished through express amendments to our rules of evidence . . . an avenue that counsels against the distortion of the otherwise general rule against propensity inferences under rule 404(b).”<sup>21</sup>

The Court remanded the case for a new trial and directed the trial court to determine whether the other act evidence was admissible pursuant to the Doctrine of Chances.<sup>22</sup>

This article critiques *Verde*’s Doctrine of Chances. First, it sets forth the Doctrine’s origin and evolution. Second, it points out three problems inherent in *Verde*’s formulation and application of the Doctrine. Lastly, it suggests possible proper applications of the Doctrine.

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<sup>18</sup> *Verde, supra*, note 3, ¶ 47.

<sup>19</sup> *Verde, supra*, note 3, ¶¶ 47-62.

<sup>20</sup> *Verde, supra*, note 3, ¶¶ 57-61.

<sup>21</sup> *Verde, supra*, note 3, ¶ 43.

<sup>22</sup> *Id.*

## II. The Origin and Evolution of the Doctrine of Chances

Although *State v. Verde* introduced the Doctrine of Chances to Utah in 2012, it was already in use and recognized in other jurisdictions.<sup>23</sup> Originally, courts appear to have used the term “doctrine of chances” as synonymous with chance or probability. The first such reference to the doctrine in the United States was in 1824, in a lawsuit concerning legal fees.<sup>24</sup> The Supreme Court of Errors of Connecticut considered the defendant’s poverty at the time legal services were rendered to be irrelevant, pursuant to the “doctrine of chances,” because the value of legal fees did not depend on the relative wealth of the parties.<sup>25</sup> The first reference to the doctrine in a federal court case was in 1887, in *Hopt v. People*.<sup>26</sup> The United States Supreme Court, in discussing proof beyond a reasonable doubt, referred to the “doctrine of chances” as being synonymous with probability,<sup>27</sup> and quoting the Massachusetts Supreme Court, stated “it was not

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<sup>23</sup> *E.g.*, *Umbaugh v. State*, 463 S.W. 2d 634 (Ark. 1971), *People v. Erving*, 73 Cal. Rptr. 2d 815 (Cal. Ct. of App. 2<sup>nd</sup> 1998); *People v. Spoto*, 795 P.2d 1314, 1318 (Colo. 1990) (disallowing doctrine of chances evidence because acts too dissimilar); *Sutherland v. State*, 849 So. 2d 1107 (Fla. 4<sup>th</sup> App. 2003), *State v. Vail*, 150 So.3d 576 (La. App. 3d Cir. 11/5/14) (upholding use of doctrine of chances in homicide trial where first two wives disappeared years before); *State v. Silva*, 134 A.2d 628 (Me. 1957), *overruled on other grounds*, *State v. Brewer*, 505 A.2d 774 (Me. 1985); *Wynn v. State*, 718 A.2d 588 (Md. App. 1998) (declining to consider doctrine of chances because not preserved in trial court); *People v. Mardlin*, 790 N.W.2d 607, 612-620 (Mich. 2010) (describing doctrine of chances as “doctrine of objective improbability” finding in arson case past number of fires relevant to issue of whether current fire intentionally set); *State v. McManus*, 594 N.W. 2d 623, 630-32 (Neb. 1999) (declining to apply doctrine of chances on ground it requires assumption that defendant’s character never changes); *People v. Ingram*, 522 N.E. 2d 439 (N.Y. App. 1988); *State v. Lanier*, 598 S.E. 2d 596 (N.C. App. 2004) (holding admissible per doctrine of chances evidence of defendant’s prior two husbands where deaths shared similar characteristics); *State v. Armstrong*, 793 N.W. 2d 6 (N.D. 2010); *State v. Leistiko*, 282 P.3d 857, 864-865 (Ore., 2012), *Com. v. Boykin*, 298 A.2d 258 (Penn. 1972), *Scott v. State*, 720 S.W.2d 264 (Tex. App. 1986) (upholding doctrine of chances evidence of repeated touching of children’s genitals to rebut defendant’s claim of accident); *State v. Vuley*, 70 A.3d 940, 949 (Vt. 2013); *State v. Bustamante*, 549 N.W. 2d 562, 576 (Wis. App. 1996); *U.S. v. Tyndale*, 56 M.J. 209 (U.S. Ct. App. For Armed Forces, 2001) (accepting doctrine of chances as viable theory that multiple similar acts are relevant if moving party can establish sufficient similarity); *U.S. v. Tanguay*, 982 F. Supp. 2d 119 (D. N.H. 2012); *U.S. v. Cherry*, 433 F.3d 698 (10<sup>th</sup> Cir. 2005). This is a representative but by no means exhaustive list. *State v. Verde* has one of the more comprehensive discussions of the doctrine of chances.

<sup>24</sup> *Robbins v. Harvey*, 5 Conn. 335, 342, 1824 WL 74 (Conn. Sup. Ct. Err. 1824).

<sup>25</sup> *Id.* at 340. *See also*, *Dawson v. Dawson*, 16 N.C. 93, 102, 1827 WL 346 (N.C. 1827) (Hall, J. *concurring*, likening “doctrine of chances” to a lottery); *Chezum v. Kreighbaum*, 32 P. 109 (Wash. 1892), Dunbar, J., *dissenting*; *State v. Takis*, 28 S.E. 2d 679 (S.C. 1944).

<sup>26</sup> *Hopt v. People*, 120 U.S. 430, 7 S.Ct. 614 (1887), *quoting Commonwealth v. Webster*, 59 Mass. 295, 1850 WL 2988 (Mass. 1850) (*abrogated*, *Com. v. Russell*, 23 N.E. 3d 867 (Mass. 2015)).

<sup>27</sup> *Id.*

sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged against the prisoner was more likely to be true than the contrary . . .”<sup>28</sup>

The phrase “doctrine of chances” in the context of admitting prior acts evidence appears to originate with Dean John Henry Wigmore. Dean Wigmore discussed using probability to admit evidence to demonstrate intent or willfulness.<sup>29</sup>

The argument here is purely from the point of view of the doctrine of chances – the instinctive recognition of the logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all. Without formulating any accurate test, and without attempting by numerous instances to secure absolute certainty of inference, the mind applies this rough and instinctive process of reasoning, namely, that an unusual and abnormal element might perhaps be present in one instance, but that the oftener similar instances occur with similar results, the less likely is the abnormal element likely to be the true explanation of them.<sup>30</sup>

Dean Wigmore’s wording, “multiplying instances of the same result” refers to the application of probability that is invoked by using the Doctrine in criminal cases.<sup>31</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> JOHN HENRY WIGMORE, II EVIDENCE IN TRIALS AT COMMON LAW, revised by James H. Chadbourn, Little Brown, and Company, 1979, also known as “II Wigmore on Evidence,” § 302, pp. 241 et seq.

<sup>30</sup> *Id.*

<sup>31</sup> Basic Probability: Consider representing the probability “P” of an event “A” as P(A). For every event A, the probability of that event occurring is between zero (0) (i.e., the event did *not* occur) and one (1) (i.e., the event did occur). Thus, the probability of any given event occurring is between zero (0) and one (1):  $0 \leq P(A) \leq 1$ . Murray R. Spiegel, Ph.D., John Schiller, R. Alu Srinivasan, PROBABILITY AND STATISTICS, 897 FULLY SOLVED PROBLEMS, 20 PROBLEM-SOLVING VIDEOS ONLINE, 4th Ed. Schaum’s Outlines, McGraw Hill 2013, at 5, Theorem 1 – 2.

Furthermore, to determine the probability of multiple independent events all occurring (i.e., event A plus event B plus event C, “P(A∩B∩C)”), it is necessary to multiply the probability of each event. The equation for determining the probability of the occurrence of multiple events is:  $P(A \cap B \cap C) = P(A) \times P(B) \times P(C)$ . Spiegel, et al. at 7.

Thus, it is possible, by multiplying the probabilities to find the chance of every event occurring. Notice, doing so demonstrates that the likelihood of all of the events occurring *is* smaller than the likelihood of any one particular event occurring. Thus, a foundation of a probability-based Doctrine of Chances is that the occurrence of a string of events is more unlikely than the occurrence of any one event.

Notably, Dean Wigmore limited his suggested application of the Doctrine to prior bad acts evidence solely to rebut claims of accident, once the act itself was proven true. He also cautioned that a proper application of the Doctrine required the prior acts to be similar. “Since it is the improbability of a like result being repeated by mere chance that carries probative weight, the essence of this probative effect is the likeness of the instance,”<sup>32</sup> and noted, for inductive reasoning, simple logic requires likeness in prior alleged acts.<sup>33</sup>

More recently, in 1990, Professor Edward J. Imwinkelried also described the present-day Doctrine as a noncharacter exception. He encouraged the use of the doctrine to prove *actus reus*, especially in child abuse cases where a prosecutor needs to disprove a possibility of child-caused accident.<sup>34</sup> Imwinkelried theorized that the Doctrine “need not focus on the accused’s subjective character,” but instead consider “whether the uncharged incidents are so numerous that it is objectively improbable that so many accidents would befall the accused.”<sup>35</sup> He considered this determination “akin to the determination the trier must make in a tort case when the plaintiff relies on *res ipsa loquitur*,” or, “whether objectively the most likely cause of the plaintiff’s injury is the defendant’s negligent act.”<sup>36</sup> He introduced the example of Martha Woods,<sup>37</sup> charged with murder for allegedly smothering a child in her care:

Assume *arguendo* that statistics compiled by the United States Public Health Service indicate that during a twenty-five year period, only two percent of American children experienced an accidental cyanotic episode. Contrast that figure with the incidence of cyanotic episodes experienced by the children in Ms. Woods’ custody. Suppose, for example, that during the same twenty-five year period, twenty percent of those children had cyanotic episodes. The frequency of

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 246, referring to § 33.

<sup>34</sup> 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, 586-593 (1990).

<sup>35</sup> *Id.*, at 586-587.

<sup>36</sup> *Id.*, at 587.

<sup>37</sup> *United States v. Woods*, 484 F.2d 127 (4<sup>th</sup> Cir. 1973).

the episodes among those children far exceeds the national average for such episodes. The episodes are so recurrent among those children that it is objectively implausible that all those episodes were accidental. Either one or some of those episodes were caused by human intervention, or Ms. Woods is one of the most unlucky people alive.<sup>38</sup>

Professor Imwinkelried cautioned trial courts against routinely admitting prior uncharged misconduct evidence when prosecutors simply asserted it necessary to prove *actus reus*.<sup>39</sup> He feared and cautioned that lax application of the Doctrine could erode the prohibition on character evidence.<sup>40</sup> He further recommended that trial courts apply four foundational requirements to Doctrine of Chances cases. First, all of the acts must be “roughly similar” to the charged crime. Second, the acts must be frequent. “Considering the losses in both the charged and uncharged incidents, the accused has suffered the loss more frequently than the typical person endures such losses accidentally.”<sup>41</sup> Third, acts must be material. The issue of whether the *actus reus* occurred has to be in bona fide dispute.<sup>42</sup> Fourth, Imwinkelried recommended that trial courts assess the probative value of the evidence against any potential prejudice.<sup>43</sup> Professor Imwinkelried has since urged that trial courts rigorously apply the criteria.<sup>44</sup>

Professor Imwinkelried appeared unconcerned by the lack of applicable and reliable statistical data on the risk of cyanotic episode in the *Woods* case or the lack of empirical data in other Doctrine of Chances cases. He states that “[t]he doctrine invites the trier of fact to compare the accused’s experience with statistical data or the trier’s knowledge of everyday, human experience,” finding adequate, in the absence of statistics, “the trier’s knowledge of ‘the ways of

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<sup>38</sup> *Id.* What if the real explanation is that the defendant is extraordinarily unlucky? See, *infra*, notes 86 through 89 and accompanying text.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 590.

<sup>42</sup> *Id.*, at 591.

<sup>43</sup> *Id.* at 592.

<sup>44</sup> Edward J. Imwinkelried, *Criminal Minds: The Need to Refine the Application of the Doctrine of Objective Chances as a Justification for Introducing Uncharged Misconduct Evidence to Prove Intent*, 45 HOFSTRA L. REV. 851, 856, 862-64, 870-72, 875-76 (2017). Professor Imwinkelried also urged that trial courts issue jury instructions limiting permissible inferences from evidence admitted under the Doctrine. *Id.* at 873-80.

the world? . . .”<sup>45</sup> Imwinkelried suggested using pre-existing empirical data, but in the absence of such data, employing an expert “to use recognized statistical techniques to gather the data establishing the frequency.”<sup>46</sup> Failing that, he recommended simply asking the judge “to rely on her conception of common, human experience to resolve the question whether the accused suffered the loss more frequently than the typical person could expect to sustain the loss.”<sup>47</sup> He admitted this last technique is imprecise but likened it to other judgment calls by trial judges, such as “whether a *modus operandi* is so unique that it is probably the handiwork of a single criminal.”<sup>48</sup>

Professor Imwinkelried also explained, in a subsequent law review article, that Doctrine of Chances evidence is not character evidence but a limited concept, based on probability.<sup>49</sup>

Under the doctrine, the final inference is a very limited conclusion. The final conclusion is not that all the incidents were the product of an actus reus or mens rea. Rather the final inference is merely that one or some of the incidents were not accidents. The doctrine posits that some incidents can and, in the normal course of events, do occur accidentally. Moreover, there is nothing about the internal logic of the doctrine which singles out the charged incident as the product of actus reus or mens rea. At most, all that the doctrine establishes is that one or some of the incidents were probably the product of an actus reus or mens rea.<sup>50</sup>

Thus, Professor Imwinkelried recommends limiting Doctrine of Chances conclusions to “one or some of the incidents were probably the result of an actus reus or mens rea.”<sup>51</sup> This limitation is in keeping with probability principles.<sup>52</sup>

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<sup>45</sup> Imwinkelried, *supra*, note 34, at 588.

<sup>46</sup> *Id.* at 591.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition By Upholding a Non-Character Theory of Logical Relevance, the Doctrine of Chances*, 40 U. Rich. L. Rev. 419, 437-438, 461 (2006).

<sup>50</sup> *Id.*, at 437-438.

<sup>51</sup> *Id.* at 438. *See also*, Imwinkelried, *supra*, note 44 at 865, “there is nothing inherent in the doctrine’s logic that singles out the charged incident as a crime.”

<sup>52</sup> *Id.* *See also*, Spiegel et al, *supra*, note 31 at 7, Theorem 1-6. The probability of any one or more events occurring (i.e., A and/or B and/or C) can be represented as P(AUBUC). “U” means “and/or.” P(AUBUC) = P(A) + P(B) +

### III. The Doctrine of Chances Four Foundational Requirements Under *Verde*

The Utah Supreme Court established four foundational requirements that must be met before prior act evidence can be admitted under the Doctrine of Chances.

First, such evidence must be material.<sup>53</sup> Explaining “materiality,” the Court rejected the State’s argument that a defendant’s not-guilty plea made the evidence necessary to demonstrate specific intent.<sup>54</sup>

Second, “each uncharged incident must be roughly similar to the charged crime.”<sup>55</sup>

Third, “each accusation must be independent of the others.”<sup>56</sup>

Fourth, the defendant must have been accused of “‘or suffered an unusual loss,’ more frequently than the typical person endures such losses accidentally.”<sup>57</sup> The Supreme Court used<sup>58</sup> this concept of objective probability in arguing there was a low probability “that a man would take a horse by accident or that an innocent person would be falsely accused of sexual assault.”<sup>59</sup> The Court then reasoned that, “as the number of improbable occurrences increases, the probability of coincidence decreases, and the likelihood that the defendant committed one or more of the actions increases.” The improbability rises with the number of alleged prior acts until

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$P(C) - P(A \cap B) - P(B \cap C) - P(A \cap C) + P(A \cap B \cap C)$ . The probability of one or more events not occurring (or having innocent explanations) can be represented as  $P(A' \cup B' \cup C')$ , where  $P(A')$  (i.e., the probability of event A either not happening or happening with an innocent explanation) =  $1 - P(A)$ ,  $P(B') = 1 - P(B)$ , and  $P(C') = 1 - P(C)$ . *Id.* at 4, 6, Theorem 1-4. The probability of event A happening or not happening never rises or falls, no matter how many other events are considered.

<sup>53</sup> *Verde, supra*, note 3, ¶ 57.

<sup>54</sup> *Id.*, at ¶¶ 21-32. In *State v. Lowther*, 2017 UT 34, ¶¶ 23-26, 398 P.3d 1032, the Court further clarified that Doctrine of Chances evidence is potentially relevant when any element is in “bona fide dispute.”

<sup>55</sup> *Verde, supra*, note 3, ¶ 58.

<sup>56</sup> *Verde, supra*, note 3, ¶ 60.

<sup>57</sup> *Verde, supra*, note 3, ¶ 61.

<sup>58</sup> *Verde, supra*, note 3, ¶¶ 48-50.

<sup>59</sup> *Verde, supra*, note 3, ¶ 49.

“[t]he fortuitous coincidence becomes too abnormal, bizarre, implausible, unusual or objectively improbable.”<sup>60</sup> The Court further stated:

“The question for the jury is not whether the defendant is the type of person” who, for example, “sets incendiary fires or murders his relatives. The question is whether it is objectively unlikely that so many fires or deaths could be attributable to natural causes. It is that objective unlikelihood that tends to prove human agency, causation, and design.”<sup>61</sup>

The *Verde* Court indicated that the Doctrine did not impermissibly admit propensity evidence, but instead, recognized the objective unlikelihood that a defendant could be innocent of all accusations in a string of like “bizarre” accusations.<sup>62</sup>

#### IV. The Problems with *Verde*

The Doctrine of Chances as set forth in *Verde* presents three problems. These are: (1) The similarity requirement does not provide adequate guidance to trial courts about which alleged prior incidents to admit; (2) The requirement that trial courts determine whether a defendant has been accused or has “suffered an unusual loss’ more frequently than the typical person”<sup>63</sup> does not provide adequate guidance to trial courts on how to make this determination both constitutionally and logically; and (3) Proving generally that one of a set of events (prior events and the charged event) is more likely true or that some of the set are more likely true, does not establish that the charged event is more likely to be true.

##### A. *VERDE*’S SIMILARITY REQUIREMENT IS VAGUE

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<sup>60</sup> *I.d.*

<sup>61</sup> *Verde, supra*, note 3, ¶ 50.

<sup>62</sup> *Verde, supra*, note 3, ¶¶ 49-51.

<sup>63</sup> *Verde, supra*, note 3, ¶ 61

Correct application of the Doctrine of Chances first requires ensuring that all prior events are similar. Though the *Verde* Court and Professor Imwinkelried consider “roughly similar”<sup>64</sup> to be adequate, the Doctrine’s underlying logic necessitates a requirement that the details of all events closely align.<sup>65</sup> “Since it is the improbability of a like result being repeated by mere chance that carries probative weight, the essence of this probative effect is the likeness of the instance.”<sup>66</sup> In other words, the evidence of a string of events cannot be probative unless the event themselves are similar. Therefore, trial courts need a proper method of analysis to determine similarity.

Since *Verde*, prosecutors have emphasized its “roughly similar” language. For example, in a Utah case involving allegations of aggravated sexual assault and aggravated kidnapping, prosecutors argued that prior allegations of domestic violence and sexual assaults were roughly similar because the victims were female and the assaults involved some restraint of the victims, removal of their clothing, along with acts of physical violence and death threats, although the

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<sup>64</sup> *Verde supra*, note 3, ¶ 58; Imwinkelried, *supra*, note 34, at 589. Professor Imwinkelried has since clarified that Doctrine of Chances evidence offered to prove identity should be “so similar that there is likely only one criminal who uses the modus operandi shared by the two offenses,” but evidence offered to prove intent “need merely fall into the same general category.” Imwinkelried, *supra*, note 44 at 862-863.

<sup>65</sup> Professor Wigmore, *supra*, notes 29-31, and accompanying text, explained how the doctrine of chances depends on multiplying probabilities and reaching an unlikely small product. *See also*, Spiegel, et al., *supra* note 31 and accompanying text. If the events are too different, then conceptually, their probabilities cannot be multiplied: it is inadvisable to multiply different variables. <http://www.dummies.com/how-to/content/how-to-multiply-variables.html>.

<sup>66</sup> *People v. Spoto*, 795 P.2d 1314, 1320 (Colo. 1990), *quoting* A.J. Wigmore, *Evidence* § 302 (1979) (rejecting allegations of prior gun pointing episodes for doctrine of chances purposes in murder trial where cause of death alleged to be intentional shooting); *accord*, *State v. McManus*, 594 N.W.2d 623, 632 (Neb. 1999).

alleged acts themselves were not similar.<sup>67</sup> The alleged prior assaults involved different settings, different relationships, and very different configurations of physical bodies.<sup>68</sup>

By contrast, after *Verde*, defense counsel have pointed to *Verde*'s significant similarly<sup>69</sup> language. They note that the Supreme Court stated “[t]he more similar, detailed, and distinctive the various accusations, the greater the likelihood that they are not the result of independent imaginative invention.”<sup>70</sup> Moreover, defense attorneys point out that *Verde* recognized “the probative value of similar accusations evidence rests on the improbability of chance repetition of the same event.”<sup>71</sup>

After *Verde* some Utah cases have required actual similarity for the application of the Doctrine.<sup>72</sup> In *State v. Lomu*, the Utah Court of Appeals determined the prior event to be “almost identical,”<sup>73</sup> and noted that “the fewer incidents there are, the more similarities between the crimes there must be.”<sup>74</sup> In addition, in *State v. Lowther* the Court of Appeals said that “when comparing the similarities between victims of uncharged events, ‘courts are less tolerant of dissimilarities’ because ‘[t]he accused’s intent may vary with the victim’s identity.’”<sup>75</sup> Most

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<sup>67</sup> *State v. Anthony Murphy*, Case no. 131911555, in the Third District Court for Salt Lake County, State of Utah, “State’s Motion in Limine to Admit Evidence Under Rule 404(b) and Memorandum in Support,” filed 2014-08-11, pp. 25-29. *See also*, *State v. Rackham*, 2016 UT App 167, ¶ 11, 381 P.3d 1161, where the State had offered as doctrine of chances evidence prior dissimilar acts of inappropriate touching, which the trial court rejected as insufficiently independent where they involved members of the same family.

<sup>68</sup> *Id.*

<sup>69</sup> *Verde*, *supra*, note 3 at ¶ 58.

<sup>70</sup> *Id.*, quoting Mark Cammack, *Using the Doctrine of Chances to Prove Actus reus in Child Abuse and Acquaintance Rape: People v. Ewoldt Revisited*, 29 U.C. DAVIS L. REV. 355, 404 (1996).

<sup>71</sup> *Id.*, at ¶ 60, quoting Cammack, *supra*, note 71, at 402.

<sup>72</sup> *State v. Lomu*, 2014 UT App 41, 321 P.3d 243. *See also*, in *State v. Rackham*, *supra*, note 67 at ¶ 11, the State had offered as Doctrine of Chances evidence prior dissimilar acts of inappropriate touching, which the trial court rejected on other grounds, as insufficiently independent.

<sup>73</sup> *Id.*, at ¶ 30. “The crimes occurred at roughly the same time, in the early morning with the same number of people, involved the same type of beer and convenience store, and utilized the same general plan – Defendant took beer from the cooler section and fled while another man held the door and issued a threat.”

<sup>74</sup> *Id.*, at ¶ 32.

<sup>75</sup> *State v. Lowther*, 2015 UT App. 180, ¶ 14, 356 P.3d 173, 179 (quoting *Imwinkelried*, 51 OHIO ST. L.J. 575, 596-597), *aff’d*, 2017 UT 34, 398 P.3d 1032, *supra*, note 54.

recently, in *State v. Lopez*,<sup>76</sup> the Utah Supreme Court said that prior alleged acts of gun pointing in a family were insufficiently similar for admission under the Doctrine.

The Supreme Court's use of "roughly similar" language, while also noting the importance of distinctive and detailed accusations, is confusing and risks the admission of dissimilar events being admitted.<sup>77</sup> Courts considering proposed 404(b) evidence pursuant to the Doctrine should err on the side of "similar, detailed, and distinctive"<sup>78</sup> facts. Rigorous similarity more closely hews to the Doctrine's foundations.

#### B. DETERMINING WHO IS A TYPICAL PERSON AND WHEN THEY HAVE SUFFERED AN UNUSUAL LOSS IS VERY DIFFICULT AND IS SUBJECT TO THE INFLUENCE OF BIAS

A large question left unanswered by the Court in *Verde* is how should trial courts determine whether a defendant has "suffered an unusual loss" which is "more frequently than the typical person endures such losses accidentally."<sup>79</sup> This is necessary for a determination of whether the moving party can eliminate random chance as the reason for the repetitive alleged incidents. On its face, such a determination may seem straightforward.<sup>80</sup> Yet, there is often a lack of needed and relevant empirical data to aid a judge in making this determination. Where empirical data is missing a trial judge may instead approach the issue of "unusual loss" based

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<sup>76</sup> *State v. Lopez*, 2018 UT 5, ¶¶ 57-59, \_\_\_ P.3d \_\_\_.

<sup>77</sup> *E.g.*, the prior acts alleged in *Rackham*, *supra* note 67, were dissimilar in that they involved touching different parts of the body in different situations.

<sup>78</sup> *Verde*, *supra*, note 3, ¶ 58.

<sup>79</sup> *Verde*, *supra*, note 3 ¶ 61.

<sup>80</sup> *See*, Imwinkelried, *supra*, note 34 at 588 and accompanying text and notes 49-51 at 454 and accompanying text. *See also*, Imwinkelried, *supra*, note 44 at 865-67.

upon his or her own personal life experience,<sup>81</sup> which possibly does not coincide with the day-to-day realities faced by criminal defendants.

For example, most people do not routinely carry burglary tools. But locksmiths do. If police repeatedly stop a locksmith, it seems likely resulting searches will find burglary tools more often than searches of a “typical person.” Frequent searches of the locksmith and finding of burglary tools should not lead one to conclude the locksmith is repeatedly engaging in illegal activity. Just because a series of events may look unlikely to one person does not mean that the events are objectively unlikely. Allowing a judge to determine “unusual loss” or “rare occurrences” *ad hoc* based upon her “knowledge of the ways of the world”<sup>82</sup> may lead to discrimination against racial minorities, the indigent, and the mentally ill.

To properly apply the Doctrine of Chances it is necessary to eliminate random chance. As Professor Imwinkelried explained, only then do prior events become relevant to whether the charged event has a guilty explanation.<sup>83</sup> He used the illustration of five coin flips, all yielding heads. This outcome can be explained by any one of the four possibilities: (1) random chance at work; (2) “the person flipping has a propensity to cheat, causing him to cheat on all five occasions; (3) although the person flipping has no propensity to cheat, on all five occasions the person made a situational choice to cheat,” or (4) the person flipping made some random flips but cheated on others.<sup>84</sup> Professor Imwinkelried explained:

[W]hat happens if statistical evidence of the disparity between the expected and actual values leads to a rejection of explanation (1) (entirely random chance)? If at this point, there is still no data justifying a preference among the remaining hypotheses, each of these probabilities must be reassigned. More

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<sup>81</sup> Imwinkelried, *supra*, notes 49-51, at 454 and accompanying text.

<sup>82</sup> Imwinkelried, *supra*, note 34 at 588.

<sup>83</sup> Imwinkelried, *supra*, note 49 at 451-454. This reasoning concerns not the *actus reus* but the *mens rea*.

<sup>84</sup> *Id.*

specifically, the probability of each remaining candidate explanation would have to be increased. If there are now only three remaining potential explanations and they are equally probable, then each should be assigned a probability of 33 1/3 %. Thus, by negatively eliminating the explanation that random chance accounts for the outcome of all four flips, the doctrine of chances evidence increases the probability of explanations (3) and (4), neither of which entails a propensity inference.<sup>85</sup>

Professor Imwinkelried thus argued that *only* by eliminating random chance do the remaining explanations, (2) through (4), become more likely. The Supreme Court in *Verde* gives no real guidance to trial courts as to how to do this.

Difficulty arises because low probability events occur and using a statistical probability approach cannot eliminate them. Thus, informing factfinders that an event was of an extremely high or low probability can lead to mistaken inferences. As stated, unlikely events or strings of apparently unlikely events still happen.<sup>86</sup> “When one contemplates all of the events that individually are unlikely and considers them all together, ‘it would be very unlikely for unlikely events not to occur.’”<sup>87</sup> Absent the everyday occurrence of low probability events, sports might likely disappear as entertainment and lotteries disappear as fundraisers. Using probability precepts does not change the event – it either happened or it did not, whatever our data or beliefs might be. When contemplating the likelihood of either past or future events, information is

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<sup>85</sup> *Id.*

<sup>86</sup> For example, journalist Ira Glass reported on a young woman, Jill Viles, who suffered muscular dystrophy and believed her genetic physical condition mirrored that of an Olympic athlete whose muscles appeared to “balloon.” Such a possibility seemed unlikely to her doctors. Dr. David Epstein estimated the odds of Ms. Viles having one lamin gene mutation as one in a million, the odds of another as one in at least a million, “And the odds of getting both together? There haven’t been enough human beings in the history of our species that anyone should ever get both.” That multiple doctors would fail to diagnose a condition that someone without medical training would correctly diagnose probably has a similarly low likelihood. Applying the Doctrine of Chances’s underlying assumption that extreme rarity equals eliminating random chance would incorrectly indicate Ms. Viles is either cured or never had the two lamin gene mutations together. Yet, she’s not cured and she has the two gene mutations. She suffered unusual combinations of genes and physician befuddlement and skepticism far more frequently than the typical person suffers such misfortune. This happened accidentally and due to random chance. Ira Glass, *Something Only I Can See*, THIS AMERICAN LIFE, No. 577, aired 1/15/16, transcript available at <http://www.thisamericanlife.org/radio-archives/episode/577/transcript>.

<sup>87</sup> Michael I. Meyerson and William Meyerson, *Significant Statistics: The Unwitting Policy Making of Mathematically Ignorant Judges*, 37 PEPP. L. REV. 771, 829 (2010). “Courts should be somewhat cautious about finding liability every time numbers vary from expected values.”

always missing and thus a risk of inaccuracy is always present.<sup>88</sup> It makes sense to use probability precepts when making predictions and decisions about the future— this brings rigor to the analysis of what is likely. Yet there are evolutionary and historical events that were so highly unlikely that those knowledgeable of “the ways of the world” might have believed the odds low enough as to have “eliminated” their possibilities.<sup>89</sup>

For trial courts this means that if an event transpired according to the normal and predictable human behavior and natural forces, probability may be helpful. On the other hand, if what happened was very unlikely, probability is at best irrelevant and perhaps even detrimental to the search for truth.

The *Verde* court tried to address this random chance problem by requiring a finding that a defendant suffered an accident or unusual loss “more frequently than the typical person endures such losses accidentally.”<sup>90</sup> Difficulties arise. First, what is a “typical person”? Second, how does considering a defendant’s life experience against a “typical person” standard adequately protect

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<sup>88</sup> Even with DNA evidence, courts do not equate high or low probabilities with having eliminated random chance. With DNA evidence, which limits itself to probability of exclusion, courts look also to other evidence because, for example, in a ninety-nine percent (99%) exclusion in a population of over one hundred thousand (100,000) men, that still means one thousand (1,000) who are not excluded, making it the “prosecutor’s fallacy” to conclude the defendant is ninety-nine percent (99%) likely to be guilty. Of course, in that situation, it’s the “defendant’s fallacy” to urge that all one thousand (1,000) men have the same likelihood of being the DNA donor, without examining other factors such as who might have been present in the area to leave DNA. Meyerson and Meyerson, *supra*, note 87 at 780-81. In a paternity context, as in *Cole v. Cole*, 328 S.E.2d 446 (N.C. App. 1985), *aff’d* 335 S.E. 2d 897 (N.C. 1985), the Meyersons suggested actual probability of DNA proving paternity would include a Bayesian analysis (i.e., dependant probability analysis: “what are the odds of this event, given these other events?”) that included other factors such as whether the purported father had sexual relations with the mother and with how many other men she had sex with and the timing of each sexual encounter. “Those facts will rarely be known by the fact finder with any degree of certainty, but instead will be conveyed by a wide range of incomplete, uncertain, and often disputed pieces of evidence.” Meyerson and Meyerson, *supra*, note 87 at 782-783, 785, 788. Courts evaluating proposed Doctrine of Chances evidence can expect to encounter similar sources of uncertainty.

<sup>89</sup> Google “probability of life evolving on earth,” and Richard Peacock, at <http://evolutionfaq.com/articles/probabililty-life>, estimates the probability of life having evolved on Earth as one in ten to the fortieth power. What were the popular odds for a successful American Revolution? What about a successful moon landing with safe return to Earth? On April 13, 1912, popularly accepted but unscientifically collected data had all but eliminated the chance of the *Titanic* sinking. Prior to the terroristic attacks of September 11, 2001, the odds of airliners destroying large New York buildings would have been estimated as vanishingly low.

<sup>90</sup> *Verde*, *supra*, note 3, ¶ 60.

the defendant's constitutional rights? Third, comparing a defendant in a criminal trial to a "typical person" may not eliminate random chance as the reason for repeated unlikely events.

In Utah the "typical person" is white,<sup>91</sup> lives in an urban area,<sup>92</sup> speaks English at home,<sup>93</sup> and graduated from high school.<sup>94</sup> One point three percent (1.3%) are Black or African American alone.<sup>95</sup> One point five percent (1.5%) are American Indian or Alaska Native alone.<sup>96</sup> Two point five percent (2.5%) are Asian alone.<sup>97</sup> One percent are Native Hawaiian or (Other) Pacific Islander alone.<sup>98</sup> Two point four percent (2.4%) are two or more races.<sup>99</sup> Thirteen point seven percent (13.7%) are Hispanic or Latino.<sup>100</sup> The median annual income in Utah is sixty thousand seven hundred and twenty-seven dollars (\$60,727.00) in 2015 dollars.<sup>101</sup> Only eleven percent (11%) of people in Utah live in poverty.<sup>102</sup> Only ten point three percent (10.3%) are over the age of sixty-five (65).<sup>103</sup> Only six point six percent (6.6%) of those under the age of sixty-five (65) are disabled.<sup>104</sup>

Utah courts do not encounter "typical people" as criminal defendants. In 2014, overall, getting arrested for any crime was an unlikely event.<sup>105</sup> For example, in Salt Lake County, only

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<sup>91</sup> <https://www.census.gov/quickfacts/table/PST045216/49,00>; Ninety-one point two percent (91.2%) of persons in Utah were white according to the July, 2015 census, but only seventy-nine percent (79%) were white alone, and not Hispanic or Latino. All figures reported from this website are for July 1, 2015.

<sup>92</sup> <http://www.ag.utah.gov/documents/UrbanvsRuralGraph.pdf>.

<sup>93</sup> <https://www.census.gov/quickfacts/table/PST045216/49,00>. Only fourteen point seven percent (14.7%) of persons in Utah speak a language other than English at home.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> 2014 Crime in Utah Report, Utah Department of Public Safety, Keith D. Squires, Commissioner, Utah Bureau of Criminal Identification, Alice Moffat, Bureau Chief, Updated 10/31/2016, <https://site.utah.gov/dps-criminal/wp-content/uploads/sites/15/2016/02/2014-Crime-in-Utah.pdf>.

forty-five point four (45.4) people per one thousand (1,000) were arrested; only one point three-two (1.32) per one thousand (1,000) were arrested in Morgan County.<sup>106</sup> If one considers an arrest tantamount to an accusation, any defendant on his or her first arrest has already been accused more frequently than the “typical person.”

Thus, generally asking the question of whether a defendant has been accused more frequently than the typical person is less meaningful because the answer will always be yes. Setting aside issues of guilt, innocence, mental health history, substance abuse history, criminal history, every criminal defendant is already in a statistical category unlike that of the “typical person.” No legitimate inference of guilt as to a charged event can be drawn.

*Verde* left unanswered the question of how trial courts should protect the constitutional rights of defendants, given the random chance problem. This article suggests that to provide the presumption of innocence, trial courts at a minimum must consider the “objective improbability”<sup>107</sup> of an event using established and verified data applicable to a defendant’s day-to-day realities.

Comparison depends on comparability. Unless each number reflects the same definitions and the same methods of measurement – unless each number is an apple and not something else – comparisons can be deceptive. Unless the numbers are comparable, the pattern apparently revealed through comparison may say more about the nature of the numbers than it does about the nature of the [issue being investigated].<sup>108</sup>

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<sup>106</sup> *Id.*, pp. 17-18.

<sup>107</sup> *Verde, supra*, note 3, ¶ 47.

<sup>108</sup> Joel Best, DAMN LIES AND STATISTICS: UNTANGLING NUMBERS FROM THE MEDIA, POLITICIANS, AND ACTIVISTS, (U. California Press, Updated Ed. 2012) at 127. *See also, Daily Chart, “Comparing apples with oranges,” THE ECONOMIST*, 4/1/14 (“Nothing rankles data mavens more than analyzing two things that ought not be compared. Cricket and baseball. Basho and Proust. Christmas and April Fools’ Day”).

Where racial minorities make up a very small portion of the population and yet are more apt to be arrested,<sup>109</sup> it may be wrong to subject minority defendants to *Verde*'s "typical person" standard. For example, although black people or African Americans use illegal drugs at rates comparable to whites and distribute drugs at lower rates than whites, police arrest them at twice the rate of whites.<sup>110</sup> In Utah and in the rest of the United States, there is historic evidence that minorities "do not necessarily commit more crimes but are more apt to be arrested, incarcerated,<sup>111</sup> and serve more time than whites."<sup>112</sup> While the data is most developed for drug crimes, minorities are more apt to be arrested for all crimes.<sup>113</sup> If innocent black people are seven (7) times "more likely to be convicted of murder than innocent white people"<sup>114</sup> and are exonerated of all crimes at higher rates, the logical conclusion is that they are more frequently

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<sup>109</sup> There may be class-based as well as racial distinctions made in arrest trends. Owing to predictive, statistics-based policing, residents of some neighborhoods may experience more arrests than residents of other neighborhoods because of increased police presence. *See*, John Eligon and Timothy Williams, *Police Program Aims to Pinpoint Those Most Likely to Commit Crimes*, THE NEW YORK TIMES 9/24/15. Residents of lower income neighborhoods are not necessarily more apt to commit serious crimes, however. *See also generally*, Matt Taibbi, THE DIVIDE: AMERICAN INJUSTICE IN THE AGE OF THE WEALTH GAP, Spiegel & Grau, 2014.

<sup>110</sup> Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, SOCIAL MOBILITY MEMOS, THE BROOKINGS INSTITUTION, Sept. 30, 2014, <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/>; *See also*, Brad Heath, *Racial gap in U.S. arrest rates: 'Staggering disparity'*, USA TODAY 11/18/14; Patrick A. Langan, Ph.D. Senior Statistician, Bureau of Justice Statistics, U.S. Department of Justice, *The Racial Disparity in U.S. Drug Arrests*, 10/1/95; REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM, August, 2013, pp. 3-6 (<http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf>) (analyzing criminal statistics, surveys, and academic articles, discussing how and why "higher crime rates cannot fully account for the racial disparity in arrest rates.").

<sup>111</sup> *See also generally*, Ashley Nellis, Ph.D. *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT, 6/14/16, <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparities-in-state-prisons/>. Alfred Blumstein cautioned in 1993 that if there is no discrimination after arrest, i.e., in charging, legal, and sentencing decisions, then then "one would expect the fraction of black arrestees for each crime type to be reflected in a similar racial mix in prison for that crime type." Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 746 (1993).

<sup>112</sup> Marianne Funk, *The Color of Justice in Utah: Statistics Point to Racial Bias*, THE DESERET NEWS, 2/25/93.

<sup>113</sup> *See*, Heath, *supra*, note 110.

<sup>114</sup> Scott Martelle, *Opinion: When wrongful convictions affect black people more often than white people, can we call it a justice system?*, L.A. TIMES, March 7, 2017, *quoting* National Registry of Exonerations, Samuel R. Gross, Sen. Editor, Maurice Possley, Sen. Researcher, Klara Stevens, Research Fellow, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES, March 7, 2017, [http://www.law.umich.edu/special/exoneration/Documents/Race\\_and\\_Wrongful\\_Convictions.pdf](http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf) (reporting racial disparity in exoneration in all crimes, including murder, sexual assault and drug crimes).

wrongfully accused.<sup>115</sup> Trial courts applying the Doctrine of Chances to racial minority defendants will need to find a method to discount the greater frequency of accusations experienced by minorities, as opposed to wrongfully comparing the minority defendant to the “typical person” who is white.

Additionally, there are defendants whose life experiences or circumstances simply make them atypical and thus poorly suited to a global “typical person” standard. *Verde* concluded there is a “low baseline risk that a man would take a horse by mistake.”<sup>116</sup> To modernize this example, perhaps a court would consider it to be a low risk that a man would possess a stolen computer by mistake. However, pawn shop clerks unknowingly accept stolen property often enough that it may make sense to compare the defendant clerk to other local pawn shop clerks when considering whether the pawn shop clerk has suffered the rare misfortune of innocently possessing stolen property more often than does the typical person.

Similarly, considering “the low baseline risk . . . that an innocent person would be falsely accused of sexual assault,”<sup>117</sup> should require statistically valid, area-based, data concerning the same sort of sexual assault. Considering “additional examples from actual cases, that a child would die in her sleep,”<sup>118</sup> may require, for example, considering statistics for children in families carrying the gene for Congenital Central Hypoventilation Syndrome or like disorders, as opposed to “the typical person.”

Moreover, if defendants have mental health or substance abuse issues, it may make sense for trial courts to limit their comparison to other persons with similar mental health or substance

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<sup>115</sup> *Id.*

<sup>116</sup> *Verde*, *supra* note 3, ¶ 49.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

abuse issues. Persons addicted to drugs or suffering mental illness may be more apt to find themselves in situations not entirely of their own making where they are repeatedly preyed upon by others.<sup>119</sup> Once substance abuse or mental illness becomes a factor in a case, the typical person's experience may not be applicable to a relevant comparison for Doctrine of Chances purposes.

It is important here for trial courts to require precision and compare one defendant's experience to the experience of the "typical person" in the defendant's peer population and assess whether any repeating events are, in context, objectively improbable.

As stated previously, even if a trial court solves the typical person issue, such does not necessarily eliminate random chance as the explanation for the series of events. The *Verde* Court appears to assume a defendant's encountering of repeated unlikely events and thus not being "typical," equates with the elimination of random chance. This assumption, that extreme rarity eliminates random chance as the explanation may be wrong even if factfinders are able to restrict "typical person" data to that relating to the defendant's actual peer population.

Additionally, while statisticians rightly observe and apply the accepted methodology of their disciplines, courts "must also recognize that the values of those disciplines often differ markedly from the legal system."<sup>120</sup> Statisticians' methods for addressing rarity can look as if they eliminate random chance. Statisticians viewing a sample of data expect to find some variability as to results.<sup>121</sup> Some divergence from normal is to be expected, even standard.<sup>122</sup>

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<sup>119</sup> *E.g.*, Stephen Dark, *No Safety Net*, SALT LAKE CITY WEEKLY, 11/9/16 (describing experiences of mentally ill individuals in Salt Lake City getting evicted from public housing due to their inability to follow rules such as keeping drug users and criminals out of their residences, and further dangers faced once they become homeless).

<sup>120</sup> Meyerson and Meyerson, *supra*, note 87 at 776.

<sup>121</sup> *Id.* at 817-822.

<sup>122</sup> *Id.*

Statisticians can calculate “standard deviations” to measure how much each element of every sample deviates from the average. Statisticians view extreme variations as to be “non-standard.”<sup>123</sup> In a “normal distribution” of data, that which is commonly represented in a bell curve, the probability is approximately 95.5% “that a randomly selected result will fall within two standard deviations from the mean” average of the data.<sup>124</sup> If some observed fact falls more than two standard deviations from mean average, statisticians suspect some reason other than random chance has caused the deviation.<sup>125</sup> The origin of this practice was a matter of convenience and intuition, not the result of any rigorous mathematical analysis.<sup>126</sup> In other words, for their purposes, statisticians may view data outside two standard deviations as close enough to eliminating random chance that they may not need to consider it.

By contrast, trial courts are bound by the constitutional requirements of the presumption of innocence and proof beyond a reasonable doubt. A court’s priorities and values must differ from the priorities and values of statisticians. Trial courts need to account for the possibility of a defendant’s experience diverging more than “two standard deviations” from the typical person’s experience.

Statisticians expect that many conclusions, even those based on empirical data, will inevitably lead to errors.<sup>127</sup> For example, a medical diagnostic test, presumably based on rigorous objective observation and numerous prior tests, will still give some people falsely negative

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 818.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 823-824. The Meyersons wrote:

The founder of modern statistics, R.A. Fisher, wrote, almost cavalierly, “it is convenient to draw the line at about the level at which we can say: ‘Either there is something in the treatment, or a coincidence has occurred such as does not occur more than once in twenty trials.’” Fisher actually acknowledged that choice was a subjective choice, not mandated by either science or math. Nonetheless, Fisher’s choice quickly became the gold standard for statisticians. *Id.* at 824, internal footnoting omitted.

<sup>127</sup> *Id.* at 810-811.

diagnoses and others falsely positive diagnoses.<sup>128</sup> “Raising the cutoff point will result in more false negatives (more afflicted patients declared healthy) but fewer false positives (fewer healthy patients deemed afflicted).”<sup>129</sup> Rather than strictly following, say two standard deviations, as above, deliverers of medical services make value judgements as to which sort of error leads to more severe consequences.<sup>130</sup> For diseases with grave consequences, necessitating immediate treatment, fewer false negatives are desirable, leading designers of the diagnostic test to alter perimeters of what they consider to be positive or negative.<sup>131</sup>

The Constitution has made a value judgement and has set parameters to weigh possible errors by mandating that trial courts favor erring on the side of innocence.<sup>132</sup> The Constitution’s drafters believed that the faulty guilty verdict carries more grave consequences than the faulty acquittal.<sup>133</sup> Thus, the Constitution requires proof beyond a reasonable doubt.<sup>134</sup> The reason for this is that the accused has a far greater stake in the outcome than does the government.<sup>135</sup> “[I]t is the courts’ task to make the normative determination of the harm that would be caused by both types of erroneous decisions, and to adjust the legal standard accordingly.”<sup>136</sup> The United States Supreme Court has therefore rejected the premise that an extremely low probability of an innocent explanation equates to guilt.<sup>137</sup> Other due process and evidence protections flow from

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<sup>128</sup> *Id.* at 811.

<sup>129</sup> *Id.* at 811.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 811-812.

<sup>133</sup> *Id.* at 812. The Meyersons noted “this principle predates the Constitution,” referencing 4 William Blackstone, Commentaries 358.

<sup>134</sup> *Id.* at 812, citing *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

<sup>135</sup> *Id.* at 812-813, 815.

<sup>136</sup> *Id.*, at 815, citing *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958).

<sup>137</sup> *E.g.*, *Victor v. Nebraska*, 511 U.S. 1, 21-22 (1994) (emphasizing that “strong probabilities” of guilt “must be so strong as to exclude any reasonable doubt”).

the Constitution's value judgement establishing the presumption of innocence.<sup>138</sup> If being charged with a crime is "not evidence of guilt,"<sup>139</sup> then it does not logically follow that being charged with a crime multiple times is evidence of guilt.

Trial courts should insist on relevant and applicable empirical data or evidence and that evidence admitted by the Doctrine of Chances cannot otherwise be explained by race, economic class, language, mental illness, substance abuse, or other circumstances particular to the defendant. Deferring to a factfinder's "intuitive belief"<sup>140</sup> or "knowledge of 'the ways of the world,'"<sup>141</sup> may simply disguise race, class-based, or other sorts of subjective propensity assumptions. It is important for trial courts to carefully analyze whether repeated events are, in context, objectively improbable for every defendant.

### C. PROVING GENERALLY THAT ONE OR SOME OF A SET OF EVENTS IS MORE LIKELY TRUE DOES NOT MAKE THE CHARGED EVENT MORE LIKELY TO BE TRUE

Assuming that the prosecution proves that the prior events really are similar and that the string of events is objectively improbable, the Doctrine of Chances evidence may still be irrelevant.

What is the logical inference if the prosecution can establish the "objective improbability of the same rare misfortune befalling one individual over and over"<sup>142</sup>? This article suggests no

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<sup>138</sup> *E.g.*, "Remember, the fact that a defendant is charged with a crime is not evidence of guilt." CR104 Presumption of Innocence, Model Utah Jury Instructions, Second Edition; *See also*, Utah Rules of Evidence, rules 608(b) and 609(a)(2) (prohibiting evidence of prior alleged instances of dishonesty but allowing convictions where the elements include a dishonest act or false statement).

<sup>139</sup> *Id.* Where the constitutional presumption of innocence arguably sets the evidentiary value of an accusation at zero (0), multiplying any number of accusations by zero (0) will also equal zero (0).

<sup>140</sup> Imwinkelried, *supra*, note 49.

<sup>141</sup> Imwinkelried, *supra*, note 49, and accompanying text.

<sup>142</sup> *Verde*, *supra*, note 3 at ¶ 47.

definitive logical inference as to the charged event can be drawn. Professor Imwinkelried recommended limiting Doctrine of Chances conclusions to that “one or some of the incidents were not accidents,” because there is “nothing about the internal logic of the doctrine which singles out the charged incident as the product of actus reus or mens rea.”<sup>143</sup> Probability supports no inference about any one specific accusation.<sup>144</sup>

The Supreme Court in *Verde* agreed with Professor Imwinkelried that prior similar “tragedies or accusations” lead to a conclusion that “one or some of the occurrences were not accidents or false accusations,”<sup>145</sup> but then reasoned further:

Under this pattern, prior misconduct evidence may tend to prove that the defendant more likely played a role in the events at issue than that the events occurred coincidentally. And because the evidence tends to prove a relevant fact without relying on inferences from the defendant’s character, the evidence is potentially admissible.<sup>146</sup>

The Court determined that because it is likely a defendant played a role in “one or some” events, the defendant thus “more likely played a role in” all “events at issue,” and therefore the defendant “more likely played a role” in the charged event.<sup>147</sup> This approach deviates from the precepts of probability and Professor Imwinkelried’s recommendation.

The probability of all events having guilty explanations or all events having innocent explanations will always be lower than the probability of any one alleged event. Considering more events does not make it more likely that the defendant “played a role” in all of the events at

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<sup>143</sup> “Rather, the final inference is merely that one or some of the incidents were not accidents.” Imwinkelried, *supra*, note 49, at 437, 456-57, 461.

<sup>144</sup> See, e.g., *supra*, note 52 and accompanying text.

<sup>145</sup> *Verde*, *supra*, note 3, ¶ 50.

<sup>146</sup> *Verde*, *supra*, note 3, ¶ 51.

<sup>147</sup> Subsequently, in *State v. Lowther*, *supra*, note 54 at ¶14, the State referred to *Verde*’s Doctrine of Chances to “show that it is objectively improbable that [the alleged victim] consented to sexual intercourse where three other witnesses have alleged that [the defendant] raped them in a manner similar to the way in which he allegedly raped [the victim.]” The *Lowther* Court agreed that “[t]he doctrine of chances, if its requirements are properly met, is one tool the State may use to prove that [the alleged victim] did not consent to sex with [the defendant].” *Id.*, at ¶25.

issue. No matter how many allegations are added, the probability of the charged event does not change – that event becomes neither more nor less likely.<sup>148</sup>

Obviously, the problem for trial courts applying the Doctrine of Chances is that in the typical criminal trial, the factfinders’ task is not to determine whether, overall, one or some alleged events happened but whether the charged event happened. Evidence is only relevant “if it has any tendency to make a fact more or less probable than it would be without the evidence.”<sup>149</sup> The higher likelihood of “one or some” events gives no information as to *which* one or some events are more likely.<sup>150</sup> Where past allegations do not increase the probability that the charged event is true, they are thus irrelevant.

## V. Proper Uses for the Doctrine of Chances

Despite its potential for misuse, the Doctrine of Chances may still be helpful. In *State v. Vuley*, the Vermont Supreme Court set forth a narrow circumstance in which the Doctrine does not rest upon improper assumptions of either probability or propensity.<sup>151</sup>

The Doctrine should only apply to rebut claims of accident, or, in situations where a defendant ought to have learned from his prior admitted actions that were thereafter repeated.

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<sup>148</sup> For example, in *State v. Lowther*, the Utah Supreme Court considered that if the evidence met the four foundational requirements, the prior allegations were “one tool the State may use to prove that K.S. did not consent to sex with Mr. Lowther.” *Lowther, supra*, note 53 at ¶ 25. However, the prior allegations only made it more likely that one or some of the alleged rapes happened and one or some of the alleged rapes did not happen. The prior allegations did not make it any more or less likely that any one specific act of nonconsensual sex occurred. The prior allegations of nonconsensual sex did not make it any more or less likely that Mr. Lowther engaged in nonconsensual sex with K.S. Probability does not support using Doctrine of Chances evidence to prove that K.S. did not consent to sex. *See Spiegel, et al., supra*, notes 31 and 52 and accompanying text. Probability supports only an inference that one or some allegations are most likely true and one or some are most likely false.

<sup>149</sup> Utah Rule of Evidence 401(a).

<sup>150</sup> Imwinkelried, *supra*, notes 48-51 and accompanying text.

<sup>151</sup> *State v. Vuley*, 70 A.3d 940, 949 (Vt. 2013).

The Vermont Supreme Court reasoned “[l]ightening doesn’t strike twice – unless there’s a reason.”<sup>152</sup> *Vuley* employed the Doctrine of Chances as a problem of independent probability and agreed with Professor Imwinkelried that flipping a coin and getting heads ten (10) times has some tendency to indicate something other than random chance is at work.<sup>153</sup> “Our certainty that the collection of events was not random will always be greater than our certainty that any individual event was not random.”<sup>154</sup>

The *Vuley* Court then found a narrow exception to the general inadmissibility of Doctrine of Chances evidence.

While the general prohibition against propensity-based evidence might, at first blush, suggest that the doctrine of chances cannot be used, there is a valid third and altogether different inference that goes under the header of the doctrine of chances: where someone has *already* committed an unusual act with bad consequences, it is more likely that *subsequent* acts of that type were not accidental. THIS INFERENCE IS based on the understanding THAT PEOPLE learn from their mistakes. If someone has accidentally done something with terrible consequences, then that person becomes less likely to do that same thing accidentally a second time. The person is likely to have a heightened awareness of the consequences and therefore less likely to be careless. For example, a man who accidentally shot his first wife will be less likely than an average person to accidentally shoot his second wife. As a result, one can infer that a subsequent shooting – especially one under distinctly similar circumstances – is less likely to be inadvertent and therefore more likely to be intentional. We might call this the psychological doctrine of chances. . . Note that the psychological doctrine of chances provides no inference that the first incident was not an accident.<sup>155</sup>

The Vermont court’s formulation of this “psychological doctrine of chances” which severely limits the applicability of the Doctrine relies on no unspoken propensity-based

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<sup>152</sup>*Id.* Actually, lightning does strike twice, both randomly and with reason. Dan Robinson, *Lightening Myths: Lightning never strikes the same place twice*, STORM HIGHWAY, [http://stormhighway.com/lightening\\_never\\_strikes\\_the\\_same\\_place\\_twice\\_myth.php](http://stormhighway.com/lightening_never_strikes_the_same_place_twice_myth.php). “Lightening can strike *any* location. . . It may take as little as less than ten minutes within a single thunderstorm, or longer than a million years – but lightning will eventually strike the same spot again and again. A strike to one location does nothing to change the electrical activity in the storm above, which will produce another strike as soon as it ‘recharges.’ The previously hit location is then just as fair game for the next discharge as any other spot.”

<sup>153</sup>*Id.*; see also, Imwinkelried, *supra*, notes 84 and 85 and accompanying text.

<sup>154</sup> *Vuley*, *supra*, note 151. Probability supports this statement. See *supra*, notes 50-53 and accompanying text.

<sup>155</sup> *Id.*, at 952-53, italics and allcaps in original.

assumptions. “Essentially, this reasoning treats past incidents not as bad acts attributable to the defendants, but as events that would affect defendant’s knowledge and mental state.”<sup>156</sup> The Vermont Court in *Vuley* returns the Doctrine to its roots<sup>157</sup> as a potentially useful way to examine a defendant’s intent or knowledge.

## VI. Conclusion

There are plenty of well-established reasons to admit evidence of prior alleged crimes, wrongs, or acts, without resorting to elusive or irrelevant notions of probability. Equating rarity to eliminating random chance simply transforms the appearance of certainty into claimed relevance. Stating that a possibly repeated rare act is relevant because “the fortuitous coincidence becomes too abnormal, bizarre, implausible, unusual or objectively improbable to be believed,”<sup>158</sup> substitutes appearance over substance and expedience over accuracy while at the same time claiming to be dispassionately objective. Factfinders, whether judges or juries, base decisions on evidence and logic but also upon personal experience which may allow bias, emotion, unnecessary and faulty intuition, and other lesser-understood subjective grounds to come into play under the label of “objective facts.”

As long as we agree that it is “far worse to convict an innocent [person] than to let a guilty [person] go free,”<sup>159</sup> narrowing the applicability of the Doctrine of Chances outweighs any compelling public interests that may warrant its use.

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<sup>156</sup> *Id.* at 953.

<sup>157</sup> Wigmore, *supra*, notes 29-30 and accompanying text.

<sup>158</sup> *Verde, supra*, note 3, ¶ 49, quoting 8 Edward J. Imwinkelried, UNCHARGED MISCONDUCTED EVIDENCE § 5:05 (1984).

<sup>159</sup> *In re Winship*, 397 U.S. 358, 372, 90 S.Ct. 1068, 1077, 25 L.Ed. 2d 368 (1970) (Harlan, J. concurring).

Trial courts should limit Doctrine of Chances evidence in criminal cases<sup>160</sup> to instances where, as in *Vuley*, a defendant should necessarily have learned from established admitted prior conduct.

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<sup>160</sup> There may be civil cases where causation of “one or some” events is the relevant question for the factfinder. These might include, for example, civil rights cases or large-scale torts.

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## CRIMINAL MINDS: THE NEED TO REFINE THE APPLICATION OF THE DOCTRINE OF OBJECTIVE CHANCES AS A JUSTIFICATION FOR INTRODUCING UNCHARGED MISCONDUCT EVIDENCE TO PROVE INTENT

*[T]here is nothing either good or bad but thinking makes it so.*

--William Shakespeare<sup>1</sup>

### I. INTRODUCTION

Dean Wigmore once wrote that the hearsay doctrine is the “most characteristic rule of the Anglo-American law of Evidence.”<sup>2</sup> Today, it can be said that the character evidence doctrine is the most characteristic rule of American evidence law. At early common law, a proponent could not introduce evidence of an accused's uncharged crime in order to show the accused's bad character and, in turn, treat that character as proof that the accused committed the charged crime.<sup>3</sup> Modernly, most legal systems in the common law world have significantly relaxed that prohibition.<sup>4</sup> However, with few exceptions,<sup>5</sup> the evidentiary codes in \*852 the United States firmly maintain the prohibition.<sup>6</sup> For example, Federal Rule of Evidence 404(b)(1) provides: “Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.”<sup>7</sup> Thus, at an armed robbery trial, the prosecution may not introduce evidence of a prior, uncharged robbery by the accused simply to show that the accused is a robber and hence more likely to have perpetrated the charged robbery.

However, the wording of Rule 404(b)(1) should not mislead the reader into believing that the prosecution may never introduce evidence of an accused's uncharged offenses. Quite the contrary is true. Another subsection of the very same rule reads: “This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”<sup>8</sup> This provision generates more appellate litigation and published opinions than any other section in the Rules.<sup>9</sup> Rule 404(b)(2) permits the prosecution to introduce evidence of an accused's uncharged misconduct when the evidence is logically relevant on a non-character theory.<sup>10</sup> Prosecutors frequently offer uncharged misconduct under Rule 404(b)(2) because they appreciate that its introduction can have a \*853 devastating impact on the defense.<sup>11</sup> Suppose, for example, that the accused is charged with an armed robbery committed on March 1. When the perpetrator fled the scene, he dropped a pistol with a certain serial number. The prosecutor has evidence that on February 1,

the accused stole that very pistol from a gun store. At the armed robbery trial, Rule 404(b)(2) would enable the prosecutor to introduce testimony about the February 1 theft for the purpose of identifying the accused as the perpetrator of the March 1 charged offense. In this situation, the prosecutor is not arguing simplistically that the earlier, uncharged theft shows the accused is a criminal and, therefore, more likely to have committed the charged robbery; rather, the prosecutor is relying on the non-character theory that by virtue of the prior theft, the accused gained possession of a unique, one-of-a-kind instrumentality found at the scene of the charged robbery. It is true that here the evidence has dual relevance: It is probative on a forbidden character theory as well as a legitimate non-character theory. However, in most cases of dual relevance, the judge admits the evidence and gives the jury a limiting instruction under Rule 105.<sup>12</sup> The instruction directs the jury that although they may not use the evidence to infer the accused's bad character, they may consider the evidence for the limited purpose of deciding whether the accused was the person who wielded the pistol during the charged March 1 robbery.

As the preceding hypothetical illustrates, prosecutors sometimes introduce uncharged misconduct to prove the accused's identity as the perpetrator of the charged offense. However, as the wording of Rule 404(b)(2) indicates, prosecutors may offer uncharged misconduct evidence to establish other elements of the charged crime such as the mens rea, the requisite "intent." As a matter of history, offering such evidence to prove mens rea elements was "[t]he earliest widely recognized use of uncharged misconduct evidence."<sup>13</sup> Today, the introduction of uncharged misconduct to prove intent is the most common use of Rule 404(b) evidence.<sup>14</sup> It is understandable why prosecutors resort to this use of uncharged misconduct so frequently. In \*854 many cases, prosecutors can rely on physical evidence or eyewitness testimony to establish both the occurrence of a crime and the accused's identity as the perpetrator. For example, the victim or a percipient witness may provide direct evidence of the accused's identity. The proof of the mens rea often proves to be the most difficult challenge for the prosecutor,<sup>15</sup> especially in prosecutions for white-collar crimes.<sup>16</sup> Unless the accused has made a confession directly admitting mens rea, the prosecution must almost always rely on circumstantial evidence.<sup>17</sup>

The courts appreciate how difficult it can be for a prosecutor to establish the accused's criminal intent, and they consequently are generally rather liberal in permitting the prosecution to introduce uncharged misconduct evidence for that purpose.<sup>18</sup> Most courts take a lenient attitude toward the admission of such evidence to prove intent.<sup>19</sup> Given the right circumstances, the prosecution may introduce uncharged misconduct to prove the accused's identity as the perpetrator, the accused's formation of a plan to commit the charged and uncharged crimes, or the accused's mens rea;<sup>20</sup> and, the introduction of the evidence for any of these purposes may necessitate a showing of a degree of similarity between the charged and uncharged crimes. The courts routinely assert that the lowest degree of similarity is required when the prosecution offers the evidence to prove intent.<sup>21</sup>

In the final analysis, in many cases in which the courts accept "similar" uncharged misconduct evidence under Rule 404(b) to show intent, they rely-- at least implicitly--on Dean Wigmore's famous doctrine of objective chances; on the facts, there is no other applicable non-character theory. Wigmore stated the doctrine of chances in his monumental evidence treatise:

**\*855** The argument here is ... from the point of view of the doctrine of chances,--the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all .... [T]he mind applies this rough and instinctive process of reasoning, namely, that an unusual and abnormal element might perhaps be present in one instance, but the oftener similar instances occur with similar results, the less likely is the abnormal element likely to be the true explanation of them.

Thus, if A while hunting with B hears the bullet from B's gun whistling past his head, he is willing to accept B's bad aim or B's accidental tripping as a conceivable explanation; but if shortly afterwards the same thing happens again, and if on the third

occasion A receives B's bullet in his body, the ... inference (*i.e.* as a probability, perhaps not a certainty) is that B shot at A deliberately; ... the chances of an inadvertent shooting on three successive similar occasions are extremely small ....<sup>22</sup> Ian Fleming captured the same notion in a classic line from his James Bond novel, *Goldfinger*: "Once is happenstance. Twice is coincidence. The third time it's enemy action."<sup>23</sup>

The conventional wisdom is that the admission of uncharged misconduct to prove intent on this theory is a legitimate non-character theory of logical relevance. As previously stated, Rule 404(b) forbids the prosecution from introducing testimony about an accused's uncharged misconduct to show the accused's personal, subjective<sup>24</sup> disposition or propensity for illegal or immoral conduct.<sup>25</sup> In theory, the doctrine of chances has nothing to do with the accused's character.<sup>26</sup> Instead, to apply the doctrine, the trier of fact focuses on the objective improbability of so many accidental, inadvertent occurrences.<sup>27</sup> To be sure, innocent persons sometimes find themselves enmeshed in suspicious circumstances; but common sense indicates that it is implausible that such involvement will occur repeatedly.

Although the courts now accept the doctrine of chances as an alternative, non-character theory of logical relevance, reliance on the doctrine poses significant probative dangers. As previously stated, \*856 uncharged misconduct evidence almost always possesses dual relevance; even when it is logically relevant on a non-character theory, the evidence also shows the accused's bad propensity and creates the risk that the trier will misuse the evidence for the verboten character purpose.<sup>28</sup> The line between proper non-character reasoning and improper character reasoning is a fine one.<sup>29</sup> It can be a very thin distinction for the lay jurors to draw during deliberations.<sup>30</sup> Again, to trigger the doctrine, the prosecutor must demonstrate that the charged and uncharged crimes are similar.<sup>31</sup> The very similarity of the crimes can sorely tempt the jury to succumb to the character-reasoning syndrome.<sup>32</sup> It is axiomatic that the jurors may not reason that the other act shows the accused's bad character and that "if he did it once, he did it again." However, there is an acute risk that the line between that forbidden theory and the doctrine of chances will blur<sup>33</sup> during deliberations, when the jury has to assess the similarity between the charged and uncharged acts. If the judge decides to admit uncharged misconduct on a doctrine of chances theory, it is his or her responsibility to ensure that the theory does not function as a Potemkin, virtually inviting the jury to engage in forbidden character reasoning.<sup>34</sup>

The thesis of this Article is that in many cases, the courts have shirked that responsibility. The next Part addresses the threshold question of whether the character prohibition has any application when the prosecution offers uncharged misconduct evidence to show mens rea.<sup>35</sup> Although some have suggested that the answer is no, Part II concludes that the prohibition applies with full force whether the evidence is offered to show mens rea or physical conduct.<sup>36</sup> Part III is largely descriptive, reviewing the doctrine of chances. The Part lists the requirements for invoking the doctrine and explains why the courts have concluded that the doctrine is a legitimate, non-character theory.<sup>37</sup>

\*857 The fourth and final Part is evaluative. The initial Subpart surveys the current judicial administration of the character evidence prohibition in cases in which the prosecution must turn to the doctrine of chances to justify introducing uncharged misconduct evidence to prove intent.<sup>38</sup> It demonstrates that in a large number of cases in which the courts admit uncharged misconduct to establish intent and the prosecution's only conceivable non-character theory is the doctrine of chances, the court's analysis is conclusory in the extreme.<sup>39</sup> Rather than invoking the doctrine and inquiring whether the prosecution has satisfied the doctrine's requirements, the courts advance the broad generalization that similar misdeeds are admissible to prove intent.<sup>40</sup> Even in the cases in which the doctrine's technical requirements are satisfied, many courts do little to ensure that the jury focuses on the objective improbability of multiple, similar inadvertent acts rather than engaging in forbidden character reasoning.<sup>41</sup> In particular, the appellate courts have not mandated that trial judges read the jury limiting instructions specifically tailored to the doctrine of chances.<sup>42</sup>

The next Subpart proposes reforming the manner in which the courts apply the doctrine. Under this proposal, when the prosecution invokes the doctrine to rationalize the admission of uncharged misconduct evidence to prove intent, the judge would have to (1) explicitly determine that the evidence satisfies the doctrine's requirements, and (2) administer limiting instructions specially tailored to the doctrine.<sup>43</sup> If the prosecution's foundation does not satisfy the doctrine's requirements, the judge should certainly not rely on the doctrine as the non-character justification for admitting the evidence.<sup>44</sup> In any event, the distinction between verboten character reasoning and legitimate use of the doctrine can be so thin that the trial judge ought to give the jury a limiting instruction sharply differentiating between character reasoning and the use of the evidence according to the doctrine. As we have seen, in criminal practice, Rule 404(b) is the most frequently litigated evidentiary issue; and even more to the point, the most common use of Rule 404(b) evidence is to prove intent. Given those realities, the lax practices currently followed in many, if not most, jurisdictions, are intolerable.

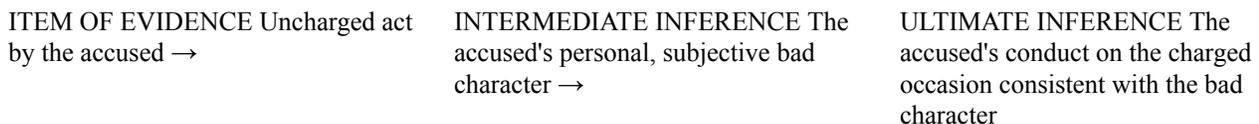
**\*858 II. THE THRESHOLD QUESTION: DOES THE CHARACTER EVIDENCE PROHIBITION APPLY WHEN THE PROSECUTION OFFERS UNCHARGED MISCONDUCT EVIDENCE TO PROVE THE ACCUSED'S MENTAL STATE OF MIND RATHER THAN PHYSICAL CONDUCT?**

***A. The Probative Dangers That Account for the Character Prohibition***

Rule 404(b)(1) codifies an aspect of the character evidence prohibition. By its terms, the rule forbids the prosecution from introducing uncharged misconduct evidence “to [prove] that on a particular occasion the person acted in accordance with” a character or trait for unlawful or immoral conduct.<sup>45</sup> When the federal drafters prepared the original Rule 404, they used section 1101 from the California Evidence Code as a model.<sup>46</sup> The wording of section 1101(b) is strikingly similar to that of Rule 404(b). There are slight linguistic differences, but the thrust of the two statutes is essentially identical. While Rule 404(b) refers to “act[ion]” in accordance with the character or trait, section 1101 uses the expression, “conduct.”<sup>47</sup> A narrow reading of the statutory language might support the contention that the prohibition comes into play only when the prosecution offers the uncharged misconduct to show the accused's physical conduct, not his or her mental intention. Indeed, in one case the California Supreme Court stressed the legislature's choice of the word, “conduct.”<sup>48</sup> Seizing on that word choice, the court suggested that the prohibition was inapplicable because “[t]he prosecutor [had] offered the evidence to prove defendant's state of mind ... rather than defendant's conduct on any particular occasion.”<sup>49</sup>

That suggestion is unsound. Figure 1, below, depicts the character evidence prohibition. As we shall now see, the policy rationale for the character evidence prohibition is that a character rationale poses a combination of two significant dangers; and the use of uncharged misconduct to prove an accused's intent raises both of those dangers.

**\*859 FIGURE 1**



A character theory of logical relevance involves two inferential steps, and each inference poses a significant probative danger. The first step is the inference from the item of evidence to the intermediate inference of the accused's personal, subjective bad character.<sup>50</sup> This inference poses the danger that the jury will convict the accused on an improper basis, namely, his or her criminal past. In order to decide whether to draw this inference, the jury must consciously focus on the question of whether the accused is the type of person who would commit a crime. If the jury is forced to do so at a conscious level, there is a substantial risk that, at least at a subconscious level, the jury will be repulsed by the accused's criminal past.<sup>51</sup> The Eighth Amendment cruel and unusual punishment provision bars criminalizing a person's status.<sup>52</sup> If the jury were to convict due to the accused's

past, not because of proof beyond a reasonable doubt of the charged offense, the conviction would not only be on an improper basis; the conviction would also offend a policy of constitutional dimension.

The second step in Figure 1 is the inference from the accused's bad character to the conclusion that on the occasion of the charged offense, the accused acted "in character" and perpetrated the charged offense (similar to the charged crime).<sup>53</sup> This step creates the danger that the jury will overvalue the evidence.<sup>54</sup> Most of the available psychological research points to the conclusion that the general construct of a person's character is a weak predictor of the person's conduct on a specific occasion.<sup>55</sup> In particular, it is difficult to find any published research that would support drawing an inference as to the person's character from a single other instance of the person's conduct.<sup>56</sup>

***\*860 B. The Presence of Those Probative Dangers When the Prosecution Offers Uncharged Misconduct Evidence to Prove Intent***

This use of uncharged misconduct undeniably poses the first probative danger. Evidence of an accused's other misconduct is potentially prejudicial because the jury may perceive the conduct as immoral<sup>57</sup> and then be tempted to punish the accused for that misconduct--not because the accused is guilty of the charged crime. For the most part, it is the accused's wrongful intent that gives the conduct its perceived immoral quality. As Shakespeare observed, "[T]here is nothing either good or bad but thinking makes it so."<sup>58</sup> As one article states:

When a writer wants to express the thought that a person has a criminal disposition, the writer frequently describes the person as a "criminal mind"--rather than a criminal arm or leg. Suppose that the jury concludes that the accused has a warped mind inclined to criminal intent. That conclusion can cause the jurors to experience the very type of revulsion which the character evidence prohibition is designed to guard against. As Judge Goldberg ... noted [in one of the most famous Rule 404(b) decisions], the "character" referred to in Rule 404(b) is "largely a concept of a person's psychological bent or frame of mind ...."<sup>59</sup>

If the uncharged misconduct evidence tends to show that the accused has a perverse mindset, a lay juror may be inclined to believe that whether the accused is innocent or guilty of the charged crime, the accused needs to be incarcerated to protect society.

Like the first probative danger inspiring the character evidence prohibition, the second danger can be present when the prosecution \*861 offers uncharged misconduct evidence to establish the accused's intent. As Subpart A notes, above, the second inference poses the risk that the jurors will ascribe undue weight to the accused's character as a predictor of conduct on a specific occasion, that is, at the time of the alleged commission of the charged crime.<sup>60</sup> How much probative value does the uncharged misconduct have to establish the accused's character as a predictor of conduct at the time of the charged crime? That probative value can be minimal:

If the only question were the accused's physical response [in the charged and uncharged incidents], to some extent the resolution of the question would be reducible to the applications of the laws of [biology,] chemistry[,] and physics. The application of the laws of the physical sciences can help predict the accused's physical reaction. It is the mental component of the accused's conduct which introduces the element of unpredictability. American criminal law operates on the assumption that the typical person possesses cognitive and volitional capacities. The variety of ways in which the person can exercise those capacities makes it difficult to forecast the person's mental state at any given time .... The risk of overestimation exists because the response to a situation includes a variable mental component.<sup>61</sup>

In short, there is no excuse for exempting uncharged misconduct evidence from the character evidence prohibition merely because the prosecution offers the evidence to show the accused's mens rea: "he thought it once, ergo he thought it again" is just as much improper character reasoning as "he did it once, therefore he did it again." Even when the evidence is offered to show intent, the evidence must pass muster under Rule 404(b).<sup>62</sup>

### III. IN THEORY, DOES THE DOCTRINE OF OBJECTIVE CHANCES QUALIFY AS A BONA FIDE NON-CHARACTER THEORY FOR ADMITTING UNCHARGED MISCONDUCT EVIDENCE?

As Part II explains, the character evidence prohibition codified in Rule 404(b) applies with full force when the prosecution offers uncharged misconduct evidence to prove intent.<sup>63</sup> Hence, to justify the admission of uncharged misconduct evidence, the prosecution must \*862 convince the judge that the evidence is admissible on a non-character theory of logical relevance. Does the doctrine of chances qualify as a bona fide non-character theory?

#### A. The Requirements for Invoking the Doctrine

The requirements for properly invoking the doctrine can be extracted from Dean Wigmore's description.<sup>64</sup> To begin with, the charged and uncharged incidents must be generally similar.<sup>65</sup> There is no across-the-board requirement that to be admissible under Rule 404(b), an uncharged incident be similar to the charged offense.<sup>66</sup> The text of Rule 404(b) does not include the adjective, "similar." Under Rule 404(b), the courts often admit "consciousness of guilt" evidence.<sup>67</sup> Thus, in a murder prosecution, Rule 404(b) would allow the prosecution to show that the accused had attempted to bribe a prosecution witness;<sup>68</sup> murder and bribery are dissimilar crimes, but the attempted bribery is relevant for a non-character purpose.

However, a showing of similarity is a logical necessity under the doctrine of chances.<sup>69</sup> The cases recognizing that necessity are legion.<sup>70</sup> Though, as Part I notes, the degree of similarity between the charged and uncharged offenses need not be as high as when the uncharged misconduct is offered to prove the accused's identity as the perpetrator of the charged offense.<sup>71</sup> When the prosecution offers the evidence for identity, the two offenses must be so similar that there is likely only one criminal who uses the modus operandi shared by the two offenses.<sup>72</sup> In \*863 contrast, when the evidence is offered to prove intent, the two crimes need merely fall into the same general category.<sup>73</sup> As Dean Wigmore stated, the charged and uncharged offenses need be similar only "in [their] gross features."<sup>74</sup> Suppose, for example, that the accused is charged with possession of cocaine and that on both the charged and uncharged occasions, the police found cocaine in a vehicle the accused was driving. If the prosecution were offering the uncharged misconduct to establish the accused's identity as the perpetrator of the charged drug offense, the prosecution would have to show that both crimes were committed with the same, unique modus operandi.<sup>75</sup> However, it is sufficient to trigger the doctrine of chances to show intent that in both instances, the accused was driving a vehicle in which drugs were found. Innocent people sometimes end up driving cars containing drugs secreted by other persons, but that is usually a "once-in-a-lifetime" experience for innocent individuals.<sup>76</sup>

The second requirement is that, considering both the charged and uncharged incidents, the accused has been involved in such incidents more frequently than the typical, innocent person. As the late Professor David Leonard observed, the doctrine of chances rests on a sort of "informal probability reasoning."<sup>77</sup> The question is not the absolute number of incidents.<sup>78</sup> Rather, the question is whether the concurrence of the charged and uncharged incidents would amount to an extraordinary coincidence--exceeding the ordinary incidence of that type of event.<sup>79</sup> If an innocent person is likely to become involved in that type of event only once in his or her lifetime, proof of a single uncharged, similar incident suffices to trigger the doctrine.<sup>80</sup> However, if even innocent persons can encounter such circumstances on multiple occasions, the doctrine comes into play only if, considering

the charged and uncharged crimes, the accused has been enmeshed in similar circumstances more frequently than would be expected.<sup>81</sup> In some cases, the judge can rely on common sense and experience to conclude that a particular type of \*864 event is a once-in-a-lifetime experience.<sup>82</sup> In other cases, though, the judge should demand that the prosecution produce evidence of the baseline frequency of such events.<sup>83</sup>

### *B. The Status of the Doctrine as a Legitimate Non-Character Theory Satisfying Rule 404(b)*

Rule 404(b) forbids prosecutors from relying on the theory of logical relevance, set out in Rule 404(b).<sup>84</sup> Revisit Figure 1, above. As Part II explained, this theory of logical relevance involves two inferential steps, and each inference entails a significant probative danger. The first is the inference from the item of evidence to the intermediate inference of the accused's personal, subjective bad character.<sup>85</sup> This inference poses the danger that the jury will convict the accused on an improper basis, that is, his or her criminal past.<sup>86</sup> The second step is the inference from the accused's bad character to the conclusion that at the time of the charged offense, the accused acted "in character"—consistently with the character—and perpetrated the charged offense (similar to the uncharged crime).<sup>87</sup> This step creates the danger that the jury will overvalue the evidence.<sup>88</sup> The bulk of the relevant psychological research points to the conclusion that the general construct of a person's character is a poor predictor of the person's conduct on a specific occasion.<sup>89</sup> Character is an especially poor predictor when the inference as to the person's character is drawn from a single other instance of the person's conduct; in the psychological research studies attempting to draw such inferences, the accuracy rate has been "at best .30."<sup>90</sup>

\*865 Contrast the theory of logical relevance underlying the doctrine of chances, using Figure 2, below.<sup>91</sup>

#### **FIGURE 2**

ITEM OF EVIDENCE An uncharged event involving the accused →	INTERMEDIATE INFERENCE Considered together with the charged event, an objectively improbable coincidence →	ULTIMATE INFERENCE The probability of the accused's criminal state of mind at the time of one or some of the events
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This theory not only differs superficially from the sort of character reasoning forbidden by Figure 1 and Rule 404(b). More fundamentally, it also differs from such reasoning with respect to both of the probative dangers inspiring the character evidence prohibition. This theory does not require the jurors to consciously advert to the question of the accused's personal, subjective character. Rather, they are asked to assess the objective improbability of so many accidents or inadvertent acts. Of course, on their own the jurors might consider the accused's personal, subjective character, since the testimony about the uncharged act has dual relevance.<sup>92</sup> However, that risk is much smaller than when the judge expressly directs the jurors to ask themselves what type of person is the accused. Moreover, the second step does not require the jurors to use character as a predictor of conduct. Rather, the second step necessitates that the jurors do what the judge will tell them to do in another part of the jury charge, namely, draw on their common sense and knowledge to assess the relative plausibility of the parties' competing versions of the events.<sup>93</sup>

### **1. Judicial Acceptance of the Doctrine of Chances**

In light of the evident differences between character reasoning and the doctrine of chances, the courts have endorsed the doctrine as a legitimate non-character theory.<sup>94</sup> The courts have permitted prosecutors \*866 to use the doctrine for several purposes. One of the leading American cases is *United States v. Woods*.<sup>95</sup> In that case, the accused was charged with infanticide.<sup>96</sup> The victim had died of cyanosis.<sup>97</sup> The accused claimed that the child's suffocation was accidental.<sup>98</sup> To rebut the accused's claim, the prosecution offered evidence that, over an approximately twenty-five-year period, children in her custody had experienced

twenty cyanotic episodes.<sup>99</sup> The trial judge admitted the testimony, and the appellate court upheld the ruling.<sup>100</sup> The court reasoned that the testimony established an extraordinary coincidence of cyanotic episodes among children in the accused's custody and that, in turn, that incidence was circumstantial evidence that one or some of the episodes were not accidental but rather the product of an actus reus.<sup>101</sup> Although the court ruled the evidence admissible on a doctrine of chances theory, the court stressed that the record of trial included testimony by a distinguished forensic pathologist, Dr. Vincent Di Maio, that there was a seventy-five percent chance that the charged incident was a homicide.<sup>102</sup> While the uncharged misconduct evidence can be admissible under the doctrine of chances, there is nothing inherent in the doctrine's logic that singles out the charged incident as a crime. The logic only supplies circumstantial evidence that one or some of the incidents were not accidents. In *Woods*, standing alone, the uncharged misconduct evidence might not have been legally sufficient to sustain a conviction; but coupled with the evidence, Dr. Di Maio's testimony satisfied the prosecution's burden of production on the actus reus issue.<sup>103</sup>

Of greater interest for our present purpose, the courts accepting the doctrine also allow prosecutors to employ the doctrine to establish mens rea.<sup>104</sup> Sometimes, criminals plant drugs on an innocent person or in an **\*867** innocent person's car in order to implicate them. But again, that seems like a once-in-a-life experience. If an accused charged with drug possession claims that the drugs must have been planted in his or her car but the prosecution has evidence that on another occasion the police also found the accused driving a car containing illegal drugs, cumulatively, the two incidents show a very "odd coincidence."<sup>105</sup> Just as the doctrine permitted the *Woods* prosecution to use the uncharged misconduct as evidence of actus reus, in this case the prosecution may introduce the evidence as proof of mens rea.

## 2. Scholarly Challenges to the Doctrine's Status as a Non-Character Theory

While there is now extensive judicial support for the doctrine of chances, some commentators have contended that the doctrine is nothing more than a smokescreen for bad-character reasoning.<sup>106</sup> These critics begin their line of argument by noting that the doctrine of chances rests on a species of statistical reasoning.<sup>107</sup> Indeed, when civil rights plaintiffs invoke the doctrine in discrimination suits, they often offer formal statistical testimony to prove the defendant's intent to discriminate.<sup>108</sup> The null hypothesis is that there has been no discrimination. The statistician then estimates what the expected value would be--for example, the number of African Americans or women hired--if the null hypothesis were true. The statistician next determines the observed value, the number actually hired. If the disparity between the expected and observed values is too great to be attributable to random chance, the null hypothesis is rejected; and, its rejection furnishes some evidence of the truth of the alternative hypothesis that there has been discrimination.<sup>109</sup> The critics of the doctrine of chances contend that the probability reasoning underlying the doctrine is propensity-based.<sup>110</sup> In essence, the contention is that once random, innocent chance is eliminated, the only remaining logical route to the ultimate inference is an intermediate inference assuming the accused's **\*868** bad character.<sup>111</sup> The critics assert that without positing the accused has a character that is "continuing,"<sup>112</sup> "constant,"<sup>113</sup> and "unchanging"<sup>114</sup> "across time,"<sup>115</sup> there is no logical nexus between the accused's uncharged act and the charged offense.<sup>116</sup>

However, these criticisms are flawed. First, in Figure 2, work forward from left to right toward the final conclusion.<sup>117</sup> The critics' implicit assumption is that once random, innocent chance is eliminated, the only way to reason toward the final conclusion is to posit an intermediate inference of the accused's constant, unchanged bad character. That assumption is plainly false. The assumption rests on a simplistic, determinist view of human behavior. Consistent with Western philosophic tradition, for the most part, American law assumes that persons are autonomous<sup>118</sup> human beings with volitional capacity.<sup>119</sup> Simply stated, they possess free will.<sup>120</sup> In Figure 2, it is possible to reason to the ultimate inference without assuming the accused's constant bad character:

A person may have characteristics predisposing him or her to act in a certain way, but situationally the person can make a choice contrary to the character trait. For example, even if a person has a propensity toward criminal

conduct, in a given case the deterrent effect of the criminal law might be so strong that she makes an ad hoc choice to refrain from committing a crime. Conversely, even if a person has a propensity toward lawful conduct, in a given case she might encounter a tremendous temptation and make a situational choice to perpetrate a crime.<sup>121</sup>

Now, in Figure 2, work from right to left--that is, backward from the ultimate inference.<sup>122</sup> The critics misconceive the doctrine of chances. If it were true that the accused had a continuing, constant, \*869 unchanging character, the ultimate inference would be that "all"<sup>123</sup> the outcomes were the same. "[E]very" act would be either innocent or criminal.<sup>124</sup> However, the proponents of the doctrine such as Wigmore make a much more limited claim. Their only claim is that when the doctrine applies, one or some of the outcomes are attributable to fault.<sup>125</sup> That is why in the leading *Woods* decision, the court placed such heavy stress on the fact that the lower court record contained both the uncharged misconduct evidence and Dr. Di Maio's findings as to the homicidal character of the death charged in that case.<sup>126</sup> The doctrine of chances yields only a limited ultimate inference. As a matter of simple logic, the doctrine does not entail the intermediate inference of constant, unchanging bad character that the doctrine's critics claim. The upshot is that not only do the courts accept the doctrine of chances, but they also, in principle, may do so without violating Rule 404(b).<sup>127</sup>

#### **IV. IN PRACTICE, ARE THE COURTS APPLYING THE DOCTRINE OF OBJECTIVE CHANCES IN A MANNER THAT ENSURES JURORS WILL USE UNCHARGED MISCONDUCT EVIDENCE ADMITTED UNDER THE DOCTRINE ONLY FOR A NON-CHARACTER PURPOSE?**

Part III demonstrates that the courts are justified in treating the doctrine of chances as a legitimate non-character theory for introducing uncharged misconduct evidence. Today, the critical question is not whether it is warranted to recognize the existence of the doctrine. Rather, the key question is the manner in which the courts are applying the doctrine. Are they applying it in a scrupulous manner that upholds the character evidence prohibition, or are they applying it in a loose manner that threatens to undermine the prohibition? An examination of the cases invoking the doctrine to permit proof of mens rea reveals that in many cases, the latter is true.

##### **\*870 A. *The Deficiencies in the Current Judicial Administration of the Doctrine of Objective Chances***

#### **1. The Dangerously Conclusory Nature of Many of the Opinions Relying on the Doctrine of Objective Chances to Justify the Admission of Uncharged Misconduct Evidence to Prove Intent**

The doctrine of chances is not the only theory of logical relevance that can justify the admission of uncharged misconduct evidence to prove intent. By way of example, suppose that the police stopped a car the accused was driving and found drugs in the trunk. The accused denies both knowing that the truck contained drugs and having any intention to possess the drugs. However, before trial, the accused threatened and attempted to bribe one of the prosecution witnesses. At trial, the prosecution attempts to introduce testimony about the threat and attempted bribe, but the defense objects that the testimony would violate the character evidence prohibition. In all likelihood, the trial judge would both characterize the testimony as evidence of the accused's "consciousness of guilt"<sup>128</sup> and admit it under Rule 404(b) as some evidence that the accused possessed a criminal intent.<sup>129</sup>

However, if the prosecution wants to introduce uncharged misconduct evidence to prove intent and no other non-character theory applies, by process of elimination the prosecution often falls back on the doctrine of chances as a last resort. Even when careful scrutiny of the fact pattern indicates that the prosecution's only tenable non-character theory is the doctrine, the courts frequently do not explicitly invoke the doctrine.<sup>130</sup> *United States v. Evans*, a prosecution for knowing receipt of stolen goods, is a case in point.<sup>131</sup> The court sustained the admission of uncharged misconduct evidence of the accused's receipt of other

stolen goods,<sup>132</sup> and, on the facts, the doctrine of chances appears to be the only conceivably applicable non-character theory. Yet the court never mentioned the theory. The court implicitly relied on the doctrine without using the label, “the doctrine of objective chances.”<sup>133</sup> *United States v. Campbell*, a 2015 prosecution for the knowing preparation of false tax returns, fits the same mold.<sup>134</sup>

\*871 Moreover, even when the courts purport to apply the doctrine in so many words, in many instances their analysis is shallow.<sup>135</sup> These courts do not pause to inquire whether the prosecution has satisfied the foundational requirements for the doctrine. In particular, they rarely demand that the prosecution demonstrate a baseline frequency or incidence for the type of event involved in the instant case to support the inference that cumulatively, the charged and uncharged incidents establish an extraordinary coincidence.

Many cases involving drug prosecutions fall into this pattern. It is a commonplace observation that the courts have been very liberal in admitting uncharged misconduct evidence of other drug transactions to prove intent in drug prosecutions.<sup>136</sup> Especially when the accused is charged with a possessory offense with intent to distribute, the courts routinely admit evidence of the accused's other drug offenses.<sup>137</sup> Although the accused is charged with intent to traffic and distribute, a large number of courts admit uncharged misconduct evidence that the accused possessed mere user quantities.<sup>138</sup> The opinions are replete with sweeping assertions that “virtually any prior drug offense” is admissible to prove intent in a drug prosecution.<sup>139</sup>

However, in any case in which the prosecution is relying on the doctrine of chances, such sweeping generalizations are indefensible. These opinions give the impression that the admissibility of the evidence in these cases turns on a question of precedent, namely, whether uncharged drug offenses are admissible to prove intent in drug prosecutions. However, that generalization is overbroad. The decisive question is fact- and case-specific: whether the prosecution has laid a foundation satisfying both requirements for triggering the doctrine of chances.

There are certainly intent to distribute cases in which it is warranted to apply the doctrine. Suppose that, on multiple occasions, the accused was found in possession of huge quantities of a drug--quantities that \*872 could exceed a lifetime supply for a casual drug user. Even if the accused were a neophyte drug-user who could not accurately predict their personal needs, they would quickly discover that they had acquired a quantity far exceeding their personal needs. It is objectively unlikely that a person could acquire such a quantity on several occasions without at least once entertaining the intent to distribute. That would be a sensible application of the doctrine. However, the generalization that any drug offense is admissible to prove intent to distribute goes well beyond the limits of the doctrine. When the issue is intent to distribute and engage in commercial trafficking, the possession of a minuscule drug quantity, barely useful for personal use, is hardly similar to the possession of a warehouse full of the drug. For that matter, even a prior conviction for conspiracy to traffic in drugs may not pass muster under the doctrine of chances. The court must examine the facts underlying the conspiracy conviction. An accused may have been convicted of such a conspiracy because he or she was the accountant for the conspiracy and never saw, much less possessed, any quantity of the drug.<sup>140</sup> Similarly, the broad net of conspiracy could extend to an accused who purchased the instrumentation for processing the drug but never held a gram of the drug in his or her hand. Indeed, the accused could have suffered the conspiracy conviction even though he or she had never possessed drugs in his or her entire life. In short, when a court is content with conclusory analysis in a doctrine of chances case, there is a grave risk that the end result will be the introduction of inadmissible bad character evidence.

## 2. The Inadequacy of the Limiting Instructions Typically Administered in Doctrine of Objective Chances Cases

As previously stated, uncharged misconduct testimony often has dual relevance.<sup>141</sup> When a single item of evidence is relevant for two purposes, one permissible and the other impermissible, the judge ordinarily<sup>142</sup> admits the evidence but gives the jury a limiting instruction. \*873 Rule 105 governs limiting instructions: “If the court admits evidence that is admissible ... for a purpose--but not ... for another purpose--the court, on timely request, must restrict the evidence to its proper scope and instruct

the jury accordingly.”<sup>143</sup> A complete, properly worded limiting instruction has two prongs.<sup>144</sup> The negative prong forbids the jury from using the evidence for the *verboten* purpose. In contrast, the affirmative prong explains how the jury is permitted to reason about the evidence.

How should the trial judge word the instruction in an uncharged misconduct evidence case? In the past, in many jurisdictions, after instructing the jury not to use the testimony as proof of the accused's bad character, the judge listed a litany of permissible purposes. For example, in the affirmative prong of the instruction, the judge might tell the jury that they could use the evidence as proof of “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident”—perhaps the entire list of purposes set out in Rule 404(b) or the equivalent state statute.<sup>145</sup> At the very least, a “shotgun” instruction can confuse the jury; on the facts, the uncharged misconduct evidence may not be at all relevant to one or more of the listed purposes. Worse still, the instruction can prompt the jury to engage in improper character reasoning; the evidence may be relevant to one of the listed purposes but only if the jury posits an intermediate inference of the accused's subjective, personal bad character.

Fortunately, a growing number of jurisdictions now forbid trial judges from giving “shotgun” instructions.<sup>146</sup> If the uncharged misconduct is relevant on only one non-character theory, to a degree, the instruction must identify and specify that purpose.<sup>147</sup> However, like many judicial opinions applying the doctrine of chances, even modernly, most pattern instructions on uncharged misconduct evidence are conclusory. After stating the negative prong of the instruction, in the \*874 affirmative prong the judge may give the jury only the guidance that they may use the evidence for the purpose of proving “intent.”<sup>148</sup>

Although that wording is preferable to a “shotgun” jury charge, even this instruction is inadequate. Again, uncharged misconduct evidence ordinarily has dual relevance. If the facts satisfy the requirements for invoking the doctrine of chances, the jury can draw the ultimate inference of intent without positing an intermediate assumption that the accused has a disposition or propensity for criminal or immoral conduct. The rub is that the jury can also reason to the same ultimate inference through improper character reasoning. The juror might think, “He had the intent once, therefore he had it again.” In a 1991 decision, *Estelle v. McGuire*, the Supreme Court dealt with the instructions in a child abuse case implicating the doctrine of chances.<sup>149</sup> In their concurring and dissenting opinion in that case, Justices O'Connor and Stevens expressed their view that there was a due process violation, warranting federal habeas corpus relief, because the state judge's instruction blurred the line between character reasoning and the doctrine of chances.<sup>150</sup> In this context, blurring the line is an acute danger; given a choice between “intuitive”<sup>151</sup> character reasoning and more “attenuated”<sup>152</sup> reasoning under the doctrine, the jury may find the character theory simpler and more attractive.

Research reveals no appellate opinion mandating that trial judges give a special limiting instruction in doctrine of chances cases. Similarly, no jurisdiction seems to have adopted a special pattern instruction for doctrine of chances cases.<sup>153</sup>

### **\*875 B. The Remedies for the Deficiencies**

Once the deficiencies in the current judicial administration in the doctrine of chances are identified, it is relatively clear what corrective action ought to be taken. As Subpart A demonstrates, the first major deficiency is the conclusory nature of many courts' analysis of the application of the doctrine.<sup>154</sup> To remedy that problem, appellate courts \*876 should direct that trial judges do the following. First, if the judge believes that the prosecution's uncharged misconduct evidence is admissible under the doctrine of chances, the judge should reflect on the record that the judge is relying on the doctrine as the non-character theory satisfying Rule 404(b). Next, in these cases, the judge ought to make explicit findings as to whether the prosecution has satisfied the substantive requirements for triggering the doctrine. Why did the judge conclude that all the underlying events are sufficiently similar? In addition, what is the judge's assumption about the baseless frequency or incidence for such events--has there been an adequate showing of an extraordinary coincidence? If the lower court record is fleshed out in this fashion, the appellate courts can engage in much more meaningful review of the propriety of the judge's decision to admit the evidence

under the doctrine. Absent such findings by the trial judge on the record, it is difficult--if not impossible--for the appellate court to intelligently second-guess the judge's application of the doctrine.

The second major deficiency is the inadequacy of the limiting instructions given in most jurisdictions. A "shotgun" instruction is certainly insufficient, and even more specific instructions singling out proof of "intent" as a permissible use of the uncharged misconduct can lead the jury into improper character reasoning.<sup>155</sup> In cases involving similar uncharged and charged misconduct, there is such a fine line between character reasoning and reasoning under the doctrine that jurisdictions should develop special instructions on the doctrine. The following illustrative language could serve as a starting point for drafting such an instruction:

Ladies and gentlemen of the jury, as you know, the defendant is charged with the crime of possession of cocaine in January 2016. The prosecution testimony indicates that when a police officer stopped the defendant's car in January 2016, the officer found cocaine in the trunk of the car. The defendant denies that he intended to possess that cocaine; he denies even knowing that there was cocaine in the trunk.

*\*877 (Initially, the judge must instruct the jury on the standard for deciding whether the accused committed the uncharged act. If the prosecution testimony does not satisfy the governing standard, the jury may not consider the testimony about the uncharged act for any purpose.)*<sup>156</sup> To prove the defendant's criminal intent, the prosecution has introduced testimony indicating that on another occasion in April 2015, while the defendant was driving a different car, he was stopped and cocaine was found in the trunk of that car. Although the prosecution has introduced that testimony, the defendant took the stand and denied that the alleged April 2015 incident ever occurred. I instruct you that the prosecution has the burden of convincing you by a preponderance of the evidence that the other incident occurred, namely, that in April 2015 the defendant was driving another car containing cocaine in the trunk. If you do not believe that the prosecution has met that burden, you must completely disregard the testimony about the alleged April 2015 incident. If you reach that conclusion, you cannot consider the testimony for any purpose during your deliberations on the defendant's guilt or innocence of the January 2016 charge.

*(At this point, the judge administers the limiting instruction about the use of the uncharged misconduct evidence. The judge can begin the instruction by stating the negative prong.)* Even if you decide that the prosecution has met that burden, there are limitations on the way in which you can use the testimony about the April 2015 incident. The defendant is on trial only for the alleged January 2016 incident. You may convict the defendant only if you are convinced beyond a reasonable doubt that he committed that crime. Even if you believe the testimony about the 2015 incident, you may not convict him because he intentionally possessed cocaine in 2015. You may not reason: He intended to possess cocaine once before, that shows *\*878* that he is a bad man, and that therefore he had that intent again in the January 2016 incident.

*(Now the judge states the affirmative prong of the limiting instruction.)* However, in deciding this case, you may rely on your knowledge of the way things happen in the real world. You may ask yourself: How likely is it that an innocent person would twice be found driving a car containing cocaine in the trunk? Innocent people sometimes find themselves in suspicious circumstances. However, use your common sense and decide whether it is likely that that would happen to an innocent person twice. If you find that that is at odds with everyday experience, you may conclude that on one or both of those occasions the defendant had the intent to possess the cocaine.

If the judge decides to admit uncharged misconduct testimony, the judge's limiting instruction may be the accused's final and most important safeguard against the danger that the jury will misuse the testimony as evidence of the accused's bad character.<sup>157</sup> Since the testimony has dual relevance, there is an unavoidable possibility that on its own motion, the jury will treat the testimony as bad character evidence. However, the judge can minimize that risk by giving the jury a clear, forceful limiting instruction; and defense counsel can further reduce the risk by underscoring the negative prong of the instruction during closing argument. In everyday life, laypersons do not force themselves to identify every intermediate inference between a fact they are presented with and their ultimate conclusion. If the jury is exposed to uncharged misconduct evidence and the judge gives the jury little guidance as to the proper use of the evidence, the jurors may be inclined to intuitively use the simplistic reasoning that "he had the criminal intent before, therefore he had it again."<sup>158</sup> That sort of reasoning comes naturally and easily to laypersons. If we want to honor the character evidence prohibition and encourage lay jurors to reason differently about the evidence, the trial judge must give the jurors a more elaborate limiting instruction. Neither a "shotgun" instruction nor even an instruction singling out "intent" as a permissible use of the evidence is sufficiently respectful of Rule 404(b).

## \*879 V. CONCLUSION

It is difficult to overstate the philosophic and practical importance of this issue. Although many nations in the common law world still recognize some version of the character evidence prohibition, only the United States has a full-fledged constitutional ban on the punishment of status offenses.<sup>159</sup> The numbers tell the story about the practical significance of the issue. As previously stated, in criminal cases, Rule 404(b) produces more published opinions than any other provision of the Rules,<sup>160</sup> and prosecutors offer Rule 404(b) evidence to prove intent more often than for any other purpose.<sup>161</sup> If the judicial application of Rule 404(b) is to be more than an intellectually dishonest "exercise in evasion,"<sup>162</sup> we must reform the lax attitude that many courts have taken in determining whether uncharged misconduct evidence offered to prove intent possesses genuine non-character relevance and how lay jurors are instructed about the permissible use of such evidence.

The root problem is that the distinction between character reasoning and reasoning under the doctrine of objective chances is so thin.<sup>163</sup> In lay jurors' minds, "the events are so similar that it is improbable that there were so many inadvertent acts" can easily elide into "the events are so similar that the accused has a propensity for this criminal intent." To prevent that improper conversion, the courts must do more than most courts presently do. To begin with, the appellate courts have to pressure trial judges to develop records of trial that permit meaningful review of the application of the doctrine in the lower court. It should be insufficient for trial judges to recite on the record the generalization that uncharged misconduct evidence is admissible to prove intent. If the judge intends to rely on the doctrine of chances, he or she should do so explicitly. Furthermore, the appellate court should demand that the judge make findings as to whether the charged and uncharged acts are sufficiently similar and whether, considered together, the concurrence of the charged and uncharged acts establishes an extraordinary coincidence exceeding the baseline frequency for inadvertent events of the same character.

Moreover, it is not enough that the trial judge convince the appellate court that it was proper to invoke the doctrine on the facts in the lower court. Even more importantly, the judge must clearly convey \*880 the doctrine of chances theory to the lay jurors in a limiting instruction. The decisive question is whether the jury engaged in improper character reasoning during their deliberations. The line between character reasoning and reasoning under the doctrine of chances is so fine that neither a "shotgun" instruction nor even an instruction mentioning only proof of "intent" as an allowable use of the evidence should be deemed adequate. Both a character rationale and reasoning according to the doctrine can lead to the same result, namely the jury's conclusion that the uncharged misconduct evidence is some proof of intent. The issue is the logical route or path that the jury takes to reach that result. If that path proceeds through the inference, "the events are so similar that the accused has a propensity for this criminal intent," the accused's conviction may violate the Eighth Amendment.<sup>164</sup> In the large number of cases in which the prosecution must rely on a doctrine of chances theory to justify introducing uncharged misconduct to prove intent, the trial and appellate courts should do more to secure the accused's Eighth Amendment rights. In our system of criminal

justice, the well-settled tradition is that a citizen may be convicted only for what he or she has done--their mental and physical conduct at a specific place and time--and not for the type of person they are.<sup>165</sup> The current lax administration of the doctrine of objective chances seriously imperils that tradition.

## Footnotes

- a1 Edward L. Barrett, Jr., Professor of Law Emeritus, University of California, Davis; former chair, Evidence Section, American Association of Law Schools; author, *Uncharged Misconduct Evidence*.
- 1 WILLIAM SHAKESPEARE, *HAMLET* act 2, sc. 2., ll. 249-50 (Harold Jenkins ed., Methuen & Co. Ltd. 1982).
- 2 5 JOHN HENRY WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 1364 (3d ed. 1940).
- 3 See1 KENNETH S. BROUN ET AL., *MCCORMICK ON EVIDENCE* §§ 186-190 (7th ed. 2013).
- 4 See Felicity Gerry et al., *Patterns of Sexual Behaviour: The Law of Evidence: Back to the Future in Australia and England*, *INT'L COMMENT. ON EVIDENCE*, Dec. 2013, at 29, 56.
- 5 E.g., FED. R. EVID. 413(a), 414(a), 415(a) (abolishing the prohibition selectively in criminal and civil cases involving allegations of sexual assault and child molestation). These rules have been sharply criticized: The federal rules ... presuppose that sex offenders are uniquely inclined to high rates of recidivism even though the empirical evidence suggests otherwise .... [S]pecial rules of admissibility should be strongly supported by empirical or other evidence and ... this standard has not been met in the case of Rules 413 and 414. The special rules of admissibility reflected in Rules 413 and 414 are unsound .... STEPHEN J. SCHULHOFER & ERIN E. MURPHY, *MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES: DISCUSSION DRAFT NO. 2*, at 234-35 (2015).
- 6 It is understandable that the United States takes the character prohibition so seriously. In *Robinson v. California*, the Court held that the Eighth Amendment prohibition of cruel and unusual punishment forbids status offenses. 370 U.S. 660, 666-67 (1962); see *Joel v. City of Orlando*, 232 F.3d 1353, 1361 (11th Cir. 2000). Hence, while in most of the common law world it offends a recognized policy if the accused is punished for being a recidivist, in the United States that policy has been elevated to constitutional status.
- 7 FED. R. EVID. 404(b)(1).
- 8 FED. R. EVID. 404(b)(2).
- 9 *United States v. Davis*, 726 F.3d 434, 441 (3d Cir. 2013) (“Rule 404(b) has become the most cited evidentiary rule on appeal.”); *State v. Johns*, 725 P.2d 312, 317 (Or. 1986) (noting that, in the mid-1980s, a Westlaw search of the relevant key numbers identified 11,607 state cases); Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 TEMP. L.REV. 201, 211 (2005) (“Since 1975, Rule 404(b) has been the most contested Federal Rule of Evidence. It has been cited in 5,603 federal trial and appellate decisions since adoption. No other evidentiary rule comes close to this rule as a breeder of issues for appeals.”); Paul Mark Sandler, *Litigator's Bookshelf: Trial Tactics by Stephen Saltzburg*, *LITIG.*, Winter 2009, at 57, 58 (book review) (discussing Rule 404(b) as “the most highly discussed federal rule of evidence”); Byron N. Miller, Note, *Admissibility of Other Offense Evidence After State v. Houghton*, 25 S.D. L. REV. 166, 167 (1980) (“Admissibility of evidence of other acts, wrongs, or crimes is the most frequently litigated question of evidence at the appellate level ....”). See generally David P. Leonard, *The Use of Uncharged Misconduct Evidence to Prove Knowledge*, 81 NEB. L. REV. 115 (2002) (extensively discussing Rule 404(b) litigations).
- 10 FED. R. EVID. 404(b)(2).
- 11 See *United States v. Hawpetoss*, 478 F.3d 820, 822, 826 (7th Cir. 2007) (noting the defense argument that the evidence produces the reaction “game over” in the eyes of the jury); *People v. Smallwood*, 722 P.2d 197, 205 (Cal. 1986) (acknowledging that evidence of other crimes is “the most prejudicial evidence imaginable against an accused”); 1 EDWARD J. IMWINKELRIED, *UNCHARGED MISCONDUCT EVIDENCE* § 1:02 (2009).
- 12 FED. R. EVID. 105.

- 13 Leonard, *supra* note 9, at 118.
- 14 22B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5242 (Supp. 2016); see Thomas J. Reed, *The Development of the Propensity Rule in Federal Criminal Causes 1840-1975*, 51 U. CIN. L. REV. 299, 306-07 (1982).
- 15 See Leonard, *supra* note 9, at 133-36. Although you can see a face or a knife, you cannot directly perceive another person's state of mind. See *id.* at 124-28, 169.
- 16 See Abbe David Lowell, *Fighting the 'Presumption of Guilt,'* 24 NAT'L L.J., June 10, 2002, at D8, D8.
- 17 See Leonard, *supra* note 9, at 124-25.
- 18 See WRIGHT & GRAHAM, *supra* note 14, § 5239.
- 19 See Leonard, *supra* note 9, at 132-33.
- 20 FED. R. EVID. 404(b)(2).
- 21 United States v. Nelson, 137 F.3d 1094, 1107 (9th Cir. 1998) (“[A] much lower degree of similarity is required to prove a state of mind than to prove identity.”); People v. Johnson, 164 Cal. Rptr. 3d 505, 515 (Ct. App. 2013) (requiring “[t]he least degree of similarity” to prove intent (quoting People v. Foster, 242 P.3d 105, 131 (Cal. 2010))); see also People v. Harris, 306 P.3d 1195, 1226 (Cal. 2013); People v. Jones, 247 P.3d 82, 102 (Cal. 2011); People v. Carpenter, 935 P.2d 708, 745 (Cal. 1997), *abrogated on other grounds by* People v. Diaz, 345 P.3d 62 (Cal. 2015); People v. Escudero, 107 Cal. Rptr. 3d 758, 766 (Ct. App. 2010); People v. Tapia, 30 Cal. Rptr. 2d 851, 871 (Ct. App. 1994).
- 22 2 WIGMORE, *supra* note 2, § 302.
- 23 IAN FLEMING, *GOLDFINGER* 123 (1959), *quoted in* Stephen E. Fienberg & D. H. Kaye, *Legal and Statistical Aspects of Some Mysterious Clusters*, 154 J. ROYAL STAT. SOC'Y 61, 61 (1991).
- 24 IMWINKELRIED, *supra* note 11, § 2:19.
- 25 *Id.*
- 26 Nancy Bauer, Casenote, People v. Spoto: *Teasing the Defense on Prior Bad Acts Evidence*, 63 U. COLO. L. REV. 783, 803-04 (1992).
- 27 IMWINKELRIED, *supra* note 11, § 5:06.
- 28 See *supra* note 12 and accompanying text.
- 29 United States v. Derington, 229 F.3d 1243, 1247 (9th Cir. 2000); see State v. Brown, 900 A.2d 1155, 1160, 1163-64 (R.I. 2006).
- 30 See United States v. Bass, 794 F.2d 1305, 1313 (8th Cir. 1986).
- 31 See *supra* note 21 and accompanying text.
- 32 State v. Newton, 743 P.2d 254, 256 (Wash. 1987) (en banc); Victor J. Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59, 68-71, 80 (1984); see Anne F. Curtin, Note, *Limiting the Use of Prior Bad Acts and Convictions to Impeach the Defendant-Witness*, 45 ALB. L. REV. 1099, 1104 (1981).
- 33 Daniel D. Blinka, *Character, Liberalism, and the Protean Culture of Evidence Law*, 37 SEATTLE U. L. REV. 87, 110-11 (2013).
- 34 United States v. Morena, 547 F.3d 191, 194 (3d Cir. 2008).
- 35 See *infra* Part II.
- 36 See *infra* Part II.B.

- 37     *See infra* Part III.
- 38     *See infra* Part IV.A.
- 39     *See infra* Part IV.A.1.
- 40     *See infra* Part IV.A.1.
- 41     *See infra* Part IV.A.2.
- 42     *See infra* Part IV.A.2.
- 43     *See infra* Part IV.B.
- 44     *See infra* Part IV.B.
- 45     FED. R. EVID. 404(b)(1).
- 46     *See* FED. R. EVID. 404 advisory committee's note. The note expressly cites the California Law Revision Commission report discussing California's codification of the doctrine. *Id.*; *see also* CAL. EVID. CODE § 1101 law revision commission cmt. (West 2009); CAL. LAW REVISION COMM'N, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE 615 (1964), <http://www.clrc.ca.gov/pub/Printed-Reports/Pub054.pdf>.
- 47     *Compare* FED. R. EVID. 404(b)(1), *with* CAL. EVID. CODE § 1101(a).
- 48     People v. Bittaker, 774 P.2d 659, 688 (Cal. 1989).
- 49     *Id.*
- 50     Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, the Doctrine of Chances*, 40 U. RICH. L. REV. 419, 426-27 (2006).
- 51     IMWINKELRIED, *supra* note 11, § 2:19.
- 52     *See supra* note 6 and accompanying text.
- 53     IMWINKELRIED, *supra* note 11, § 2:19.
- 54     *Id.*
- 55     *Id.*
- 56     Edward J. Imwinkelried, *Reshaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U. L. REV. 741, 761 (2008) (explaining that in the studies attempting to infer character from a single instance of conduct, the accuracy rate was "at best .30" and that there does not appear to be a single published study concluding that it is possible to accurately predict a person's conduct based on a single other instance of the person's conduct); Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 495 (1996) ("Of considerable concern is the fact that [the Rule] ignores the empirical data, which require a wider range of behavior than a single prior incident of wrongful conduct, and a closer match between the earlier situations and the present one, for prior acts to be predictive of current ones.").
- 57     Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 795-96 (1981).
- 58     SHAKESPEARE, *supra* note 1.
- 59     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, 583 (1990) (quoting United States v. Beechum, 582 F.2d 898, 921 (5th Cir. 1978) (Goldberg, J., dissenting)) (citing PHILIP Q. ROCHE, THE CRIMINAL MIND (1958); Don J. DeBenedictis, *Criminal Minds*, A.B.A. J., Jan. 1990, at 30).

- 60 *See supra* Part II.A.
- 61 Imwinkelried, *supra* note 59, at 584.
- 62 United States v. Henry, 848 F.3d 1, 15 (1st Cir. 2017) (Kayatta, J., concurring) (“He intended to do it before, ladies and gentlemen, so he must have intended to do it again.’ That is precisely the forbidden propensity inference.” (quoting United States v. Miller, 673 F.3d 688, 699 (7th Cir. 2012))); State v. Sullivan, 679 N.W.2d 19, 26-28 (Iowa 2004).
- 63 *See supra* text accompanying note 62.
- 64 *See* 2 WIGMORE, *supra* note 2, § 302. The doctrine of chances turns on circumstantial reasoning. The core notion is that one may be innocently involved in suspicious circumstances. However, if one is recurrently involved in questionable circumstances the likelihood of innocent involvement diminishes. Depending upon the circumstances, at some point the recurrence alone warrants an inference that at least one of the incidents is not attributable to innocent happenstance. Imwinkelried, *supra* note 50, at 436-37.
- 65 IMWINKELRIED, *supra* note 11, § 3:11.
- 66 *Id.* § 2:13.
- 67 *Id.* § 3:4.
- 68 *Id.*; *see also* People v. McLaurin, 811 N.Y.S.2d 401, 402 (App. Div. 2006).
- 69 *See* Eric D. Lanserk, Comment, *Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b)*, 61 WASH. L. REV. 1213, 1230 (1986).
- 70 *E.g.*, United States v. Johnson, 458 F. App’x 727, 731-32 (10th Cir. 2012); United States v. Cole, 537 F.3d 923, 928 (8th Cir. 2008); United States v. Nicely, 922 F.2d 850, 857 (D.C. Cir. 1991); People v. Thomas, 256 P.3d 603, 616 (Cal. 2011); People v. Davis, 208 P.3d 78, 128 (Cal. 2009); People v. Yeoman, 72 P.3d 1166, 1190 (Cal. 2003); People v. Daniels, 97 Cal. Rptr. 3d 659, 668 (Ct. App. 2009); People v. Hawkins, 121 Cal. Rptr. 2d 627, 639 (Ct. App. 2002); People v. Everett, 250 P.3d 649, 654 (Colo. App. 2010).
- 71 *See supra* note 19 and accompanying text.
- 72 *See* IMWINKELRIED, *supra* note 11, § 3:11.
- 73 *Everett*, 250 P.3d at 658.
- 74 2 WIGMORE, *supra* note 2, § 304.
- 75 IMWINKELRIED, *supra* note 11, § 3:13.
- 76 *See* I. H. DENNIS, THE LAW OF EVIDENCE 596 (1999) (explaining that “it would be an odd coincidence if the defendant were an innocent victim of drugs planted in his car while being in possession of drugs elsewhere,” or on more than one occasion).
- 77 Leonard, *supra* note 9, at 161-62.
- 78 Imwinkelried, *supra* note 59, at 590.
- 79 *See id.*
- 80 *See* People v. Everett, 250 P.3d 649, 658-60 (Colo. App. 2010).
- 81 *See id.*
- 82 *Id.*
- 83 Imwinkelried, *supra* note 59, at 591-92.
- 84 FED. R. EVID. 404(b); *see supra* Figure 1.

- 85     *See supra* note 50 and accompanying text.
- 86     *See supra* note 51 and accompanying text.
- 87     *See supra* note 53 and accompanying text.
- 88     *See* IMWINKELRIED, *supra* note 11, § 2:19.
- 89     *See supra* note 55 and accompanying text.
- 90     Imwinkelried, *supra* note 56, at 761 (explaining that in the studies attempting to infer character from a single instance of conduct, the accuracy rate was “at best .30”); Taslitz, *supra* note 56, at 495 (“Of considerable concern is the fact that [the Rule] ignores the empirical data, which require a wider range of behavior than a single prior incident of wrongful conduct, and a closer match between the earlier situations and the present one, for prior acts to be predictive of current ones.”). These research findings are one of the reasons why rape sword statutes, such as Rule 413, are so troublesome; on their face, they purport to permit a jury to infer character from a single instance of uncharged misconduct. *See* FED. R.EVID. 413(a).
- 91     Compare *supra* Figure 1, with *infra* Figure 2.
- 92     *See supra* text accompanying note 28.
- 93     *See* United States v. Starks, 309 F.3d 1017, 1021-22 (7th Cir. 2002); United States v. Hamie, 165 F.3d 80, 84 (1st Cir. 1999); United States v. Gainey, 111 F.3d 834, 836 (11th Cir. 1997); United States v. Saccoccia, 58 F.3d 754, 775 (1st Cir. 1995); United States v. Flores-Chapa, 48 F.3d 156, 161 (5th Cir. 1995); United States v. Donovan, 24 F.3d 908, 913 (7th Cir. 1994); United States v. McAfee, 8 F.3d 1010, 1014 (5th Cir. 1993); Zada v. Scully, 847 F. Supp. 325, 328 (S.D.N.Y. 1994).
- 94     *See* United States v. Young, 65 F. Supp. 2d 370, 372-75 (E.D. Va. 1999) (collecting cases applying the doctrine of chances); Wynn v. State, 718 A.2d 588, 607 (Md. 1998) (Raker, J., dissenting) (listing cases in which appellate courts have utilized the doctrine); *see also* People v. Spector, 128 Cal. Rptr. 3d 31, 65 (Ct. App. 2011).
- 95     484 F.2d 127 (4th Cir. 1973); *see also* Recent Case, *Evidence-- Proof of Particular Facts--Evidence That Defendant May Have Committed Similar Crimes Is Admissible to Prove Corpus Delicti of Murder--*United States v. Woods 484 F.2d 127 (4th Cir. 1973), 87 HARV. L.REV. 1074, 1074-75 (1974).
- 96     Woods, 484 F.2d at 128-30.
- 97     *Id.* at 129.
- 98     *Id.*
- 99     *Id.* at 130-32.
- 100    *Id.* at 129-34.
- 101    *Id.* at 133-35.
- 102    *Id.* at 130.
- 103    *See id.* at 135.
- 104    *See, e.g.,* People v. Carpenter, 935 P.2d 708, 745 (Cal. 1997), *abrogated on other grounds by* People v. Diaz, 345 P.3d 62 (Cal. 2015).
- 105    DENNIS, *supra* note 76, at 596.
- 106    *See* Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 199-201 (1998); Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259, 1262-64 (1995); *see also* Lisa Marshall, Note, *The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits*, 114 YALE L.J. 1063, 1085-86 (2005).

- 107 Morris, *supra* note 106, at 192-94.
- 108 Marshall, *supra* note 106, at 1080-81.
- 109 See DAVID W. BARNES, STATISTICS AS PROOF: FUNDAMENTALS OF QUANTITATIVE EVIDENCE 91-92 (1983); see also *Castaneda v. Partida*, 430 U.S. 482, 494 & n.13 (1977).
- 110 See, e.g., Marshall, *supra* note 106, at 1080-82.
- 111 *Id.* at 1071-72, 1081.
- 112 Morris, *supra* note 106, at 195, 201.
- 113 *Id.* at 194, 201.
- 114 *Id.* at 201.
- 115 *Id.* at 194.
- 116 *Id.* at 191-201.
- 117 See *supra* Figure 2.
- 118 See generally GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY (1988).
- 119 MORTIMER J. ADLER, SIX GREAT IDEAS 141-42, 164 (1981); Imwinkelried, *supra* note 50, at 451.
- 120 ADLER, *supra* note 119; Imwinkelried, *supra* note 50, at 451.
- 121 Imwinkelried, *supra* note 50, at 451; see also WAYNE R. LAFAVE, CRIMINAL LAW § 1.5(a)(2)-(4) (5th ed. 2010).
- 122 See *supra* Figure 2.
- 123 Morris, *supra* note 106, at 203.
- 124 *Id.* at 201.
- 125 Imwinkelried, *supra* note 50, at 456-57.
- 126 *Id.* at 456, 461.
- 127 *United States v. Aguilar-Aranceta*, 58 F.3d 796, 798-99 (1st Cir. 1995) (“The justification ... is that no inference as to the defendant's character is required.”); *United States v. York*, 933 F.2d 1343, 1350 (7th Cir. 1991) (explaining that under the doctrine of chances, the “inference is purely objective, and has nothing to do with a subjective assessment of [the defendant's] character”); *People v. VanderVliet*, 508 N.W.2d 114, 125, 128-29, 128 n.35 (Mich. 1993).
- 128 IMWINKELRIED, *supra* note 11, § 3:4.
- 129 *Id.* § 5:15.
- 130 Leonard, *supra* note 9, at 164.
- 131 27 F.3d 1219, 1222, 1232 (7th Cir. 1994); see also Leonard, *supra* note 9, at 164 (discussing *Evans* as a case employing the doctrine of chances without labeling it as such).
- 132 *Evans*, 27 F.3d at 1232.
- 133 Leonard, *supra* note 9, at 164.
- 134 142 F. Supp. 3d 298, 299, 300-01 (E.D.N.Y. 2015).

- 135 See Leonard, *supra* note 9, at 148, 152, 159 (discussing the “weak judicial analysis” of the admissibility of uncharged misconduct, asserting that courts often affirm the admission of uncharged misconduct evidence with “little or no analysis,” and discussing that trial courts do not scrutinize the facts carefully to make certain that the evidence possesses genuine non-character relevance under the doctrine of chances).
- 136 *Id.* at 148 (“The courts have liberally admitted evidence of the defendant’s other drug activities ....”); see Michael H. Graham, *Other Crimes, Wrongs, or Culpable Acts Evidence: The Waning Penchant Toward Admissibility as the Wars Against Crime Stagger on; Part I. The War on Drugs--The Seventh Circuit Crosses Over to the Dark Side*, 49 CRIM. L. BULL. 875, 879-81 (2013).
- 137 See, e.g., United States v. Jefferson, 725 F.3d 829, 836 (8th Cir. 2013).
- 138 *Id.*
- 139 United States v. Sanders, 668 F.3d 1298, 1314 (11th Cir. 2012) (quoting United States v. Matthews, 431 F.3d 1296, 1311 (11th Cir. 2005)).
- 140 See Smith v. United States, 133 S. Ct. 714, 717-18 (2013); Salinas v. United States, 522 U.S. 52, 63-64 (1997); Stewart v. Texas, 474 U.S. 866, 869 (1985) (Marshall, J., dissenting); Pinkerton v. United States, 328 U.S. 640, 647 (1946); 2 WAYNE R. LAFAYE, SUBSTANTIVE CRIMINAL LAW § 13.3 (2d ed. 2003).
- 141 See Leonard, *supra* note 9, at 165.
- 142 As the text indicates, in these situations, the judge typically admits the item of evidence but gives the jury a limiting instruction, which (1) identifies the permissible use of the evidence but (2) forbids the jury from using the evidence for the impermissible purpose. The courts usually assume that lay jurors are both willing and able to follow limiting instructions. Cf. David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 414-19, 424-30, 451 (2013). However, in extreme cases, the judge may conclude that it is fanciful to think that the jury will be willing and able to comply with the limiting instruction. RONALD L. CARLSON & EDWARD J. IMWINKELRIED, DYNAMICS OF TRIAL PRACTICE: PROBLEMS AND MATERIALS § 15.3(A) (5th ed. 2017). On rare occasions, the Supreme Court itself has held that it is unrealistic to believe that a jury can carry out a particular type of judicial instruction. *Id.* at 439-41 (citing Bruton v. United States, 391 U.S. 123 (1968); Jackson v. Denno, 378 U.S. 368 (1964); Shepard v. United States, 290 U.S. 96 (1933)). The fact pattern may create a “perfect storm” rendering the instruction ineffective: the evidence is directly relevant to a critical issue in the case, the source of the evidence presumably has personal knowledge of the facts, and the source is either the opposing litigant himself, herself, or someone with a close relationship to the litigant. *Id.* at 441.
- 143 FED. R. EVID. 105.
- 144 IMWINKELRIED, *supra* note 11, §§ 9:73-:74.
- 145 *Id.* § 9:74.
- 146 *Id.*
- 147 *Id.*
- 148 See *id.*
- 149 502 U.S. 62, 64-65, 67-68, 70-75 (1991).
- 150 *Id.* at 64, 75-80 (O’Connor, J., joined by Stevens, J., concurring in part and dissenting in part). In this case, the state trial judge’s instruction included a negative as well as an affirmative prong. *Id.* at 67 n.1. The negative prong informed the jury that the uncharged misconduct testimony “may not be considered by you to prove that [the defendant] is a person of bad character or that he has a disposition to commit crimes.” *Id.* However, the affirmative prong was very vaguely worded. The affirmative prong told the jury that they could consider the evidence:  
[O]nly for the limited purpose of determining if it tends to show ... a clear connection between the other two [uncharged] offense[s] and the one of which the Defendant is accused, so that it may be logically concluded that if the Defendant committed the other offenses, he also committed the crime charged in this case.

*Id.* The instruction did not define the necessary “clear connection” or direct the jury to consider the objective probability of the defendant’s involvement in so many accidents. *Id.*; see *supra* text accompanying notes 26-27. Given the jurors’ lack of legal training, it is perfectly plausible that after hearing this instruction, the jurors voted to convict on the basis of improper character reasoning.

151 Leonard, *supra* note 9, at 139, 144.

152 *Id.* at 139.

153 There are pattern instructions on uncharged misconduct evidence in many jurisdictions. See, e.g., ELEVENTH CIRCUIT, PATTERN JURY INSTRUCTIONS (CRIMINAL CASES)) §§ 1.1-2, 4.1-2 (2016), <http://www.ca11.uscourts.gov/pattern-jury-instructions>; U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, MODEL CRIMINAL JURY TABLE OF CONTENTS AND INSTRUCTIONS §§ 2.23, 4.29 (2016), <http://www.ca3.uscourts.gov/model-criminal-jury-table-contents-and-instructions>; SIXTH CIRCUIT COMM. ON PATTERN CRIMINAL JURY INSTRUCTIONS, PATTERN CRIMINAL JURY INSTRUCTIONS § 7.13 (2016), [http://www.ca6.uscourts.gov/sites/ca6/files/documents/pattern\\_jury/pdf/13\\_Chapter\\_7\\_0.pdf](http://www.ca6.uscourts.gov/sites/ca6/files/documents/pattern_jury/pdf/13_Chapter_7_0.pdf); U.S. COURT OF APPEALS EIGHTH CIRCUIT, EIGHTH CIRCUIT MODEL JURY INSTRUCTIONS §§ 2.08-.08A (2014), [http://www.juryinstructions.ca8.uscourts.gov/Manual\\_of\\_Model\\_Criminal\\_Jury\\_Instructions\\_New\\_and\\_Revised%208\\_5\\_2014.pdf](http://www.juryinstructions.ca8.uscourts.gov/Manual_of_Model_Criminal_Jury_Instructions_New_and_Revised%208_5_2014.pdf); U.S. DIST. COURT DIST. OF ME., PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE FIRST CIRCUIT § 2.06 (2015), <http://www.ca1.uscourts.gov/sites/ca1/files/citations/2015%20Revisions%20to%20Pattern%20Criminal%20Jury%20Instructions%20for%20the%20District%20Courts%20of%20the%20First%20Circuit.pdf>; STATE BAR OF ARIZ., REVISED ARIZONA JURY INSTRUCTIONS(CRIMINAL) § 26A (4th ed. 2016), <http://www.azbar.org/media/1179884/rajicriminal-4thed2016-final.pdf>; JUDICIAL COUNCIL OF CAL. ADVISORY COMM. ON CRIMINAL JURY INSTRUCTIONS, CRIMINAL JURY INSTRUCTIONS § 375 (2016), [http://www.courts.ca.gov/partners/documents/calcrim\\_2016\\_edition.pdf](http://www.courts.ca.gov/partners/documents/calcrim_2016_edition.pdf); PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SUPERIOR COURT OF THE STATE OF DELAWARE § 4.4 (2016), [http://courts.delaware.gov/superior/pattern/pdfs/pattern\\_criminal\\_jury\\_rev4\\_2016.pdf](http://courts.delaware.gov/superior/pattern/pdfs/pattern_criminal_jury_rev4_2016.pdf); GEORGIA STATE BAR JURY INSTRUCTIONS--CRIMINAL § 1.34.10 (2016); HAW. STATE JUDICIARY, HAWAII CRIMINAL JURY INSTRUCTIONS § 2.03 (2005), <http://www.courts.state.hi.us/docs/docs4/crimjuryinstruct.pdf>; STATE OF IDAHO JUDICIAL BRANCH SUPREME COURT, CRIMINAL JURY INSTRUCTIONS § 303 (2010), <https://isc.idaho.gov/main/criminal-jury-instructions>; MAINE JURY INSTRUCTION MANUAL § 6-15 (2016); MARYLAND CRIMINAL JURY INSTRUCTIONS AND COMMENTARY § 2.29(A) (3d ed. 2016); MASS. DIST. COURT, CRIMINAL MODEL JURY INSTRUCTIONS § 3.800 (2016), <http://www.mass.gov/courts/docs/courts-and-judges/courts/district-court/jury-instructions-criminal/criminal-model-jury-instructions.pdf>; OHIO JURY INSTRUCTIONS--CRIMINAL § 401.25 (2016); OKLAHOMA UNIFORM JURY INSTRUCTIONS: CRIMINAL § 9-9 (2d ed. 2017), <http://www.okcca.net/online/oujis/oujisrvr.jsp?oc=OUJICR%209-9>; PENNSYLVANIA SUGGESTED CRIMINAL JURY INSTRUCTIONS § 3.08 (2016); SOUTH CAROLINA REQUESTS TO CHARGE--CRIMINAL §§ 1-16, -17 (2007); TEXAS CRIMINAL PATTERN JURY CHARGES §§ 3.1, A3.1 (2016) INSTRUCTIONS FOR VIRGINIA AND WEST VIRGINIA § 24-250 (2016); see also PROPOSED MISSISSIPPI PLAIN LANGUAGE MODEL JURY INSTRUCTIONS--CRIMINAL § 205 (2012), <https://courts.ms.gov/mmji/Proposed%20Plain%20Language%20Model%20Jury%20Instructions%20-%20Criminal.pdf>.

The instructions fall into three general categories. Some are “shotgun” instructions, which merely list a number of permissible non-character uses for uncharged misconduct evidence. See, e.g., PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SUPERIOR COURT OF THE STATE OF DELAWARE, *supra*. Others contain such a list but add a paragraph or short paragraph going into more detail about particular uses. See, e.g., U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, *supra*. Still others employ brackets to signal the trial judge that he or she should specify the non-character purpose or purposes that the judge is relying on as the justification for admitting the evidence. See, e.g., MAINE JURY INSTRUCTION MANUAL, *supra*. However, there do not appear to be any instructions that contain an amplification for situations in which the prosecution is relying on the doctrine of chances to prove intent.

154 See *supra* Part IV.A.1.

155 It might be argued that the latter type of instruction is adequate because during closing argument the attorneys can explain the instruction to the jurors. However, that argument is unpersuasive. To begin with, the jurors pay more attention to what the judge tells them. Mark A. Dombroff, *Jury Instructions Can Be Crucial in Trial Process*, LEGAL TIMES, Feb. 25, 1985, at 26, 26. The jurors realize that the attorneys are partisans and tend to discount the attorneys’ statements. Moreover, the judge’s explanation is more likely to be accurate, at least in the sense that it is more balanced and neutral than either attorney’s explanation.

156 In *Huddleston v. United States*, the Supreme Court announced that Rule 104(b) governs the determination of whether the accused committed an uncharged act. 485 U.S. 681, 689-92 (1988). Under Rule 104(b), the judge makes a limited, screening decision whether

the prosecution's foundational testimony is sufficient to support a rational, permissive jury finding that the accused committed the act. *Id.* at 690. If the foundational testimony suffices, the judge admits the testimony. In the final jury charge, the judge instructs the jury that they are to determine whether the prosecution has established by a preponderance of the evidence that the accused perpetrated the act. *See id.* The judge further directs the jury to completely disregard the testimony about the uncharged act if they decide that the prosecution has not established by a preponderance of the evidence that the accused committed that act. *Id.* Not all states follow *Huddleston*. Some require that, before admitting the evidence, the judge must find by a preponderance of the evidence that the accused committed the uncharged act. *IMWINKELRIED*, *supra* note 11, § 2:9. Other jurisdictions demand clear and convincing evidence. *Id.*

- 157 Edward J. Imwinkelried, *Limiting Instructions on Uncharged Misconduct Evidence: The Last Line of Defense Against Jury Misuse of the Evidence*, TRIAL DIPL. J., Fall 1985, at 23, 24.
- 158 *See* Leonard, *supra* note 9, at 144.
- 159 *Robinson v. California*, 370 U.S. 660, 666 (1962).
- 160 *See supra* note 9 and accompanying text.
- 161 *See supra* note 14 and accompanying text.
- 162 Blinka, *supra* note 33, at 110.
- 163 *See* *United States v. Derington*, 229 F.3d 1243, 1247 (9th Cir. 2000); *State v. Brown*, 900 A.2d 1155, 1160 (R.I. 2006).
- 164 Imwinkelried, *supra* note 59, at 581.
- 165 *See* *People v. Allen*, 420 N.W.2d 499, 504 (Mich. 1988) (“[I]n our system of jurisprudence, we try cases, rather than persons ....”). In *Romer v. Evans*, the so-called “Colorado Gay Rights Case,” the Court used language to the effect that it is improper to penalize a person for his or her status. 517 U.S. 620, 635 (1996).

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**THE USE OF EVIDENCE OF AN ACCUSED'S UNCHARGED MISCONDUCT TO PROVE MENS REA: THE DOCTRINES WHICH THREATEN TO ENGULF THE CHARACTER EVIDENCE PROHIBITION**

**I. INTRODUCTION**

The accused is charged with homicide. The indictment alleges that the accused committed the murder in early 1990. During the government's case-in-chief at trial, the prosecutor calls a witness. The witness begins describing a killing which the accused supposedly committed in 1989. The defense strenuously objects that the witness's testimony is "nothing more than blatantly inadmissible evidence of the accused's general bad character." However, at sidebar the prosecutor makes an offer of proof that the 1989 killing was perpetrated with "exactly the same *modus operandi* as the 1990 murder." Given this state of the record, how should the trial judge rule on the defense objection?

Federal Rule of Evidence 404(b),<sup>1</sup> which is in effect in over thirty states as well as federal practice,<sup>2</sup> supplies the answer to the question. On the one hand, the first sentence of Rule 404(b) forbids the judge from admitting the evidence as circumstantial proof of the accused's conduct on the alleged occasion in 1990. That sentence provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."<sup>3</sup> Figure 1 depicts the theory of admissibility banned by the first sentence of the rule.<sup>4</sup> Thus, the prosecutor cannot offer the witness's testimony about the 1989 incident to prove the accused's disposition toward murder and, in turn, use the accused's antisocial disposition as evidence that the accused committed the alleged 1990 murder.

On the other hand, the second sentence of Rule 404(b) permits the judge to admit the evidence when it is relevant on a noncharacter theory. That sentence reads that uncharged misconduct evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation,

\*576 Figure 1

ITEM OF EVIDENCE	INTERMEDIATE INFERENCE	ULTIMATE INFERENCE
THE ACCUSED'S UNCHARGED ACT	THE ACCUSED'S SUBJECTIVE, PERSONAL CHARACTER, DISPOSITION OR PROPENSITY	THE ACCUSED'S CONDUCT IN CONFORMITY WITH HIS OR HER

plan, knowledge, identity, or absence of mistake or accident.”<sup>5</sup> In our hypothetical case, the trial judge could allow the prosecutor to introduce the 1989 incident to establish the accused's identity as the perpetrator of the 1990 killing. If the two killings were committed with the identical, unique *modus operandi*, the uncharged incident is logically relevant to prove the accused's identity as the perpetrator of the charged crime without relying on a verboten character inference.<sup>6</sup> Hence, the judge could properly admit the testimony with a limiting instruction<sup>7</sup> identifying the permissible and impermissible uses of the evidence.

The admissibility of uncharged misconduct evidence is the single most important issue in contemporary criminal evidence law.<sup>8</sup> The issue has figured importantly in several of the most celebrated criminal trials of our time. Although Wayne Williams was formally charged with the murders of only Nathaniel Cater and Jimmy Ray Payne, the Georgia trial judge permitted the prosecutor to introduce evidence about ten other killings.<sup>9</sup> The national media made the prosecution's hair and fiber evidence the centerpiece of the trial, but that evidence was merely a means to the end of tying all twelve killings together. Similarly, uncharged misconduct evidence was a vital part of the prosecution's case against Claus von Bulow; the prosecution presented testimony about the accused's affair with Mrs. Isles on the theory that the affair supplied the motive for the accused's attempt to kill his millionairess wife.<sup>10</sup>

**\*577** The numbers confirm the importance of the issue of uncharged misconduct evidence.<sup>11</sup> Rule 404(b) has generated more published opinions than any other subsection of the Federal Rules.<sup>12</sup> In many jurisdictions, alleged errors in the admission of uncharged misconduct evidence are the most common ground for appeal in criminal cases.<sup>13</sup> In some jurisdictions, errors in the introduction of uncharged misconduct are the most frequent basis for reversal in criminal cases.<sup>14</sup>

Recent years have witnessed several frontal assaults on the first prong of the uncharged misconduct doctrine, prohibiting the prosecutor from offering evidence of an accused's uncharged crimes on a character theory as circumstantial proof of conduct. Some commentators have argued that the distinction between character and noncharacter theories of relevance is illusory; according to this argument, even the purportedly noncharacter theories entail assumptions about the accused's tendencies and disposition.<sup>15</sup> Alternatively, other commentators have contended that an accused's uncharged crimes can be so highly probative even on a character theory that it would be irrational to exclude them.<sup>16</sup> In one jurisdiction, prosecutors have argued that a proposition adopted by the state electorate has the effect of abolishing the general ban on evidence of an accused's bad character.<sup>17</sup>

To date, the direct attacks on the character evidence prohibition have been unsuccessful. The American Bar Association Criminal Justice Section's Committee on Rules of Criminal Procedure and Evidence recently reaffirmed the distinction between character and noncharacter theories of logical relevance.<sup>18</sup> For their part, the courts have uniformly declined the invitation to overturn the character evidence prohibition.<sup>19</sup>

**\*578** However, the advocates of the traditional ban on character evidence should take little solace from the failure of the direct attacks on the ban. Notwithstanding the failure of the direct attacks, the ban is imperiled. The threat to the ban arises from two emerging lines of case law governing the use of an accused's uncharged misconduct to prove the accused's *mens rea*. The use of the defendant's other crimes to prove intent is already the most widely used basis for admitting uncharged misconduct

evidence.<sup>20</sup> These new lines of authority, however, threaten to expand the admissibility of uncharged misconduct to establish *mens rea* to the point that this use of the evidence may substantially undermine the character evidence prohibition.

The purpose of this article is to describe and critique these two lines of authority. Section II of the article discusses one line, namely, the case law advancing the proposition that the first sentence in Rule 404(b) is automatically inapplicable whenever the prosecutor offers uncharged misconduct to support an ultimate inference of mental intent rather than physical conduct. The next section of the article analyzes the second line of authority. That line includes the decisions urging that under the doctrine of objective chances, the prosecutor can routinely offer uncharged misconduct on a noncharacter theory to prove intent. Both lines of authority are spurious, and both represent grave threats to the continued viability of the character evidence prohibition.

## II. THE DOCTRINE THAT THE CHARACTER EVIDENCE PROHIBITION IS INAPPLICABLE WHEN THE PROSECUTOR OFFERS THE ACCUSED'S UNCHARGED MISCONDUCT TO ESTABLISH THE ULTIMATE INFERENCE OF THE ACCUSED'S *MENS REA*

The first sentence of Rule 404(b) embodies the character evidence prohibition. In pertinent part, the first sentence of Rule 404(b) precludes a prosecutor from introducing evidence of an accused's other crimes "to prove the [accused's bad] character . . . in order to show action in conformity therewith."<sup>21</sup> On its face, the wording of the rule suggests that the rule comes into play only when the prosecutor offers the uncharged misconduct to support an ultimate inference of conduct.<sup>22</sup> Suppose that in a given case, the prosecutor offers testimony about the accused's uncharged misconduct to support the ultimate inference that the accused committed the charged offense with the requisite *mens rea*. Figure 2 depicts the prosecutor's theory of admissibility. Given the wording of the first sentence of Rule 404(b), the prohibition is arguably inapplicable whenever the prosecutor proposes relying on this theory of admissibility. The prosecutor will argue that an inference of *mens rea* differs from an inference of action or conduct.<sup>23</sup>

\*579 Figure 2

ITEM OF EVIDENCE	INTERMEDIATE INFERENCE	ULTIMATE INFERENCE
THE ACCUSED'S UNCHARGED ACT	THE ACCUSED'S TENDENCY TO FORM A CERTAIN <i>MENS REA</i> DISPOSITION	THE ACCUSED'S FORMATION OF THE <i>MENS REA</i> ON THE CHARGED HER CHARACTER OCCASION

The prosecutor's argument is not only plausible; there is a wealth of case law embracing the argument.<sup>24</sup> Indeed, it may currently be the prevailing view that the character evidence prohibition codified in Rule 404(b) is inapposite when the prosecutor's ultimate purpose is proving the accused's *mens rea*.<sup>25</sup> The California equivalent of Rule 404(b) is Evidence Code Sec. 1101(b).<sup>26</sup> The Federal Advisory Committee used § 1101(b) as one of its models in drafting Rule 404(b).<sup>27</sup> Section 1101(b) forbids the prosecution from offering uncharged misconduct evidence to support an ultimate inference of "conduct on a specified occasion."<sup>28</sup> In a recent case, the California Supreme Court emphasized that § 1101(b) forbids the prosecutor from introducing the accused's uncharged misconduct "only 'when offered to prove [defendant's] *conduct* on a specified occasion.'"<sup>29</sup> In that case, the court held that the character evidence prohibition in § 1101(b) was inapplicable because "[t]he prosecutor offered the

evidence to prove defendant's state of mind . . . rather than defendant's conduct on any particular occasion.”<sup>30</sup> Other decisions have similarly permitted prosecutors to argue that if an accused entertained the required *mens rea* during a similar, uncharged incident, “he probably harbor[ed] the same intent” at the time of the charged offense.<sup>31</sup>

This doctrine is a dangerous one threatening to emasculate the character evidence prohibition.<sup>32</sup> Several courts<sup>33</sup> have warned that this doctrine has the potential to swallow up the character evidence prohibition. Admittedly, that \*580 warning is somewhat overstated. Even if we posit that the prohibition in the first sentence of Rule 404(b) is inapplicable when uncharged misconduct is used to prove *mens rea*, evidence of the accused's uncharged misconduct would not become automatically admissible in every prosecution; the prosecutor would still have to convince the judge that the uncharged incident is similar enough to the charged offense to satisfy the requirement of logical relevance under Rule 401.<sup>34</sup> However, there is a large element of truth in the warning; the acceptance of the doctrine would represent a major inroad on the character evidence prohibition. Intent is an element of every true crime.<sup>35</sup> Accepting the premise that the character evidence prohibition is inapplicable to evidence offered to establish *mens rea*, the courts could rationalize admitting evidence of any similar uncharged crimes as a matter of course.

In the final analysis, however, the doctrine is not only dangerous; more importantly, the doctrine is unsound. A careful analysis of the theory of admissibility depicted in Figure 2 dictates the conclusion that the theory implicates the core concerns of the character evidence prohibition. In principle, the courts should treat the theory as impermissible character reasoning.

#### ***A. The Policy Rationales for the Character Evidence Prohibition***

As Figure 1 demonstrates, the forbidden character theory of relevance entails two inferences. Each inference presents a distinct probative danger, and the combination of probative dangers constitutes the policy justification for the character evidence prohibition.<sup>36</sup>

The first inferential step in character reasoning is determining the type of person the accused is. This step requires the jury to focus on the accused's disposition or propensity. The jurors must ask themselves: What type of person is the accused? Is she a law-abiding, moral person or a law-breaking, immoral individual? At a conscious level, the jurors must dwell on the accused's personal character.<sup>37</sup>

While consciously deciding whether to infer the accused's subjective bad character from the accused's uncharged crimes, at a subconscious level the jurors may be tempted to punish the accused for the other crimes.<sup>38</sup> The temptation may be especially acute when the testimony indicates that the accused has not as of yet been convicted of and punished for the uncharged crime.<sup>39</sup> The uncharged misconduct evidence may create the impression that to date, the accused \*581 has unjustly escaped punishment for the uncharged misdeeds.<sup>40</sup> The jurors may be tempted to rectify that injustice by punishing the accused now for the uncharged crimes--even though they have a reasonable doubt about the accused's guilt of the charged offense.<sup>41</sup>

If the jury convicted the accused for that reason, the basis of the conviction would be improper. Under our accusatory criminal justice system, it is axiomatic that the accused need answer only for the crime she is currently charged with.<sup>42</sup> The Supreme Court has held that the eighth amendment ban on cruel and unusual punishment precludes a state from criminalizing a personal status such as drug addiction.<sup>43</sup> If the uncharged misconduct evidence prompts the jury to convict to punish the accused for his uncharged crimes, in effect the jury has punished the accused for his status as a recidivist. When the admission of technically relevant evidence would realistically create the risk that the jury will decide the case on an improper basis, the risk is a probative danger which may warrant the exclusion of the evidence.<sup>44</sup> In their Note to Federal Rule 403, the Advisory Committee states that Rule 403 authorizes the trial judge to exclude marginally relevant evidence which “suggest[s] decision on an improper basis . . . .”<sup>45</sup>

Like the initial inferential step in character reasoning, the second step poses a significant probative danger. Just as the jurors wrongly decide<sup>46</sup> the case if they rest their verdict on an improper basis, they may be guilty of misdecision if they overestimate the probative value of a particular item of evidence.<sup>47</sup> The jurors can commit inferential error by ascribing undue weight to the item.<sup>48</sup> This possibility of inferential error materializes when a jury engages in the second step in character reasoning.

On the one hand, the available psychological studies indicate that once they have characterized the accused's general character, the jurors are likely to attach great weight to that characterization in determining whether the accused acted "in character" on the occasion of the charged offense.<sup>49</sup> Even when they have only fragmentary data about an individual, many laypersons tend to form oversimplified perceptions of the individual's character.<sup>50</sup> Thus, having concluded \*582 that the accused is disposed to criminal misconduct, the jurors may ascribe great significance to that conclusion in deciding whether the accused committed the charged crime.

On the other hand, the empirical studies indicate that the general construct of character is a relatively poor predictor of a person's conduct on a given occasion.<sup>51</sup> At one time, the trait theory, championed by Gordon Allport, was quite popular.<sup>52</sup> That theory viewed a person's general character as a reliable predictor of conduct across widely differing situations. However, in the 1960's Walter Mischel introduced the competing theory of specificity or situationism.<sup>53</sup> Mischel attacked the trait theory by pointing to studies showing a lack of cross-situational consistency. Those studies demonstrated that "moral conduct in one situation is not highly correlated with moral conduct in another."<sup>54</sup> In light of the available studies, we can have little confidence in the construct of character as a predictor of conduct.<sup>55</sup> Although some psychologists still subscribe to a modified version of the trait theory,<sup>56</sup> there is considerable evidence discrediting the popular faith in the predictive value of a person's general character.<sup>57</sup> Situational factors are often more determinant of human behavior.<sup>58</sup> The upshot is that the jurors may give character far more weight than it deserves.<sup>59</sup>

As previously stated, the admission of evidence of an accused's uncharged crimes creates the probative danger that the jurors will convict despite a reasonable doubt about the accused's guilt of the charged offense. Combined with that danger, the risk of the jurors' overestimation of the probative value of the accused's bad character furnishes the rationale for the character evidence prohibition prescribed by the first sentence of Rule 404(b).

### ***B. The Applicability of the Policy Rationales to the Prosecution's Use of the Accused's Uncharged Misconduct to Prove the Accused's Mens Rea***

To be sure, the theory of relevance depicted in Figure 2 differs superficially from the forbidden theory depicted in Figure 1. However, on closer scrutiny, it \*583 becomes clear that the two theories are indistinguishable in terms of the pertinent policy considerations. The theory depicted in Figure 2 poses both of the probative dangers inspiring the character evidence prohibition.

At the outset, it is evident that when the prosecutor relies on the theory depicted in Figure 2, there is a grave risk that the jurors will be tempted to return a guilty verdict resting on an improper basis. Evidence of the accused's uncharged misconduct is potentially prejudicial because the jurors may perceive the uncharged conduct as immoral<sup>60</sup> and consequently react adversely to the accused.<sup>61</sup> For the most part, it is the accused's wrongful intent which gives the conduct its perceived immoral quality. As Shakespeare wrote, "[T]here is nothing either good or bad, but thinking makes it so."<sup>62</sup> When a writer wants to express the thought that a person has a criminal disposition, the writer frequently describes the person as a "criminal mind"<sup>63</sup> --rather than a criminal arm or leg. Suppose that the jury concludes that the accused has a warped mind inclined to criminal intent. That conclusion can cause the jurors to experience the very type of revulsion which the character evidence prohibition is designed

to guard against. As Judge Goldberg has noted, the “character” referred to in Rule 404(b) is “largely a concept of a person's psychological bent or frame of mind . . . .”<sup>64</sup>

Compounding the probative danger, the theory set out in Figure 2 also poses the second probative danger underlying the prohibition: the risk that the jury will overestimate the probative worth of the evidence.

The theory certainly requires the jury to draw an intermediate inference as to the accused's disposition or tendency to form a particular *mens rea*. The charged offense occurred at one time and place while the uncharged crime ordinarily occurs at a different time and place. To bridge the temporal and spatial gap between the two incidents,<sup>65</sup> the prosecutor must assume the accused's propensity to entertain the same intent in similar situations.<sup>66</sup> That assumption is the inescapable link between the charged and uncharged crimes.<sup>67</sup> The trier of fact can reason from the starting point of the uncharged crime to a conclusion \*584 about the *mens rea* of the charged crime only through an intermediate assumption about the accused's character or propensity.<sup>68</sup>

The reliance on an assumption about a person's propensity or tendency to form the same intent creates the possibility that the jury will overvalue the uncharged misconduct evidence. If the only question were the accused's physical response, to some extent the resolution of the question would be reducible to the application of the laws of chemistry and physics. The application of the laws of the physical sciences can help predict the accused's physical reaction. It is the mental component of the accused's conduct which introduces the element of unpredictability. American criminal law operates on the assumption that the typical person possesses cognitive and volitional capacities.<sup>69</sup> The variety of ways in which the person can exercise those capacities makes it difficult to forecast the person's mental state at any given time. Even if the accused entertained a certain intent during a similar, uncharged incident, the accused may not have formed that intent on the charged occasion. The risk of overestimation exists because the response to a situation includes a variable mental component.

Despite the seeming differences between the theories depicted in Figures 1 and 2, the theories are indistinguishable in policy.<sup>70</sup> Both theories necessitate an intermediate assumption about the accused's propensity or tendency. Both theories create a risk of prejudice to the accused; in attempting to decide at a conscious level whether the accused has a tendency to entertain a certain *mens rea*, the jurors may subconsciously conclude that the accused is a repulsive, immoral individual--the type of person who should be incarcerated even if there is a reasonable doubt of his guilt of the charged offense. Finally, in applying both theories, the jury can easily overestimate the probative value of the uncharged misconduct evidence. Thus, whether the question arises at common law<sup>71</sup> or under Federal Rule 404(b),<sup>72</sup> the court should hold that the theory depicted in Figure 2 violates the character evidence prohibition.<sup>73</sup> The prohibition applies whether the ultimate inference is the physical act of pulling a trigger or the mental act of forming an intent to kill.<sup>74</sup>

### **\*585 III. THE DOCTRINE THAT THE PROSECUTOR MAY ROUTINELY OFFER EVIDENCE OF THE ACCUSED'S UNCHARGED MISCONDUCT TO PROVE INTENT UNDER THE DOCTRINE OF OBJECTIVE CHANCES WITHOUT VIOLATING THE CHARACTER EVIDENCE PROHIBITION**

Section II demonstrated that the character evidence prohibition applies even when the prosecutor offers the testimony about the accused's other crimes to establish an ultimate inference of *mens rea*. For that reason, when the government contemplates offering uncharged misconduct to prove *mens rea*, it is incumbent on the prosecutor to articulate a tenable noncharacter theory of logical relevance.

In some fact situations the prosecutor can readily develop a valid, noncharacter theory of admissibility. Assume, for instance, that the accused is charged with knowing receipt of stolen goods from A on September 1, 1990. The prosecutor has evidence that on March 1, 1990 under very suspicious circumstances, the accused received other stolen property from A: the accused met A in an alley at 2:00 a.m., A demanded that the accused pay in \$1.00 bills, and the identification numbers on the items of personalty had been defaced. In this case, the prosecutor may offer the testimony about the March 1st incident without relying

on any inference about the accused's general, bad character.<sup>75</sup> The March 1st incident should have placed the accused on notice that A is a fence for stolen property, and the jury may make the common sense inference that the accused's knowledge of A's status as a fence continued until September 1st.

In other cases, however, it is more difficult to determine whether the prosecutor has developed a legitimate noncharacter theory of relevance--or whether the prosecutor is merely endeavoring to cloak an illicit character theory. In a growing number of cases, prosecutors are citing the doctrine of objective chances as their theory of noncharacter relevance.<sup>76</sup> In the main, the courts have approved of prosecutors' invocations of the doctrine.<sup>77</sup> However, several commentators have argued that prosecutors are now smuggling inadmissible bad character evidence into the record under the guise of invoking the doctrine of objective chances.<sup>78</sup> The purpose of this section of the article is to assess that argument. The first part of this section describes the doctrine of chances and analyzes the use of the doctrine to prove the *actus reus* in the case. The next part of this section evaluates the more controversial application of the doctrine, namely, its use to establish *mens rea*.

### **\*586 A. The Use of the Doctrine of Chances to Prove the Actus Reus**

In the last decade, our society has come to the distressing realization that there is extensive child abuse in the United States.<sup>79</sup> Throughout the United States, prosecutors are making a more determined effort to convict child abusers.<sup>80</sup> There may be indisputable medical evidence that the alleged victim has suffered a fracture or subdural hematoma.<sup>81</sup> However, the accused often defends on the theory that the child sustained the injury accidentally. For example, the accused might contend that the child incurred the injury by falling off a swing set or down a flight of stairs. In these cases, the prosecutor's primary problem of proof is establishing an *actus reus*--a social loss or harm<sup>82</sup> caused by human agency.<sup>83</sup> At trial, the principal challenge facing the prosecution will be convincing the jury that the child's injury resulted from the intervention of another human being.<sup>84</sup> To meet that challenge, prosecutors frequently rely on the doctrine of chances.

*United States v. Woods*<sup>85</sup> is the paradigmatic case.<sup>86</sup> In *Woods*, the accused stood trial for infanticide. The victim had died of cyanosis. The accused claimed that the suffocation was accidental. To rebut the accused's claim, the prosecutor offered evidence that over a twenty-five year period, children in the accused's custody had experienced twenty cyanotic episodes.<sup>87</sup> The defense objected to the admission of the testimony on the ground that the testimony amounted to impermissible evidence of the accused's bad character.<sup>88</sup> However, the prosecution rejoined that the testimony was relevant on a noncharacter theory, that is, the doctrine of chances.<sup>89</sup>

Figure 3 depicts the theory of logical relevance underlying the doctrine. Under both the doctrine and the character theory shown in Figure 1, the trier of fact begins at the same starting point, the evidence of the accused's uncharged crimes. However, when the trier engages in character reasoning, the initial decision facing the trier is whether to infer from the evidence that the accused has a personal bad character.<sup>90</sup> In contrast, under the doctrine of chances, the trier need not focus on the accused's subjective character. Under the doctrine of chances, the initial decision facing the trier is whether the uncharged incidents are so numerous that it is objectively improbable that so many accidents would \*587 befall the accused.<sup>91</sup> The decision is akin to the determination the trier must make in a tort case when the plaintiff relies on *res ipsa loquitur*: In the tort setting, the trier must decide whether objectively the most likely cause of the plaintiff's injury is the defendant's negligent act.<sup>92</sup> In the present setting, the trier must determine whether the more likely cause of the victim's injury is the act of another human being.

Assume *arguendo* that statistics compiled by the United States Public Health Service indicate that during a twenty-five year period, only two percent of American children experienced an accidental cyanotic episode. Contrast that figure with the incidence of cyanotic episodes experienced by the children in Ms. Woods' custody. Suppose, for example, that during the same twenty-five year period, twenty percent of those children had cyanotic episodes. The frequency of the episodes among

those children far exceeds the national average for such episodes. The episodes are so recurrent among those children that it is objectively implausible to assume that all those episodes were accidental.<sup>93</sup> Either one or some of those episodes were caused by human intervention, or Ms. Woods is one of the most unlucky people alive.<sup>94</sup>

Like the theory of relevance shown in Figure 2, on its face the doctrine of chances differs from the character evidence theory depicted in Figure 1. More importantly, unlike the theory shown in Figure 2, the doctrine is distinguishable from a character reasoning theory in terms of the pertinent policies. The probative dangers posed by the doctrine differ to a marked degree from the risks raised by a character theory.

One risk raised by a character theory is that at least at a subconscious level, the jury will be tempted to punish the accused for uncharged misdeeds. That risk is acute under a character theory because the theory forces the jury to concentrate on the accused's personal character or disposition. The jurors must consciously address the question of the type of person the accused is. There is no need for the jurors to grapple with that question under the doctrine of chances. There is an undeniable possibility that on their own motion, the jurors may advert to the question. However, unlike a character theory, the doctrine of chances does not compel the jurors to focus on the accused's subjective disposition.<sup>95</sup> Consequently, the nature of the initial inferential step under the doctrine significantly reduces the risk of a decision on an improper basis.

The second probative danger raised by a character theory is that the jury will overvalue the probative worth of the item of evidence. Although general character has only slight<sup>96</sup> or small<sup>97</sup> relevancy to the issue of the accused's \*588 conduct on a specific occasion, we fear that the jurors will treat character as a reliable predictor of conduct.<sup>98</sup> There is less risk of overestimation of probative value under the doctrine of chances. The doctrine invites the trier to compare the accused's experience with statistical data or the trier's knowledge of everyday, human experience. We commonly accept the trier's knowledge of "the ways of the world" as a trustworthy basis for legal reasoning. That knowledge is one of the bases for the *res ipsa loquitur* doctrine;<sup>99</sup> and the jury instructions in many jurisdictions specifically encourage jurors to employ that knowledge as a basis for resolving factual disputes.<sup>100</sup>

Since the theory of relevance depicted in Figure 3 is distinguishable from the forbidden theory depicted in Figure 1, prosecutors may properly rely on the doctrine of chances as a noncharacter theory for satisfying Rule 404(b).<sup>101</sup> However, the courts should not admit uncharged misconduct evidence as a matter of course whenever the prosecutor asserts that the evidence is relevant under the doctrine of chances to prove the *actus reus*. Rather than accepting the prosecutor's argument as *ipse dixit*, the courts should carefully evaluate the evidence to ensure that the prosecutor has established the factual predicate for invoking the doctrine.<sup>102</sup> In theory, there is a distinction between character reasoning and the use of the doctrine of chances to establish the *actus reus*. However, in practice the distinction can be a thin,<sup>103</sup> difficult line for the jurors to draw; while the two doctrines posit different intermediate inferences, under both doctrines the jurors draw an ultimate inference of conduct. Moreover, the lax application of the doctrine of chances can eviscerate the character evidence prohibition. Just as every true crime includes a *mens rea*, an *actus reus* is an essential element of each true crime.<sup>104</sup> If uncharged misconduct becomes routinely admissible to prove the *actus reus*, there will be little left to the prohibition. Before admitting evidence of the accused's uncharged crimes to establish the *actus* under the doctrine of chances, the trial judge must ensure that the prosecutor has strictly satisfied the following foundational requirements.

### \*589 Figure 3

ITEM OF EVIDENCE	INTERMEDIATE INFERENCE	ULTIMATE INFERENCE
THE ACCUSED'S UNCHARGED ACTS	THE OBJECTIVE IMPROBABILITY OF SO MANY LOSSES BEFALLING THE ACCUSED ACCIDENTALLY	AN ACTUS REUS

*Each uncharged incident must be roughly similar to the charged crime.* In the hypothetical at the outset of this article, the prosecutor offered testimony about the accused's uncharged crime to establish the accused's identity as the perpetrator of the charged offense. The prosecutor argued that the uncharged incident was relevant on a noncharacter theory because both crimes evidenced the same, distinctive *modus operandi*. When the prosecutor relies on the *modus operandi* theory to establish identity, there must be a high degree of similarity between the charged and uncharged incidents.<sup>105</sup> Although the crimes need not be carbon copies,<sup>106</sup> the test is stringent.<sup>107</sup> The similarities must be so striking that they create the inference that all the acts are the handiwork<sup>108</sup> of the same criminal.<sup>109</sup> Assume, for example, a variation of the *Woods* fact situation. The body of the victim, who died of cyanosis, was found under a heavy blanket and several thick pillows. A year earlier another child in the accused's custody died of cyanosis. However, on the earlier occasion the body was found at the bottom of a hay stack on the premises. Since the two incidents lack a common "signature quality"<sup>110</sup> *modus*, the judge could not admit testimony about the earlier incident to show the accused's identity as the perpetrator of the charged offense.

To trigger the doctrine of chances, the uncharged incident must also be similar to the charged crime.<sup>111</sup> A dissimilar uncharged incident has at most a negligible effect on the probability of an accidental occurrence of the social \*590 harm.<sup>112</sup> However, the required degree of similarity is not as great as the degree necessary to invoke the *modus operandi* theory.<sup>113</sup> Under the doctrine of chances, it suffices that all the incidents fall into the same general category.<sup>114</sup> In the variation of the *Woods* case in the preceding paragraph, the earlier cyanotic episode would probably be admissible to help establish the *actus reus*. In both incidents, the cause of death was cyanosis; and it is the objective improbability of so many accidental cyanotic episodes which generates the inference of an *actus reus*.

*Considering the losses in both the charged and uncharged incidents, the accused has suffered the loss more frequently than the typical person endures such losses accidentally.* The courts and commentators intuitively recognize that when the prosecutor resorts to the doctrine of chances, it is highly relevant to consider the number of losses the accused has suffered. The *Woods* case is a classic example of the utilization of the doctrine because the twenty other cyanotic incidents were so numerous.<sup>115</sup> However, in analyzing the propriety of applying the doctrine in a particular case, the courts<sup>116</sup> and commentators<sup>117</sup> have tended to focus on the absolute size of the number of incidents. The debate is usually phrased in terms of the question of whether a single uncharged incident is enough to trigger the doctrine of chances.<sup>118</sup>

It is submitted that the focus on the absolute size of the number of incidents is wrong-minded. Instead, the courts should consider the relative frequency of the incidents. The most meaningful question is whether cumulatively, the losses suffered by the accused--the number of cyanotic episodes experienced by the accused's children or the number of fires at buildings owned by the accused-- exceed the frequency rate for the general population. The total number of losses must reach an improbability threshold,<sup>119</sup> and the number reaches that threshold only when the frequency with which the accused suffers the losses is greater than the general frequency with which such losses occur.

Revisit the *Woods* fact situation. Assume again that during the relevant twenty-five year period, only two percent of the children in the United States experienced cyanotic episodes. During that period, the children in Ms. Woods' custody had twenty cyanotic incidents. Suppose that there were a total of 100 children in her custody during those twenty-five years. Thus, twenty percent of the children in the accused's custody experienced cyanotic episodes. The uncharged incidents are highly probative of an *actus reus* because the accused's incidence of losses is several times the frequency for the general population.

**\*591** The key is the relative frequency rather than brute number of incidents. Vary the facts. Suppose that Ms. Woods had been in charge of a huge orphanage during the twenty-five year period. During the twenty-five year period a total of 3,000 children were in the custodial care of the orphanage. The constant is that during the twenty-five year period, the children in her custody suffered a total of twenty cyanotic episodes. Should the judge admit the uncharged misconduct evidence in this variation of the *Woods* case? The answer is No. The evidence has not attained the improbability threshold. During the same period two percent of American children experienced cyanotic episodes. Although the absolute size of the number of uncharged incidents--twenty--is impressive, only 1.5 percent of the children in the accused's custody had cyanotic experiences. The relative frequency of the accused's losses does not make it objectively improbable that on the occasion of the charged offense, the child's death resulted from an *actus reus*.

How can the prosecutor establish the frequency with which the type of loss involved in the case occurs in the general population? There may be pre-existing data compilations. Government agencies or private research organizations might have gathered empirical data, for example, in the form of an epidemiological study.<sup>120</sup> The studies may be so authoritative that the data is judicially noticeable,<sup>121</sup> or the study may fall within the learned treatise exception to the hearsay rule.<sup>122</sup> If the data has not been compiled but it is accessible, the prosecutor can retain an expert to use recognized statistical techniques to gather the data establishing the frequency.<sup>123</sup> Failing all other methods, the prosecutor can ask the judge to rely on her conception of common, human experience to resolve the question whether the accused suffered the loss more frequently than the typical person could expect to sustain the loss. This last technique is imprecise. However, it is the same sort of judgment which the trial judge makes when the judge must decide whether a *modus operandi* is so unique that it is probably the handiwork of a single criminal. In making that decision, the judge rarely has the benefit of empirical data about the frequency with which a particular *modus* is utilized.<sup>124</sup> Yet every jurisdiction allows the judge to rely on common sense and experience to make that decision.

Of course, as the proponent, the prosecutor has the burden of establishing all the foundational facts conditioning the admissibility of the uncharged misconduct evidence under the doctrine of chances.<sup>125</sup> At the end of her analysis of **\*592** all the foundational testimony the judge may genuinely doubt whether the frequency of the accused's losses exceeds the incidence for the general population. In that event, the judge has no choice but to exclude the prosecutor's evidence. If the judge has no satisfactory basis for determining the frequency of such accidental occurrences among the general populace, the judge may not admit the uncharged misconduct evidence under the aegis of the doctrine of chances.

*The issue of the occurrence of an actus reus must be in bona fide dispute; the prosecution must have a legitimate need to resort to the uncharged misconduct to prove the actus reus.* The first two foundational requirements, mandating proof of similarity and a frequency of loss exceeding the improbability threshold, flow from the character evidence prohibition codified in Rule 404(b). If either requirement is unmet, the prosecutor has not triggered the doctrine of chances; and the uncharged misconduct evidence does not possess relevance on a noncharacter theory. The last foundational requirement, though, flows from Federal Rule of Evidence 403.

Bare logical relevance on a noncharacter theory is not enough to guarantee the admissibility of uncharged misconduct evidence. The evidence must also pass muster under Rule 403. Rule 403 permits the judge to exclude logically relevant evidence when the accompanying probative dangers outweigh the probative value of the evidence. The Advisory Committee Note to Rule 403 indicates that in assessing the probative value of an item of potentially prejudicial evidence, the judge ought to consider whether the proponent has a bona fide need to introduce that item.<sup>126</sup>

We shall consider the question of the extent of the prosecution's need for uncharged misconduct evidence in detail in the next subsection devoted to the use of uncharged misconduct evidence to prove *mens rea*. We shall defer the in depth discussion of prosecution need until that subsection, since that subsection addresses the primary topic of this article, the use of uncharged crimes to establish intent. However, even an abbreviated discussion of the case law governing the use of other crimes to prove *actus reus* must make the point that the prosecutor may resort to other crimes evidence for that purpose only when the occurrence of the *actus reus* is in genuine dispute. In a 1990 decision,<sup>127</sup> the Court of Appeals for the Ninth Circuit made that point in emphatic fashion. The case was a habeas corpus proceeding based on a state conviction. Like Ms. Woods, the accused in this case was charged with infanticide. Unlike Ms. Woods, the accused did not contend that the decedent child suffered the injuries accidentally; as the Ninth Circuit commented, “[i]n the instant case, no claim was made that the child died accidentally.”<sup>128</sup> Nevertheless, as in *Woods*, the trial judge permitted the prosecutor to introduce uncharged misconduct evidence for the stated reason that the evidence was relevant to prove the *actus reus*. The Ninth Circuit not only held that the trial judge erred; the court also ruled that \*593 the uncharged misconduct evidence was so virulent that the erroneous admission of the evidence denied the accused due process and rendered the trial fundamentally unfair.<sup>129</sup> The court emphasized that while highly prejudicial, the evidence had minimal probative value, since the accused had not disputed the issue of the occurrence of an *actus reus*.<sup>130</sup>

The Ninth Circuit's insistence that the issue be controverted is well taken. Uncharged misconduct evidence often has dual logical relevance; even when the evidence is relevant on a noncharacter theory, it also incidentally shows the accused's bad character.<sup>131</sup> If the charge is infanticide and the uncharged misconduct evidence establishes the death of several other children in the accused's custody, the criminal disposition inference is patent even when neither the prosecutor nor the judge mentions the inference. If the judge admits uncharged misconduct to prove the *actus reus* when the evidence has only tenuous<sup>132</sup> probative value for that purpose, there is a significant risk that the jurors will misuse the evidence by drawing the forbidden character inference.<sup>133</sup> Unless the prosecution has a bona fide need to use the evidence to prove the occurrence of an *actus reus*, the predominant effect<sup>134</sup> on the jurors' minds may be to “serve mostly to demonstrate that the Defendant had the propensity to commit the crime charged, the one impermissible use of such evidence.”<sup>135</sup>

### **B. The Use of the Doctrine of Chances to Prove the Mens Rea**

In criminal law, conduct can be “accidental” in two, very different senses. As subsection A explained, conduct can be accidental in the sense that the conduct does not represent an *actus reus*. A social loss such as a death can occur without the causal intervention of another human being; the death may be the result of “an act of God” such as an earthquake or flood.<sup>136</sup> As the *Woods* case illustrates,<sup>137</sup> when the accused claims that the conduct in question was accidental in this fundamental sense, the prosecutor may sometimes legitimately offer uncharged misconduct evidence under the doctrine of chances to negate the claim.

There is a second sense in which allegedly criminal conduct can be accidental. The accused may admit that he performed the *actus reus* but claim that he did so with an innocent state of mind.<sup>138</sup> For example, the accused may concede that he had possession of a contraband drug but deny that he knew \*594 that the substance was an illegal drug; he might testify that he thought that the substance was a lawful medicine.<sup>139</sup> Or an accused might admit that he received stolen property but defend on the theory that he was unaware that the property was stolen.<sup>140</sup> In this context, when the accused characterizes the conduct as “accidental,” the accused means that he performed the act without the required *mens rea*.

Just as the government may offer evidence of the accused's other crimes to disprove “accident” in the first sense, the prosecutor may attempt to introduce uncharged misconduct evidence to negate “accident” in the second sense.<sup>141</sup> Dean Wigmore proposed the following hypothetical to exemplify this use of uncharged misconduct evidence:

[I]f A while hunting with B hears the bullet from B's gun whistling past his head, he is willing to accept B's bad aim . . . as a conceivable explanation; but if shortly afterwards the same thing happens again, and if on the third occasion A receives B's bullet in his body, the immediate inference (i.e., as a probability, perhaps not as a certainty) is that B shot at A deliberately; because the chances of an inadvertent shooting on three successive similar occasions are extremely small; or (to put it another way) because inadvertence or accident is only an abnormal or occasional explanation for the discharge of a gun at a given object, and therefore the recurrence of a similar result (i.e., discharge towards the same object, A) excludes the fair possibility of such an abnormal cause and points out the cause as probably a more natural and usual one, i.e., a deliberate discharge at A. In short, similar results do not usually occur through abnormal causes; and the recurrence of a similar result . . . tends (increasingly with each instance) to negative . . . inadvertence . . . or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act; and the force of each additional instance will vary in each kind of offense according to the probability that the act could be repeated, within a limited time and under given circumstances, with an innocent intent.<sup>142</sup>

Essentially, Dean Wigmore relies on the theory of logical relevance depicted in Figure 4. Like the theory shown in Figure 3, this theory enables the jury to reason about the case without relying on any forbidden inferences about the accused's subjective, personal character. As under Figure 3, the intermediate inference in this theory is a conclusion about the objective improbability<sup>143</sup> of the accused's innocent involvement in so many similar incidents such as instances of possession of contraband drugs or receipts of stolen property.

**\*595 Figure 4**

ITEM OF EVIDENCE	INTERMEDIATE INFERENCE	ULTIMATE INFERENCE
THE ACCUSED'S UNCHARGED ACTS	THE OBJECTIVE IMPROBABILITY OF THE ACCUSED'S INNOCENT INVOLVEMENT IN SO MANY INCIDENTS	THE MENS REA

However, like the theory depicted in Figure 3, this theory can easily be abused. As Section II noted, intent is an essential element of every true crime.<sup>144</sup> Whenever the prosecutor has evidence of an uncharged crime similar to the charged offense, the prosecutor can attempt to invoke Wigmore's doctrine of chances; the prosecutor can always argue that a similar uncharged crime triggers the doctrine of chances and is, therefore, logically relevant on a noncharacter theory both to disprove accident and thereby to prove *mens rea*. If the courts accept these arguments uncritically, the prosecutor may be able to introduce bad character evidence in disguise.<sup>145</sup> Unfortunately, as one commentator has already observed,<sup>146</sup> there is mounting evidence that the courts have tended to be too receptive to prosecutors' invocation of the doctrine of chances to prove *mens rea*.<sup>147</sup>

To counter this tendency, the courts should clearly enunciate and rigorously enforce the foundational requirements applicable when the prosecutor relies on the doctrine of chances to establish *mens rea*. The requirements parallel the foundational requirements for invoking the doctrine to prove the *actus reus*.

*Each uncharged incident must be roughly similar to the charged crime.* To bring the doctrine into play, the prosecutor must show that the uncharged incident is similar to the charged offense. As Dean Wigmore emphasized in the analysis of his famous hypothetical, the facts give rise to an inference of *mens rea* because “the chances of an inadvertent shooting on three successive similar occasions are extremely small . . . .”<sup>148</sup> It flies in the face of common sense to assume that on all three occasions, the accused had an innocent state of \*596 mind;<sup>149</sup> a coincidence of three, inadvertent, similar acts is objectively unlikely.<sup>150</sup>

In several respects, this foundational requirement tracks the corresponding requirement which the prosecutor must satisfy when the government relies on the doctrine of chances to prove the *actus reus*. The degree of similarity between the charged and uncharged incidents need not be as great as the degree required when the prosecutor relies on the *modus operandi* theory to prove identity.<sup>151</sup>

Further, under both applications of the doctrine of chances, the prosecutor must demonstrate that the physical elements of the charged and uncharged offenses are similar.<sup>152</sup> The earlier discussion of the *Woods* case pointed out that the charged and uncharged incidents were sufficiently similar to trigger the doctrine of chances because all the incidents involved the same medical condition, cyanosis.<sup>153</sup> While the physical elements must be similar,<sup>154</sup> the courts apply the similarity requirement laxly. Suppose, for example, that the accused is charged with knowing possession of heroin and defends on the basis that he was unaware that the substance in his possession was a contraband drug. In all likelihood, the court would permit the prosecutor to introduce testimony about uncharged incidents in which the accused was found in possession of marijuana<sup>155</sup> or amphetamines.<sup>156</sup> In short, the physical elements of the charged and uncharged events need not be identical.<sup>157</sup>

The courts are less tolerant of dissimilarities between the victims of the charged and uncharged incidents.<sup>158</sup> When the charged crime is a sexual offense against a young girl, the judge may exclude prosecution testimony about an uncharged offense against a boy.<sup>159</sup> If the charged offense is a sexual offense against a child, the judge may bar evidence of an uncharged crime against an adult.<sup>160</sup> In a case charging an assault on a police officer, the judge may well sustain a defense objection to evidence of uncharged attacks on private persons.<sup>161</sup> The courts should insist that the victims be similar when the prosecutor offers uncharged misconduct evidence under the doctrine of chances to prove \*597 *mens rea*. The focus is the accused's state of mind. The accused's intent may vary with the victim's identity. The accused may have radically different attitudes toward different groups of persons, and the trier can infer wrongful intent much more confidently if the accused has victimized the same type of person on other occasions.

*Considering the accused's involvement in both the charged and uncharged incidents, the accused has been involved in such events more frequently than the typical person.* Proof of similarity between the charged and uncharged incidents is a necessary condition to invoking the doctrine of chances. However, standing alone, proof of similarity is insufficient to bring the doctrine into play. Another necessary condition is proof that the accused has been involved in similar incidents so often that it is objectively unlikely that he became involved innocently. This foundational requirement is obviously similar to the second foundational requirement applicable when the prosecutor relies on the doctrine of chances to prove the occurrence of an *actus reus*. In applying both requirements, the judge must engage in relative frequency analysis. However, the requirements differ in kind and degree, and the differences may make it more difficult for the prosecution to satisfy this foundational requirement when the issue is the accused's *mens rea*.

The requirements for the two applications of the doctrine of chances differ in kind because the application determines the nature of the frequency the judge must analyze. When the prosecutor invites the court to apply the doctrine to prove the *actus reus*, the focus is on the frequency of a particular type of loss--the death of a child in a person's custody or the fire at a person's

building. In contrast, when the prosecutor asks the court to employ the doctrine to establish *mens rea*, the relevant frequency is the incidence of the accused's personal involvement in a type of event--the discharge of a weapon in Wigmore's hypothetical, the possession of contraband drugs, or the receipt of stolen property. To intelligently decide whether the prosecutor's evidence exceeds the objective improbability threshold,<sup>162</sup> the judge must define the correct relative frequency.

The difference in kind between the foundational requirements under the two applications of the doctrine of chances results in a further difference in degree. The requirements differ in the practical degree of difficulty of proving the relevant frequencies. There are many empirical studies documenting the incidence of social losses such as cyanotic episodes, deaths caused by asphyxiation, and fires. Quite apart from the utility of this data to judges struggling with the application of the doctrine of chances, there are other important social reasons for collecting the data. Many of these data collections play a critical role in medical diagnosis. Other data collections are useful to businesses such as insurance companies. In a given case, it may be relatively easy for the prosecutor to marshal the frequency data needed to satisfy the foundational requirement applicable when the question is the occurrence of the *actus reus*.

However, it is far more difficult to find the relevant frequency data when the question is the existence of the *mens rea*. There may be little or no data on \*598 such questions as how often the typical citizen is likely to be found in possession of contraband drugs or stolen property. The judge is more likely to have to rely on her common sense and knowledge of human experience. The extent of the judge's pertinent knowledge may be an intuitive belief that the inadvertent possession of illicit drugs or stolen property is probably a "once in a lifetime" experience for an innocent person. Thus, there is ordinarily more conjecture when the prosecutor invokes the doctrine of chances to prove *mens rea*--all the more reason, of course, to employ the doctrine cautiously. As when the prosecutor relies on the doctrine of chances to prove the *actus reus*, the burden of proving the preliminary facts rests on the prosecutor.<sup>163</sup> If after weighing all the foundational testimony the judge believes that it would be speculative to find that the prosecution has attained the improbability threshold, the judge should exclude the uncharged misconduct evidence.

*The issue of the existence of the mens rea must be in bona fide dispute; the prosecution must have a legitimate need to resort to the uncharged misconduct evidence to prove intent.* Subsection A observed that uncharged misconduct offered to prove the *actus reus* must pass muster under Federal Rule 403 as well as under Rule 404(b).<sup>164</sup> The same observation obtains when the prosecution attempts to introduce evidence of the accused's other crimes to establish the *mens rea*. The prosecution must have a bona fide need to resort to the potentially prejudicial uncharged misconduct evidence.<sup>165</sup> To assess the extent of the prosecution need, the judge must painstakingly evaluate the state of the record when the prosecutor offers the evidence. There are four possible variations of the state of the record.

In one variation, the accused has already affirmatively disputed the issue of the existence of the *mens rea*. There are several ways in which the accused could do so. During opening statement,<sup>166</sup> the defense attorney might assert that at the time of the *actus reus*, the accused had an innocent state of mind. The accused<sup>167</sup> or a defense witness<sup>168</sup> may give testimony calling into question the existence of the *mens rea*. If a prosecution witness' testimony points to the existence of the *mens rea*, a pointed cross-examination by the defense attorney could serve to place intent in doubt.<sup>169</sup> The common denominator in these cases is that intent is more than a purely formal issue. The accused is actively contesting<sup>170</sup> the intent issue. All courts agree that this state of the record warrants \*599 the receipt of otherwise admissible uncharged misconduct evidence to establish *mens rea*.

Now shift to the variation at the polar extreme. Assume that the parties have entered into a formal stipulation as to the existence of intent.<sup>171</sup> The accused might have decided to defend on a theory other than lack of *mens rea*. If the accused and the prosecution stipulate to the existence of the intent, the stipulation effectively removes the *mens rea* issue from the range of dispute in the case. In this state of the record, all courts agree that unless the uncharged misconduct evidence is relevant to another issue, the evidence is inadmissible to prove intent.

While it is easy to determine the proper outcome in the first two variations of the state of the record, the next two variations are troublesome.

In the third variation, although there is no formal stipulation, the accused informally concedes the *mens rea* issue. There might be several reasons why the accused would be willing to informally concede intent absent a formal stipulation. In many jurisdictions, the accused cannot compel the prosecution to enter into a stipulation.<sup>172</sup> Even if the accused offered to formally stipulate, the prosecution might reject the offer. Or the defense might be reluctant to enter into a formal stipulation. Suppose, for instance, that the accused intended to defend on an alibi or misidentification theory.<sup>173</sup> Even though the accused does not contemplate contesting the intent element of the crime, the accused might be leary of stipulating that whoever committed the *actus reus* possessed the requisite *mens rea*. Unless the judge clearly explains the law governing stipulations,<sup>174</sup> a juror might suspect that any accused who knew enough about the crime to stipulate to the *mens rea* must have been personally involved in the crime. The juror might not realize that evidence law permits parties to stipulate to the existence of facts which they lack personal knowledge of.

In this light, the accused may well find herself in a situation in which she is willing to informally concede the existence of *mens rea*. Assume that the defense counsel assures<sup>175</sup> the trial judge that during both opening statements and closing argument, the defense counsel will expressly state that as far as the defense can tell, the perpetrator of the charged crime possessed the required *mens rea*. The defense counsel also assures the judge that the defense will not object if the judge mentions and highlights the informal concession during the final jury charge.<sup>176</sup> If the defense makes and lives up to these assurances, the \*600 trial judge should exclude any uncharged misconduct testimony offered to prove *mens rea*. It is true that there is still a chance that the jurors could acquit for want of evidence of intent. However, given the defense concessions and the judicial comment, it would be highly irrational for the jurors to do so. Realistically, the possibility is so remote that it does not justify exposing the accused to the much livelier possibility that the jury will misuse the testimony as general bad character evidence. On balance, the judge should rule the uncharged misconduct evidence inadmissible in this variation.

In the last variation of the state of the record, although the accused explicitly defends on another theory such as alibi or misidentification, the accused is unwilling to even informally concede the *mens rea*.<sup>177</sup> The defense attorney may want to leave open the possibility that the jury will acquit for lack of evidence of intent. The defense attorney might be especially tempted to follow this tack when the charge requires a special *mens rea* element and the jury instruction on the *mens rea* element seems to impose an onerous burden on the prosecution.

In this variation, the prosecution should generally be entitled to introduce otherwise admissible uncharged misconduct evidence to establish the *mens rea*. When the prosecutor is relying on the doctrine of chances to prove *mens rea* rather than the *actus reus*, there may be little admissible evidence of the *mens rea* other than uncharged crimes evidencing the same intent.

The *actus reus* is a social loss caused by human agency.<sup>178</sup> There is often readily available physical evidence of the loss itself. In a homicide prosecution, a forensic pathologist can describe the body and authenticate photographs of the cadaver. Moreover, the prosecution may have expert testimony attesting that the loss was caused by human agency. Based on the wound pattern on the cadaver, the pathologist can opine that the manner of death was homicidal.<sup>179</sup>

In contrast, in the typical case in which the prosecutor attempts to establish the *mens rea*, the prosecutor may have little alternative evidence. In rare cases, the prosecutor is fortunate; the prosecutor has evidence that shortly before, during, or shortly after the crime the accused made statements reflecting the *mens rea*. However, more commonly, the prosecutor has no evidence of such statements. Worse still, the prosecutor often has no physical evidence or expert testimony. The prosecutor may be able to prove a death by producing a photograph of the cadaver, but no camera is capable of capturing and recording the *mens rea* of intent to kill. Further, the courts are more reluctant to admit testimony about *mens rea* by mental health experts than testimony about manner of death by forensic pathologists.<sup>180</sup> There has been extensive criticism of expert testimony by psychiatrists and

psychologists.<sup>181</sup> There is widespread skepticism \*601 about the ability of mental health experts to retrospectively determine an accused's state of mind. In part due to that skepticism, in 1984 Congress amended Federal Rule of Evidence 704 to add the following language:

No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.<sup>182</sup>

It is true that the prosecutor can invite the jury to infer the *mens rea* from the percipient witnesses' testimony describing the evidently rational, calculating manner in which the perpetrator committed the *actus reus*.<sup>183</sup> In an exceptional case, that inference might be virtually conclusive evidence of an accompanying criminal intent.<sup>184</sup> However, that inference may be the prosecutor's only evidence of intent other than any available uncharged misconduct testimony. The prosecutor typically has many more evidentiary options when she endeavors to prove the *actus reus*. Apart from the uncharged misconduct testimony, there may be a dearth of evidence usable to establish *mens rea*.

In addition, if the defense refuses to concede the existence of *mens rea* and the judge nevertheless excludes the prosecution's uncharged misconduct evidence probative of intent, the jury instructions may make it very difficult for the prosecution to sustain its burden of proof. Absent a defense concession, the judge will have to charge the jury on the essential elements of the crime, including the *mens rea*. There is substantial authority that even absent an express defense request, the trial judge has a *sua sponte* obligation to instruct the jury on the elements of the charged offense.<sup>185</sup> We must assume that the jurors will be attentive to the instructions and apply them conscientiously. On that assumption, there is a good possibility that the jury will acquit for want of evidence of intent. When the question is the existence of the *mens rea*, the prosecutor ordinarily has a much more compelling need to resort to probative uncharged misconduct evidence. If the accused does not at least informally concede the existence of the *mens rea*, the prosecutor should presumptively<sup>186</sup> be entitled to introduce evidence of similar, sufficiently frequent uncharged incidents to prove intent under the doctrine of chances.

#### \*602 IV. CONCLUSION

Following the example of the United Kingdom,<sup>187</sup> our courts may one day relax the character evidence prohibition in criminal cases. Distinguished American commentators have called for that relaxation.<sup>188</sup> However, at least for the interim, the American courts seem determined to adhere to the conventional prohibition.

If we are to continue to make any pretense of enforcing the prohibition, we must repudiate both of the doctrines discussed in this Article. The character evidence prohibition is violated when we permit a prosecutor to rely on the theory depicted in Figure 2 to justify the admissibility for uncharged misconduct evidence. As Section II of this Article hopefully demonstrated, that theory of admissibility is character evidence pure and simple.<sup>189</sup> While the theory differs cosmetically from traditional character reasoning, the theory squarely poses both of the probative dangers inspiring the character evidence prohibition. If the prosecutor's only argument for the admission of uncharged misconduct evidence is that theory of logical relevance, the prohibition mandates the exclusion of the evidence.

The rejection of the theory depicted in Figure 2 will give prosecutors even more incentive to resort to the doctrine of objective chances. As Section III noted, a doctrine of chances theory possesses legitimate, noncharacter relevance. However, the theory is susceptible to abuse. The distinction between a verboten character theory and a permissible chances theory is a thin line<sup>190</sup> which a lay juror could easily lose sight of. To guard against that risk, the courts should rigorously enforce the foundational requirements for triggering the doctrine of chances. The courts should admit uncharged misconduct evidence under the doctrine

to prove *mens rea* only when the prosecutor can make persuasive showings that each uncharged incident is similar to the charged offense and that the accused has been involved in such incidents more frequently than the typical person. The prosecutor's uncharged misconduct testimony must satisfy both foundational requirements to ensure genuine noncharacter relevance under \*603 Rule 404(b). Even if the prosecutor can surmount the similarity and relative frequency hurdles, the judge should exclude the evidence under Rule 403 unless the intent issue is in bona fide dispute.

Intellectual honesty demands the repudiation of both of the doctrines currently threatening to engulf the character evidence prohibition. If we are going to modify or abolish the prohibition, it should be done explicitly in a straightforward fashion--not by legerdemain.

## Footnotes

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- 1 FED. R. EVID. 404(b).
- 2 R. CARLSON, E. IMWINKELRIED & E. KIONKA, MATERIALS FOR THE STUDY OF EVIDENCE 2 (Supp. 1989).
- 3 FED. R. EVID. 404(b).
- 4 E. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:18, at 48 (1984).
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- 6 E. IMWINKELRIED, *supra* note 4, §§ 3:10-:14.
- 7 FED. R. EVID. 105.
- 8 Imwinkelried, *Uncharged Misconduct: One of the Most Misunderstood Issues in Criminal Evidence*, 1 CRIM. JUST. 6, 7 (1986).
- 9 Williams v. State, 251 Ga. 749, 312 S.E.2d 40 (1983).
- 10 E. IMWINKELRIED, *supra* note 4, § 1:01, at 2.
- 11 Imwinkelried, *The Plan Theory for Admitting Evidence of the Defendant's Uncharged Crimes: A Microcosm of the Flaws in the Uncharged Misconduct Doctrine*, 50 MO. L. REV. 1, 2 (1985).
- 12 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 404[08], at 404-56 (1989); S. SALTZBURG, L. SCHINASI & D. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL 361 (2d ed. 1986) ("heavily litigated in federal and military courts").
- 13 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5239, at 427 (1978).
- 14 *Evidence--The Emotional Propensity Exception: State v. Treadaway* 1978 ARIZ. ST. L.J. 153, 156 n.29.
- 15 *See generally* Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777 (1981).
- 16 Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 883, 890 (1982). *See also* Hutton, *Commentary: Prior Bad Acts Evidence in Cases of Sexual Contact With a Child*, 34 S.D. L. REV. 604 (1989) (urging the recognition of a limited sexual offender exception to the general character evidence prohibition in child sexual abuse prosecutions).

- 17 In 1982, the California electorate adopted Proposition 8, amending the state constitution. Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003 (1984). California prosecutors have argued that Proposition 8 overturns the character evidence prohibition in that state. *E.g.*, *People v. Jordan*, 202 Cal. App. 3d 1127, 249 Cal. Rptr. 269 (1988); *People v. Nible*, 200 Cal. App. 3d 838, 846 n.5, 247 Cal. Rptr. 396, 400 n.5 (1988); *People v. Perkins*, 159 Cal. App. 3d 646, 205 Cal. Rptr. 625 (1984).
- 18 ABA Comm. On Rules of Crim. Proc. & Evid., Crim. Just. Sect., *Federal Rules of Evidence: A Fresh Review and Evaluation* 28 (1987) (“a line can be drawn based on whether or not the proof’s line of reasoning seeks to make use of the particular propensity known as ‘character’”).
- 19 *Frank v. Superior Court*, 48 Cal. 3d 632, 770 P.2d 1119, 257 Cal. Rptr. 550 (1989); *People v. Perkins*, 159 Cal. App. 3d 646, 205 Cal. Rptr. 625 (1984); *Williams v. Superior Court*, 36 Cal. 3d 441, 449 n.6, 683 P.2d 699, 704 n.6, 204 Cal. Rptr. 700, 705 n.6 (1984).
- 20 22 C. WRIGHT & K. GRAHAM, *supra* note 13, § 5242; Reed, *The Development of the Propensity Rule in Federal Criminal Causes 1840-1975*, 51 U. CIN. L. REV. 299, 306 (1982).
- 21 FED. R. EVID. 404(b).
- 22 22 C. WRIGHT & K. GRAHAM, *supra* note 13, § 5242, at 488; Myers, *Uncharged Misconduct Evidence in Child Abuse Litigation*, 1988 UTAH L. REV. 479, 524-25; Teitelbaum & Hertz, *Evidence II: Evidence of Other Crimes as Proof of Intent*, 13 N.M. L. REV. 423, 431 (1983).
- 23 *See* authorities cited in *supra* note 22.
- 24 Myers, *supra* note 22, at 531. *See also* *United States v. Weddell*, 890 F.2d 106, 107-08 (8th Cir. 1989) (“Where intent is an element of the crime charged, evidence of other acts tending to establish that element is generally admissible”).
- 25 Myers, *supra* note 22, at 531.
- 26 CAL. EVID. CODE § 1101(b) (West 1990).
- 27 Adv. Comm. Note, FED. R. EVID. 404(b). The note twice refers to the California Law Revision Commission commentary to the proposed statute which ultimately became Evidence Code § 1101(b).
- 28 CAL. EVID. CODE § 1101(b) (West 1990).
- 29 *People v. Bittaker*, 48 Cal. 3d 1046, 1096, 774 P.2d 659, 688, 259 Cal. Rptr. 630, 659 (1989) (emphasis in the original).
- 30 *Id.*
- 31 *People v. Wade*, 44 Cal. 3d 975, 990-91, 750 P.2d 794, 244 Cal. Rptr. 905, *cert. denied*, 109 S.Ct. 248 (1988).
- 32 Teitelbaum & Hertz, *supra* note 22, at 431.
- 33 *Thompson v. United States*, 546 A.2d 414, 421 (D.C. Cir. 1988); *United States v. Oppon*, 863 F.2d 141, 149 (1st Cir. 1988) (Coffin, J., concurring). *See also* Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135, 152-53 (1989).
- 34 FED. R. EVID. 401.
- 35 *Thompson v. United States*, *supra* note 33; Ordover, *supra* note 33, at 152; Comment, *Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b)*, 61 WASH. L. REV. 1213, 1221 (1986).
- 36 E. IMWINKELRIED, *supra* note 4, § 2:18.
- 37 Turcott, *Similar Fact Evidence: The Boardman Legacy*, 21 CRIM. L.Q. 43, 46, 48, 54, 56 (1978-79).
- 38 Johnson, *The Admissibility of Extraneous Offenses in Texas Criminal Cases*, 14 S. TEX. L.J. 69, 78 (1972-73).

- 39 Williams, *The Problem of Similar Fact Evidence*, 5 DALHOUSIE L.J. 281, 299-300 (1979).
- 40 *Id.*
- 41 *Id.*
- 42 Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidence in Federal Criminal Trials*, 50 U. CIN. L. REV. 713, 731 (1981); *State v. Ellis : The Other Wrongful Acts Rule, Survey of Nebraska Law--Evidence*, 15 CREIGHTON L. REV. 281, 284 (1981).
- 43 *Robinson v. California*, 370 U.S. 660 (1962). *See* Reed, *Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of Evidence*, 53 U. CIN. L. REV. 113, 163-69 (1984).
- 44 Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 889 (1988).
- 45 Adv. Comm. Note, FED. R. EVID. 403.
- 46 6 J. BENTHAM, THE WORKS OF JEREMY BENTHAM 105-09 (J. Bowring ed. 1962).
- 47 Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59, 83 (1984).
- 48 *Id.* at 90; Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1030-31 (1977).
- 49 Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 NOTRE DAME L. REV. 758, 776 (1975).
- 50 Munday, *Stepping Beyond the Bounds of Credibility: The Application of Section 1(f)(ii) of the Criminal Evidence Act 1898*, CRIM. L. REV. 511, 513 (1986) (“Psychologists have reported for several decades on the tendency of people to judge one another on the basis of one outstanding ‘good’ or ‘bad’ characteristic. This is popularly known as the ‘halo effect.’ In essence, it represents our propensity to oversimplify our perception of others' personalities and to take for the whole that portion of someone else's personality which happens to be visible to us. . . . This tendency to exaggerate the representativeness of particular conduct is especially dangerous in the case of the misconduct and bad character of the accused . . . .”).
- 51 *See generally* Mendez, *supra* note 17; Spector, *Rule 609: A Last Plea for Its Withdrawal*, 32 OKLA. L. REV. 334, 351-53 (1979).
- 52 Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 26 (1986-87).
- 53 *Id.* at 27.
- 54 *Campbell v. Greer*, 831 F.2d 700, 707 (7th Cir. 1987) (citing Burton, *Generality of Honesty Reconsidered*, 70 PSYCHOLOGY REV. 481 (1963)).
- 55 22 C. WRIGHT & K. GRAHAM, *supra* note 13, § 5239.
- 56 Crump, *How Should We Treat Character Evidence Offered to Prove Conduct?*, 58 U. COLO. L. REV. 279, 283 (1987). For some persons, character appears to be a good predictor of behavior in specific situations. Sherman & Fazio, *Parallels Between Attitudes and Traits as Predictors of Behavior*, 51 J. PERSONALITY 308, 309, 312 (1983).
- 57 Mischel, *Alternatives in the Pursuit of the Predictability and Consistency of Persons: Stable Data That Yield Unstable Interpretation*, 51 J. PERSONALITY 578, 584-85 (1983).
- 58 Lawson, *supra* note 49, at 778-85.
- 59 Elliott, *The Young Person's Guide to Similar Fact Evidence-I*, 1983 CRIM. L. REV. 284, 287.
- 60 *See generally* Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777 (1981).
- 61 Teitelbaum, Sutton-Barbere & Johnson, *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 WIS. L. REV. 1147, 1162 (although the persons surveyed frequently differed in their evaluation of the

prejudicial character of various items of evidence, “the greatest agreement . . . is found in connection with evidence suggesting immoral conduct by the defendant . . . .”).

62 HAMLET, Act II, Sc. 2, Line 259.

63 See generally P. ROCHE, THE CRIMINAL MIND (1958); DeBenedictis, *Criminal Minds*, 76 A.B.A.J. 30 (Jan. 1990).

64 United States v. Beechum, 582 F.2d 898, 921 (5th Cir. 1978) (Goldberg, J., dissenting), *cert. denied*, 440 U.S. 920 (1979); Ordover, *Balancing the Presumptions of Guilt and Innocence: Rule 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135, 166 (1989).

65 Ordover, *supra* note 64, at 158.

66 Myers, *Uncharged Misconduct Evidence in Child Abuse Litigation*, 1988 UTAH L. REV. 479, 526.

67 United States v. Rubio-Estrada, 857 F.2d 845, 853 (1st Cir. 1988) (Torruella, J., dissenting); Ordover, *supra* note 64, at 160.

68 Teitelbaum & Hertz, *supra* note 22, at 427, 429. See United States v. Logan, 18 M.J. 606, (A.F.C.M.R. 1984) (the prosecution argued “that if the accused stole items not charged it could be inferred that he had the requisite intent with regards to the items charged.” The court held that the prosecution’s argument was merely an attempt to demonstrate that “the accused is a ‘bad man’ . . . .”).

69 W. LAFAVE & A. SCOTT, CRIMINAL LAW §§ 3.1, 3.4, 3.5, 4.2 (2d ed. 1986); R. PERKINS & R. BOYCE, CRIMINAL LAW 826-35, 950-75 (3d ed. 1982).

70 Teitelbaum & Hertz, *supra* note 22, at 427.

71 Even Professor Julius Stone, the staunchest supporter of the inclusionary rule, condemns this sort of reasoning as a perversion of the rule. Where the prior crime evidence is offered to prove the defendant’s ‘tendency’ or ‘mental attitude (intent) along that particular line of crime,’ we are admitting evidence ‘*precisely* for the reason that the original rule excluded it’. Ordover, *supra* note 64, at 158 (emphasis in original).

72 Comment, *supra* note 35, at 1232 (“This reasoning fails to comport with the plain language of ER 404(b)”).

73 Judge Toruella has persuasively argued for this holding in a series of cases. United States v. Garcia-Rosa, 876 F.2d 209, 221 (1st Cir. 1989); United States v. Cortijo-Diaz, 875 F.2d 13 (1st Cir. 1989); United States v. Rubio-Estrada, 857 F.2d 845, 853 (1st Cir. 1988) (Toruella, J., dissenting).

74 E. IMWINKELRIED, *supra* note 4, § 2:18, at 2-50.

75 *Id.* at §§ 5:21-:28.

76 Comment, *supra* note 35, at 1225, 1227, 1233.

77 *E.g.*, United States v. Woods, 484 F.2d 127 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974); State v. Allen, 301 Or. 569, 725 P.2d 331 (1986). See also People v. Spoto, No. 88 SC 611 (Colo., July 9, 1990) (WESTLAW, States library, Colorado file).

78 Ordover, *supra* note 64, at 168; Orfinger, *Battered Child Syndrome: Evidence of Prior Acts in Disguise*, 41 U. FLA. L. REV. 345, 362, 366 (1989).

79 Orfinger, *supra* note 78, at 345-46.

80 *Id.* at 346-47.

81 *Id.* at 348.

82 R. PERKINS & R. BOYCE, *supra* note 69, at 605.

83 Lacy, *Admissibility of Evidence of Crimes Not Charged in the Indictment*, 31 OR. L. REV. 267, 270-71 (1951-52).

84 W. LAFAVE & A. SCOTT, *supra* note 69, 3.1-2; R. PERKINS & R. BOYCE, *supra* note 69, 830-31.

- 85 484 F.2d 127 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974).
- 86 Note, *Evidence--Proof of Prior Events Admissible Generally and Specifically to Demonstrate Corpus Delicti Because the Relevance of and Need for the Evidence Outweighed Its Prejudicial Impact*, 52 TEX. L. REV. 585 (1973-74).
- 87 *Woods*, 484 F.2d at 130.
- 88 *Id.* at 133.
- 89 *Id.* at 133-34.
- 90 Turcott, *Similar Fact Evidence: The Boardman Legacy*, 21 CRIM. L.Q. 43, 46 (1978-79).
- 91 *Id.* at 48-49; Comment, *Developments in Evidence of Other Crimes*, 7 U. MICH. J.L. REF. 535, 539 (1974).
- 92 C. MORRIS & C. MORRIS, TORTS 117-25 (2d ed. 1980); W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS §§ 39-40 (5th ed. 1984).
- 93 Comment, *supra* note 35, at 1225.
- 94 Elliott, *The Young Person's Guide to Similar Fact Evidence--I*, 1983 CRIM. L. REV. 284, 289.
- 95 E. IMWINKELRIED, *supra* note 4, at § 4:01, at 4-4.
- 96 1 B. JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK § 21.3; Comment, *Evidence--Other Crimes--Balancing Relevance and Need Against Unfair Prejudice to Determine the Admissibility of Other Unexplained Deaths as Proof of the Corpus Belicti and the Perpetrator's Identity*, 6 RUT.-CAM. L.J. 173, 183-84 (1974-75).
- 97 Blakey, *An Introduction to the Oklahoma Evidence Code: Relevancy, Competency, Privileges, Witnesses, Opinion, and Expert Witnesses*, 14 TULSA L.J. 227, 271 (1978-79).
- 98 R. CROSS & N. WILKINS, AN OUTLINE OF THE LAW OF EVIDENCE 172 (1964).
- 99 *See* C. MORRIS & C. MORRIS, *supra* note 92; *see* W. KEETON, *supra* note 92.
- 100 *E.g.*, 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS--CIVIL AND CRIMINAL § 10.01, at 260 (3d ed. 1977)(this instruction tells the jury that in evaluating a witness' credibility, the jurors consider "the probability or improbability of the witness' statements . . ."); 1 L. SAND, J. SIFFERT, W. LOUGHLIN & S. REISS, MODERN FEDERAL JURY INSTRUCTIONS 7.01, at 7-4 (1984)("In deciding the question of credibility, remember that you should use your common sense, . . . and your experience"). *See also* United States v. Troop, 890 F. 2d 1393, 1397 (7th Cir. 1989) ("[j]uries, in reaching their verdicts, are allowed and expected to draw upon their common sense in evaluating what is reasonable to infer from circumstantial evidence").
- 101 Comment, *supra* note 35, at 1227.
- 102 1 B. JEFFERSON, *supra* note 96, at § 21.4.
- 103 United States v. Bass, 794 F.2d 1305, 1313 (8th Cir. 1986), *cert. denied*, 479 U.S. 869 (1986).
- 104 W. LAFAVE & A. SCOTT, *supra* note 69, at §§ 3.1-.2; R. PERKINS & R. BOYCE, *supra* note 69, at 605-11.
- 105 Carter v. Hewitt, 617 F.2d 961, 968 (3d Cir. 1980); Shifflet, *Admissibility of Evidence Disclosing Other Crimes*, 5 HASTINGS L.J. 73, 75, 76 (1953-54).
- 106 United States v. Ingraham, 832 F.2d 229, 232 (1st Cir. 1987), *cert. denied*, 486 U.S. 1009 (1988).
- 107 United States v. Lail, 846 F.2d 1299, 1301 (11th Cir. 1988).
- 108 United States v. Morano, 697 F.2d 923, 926 (11th Cir. 1983); United States v. Beechum, 582 F.2d 898 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979); United States v. Park, 525 F.2d 1279, 1284 (5th Cir. 1976).

- 109 Raymond Leslie Morris, 54 CRIM. APP. 69, 80 (1970).
- 110 United States v. Gutierrez, 696 F.2d 753, 755 (10th Cir. 1982), *cert. denied*, 461 U.S. 909 (1983); United States v. Rappaport, 19 M.J. 708, 713 (A.F.C.M.R. 1984); People v. Alvarez, 44 Cal. App. 3d 375, 383, 118 Cal. Rptr. 602, 606 (1975); Dickey v. State, 646 S.W.2d 232, 240 (Tex. Crim. App. 1983) (Teague, J., dissenting); Collazo v. State, 623 S.W.2d 647 (Tex. Crim. App. 1981).
- 111 Comment, *supra* note 35, at 1230, 1234.
- 112 *Id.* at 1230.
- 113 United States v. Baldarrama, 566 F.2d 560, 567-68 (5th Cir. 1978), *cert. denied*, 439 U.S. 844 (1978); United States v. Myers, 550 F.2d 1036, 1045 (5th Cir. 1977), *cert. denied*, 439 U.S. 847 (1978); Shifflet, *supra* note 105, at 76; State v. Ellis: *The Other Wrongful Act Rule, Survey of Nebraska Law -- Evidence* 15 CREIGHTON L. REV. 281, 288 (1981-82).
- 114 E. IMWINKELRIED, *supra* note 4, at § 3.11.
- 115 United States v. Woods, 484 F.2d 127 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974).
- 116 State v. Allen, 301 Or. 569, 725 P.2d 331 (1986).
- 117 Comment, *supra* note 35, at 1228.
- 118 *See supra* notes 116 & 117.
- 119 Comment, *supra* note 35, at 1228.
- 120 Dore, *A Proposed Standard for Evaluating the Use of Epidemiological Evidence in Toxic Tort and other Personal Injury Cases*, 28 HOW. L.J. 677 (1985).
- 121 Section 201(b)(2) of the Federal Rules of Evidence provides that “[a] judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”
- 122 FED. R. EVID. 803(18); Imwinkelried, *The Use of Learned Scientific Treatises Under Federal Rule of Evidence 803(18)*, 18 TRIAL Feb. 1982, at 56.
- 123 P. GIANNELLI & E. IMWINKELRIED, SCIENTIFIC EVIDENCE § 15-4(B) (1986).
- 124 United States v. Rogers, 769 F.2d 1418 (9th Cir. 1985) is an exceptional case. In that case, eyewitnesses described the bank robber as wearing a bandana. The prosecutor went to the length of presenting an F.B.I. agent's testimony that of the 1,800 bank robberies in the Los Angeles area during a certain time period, only two involved persons wearing a bandana.
- 125 E. IMWINKELRIED, *supra* note 4, at § 9:49.
- 126 Adv. Comm. Note, FED. R. EVID. 403. (“The availability of other means of proof may also be an appropriate factor.”); S. SALTZBURG, L. SCHINASI & D. SCHLUETER, *supra* note 12, at 362 (2d ed. 1986) (“actually disputed”).
- 127 McGuire v. Estelle, 902 F.2d 749 (9th Cir. 1990).
- 128 *Id.* at 754.
- 129 *Id.*
- 130 *Id.* The earlier opinion in *McGuire* appears at 873 F.2d 1323. *See also* People v. Spoto, No. 88SC611 (Colo., July 9, 1990)(WESTLAW, States library, Colorado file).
- 131 *See Note, Admissibility of Evidence of Similar Offenses in Criminal Prosecutions in West Virginia*, 54 W. VA. L. REV. 142 (1951).
- 132 Johnson, *The Admissibility of Evidence of Extraneous Offenses in Texas Criminal Trials*, 14 S. TEX. L.J. 69, 74 (1973).

- 133 Z. COWEN & P. CARTER, *ESSAYS ON THE LAW OF EVIDENCE* 120-23 (1956); Carter, *The Admissibility of Evidence of Similar Facts*, 69 LAW Q. REV. 80, 92 (1953).
- 134 United States v. Burkhart, 458 F.2d 201, 204 (10th Cir. 1972); Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135, 147 (1989).
- 135 United States v. Anthony, 712 F.Supp. 112, 117 (N.D. Ohio 1989).
- 136 R. PERKINS & R. BOYCE, *supra* note 69, at 610.
- 137 United States v. Woods, 484 F.2d 127 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974).
- 138 W. LAFAVE & A. SCOTT, *supra* note 69, at § 5.1.
- 139 United States v. Meneses-Davila, 580 F.2d 888 (5th Cir. 1978); United States v. Greenwood, 6 C.M.A. 209, 215-16, 19 C.M.R. 335, 341-42 (1955).
- 140 R. PERKINS & R. BOYCE, *supra* note 69, at 394-405.
- 141 Comment, *Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b)*, 61 WASH. L. REV. 1213, 1226-27 (1986).
- 142 2 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 302, at 241 (1979).
- 143 Ordover, *supra* note 134, at 168.
- 144 W. LAFAVE & A. SCOTT, *supra* note 69, at §§ 3.1, 3.4-.5, 3.8; R. PERKINS & R. BOYCE, *supra* note 69, at 826-40 (3d ed. 1982).
- 145 Ordover, *supra* note 134, at 168.
- 146 *Id.*
- 147 In *Harvey v. State*, 604 P.2d 586 (Alaska 1979), the Supreme Court of Alaska reversed a criminal conviction because the trial judge permitted the prosecution to introduce uncharged misconduct evidence to disprove accident and establish *mens rea* even though the accused did not defend on the basis of lack of *mens rea*.
- 148 2 J. WIGMORE, *supra* note 142, § 302, at 241 (1979).
- 149 United States v. Semak, 536 F.2d 1142, 1145 (6th Cir. 1976).
- 150 *Id.*
- 151 *See, e.g.*, United States v. Peterson, 20 M.J. 806 (N.M.C.M.R. 1985); People v. Robbins, 45 Cal. 3d 867, 755 P. 2d 355, 248 Cal. Rptr. 172 (1988), *cert. denied sub. nom., Robbins v. California*, 109 S. Ct. 849 (1989).
- 152 Comment, *supra* note 141, at 1230-31. *See also* State v. Pratt, 309 Or. 205, 785 P.2d 350 (1990).
- 153 *See supra* notes 105-14 and accompanying text.
- 154 Roth, *Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach*, 9 PEPPERDINE L. REV. 297, 310 (1982). *See also* Case Note, *Evidence: Prior Crimes Used to Show Specific Intent and Identity*, 50 MARQ. L. REV. 133, 134 (1966).
- 155 United States v. Skramstad, 649 F.2d 1259 (8th Cir. 1981).
- 156 United States v. Parkison, 417 F.Supp. 730 (E.D. Wis. 1976).
- 157 *See generally* Note, *Evidence--Admissibility of Other Crimes*, 18 WAKE FOREST L. REV. 571, 582 (1982).
- 158 Comment, *supra* note 141, at 1230.

- 159 Garza v. State, 632 S.W.2d 823 (Tex. Crim. App. 1982).
- 160 Comment, *supra* note 141, at 1230. *See also* People v. Spoto, No. 88SC611 (Colo., July 9, 1990) (WESTLAW, States library, Colorado file).
- 161 United States v. Jaqua, 485 F.2d 193 (5th Cir. 1973). *See also* United States v. San Martin, 505 F.2d 918 (5th Cir. 1974).
- 162 Comment, *supra* note 141, at 1227.
- 163 E. IMWINKELRIED, *supra* note 4, § 9:49 (1984).
- 164 *See supra* note 126 and accompanying text.
- 165 S. SALTZBURG, L. SCHINASI & D. SCHLUETER, *supra* note 12, at 362 (“actually disputed”). *See also* United States v. Brooks, 22 M.J. 441 (C.M.A. 1986); United States v. Rappaport, 22 M.J. 445 (C.M.A. 1986).
- 166 United States v. Badolato, 710 F.2d 1509 (11th Cir. 1983); United States v. Olsen, 589 F.2d 351 (8th Cir. 1978), *cert. denied*, 440 U.S. 917 (1979); United States v. Cohen, 489 F.2d 945, 950 (2d Cir. 1973).
- 167 United States v. Erb, 596 F.2d 412 (10th Cir. 1979), *cert. denied*, 444 U.S. 848 (1979). *See also* Comment, *Defining Standards for Determining the Admissibility of Evidence of Other Sex Offenses*, 25 UCLA L. REV. 261, 277 (1977).
- 168 People v. Nible, 200 Cal. App. 3d 838, 246 Cal. Rptr. 119, 247 Cal. Rptr. 396 (1988).
- 169 E. IMWINKELRIED, *supra* note 4, at § 8:14 (1984).
- 170 United States v. Kaiser, 545 F.2d 467 (5th Cir. 1977); United States v. Broadway, 477 F.2d 991 (5th Cir. 1973); Bunch v. State, 605 S.W.2d 227 (Tenn. 1980); Elliott, *The Young Person's Guide to Similar Fact Evidence-- I*, 1983 CRIM. L. REV. 284, 292, 296 (1983).
- 171 There is currently a sharp split of authority among the courts over the question of whether the accused can force the prosecution to enter into a stipulation as to the existence of an ultimate fact in the case. E. IMWINKELRIED, *supra* note 4, at § 8:11 (1984). An analysis of that split of authority is beyond the scope of this Article.
- 172 E. IMWINKELRIED, *supra* note 4, at § 8:11 (1984).
- 173 *Id.* at § 8:13.
- 174 *See generally* E. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 307-12 (2d ed. 1989).
- 175 If the defense attorney reneges on the assurance during summation, the prosecution may move to reopen the evidence. People v. Tassel, 36 Cal. 3d 77, 83 n.3, 679 P.2d 1, 4 n.3, 201 Cal. Rptr. 567, 570 n.3 (1984).
- 176 In many states, the trial judge has lost the common-law power to comment on the evidence. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 418-21 (1971). It would not constitute “comment” for the judge to merely mention the defense's informal concession; even in jurisdictions barring judicial comment on the weight of the evidence, the judge may sum up. *Id.* However, the judge should go beyond merely summarizing the state of the record. The judge should tell the jury that there is no real dispute over the existence of the *mens rea*. Since the prohibition of judicial comment is designed to protect the accused, the accused should be deemed competent to waive the prohibition.
- 177 E. IMWINKELRIED, *supra* note 4, at §§ 8:13, 8:15.
- 178 *See supra* notes 82-84 and accompanying text.
- 179 P. GIANNELLI & E. IMWINKELRIED, *supra* note 123, § 19-10(B), at 750-52.
- 180 *See generally* P. GIANNELLI & E. IMWINKELRIED, *supra* note 123, Ch. 9.
- 181 Washington v. United States, 390 F.2d 444, 455-56 (D.C. Cir. 1967)(Bazelon, C. J.); Burger, *Psychiatrists, Lawyers and the Courts*, 28 FED. PROBATION 3, 7 (June 1964); Shell, *Psychiatric Testimony: Science or Fortune-Telling?*, BARRISTER 8 (Fall 1980). *See*

also ZISKIN, *The Importance of Hard Data to Software Techniques*, in SCIENTIFIC AND EXPERT EVIDENCE 1097, 1100-02 (2d ed. 1981).

182 FED. R. EVID. 704(b). See Note, *Resurrection of the Ultimate Issue Rule: Federal Rule of Evidence 704(b) and the Insanity Defense*, 72 CORNELL L. REV. 620 (1987).

183 E. IMWINKELRIED, *supra* note 4, § 8:20 (1984).

184 See Comment, *supra* note 141, at 1221-22, 1223-25. Suppose, for example, that a hidden surveillance camera happened to videotape a murder on a business premises. The film shows the perpetrator load the weapon, hide in wait for the victim, shoot the victim three times, poke the body to ensure that the victim was dead, and fire a final shot for good measure. Viewing the film, any juror in his or her right mind would conclude that the perpetrator possessed the intent to kill at the time of the *actus reus*.

185 E.g., *People v. Geiger*, 35 Cal. 3d 510, 674 P.2d 1303, 199 Cal. Rptr. 45 (1984); *People v. Wickersham*, 32 Cal. 3d 307, 650 P.2d 311, 185 Cal. Rptr. 436 (1982). Cf. *People v. Modesto*, 59 Cal. 2d 722, 382 P.2d 33, 31 Cal. Rptr. 225 (1963).

186 It is arguable that even absent a defense concession, the uncharged misconduct evidence should be inadmissible when the testimony about the *actus reus* almost conclusively demonstrates the existence of the *mens rea*. See *supra* note 183. However, such cases will be extremely rare.

187 In *Regina v. Boardman*, 1975 App. Cas. 421, the House of Lords decided to relax the rigid character evidence prohibition. The Lords concluded that the difference between character and noncharacter theories of logical relevance is largely a difference of degree. Lord Cross argued that in a given case, an act of uncharged misconduct might have so much probative value--even on a character theory--that it would be an affront to common sense to exclude testimony about the misconduct. However, the Lords made it clear that the uncharged crime must have extraordinary probative value on a character theory to warrant admissibility. In the great majority of criminal cases, English courts still find character evidence inadequately probative. See also Carter, *Forbidden Reasoning Permissible: Similar Fact Evidence a Decade After Boardman*, 48 MODERN L. REV. 29 (1985). "Like Banquo's ghost," the distinction between character and noncharacter theories "reappears to demand attention" in English law. Allan, *Similar Fact Evidence and Disposition: Law, Discretion, and Admissibility*, 48 MODERN L. REV. 253, 263 (1985).

188 See Hutton, *Commentary: Prior Bad Acts Evidence in Cases of Sexual Contact with a Child*, 34 S.D. L. REV. 604 (1989); Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777 (1981); Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845 (1982).

189 Myers, *Uncharged Misconduct Evidence in Child Abuse Litigation*, 1988 UTAH L. REV. 479, 526 (1988).

190 *United States v. Bass*, 794 F.2d 1305 (8th Cir. 1986), *cert. denied sub. nom.*, *Price v. United States*, 479 U.S. 869 (1986).

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DEC 30 2016

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

## IN THE FOURTH JUDICIAL DISTRICT COURT

## IN AND FOR UTAH COUNTY, STATE OF UTAH

STATE OF UTAH,  <p style="text-align: center;">Plaintiff,</p> v.  DALE HEATH,  <p style="text-align: center;">Defendant.</p>	<p><b><u>RULING AND ORDER</u></b>  <b>ON CROSS MOTIONS IN LIMINE</b>  <b>RELATED TO RULE 404(B)</b>  <b>EVIDENCE</b></p> <p>Case No. 151402675</p> <p>Judge Derek P. Pullan</p>
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Defendant Dale Heath is a chiropractor charged with seven counts of sexual misconduct against two patients. The first five charges—three counts of sexual battery, one count of forcible sexual abuse, and one count of object rape—relate to patient B.C. The sixth and seventh charges—two counts of sexual battery—relate to patient E.B. The Court granted Defendant’s motion to sever the counts. Those involving B.C. will be tried first.

The State moves in limine to admit other crimes, wrongs, or acts in both trials. Defendant moves to exclude this evidence.

Having carefully considered the briefing and oral arguments, the Court now enters the following:

**RULING**

**The Other Crimes, Wrongs, or Acts**

The State moves to admit into evidence the following other crimes, wrongs, or acts set forth in chronological order:

1. **K.W.** Defendant treated K.W. two times between January 21 and February 1, 2005. K.W. will testify that on the first visit, Defendant massaged her breast tissue during treatment, but did not touch her nipple. He also massaged her lower abdomen. On the second visit, Defendant massaged her lower abdomen during treatment, progressing lower and lower until his hand went under her jeans and underwear and touched her pubic hair. K.W. stopped him. K.W. reported these events to her fiancé and her California doctor. Eleven years passed. In 2016, K.W. googled Defendant's name. From media sources, she learned that abuse allegations were pending against him. She read a couple of news stories, and then contacted police through the phone number provided.
2. **J.T.** Defendant treated J.T. one time in June 2011. During that visit, Defendant rubbed J.T.'s vaginal area and clitoris over the clothing. J.T. reported this event to police on June 23, 2011.
3. **Police Interview No. 1.** On June 29, 2011, Officer Sorenson contacted Defendant about J.T.'s complaint. When asked if he touched J.T.'s vagina during treatment, the Defendant responded that he did not think so, and if he did, it was unintentional and incidental to treatment. J.T. had reported that other chiropractors have patients hold their own hand over sensitive areas to avoid contact with these areas during treatment. When Officer Sorenson explained this to Defendant, Defendant responded that the practice might be a good idea in the future. State's Ex. 7.
4. **Division of Occupational and Professional Licensing ("DOPL") Letter.** On July 11, 2011, DOPL issued a letter of concern to Defendant. The letter described J.T.'s accusation and Defendant's denial of misconduct. The letter concludes: "Please be

aware that future problems in this area of concern may result in formal disciplinary action by the division. Also be aware that if other improprieties are brought to our attention, we may reopen our investigation and take action as may be appropriate.” State’s Ex. 8.

5. **V.J.** Defendant treated V.J. three or four times between 2011 and 2012. On the first visit, Defendant unclasped V.J.’s bra and told her to remove it before treatment. On her fourth visit, Defendant told her that he needed to massage her full front torso, including her breasts. V.J. refused. Defendant told her to speak with her husband about it because that is the treatment Defendant recommended. V.J. did not report these events until September 2015.
6. **B.C.** Defendant treated B.C. seven times between October and December 2012. On November 3, Defendant rubbed B.C.’s vaginal area and clitoris over the clothing. During the treatment, her gown was raised exposing one breast. On November 24, Defendant again rubbed B.C.’s vaginal area and clitoris over the clothing. On December 1, Defendant did this again, but this time placed his hand under B.C.’s underwear and massaged her pubic mound. On December 8, during treatment Defendant placed his hand under B.C.’s underwear. He touched her clitoris and vagina and digitally penetrated her. B.C. reported these events to police in January 2013. The State seeks to admit the events involving B.C. in the trial of charges related to E.B.
7. **Police Interview No. 2.** On February 26, 2013, Lieutenant Adams interviewed Defendant regarding B.C.’s complaint. Defendant stated that if there was inappropriate contact, that was not his intention. He acknowledged having some experience with accusations of this type—referring to J.T.’s prior complaint. Defendant said if he had problems touching his female patients for his own sexual gratification, it would have

been raised a long time ago. Two days later, Lieutenant Adams spoke to Defendant on the telephone. Defendant explained that if any touching occurred it was incidental to treatment. He said he needed to do something different to avoid this type of problem.

8. **DOPL Stipulated Order**. In September 2014, Defendant stipulated to entry of an Order revoking his license, and suspending the revocation subject to conditions. In the Order, Defendant acknowledged that two female patients (J.T. and B.C.) alleged inappropriate touching. Defendant denied this but admitted that he “incidentally touched areas which caused [these] patients concern.”
9. **A.W.**<sup>1</sup> Defendant treated A.W. between February 6 and March 6, 2015 in exchange for office work provided to him. She had more than one visit during which Defendant would “occasionally work on [her] chest.” A.W. did not report this until April 2015.
10. **E.B.** Defendant treated E.B. four times between February 17 and February 24, 2015. During the first visit, Defendant massaged above her breasts over the clothing causing breast-shaking that was uncomfortable. The same thing occurred on her second visit. On her third visit, Defendant brushed up against her labia a few times, something that seemed unintentional to E.B. because Defendant was working the area really fast. On her fourth visit, the same thing happened but this time Defendant stimulated her clitoris for 10–15 seconds causing her to become sexually aroused. E.B. described this as “blatant rubbing and touching of my labia and clitoral area.” E.B. reported these events in March 2015 after speaking to her mother and a friend, and after reading on DOPL’s webpage that Defendant was on probation due to complaints of inappropriate touching by female

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<sup>1</sup> At oral argument, the State withdrew its motion to admit other crimes, wrongs, or acts alleged to have been committed against A.W.

patients. The State seeks to admit the events involving E.B. in the trial of charges related to B.C.

### **Summary of Arguments**

The State contends that Defendant's acts against other patients, the police interviews, the DOPL Letter, and the DOPL Stipulated Order are admissible for the non-character purposes of proving intent and absence of mistake or accident. The State further argues that under the doctrine of chances the other acts are admissible to prove both the actus reus and mens rea of each offense.

Defendant moves to exclude this evidence. He contends that the State has failed to prove by a preponderance of the evidence that Defendant committed the alleged acts against his other patients. Therefore, the alleged acts are irrelevant. In the alternative, Defendant contends that the acts are not offered for a proper non-character purpose, and any probative value would be substantially outweighed by the danger of unfair prejudice. Finally, Defendant contends that the State has failed to establish the foundational prerequisites to admitting evidence under a doctrine of chances theory.

### **Conclusions of Law**

#### ***Conditional Relevance Under Utah R. Evid. 104(b)***

An issue of conditional relevance arises any time the State seeks to admit other crimes, wrongs, or acts against the accused. The relevance of the other acts depends on whether other facts exist—specifically, the fact that the other acts occurred, and the fact that the accused was the actor. *State v. Lucero*, 2014 UT 15, ¶ 19. If the other acts did not happen or the defendant did not commit them, the other acts are irrelevant. *Id.* ¶ 23.

Rule 104(b) of the Utah Rules of Evidence provides: “When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist.” The analysis is set forth in *Lucero*. There, the Utah Supreme Court held:

Although it is the province of the jury under rule 104(b) to decide whether the “condition of fact” is fulfilled and to ultimately view the evidence as credible, it is the duty of the court to decide whether there is sufficient evidence upon which the jury could make such a determination. In *Huddleston v. United States*, the Supreme Court described the court’s role in this situation and stated that to determin[e] whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact ... by a preponderance of the evidence.

We agree with the Supreme Court’s reasoning and interpret Utah Rule of Evidence 104 to require a judge to admit evidence when it determines that the jury could reasonably find matters of conditional fact by a preponderance of the evidence. In the context of Rule 404(b), “similar act evidence is relevant only if the jury can reasonably conclude [by a preponderance of the evidence] that [1] the act occurred and that [2] the defendant was the actor.”

*Lucero*, 2014 UT 15, ¶ 19.

In light of all the evidence, a reasonable jury could find by a preponderance of the evidence that Defendant committed the other acts against his patients K.W., J.T., V.J., B.C., A.W., and E.B. Each woman reported her experience to the police providing a detailed description of the treatment provided by Defendant and his inappropriate touching. Defendant admitted in the Stipulated Order that he incidentally touched both J.T. and B.C. in areas that caused both patients concern.

***Admission of Other Crimes, Wrongs, or Acts under Rule 404(b)***

Other crimes, wrongs, or acts are not admissible to prove Defendant's bad character and that he acted consistent with that bad character on a particular occasion. Utah R. Evid. 404(b)(1) ("evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character").

Evidence of other acts may be admissible for a non-character purpose, including proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or lack of accident." *Id.*

To admit evidence of the other acts, the Court must conclude that (1) the other acts are offered for a proper non-character purpose; (2) the other acts are relevant; and (3) the probative value of the other acts is not substantially outweighed by the danger of unfair prejudice. *State v. Labrum*, 2014 UT App 5, ¶ 19.

The difficulty in applying Rule 404(b) "springs from the fact that evidence of prior bad acts often will yield dual inferences—and thus betray both a permissible purpose and an improper one." *State v. Verde*, 2012 UT 60, ¶ 16. Accordingly:

[W]hen prior misconduct evidence is presented under rule 404(b), the court should carefully consider whether it is genuinely being offered for a proper, non-character purpose, or whether it might actually be aimed at sustaining an improper inference of action in conformity with a person's bad character. And even if the evidence may sustain both proper and improper inferences under rule 404(b), the court should balance the two against each other under rule 403, excluding the bad acts evidence if its tendency to sustain a proper inference is outweighed by its propensity for an improper inference or for jury confusion about its real purpose. Such weighing is essential to preserve the integrity of rule 404(b). Without it, evidence of past misconduct could routinely be allowed to sustain an inference of action in conformity with bad character—so long as the proponent of the evidence could proffer a plausible companion inference that does not contravene the rule.

*Verde*, 2012 UT 60, ¶ 18.

***Non-Character Purpose—Intent***

The State moves to admit the acts Defendant committed against his other patients in order to prove intent. Standing alone—without the non-character inference drawn under the doctrine of chances—the State’s theory is grounded in the very propensity reasoning Rule 404(b) prohibits. In effect, the State contends that because Defendant intentionally touched other patients for sexual gratification, he is more likely to have touched B.C. and E.B. for the same reason. In other words, Defendant has a propensity to use treatment as guise for sexual assault, and he acted in conformance with that propensity on a particular occasion.

To the extent the State’s motion rests on this inference, the motion is denied.

***Non-Character Purpose—Absence of Mistake or Accident***

**The Trial Involving B.C.**

In his statements to police and DOPL regarding treatment of B.C., Defendant asserted the defense of mistake or accident. He claimed that if he did touch B.C.’s vaginal area, the touching was unintended and incidental to chiropractic treatment.<sup>2</sup> Rebutting this claim is a proper non-character purpose for which prior bad acts may be admitted.

More than a year before treating B.C., Defendant learned through a police interview and the DOPL Letter of Concern that J.T. had lodged a complaint against him for non-consensual sexual touching during treatment. He also learned that any future improprieties in this area of concern may result in formal discipline. Finally, he learned that asking patients to cover themselves during treatment of sensitive areas was a practice used by other chiropractors to

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<sup>2</sup> The State is permitted to offer these admissions in its case in chief. Utah R. Evid. 801(d)(2)(A).

avoid allegations of inappropriate touching. These events would have placed Defendant in a state of hyper-vigilance such that an accident or mistake in touching B.C.'s vaginal area and clitoris was less likely.

J.T.'s testimony is unnecessary to prove absence of mistake or accident. To rebut the defense of incidental touching the State need only prove that Defendant was placed on notice of J.T.'s complaint. It is notice of her complaint—whether true or not—that placed Defendant in a state of vigilance and made a subsequent mistake less likely.

The K.W. and V.J. incidents are not admissible to prove absence of mistake or accident. These incidents—while earlier in time to the events involving B.C.—were not reported until 2015. The State has presented no evidence suggesting that Defendant knew about K.W.'s and V.J.'s complaints before then.

The incidents involving A.W. and E.B. are inadmissible to show absence of mistake or accident in treating B.C. Defendant treated A.W. and E.B. in 2015. Both women reported the misconduct in 2015. These events could not have made Defendant more cautious four years earlier when he was treating B.C.

#### The Trial Involving E.B.

For the same reasons set out above, Police Interview No. 1 and the DOPL Letter of Concern are admissible to show absence of mistake or accident in treating E.B.

Police Interview No. 2 in 2013 and the DOPL Stipulated Order in 2014 are also admissible to show absence of mistake or accident in treating E.B. in 2015. From these additional events, Defendant learned that B.C. had made allegations of non-consensual sexual touching during chiropractic treatment. He knew that his license had been placed on probationary status due to B.C.'s and J.T.'s complaints. He expressed that he must alter his

practice to avoid similar allegations in the future, and in fact agreed to do so as part of the DOPL Stipulated Order. These events would have placed Defendant in a state of hyper-vigilance, making a mistake in touching E.B. in 2015 less likely. Again, it is unnecessary for J.T. and B.C. to testify. To rebut Defendant's claim of accidental touching incident to treatment, the State need only prove that Defendant was on notice of J.T.'s and B.C.'s complaints.

The testimony of K.W. and V.J. is inadmissible to prove absence of mistake or accident. The incidents involving them were not reported until after E.B. was treated in February 2015. The State has produced no evidence suggesting that Defendant knew about K.W.'s or V.J.'s complaints before then. Therefore, these other acts could not have made Defendant more cautious in treating E.B.

The same is true for the incident involving A.W. She did not report until April 2015, weeks after E.B.'s last treatment. There is no evidence before the Court suggesting that Defendant knew of A.W.'s complaints before treating E.B. Moreover, the State has withdrawn its motion to admit the events involving A.W.

### ***The Doctrine of Chances—Generally***

Uncharged bad acts may be admitted under a doctrine of chances theory. The doctrine is a theory of logical relevance that “rests on the objective improbability of the same rare misfortune befalling one individual over and over.” *Verde*, 2012 UT 60, ¶ 47 (citing Mark Cammack, *Using the Doctrine of Chances to Prove Actus Reus in Child Abuse and Acquaintance Rape: People v. Ewoldt Revisited*, 29 U.C. Davis L. Rev. 355, 388 (1996)). In the words of the Utah Supreme Court:

As the number of improbable occurrences increases, the probability of coincidence decreases, and the likelihood that the defendant committed one or more of the actions increases. An

innocent person may be falsely accused or suffer an unfortunate accident, but when *several independent accusations arise* or *multiple similar “accidents” occur*, the objective probability that the accused innocently suffered such unfortunate coincidences decreases. At some point “[t]he fortuitous coincidence becomes too abnormal, bizarre, implausible, unusual, or objectively improbable to be believed.”

*Verde*, 2012 UT 60, ¶ 49 (emphasis added) (quoting *State v. Johns*, 301 Or. 535, 725 P.2d 312, 322–23 (1986))

***The Doctrine of Chances—An Inferential Chain to Prove Actus Reus and Mens Rea***

The doctrine of chances is a chain of inferences by which the finder of fact may conclude that the accused committed the *actus reus* of the charged offense, or that the accused acted with the required *mens rea*. The chain of inference differs based on the purpose for which the uncharged acts are offered.

Utah cases hold that the State may rely on the doctrine of chances to rebut the defense that the complaining witness is fabricating her testimony. When used in this way, the doctrine is a chain of inferences by which the jury can conclude that the accused committed the *actus reus* of the charged offense. Professor Imwinkelried described the chain of inferences in this way:

<b>Item of Evidence</b>	<b>Intermediate Inference</b>	<b>Ultimate Inference</b>
The accused’s uncharged acts	The objective improbability of so many losses befalling the accused accidentally	The accused committed the <i>actus reus</i> of the charged offense

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, 588 (1990).

Examples of Utah cases in which the doctrine of chances is used to infer a criminal *actus reus* include *Verde*, 2012 UT 60, ¶ 46 (remanding case to trial court to determine whether prior acts of sexual assault were admissible to rebut defendant’s claim that the alleged victim had fabricated the facts underlying the charged offense); *State v. Rackham*, 2016 UT App 167, 381 P.3d 1161 (prior incidents of inappropriate touching of female relatives offered to prove *actus reus* by rebutting defense of fabrication in prosecution for sexual battery); *State v. Bradley*, 2002 UT App 348, ¶ 28 (admitting evidence of prior, independent allegation of sexual assault to rebut defense of fabrication); *State v. Nelson-Waggoner*, 2000 UT 59, ¶ 25, *explained in Verde*, 2012 UT 60, ¶ 53 (admitting under doctrine of chances reasoning prior rape allegations as probative of whether accused engaged in nonconsensual sex with the alleged victim).

Utah cases also hold that the doctrine of chances may be used to rebut a claim of mistake or accident. When used in this way, the doctrine again constitutes an inferential chain, but with different intermediate and ultimate inferences:

Item of Evidence	Intermediate Inference	Ultimate Inference
The accused’s uncharged acts	The objective improbability of the accused’s innocent involvement in so many incidents.	The accused acted with the required mens rea.

Imwinkelried, *supra*, at 588. As the Utah Court of Appeals explained, “Under the doctrine of chances, ‘the inference of mens rea arises from the implausibility of the defendant’s claim of successive similar innocent acts.’” *State v. Labrum*, 2014 UT App 5, ¶ 30 (quoting Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 5.08).

Examples of the doctrine of chances being used to prove mens rea include *State v. Lomu*, 2014 UT App. 41 (admitting highly similar convenience store robbery to prove that the accused

intended to commit aggravated robbery not retail theft on the date of the charged offense); *State v. Marchet*, 2014 UT App 147, 330 P.3d 138, *cert. denied*, 341 P.3d 253 (Utah 2014), and *cert. denied*, 135 S. Ct. 2331, 191 L. Ed. 2d 994 (2015) (using doctrine of chances reasoning to admit prior, similar allegations or rape for the purpose of proving intent to engage in non-consensual sex and to rebut claim of accident or mistake); *State v. Lowther*, 2015 UT App 180, 356 P.3d 173, *cert. granted*, 364 P.3d 48 (Utah 2015) (admitting testimony of three other women who claimed the defendant raped them to prove defendant’s intent to engage in non-consensual intercourse with alleged victim).

### ***The Doctrine of Chances—Establishing Foundation***

While “propensity inferences do not pollute” doctrine of chances reasoning, the jury may misuse the evidence by drawing an intermediate inference about the bad character of the accused. *Verde*, 2012 UT 60, ¶ 50. This character-based reasoning is precisely what Rules 404(a) and 404(b)(1) prohibit. As the Supreme Court warned in *Verde*:

A charge of fabrication is insufficient by itself to open the door to evidence of any and all prior bad acts. As with other questions arising under Rule 404(b), care and precision are necessary to distinguish permissible and impermissible uses of evidence of prior bad acts, and to limit the factfinder’s use of the evidence to the uses allowed by rule.

2012 UT 60, ¶ 55.

Twenty-four years before *Verde*, Professor Imwinkelried pronounced the same warning:

In theory, there is a distinction between character reasoning and the use of the doctrine of chances to establish the actus reus. However, in practice the distinction can be a thin, difficult line for the jurors to draw. . . . [T]he lax application of the doctrine of chances can eviscerate the character evidence prohibition. Just as every true crime includes a mens rea, an actus reus is an essential element of each true crime. If uncharged misconduct becomes

routinely admissible to prove actus reus, there will be little left of the [character evidence] prohibition. . . .

Imwinkelried, *supra*, at 588. The same risk of misuse for a character-based inference exists when the State uses the doctrine of chances to prove mens rea. Professor Imwinkelried continues:

This [doctrine of chances] theory can easily be abused. [I]ntent is an essential element of every true crime. Whenever the prosecutor has evidence of an uncharged crime similar to the charged offense, the prosecutor can attempt to invoke [the] doctrine of chances; the prosecutor can always argue that a similar uncharged crime triggers the doctrine of chances and is, therefore, logically relevant on a noncharacter theory both to disprove accident and thereby to prove mens rea.

*Id.* at 595.

To avoid abuse of the doctrine of chances, trial courts must carefully and precisely enforce four foundational prerequisites: (1) materiality—“the issue for which the uncharged conduct is offered must be in bona fide dispute;” (2) similarity—“each uncharged incident must be roughly similar to the charged crime;” (3) independence—each uncharged incident must be independent of the others, the probative value resting “on the improbability of chance repetition of the same event;” and (4) frequency—the defendant “must have been accused of the same crime or suffered an unusual loss more frequently than the typical person endures such losses accidentally.” *Verde*, 2012 UT 60, ¶¶ 57–62.

As to the second factor, there must be “some significant similarity between the charged and uncharged incidents to suggest a decreased likelihood of coincidence—and thus an increased probability that the defendant committed all such acts.” *Id.* ¶ 58. “The more similar, detailed, and distinctive the various accusations, the greater is the likelihood that they are not the result of

independent imaginative invention.” *Id.* Ultimately, the similarity must be “sufficient to dispel any realistic possibility of independent invention.” *Id.*

When the uncharged incidents are few, a higher degree of similarity is required. As the Utah Court of Appeals explained:

To begin, we note that the commission of a crime on two occasions in a specific manner is certainly less compelling than the commission of the same crime a half a dozen or more times. So in considering the probative value of other acts, courts should properly have in mind the principle that the fewer the incidents there are, the more similarities between the crimes there must be.

*Lomu*, 2014 UT App 41, ¶ 32.

In applying the frequency factor, the judge must “define the correct relative frequency.” Imwinkelried, *supra*, at 597. The relevant frequency differs based on the purpose for which the doctrine of chances is being employed. Professor Imwinkelried explains:

The requirements for the two applications of the doctrine of chances—[to prove actus reus and to prove mens rea]—differ in kind because the application determines the nature of the frequency the judge must analyze. When the prosecutor invites the court to apply the doctrine to prove the actus reus, the focus is on the frequency of a particular type of loss—the death of a child in a person’s custody or the fire at a person’s building. In contrast, when the prosecutor asks the court to employ the doctrine to establish mens rea, the relevant frequency is the incidence of the accused’s personal involvement in a type of event—the discharge of a weapon in Wigmore’s hypothetical<sup>3</sup>, the possession of

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<sup>3</sup> Wigmore’s hypothetical is as follows: “If A while hunting with B hears the bullet from B’s gun whistling past his head, he is willing to accept B’s bad aim . . . as a conceivable explanation; but if shortly afterwards the same thing happens again, and if on the third occasion A receives B’s bullet in his body, the immediate inference (i.e. as a probability, perhaps not as a certainty) is that B shot at A deliberately; because the chances of an inadvertent shooting on three successive similar occasions are extremely small; or (to put it in another way) because inadvertence or accident is only an abnormal or occasional explanation for the discharge of a gun at a given object, and therefore the recurrence of a similar result (i.e. discharge towards the same object A) excludes the fair possibility of such an abnormal cause and points out the cause as probably a more natural and usual one, i.e., a deliberate discharge at A. In short, similar results do not usually occur through abnormal causes; and the recurrence of a similar result . . . tends (increasingly with each instance) to negative . . . inadvertence . . . or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal,

contraband drugs, or the receipt of stolen property. To intelligently decide whether the prosecutor's evidence exceeds the objective improbability threshold, the judge must define the correct relative frequency.

*Id.*

To prove the relative frequency of a particular event, the State may rely on statistical data. This data is more likely to be available "when the question is the occurrence of the *actus reus*" because "there are many empirical studies documenting the incidence of social losses." *Id.* But "it is far more difficult to find the relevant frequency data when the question is the existence of *mens rea*." On this point, Professor Imwinkelried writes:

There may be little or no data on such questions as how often the typical citizen is likely to be found in possession of contraband drugs or stolen property. The judge is more likely to have to rely on her common sense and knowledge of human experience. The extent of the judge's pertinent knowledge may be an intuitive belief that the inadvertent possession of illicit drugs or stolen property is probably a "once in a lifetime" experience for an innocent person. Thus, there is ordinarily more conjecture when the prosecutor invokes the doctrine of chances to prove *mens rea*—all the more reason, of course, to employ the doctrine cautiously. . . . If after weighing the foundational testimony, the judge believes that it would be speculative to find that the prosecution has attained the probability threshold, the judge should exclude the uncharged misconduct evidence.

*Id.* at 597–98.

### ***The Doctrine of Chances as Applied to this Case***

In this case, the State offers the uncharged acts of Defendant against K.W., J.T., V.J., B.C., A.W. and E.B. to prove that (1) Defendant committed the *actus reus* of sexual battery, forcible sexual abuse, and object rape; and (2) Defendant committed these acts, not by mistake or

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i.e., criminal, intent accompanying such an act; and the force of each additional instance will vary in each kind of offense according to the probability that the act could be repeated, within a limited time and under given circumstances, with an innocent intent." Imwinkelried, *supra*, at 594.

accident incidental to treatment, but rather with the required mens rea (intentionally, knowingly, recklessly, or with intent to arouse or gratify sexual desire).

#### The Trial Involving B.C.

- *Materiality*

Whether Defendant touched the genitals of B.C. and digitally penetrated her are facts in bona fide dispute. In Police Interview No. 2, Defendant states that “if” there was touching, it was incidental to treatment. Thus, by his own statements Defendant placed his commission of the *actus reus* in question.

Whether Defendant committed the *actus reus* of each offense intentionally, knowingly, or recklessly and with intent to arouse or gratify sexual desire is in bona fide dispute. As explained, in his statements to police and DOPL regarding treatment of B.C., Defendant asserted the defense of mistake or accident. He claimed that if he did touch B.C.’s vaginal area, the touching was unintended and incidental to chiropractic treatment. By these statements, Defendant has placed *mens rea* in dispute. Rebutting Defendant’s claimed mental state is material.

For these reasons, the Court concludes that the materiality factor has been satisfied.

- *Similarity*

The incidents involving K.W. (to the extent it involved touching of the pubic region), J.T., and E.B. are sufficiently similar to suggest a decreased likelihood of coincidence. Each woman was a patient of Defendant. Each describes Defendant touching their vaginal area during the course of treatment. Defendant did not ask any of them to cover sensitive areas during treatment to avoid his inadvertently touching these areas.

The incidents involving V.J. and A.W. are not roughly similar. V.J. describes Defendant unclasping her bra and telling her to remove it prior to treatment. She also states that he

recommended massage of her front torso including her breasts, which treatment V.J. declined. A.W. states that Defendant would occasionally work on her chest during treatment. The only similarity that could be claimed between these events and B.C.'s experience is that B.C.'s breast was exposed one time during treatment. This is not sufficient to satisfy the similarity component of foundation.

- *Independence*

There is no evidence that K.W., J.T., and E.B. colluded with each other. In that sense, their reports are independent. However, collusion is only one way in which independence may be compromised. For example, if a complainant learns the facts alleged by three other complaining witnesses through media reports or other sources, proving the independence of that complainant's subsequent report may prove difficult.

The incident involving K.W. occurred in 2005. She did not report until 2016 after googling Defendant's name and reading news stories about Defendant's pending case. The content of the news stories she read is unknown. As the proponent of the evidence, the State has the burden of proving that K.W.'s complaint was independent of the media content to which she was exposed. The State has failed to meet that burden.

The incident involving J.T. is independent. She was treated in June 2011 and reported Defendant's conduct days later.

E.B. reported in 2015 after searching for Defendant on DOPL's website. From that search, she learned that Defendant was on probation following complaints of inappropriate touching from two other female patients. For E.B.—in contrast to K.W.—the content of the information to which she was exposed is known. It lacked sufficient detail to undermine the independence of E.B.'s report.

For these reasons, the Court concludes that the independence factor has been proved as to J.T. and E.B., but not as to K.W..

- *Frequency*

As explained, the State offers the prior incidents involving J.T. and E.B. to prove that Defendant committed the *actus reus*. Here, the question is the frequency with which chiropractors are falsely accused of inappropriate touching during treatment. Some data on this question may well be kept by DOPL or other institutions. The State has not produced any such data, choosing instead to rely on the court's common sense and knowledge of human experience to prove probability.

The difficulty is that the frequency with which chiropractors are falsely accused of sexual assault during treatment is not commonly known. Any conclusion about Defendant's experience exceeding the incidence of sexual assault allegations in the eligible chiropractor population would be nothing more than conjecture.

The State offers the incidents involving J.T. and E.B. to prove that Defendant had the requisite *mens rea*. Here, the question is the frequency of the *Defendant's* involvement in a type of event—the accidental touching of his patients' genitals. As the number of these events increase, the likelihood that they occurred by mistake or accident decreases. The frequency with which such accidental touchings occur will not be the subject of data compilations. Again, the State relies upon common sense and general knowledge of human experience to prove probability.

For the average person, the mistaken touching of another's genitals would be a once in a lifetime event, and the court could reasonably rely on common sense to reach that conclusion. However, Defendant is a chiropractor whose work routinely involves the consensual touching of

the clothed and unclothed human body, including areas close to the genitals. For the eligible population to which Defendant belongs, the frequency of unintended touching may be markedly higher than for a person in the general population.

However, at trial the State intends to offer evidence that the standard of care for chiropractors is to ask the patient to cover her genitals during care. If applied, this standard of care would entirely eliminate incidental contact between the chiropractor's hands and the patient's genitalia during treatment—making chiropractors an eligible population indistinct from people generally.

While only two other incidents remain—those involving J.T. and E.B.—these incidents are highly similar to the charged offenses. Certainly, a repeated mistake is less likely when the accidental touching of both J.T., E.B., and B.C. was focused on the clitoris and caused sexual arousal.

Considering the totality of the facts and circumstances, the Court concludes that: (1) to the extent the State offers the J.T. and E.B. incidents to prove *actus reus*, the State has failed to prove the foundational requirement of frequency; and (2) to the extent that the State offers the J.T. and E.B. incidents to prove *mens rea*, the State has satisfied the frequency requirement.

Accordingly, the J.T. and E.B. incidents are admissible under a doctrine of chances theory to prove *mens rea*, but inadmissible to prove *actus reus*. Under a doctrine of chances theory, the fact that the incidents actually occurred—not the mere allegation of misconduct—is relevant. Therefore, J.T. and E.B. will be permitted to testify.

### The Trial Involving E.B.

- *Materiality*

Less is known about how Defendant will defend against the charges involving E.B. Assuming Defendant claims that the incidents did not occur, or that they happened by mistake or accident, then the State has satisfied the materiality element of foundation. Again, the State offers the other acts involving K.W., J.T., V.J., B.C., and A.W. to prove: (1) *actus reus*—rebutting a claim that the E.B. incident did not occur; and (2) *mens rea*—rebutting a claim of accident or mistake.

- *Similarity*

For the reasons set forth above, the incidents involving K.W. (to the extent that it involves genital touching), J.T., and B.C. are sufficiently similar to meet the foundational requirement. However—as conceded by the State—admission of evidence that Defendant digitally penetrated B.C. would be unfairly prejudicial.

For the reasons set forth above, the incidents involving V.J. and A.W. lack sufficient similarity to the charged offense. As to these incidents, the State has failed to meet its burden to show similarity.

- *Independence*

For the reasons set forth above, the State has failed to prove that K.W.'s report was independent of the media content to which she was exposed.

The State has proved the independence of B.C.'s report. There is no evidence that she colluded with E.B. or others. She was treated between October and December 2012. She reported in January 2013.

For the reasons set forth above, the State has proved that the J.T. report was independent.

- *Frequency*

As explained, the State offers the prior incidents involving J.T. and B.C. to prove that Defendant committed the *actus reus*. For the reasons set forth above, the State has failed to prove the foundational element of frequency.

The State offers the prior incidents involving J.T. and B.C. to prove that the Defendant acted with the required *mens rea*. For the reasons set forth above, the Court concludes that the State has proved the foundational element of frequency.

Accordingly, the J.T. and B.C. incidents are admissible under a doctrine of chances theory to prove *mens rea*, but inadmissible to prove *actus reus*. Under a doctrine of chances theory, the fact that the incidents occurred—not the mere allegation of misconduct—is relevant. Therefore, J.T. and B.C. will be permitted to testify.

### ***Rule 403 Balancing***

Relevant evidence admissible for a non-character purpose may still be excluded if “its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Utah R. Evid. 403.

The four foundational requirements for admission under the doctrine of chances are “considered within the context of a rule 403 balancing analysis.” *Verde*, 2012 UT 60, ¶ 57. These factors inform the ultimate inquiry—whether improper inferences predominate, substantially outweighing the probative value of objective improbability. Having weighed the four foundational factors, the Court concludes that the probative value of the incidents involving J.T., B.C., and E.B. to prove *mens rea* is not substantially outweighed by the danger of unfair prejudice, especially where a limiting instruction is available. *See* MUJI 2d CR411. However—

as the State concedes—in the trial involving E.B., the admission of evidence that Defendant digitally penetrated B.C. would be unfairly prejudicial.

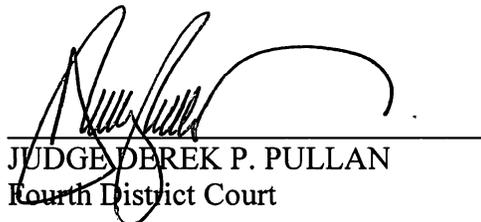
In the trial involving B.C., the State moves to admit the J.T. allegations, Police Interview No. 1, and the DOPL letter to show absence of mistake or accident. This theory is unrelated to objective improbability. As explained, these events are highly probative of absence of mistake or accident. That probative value is not substantially outweighed by the danger of unfair prejudice or confusion of the issues, especially where a limiting instruction is available.

In the trial involving E.B., the State moves to admit the J.T. allegations, Police Interview No. 1, the DOPL Letter of Concern, the B.C. allegations, Police Interview No. 2, and the DOPL Stipulated Order to prove absence of mistake or accident. Again, this theory is unrelated to objective improbability. As explained, these events are highly probative of absence of mistake or accident. Except as explained in this section, that probative value is not substantially outweighed by the danger of unfair prejudice or confusion of the issues, especially where a limiting instruction is available.

### **ORDER**

For the foregoing reasons, the Court: (1) grants in part the State's motion in limine; and (2) grants in part Defendant's motion in limine.

DATED this 22 day of December, 2016.

  
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JUDGE DEREK P. PULLAN  
Fourth District Court

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 151402675 by the method and on the date specified.

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12/30/2016

/s/ MYKEL DALLEY

Date: \_\_\_\_\_

\_\_\_\_\_

Deputy Court Clerk

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY  
SEP 21 2017

IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH

<p>STATE OF UTAH,  Plaintiff,  v.  DALE HARLAND HEATH,  Defendant.</p>	<p><b>CLOSING JURY INSTRUCTIONS</b></p> <p>Case No. 151402675</p> <p>Judge Derek P. Pullan</p>
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The following Closing Jury Instructions were approved by the Court this 14<sup>th</sup> day of September, 2017.

  
\_\_\_\_\_  
JUDGE DEREK P. PULLAN



INSTRUCTION NO. 47

DOPL Action

You have heard evidence of statements made by Dale Heath during proceedings before the Utah Division of Occupational and Professional Licensing (DOPL). You may only consider this evidence for two purposes: (1) as evidence of statements made by Dale Heath; and (2) as evidence of Dale Heath's mental state at the time he treated Brianna Cootey. Any decision by DOPL to take action or not to take action against Dale Heath's license is not relevant to your determination of guilt for the offenses charged in this case.

INSTRUCTION NO. 48  
CR411 404(b) Instruction – 2011 Police Interview

You have heard evidence of a 2011 interview of Dale Heath conducted by the Orem Police Department before the acts charged in this case. You may consider this evidence, if at all, for the limited purpose of determining whether the acts charged in this case were mistaken or accidental. This evidence has not been admitted to prove a character trait of the defendant or to show that he acted in a manner consistent with such a trait. Keep in mind that the defendant is on trial for the crimes charged in this case, and for those crimes only. You may not convict a person simply because you believe he may have committed some other act at another time.

INSTRUCTION NO. 49  
CR411 404(b) Instruction – 2011 DOPL Letter

You have heard evidence of a 2011 letter issued to Dale Heath by the Utah Division of Occupational and Professional Licensing before the acts charged in this case. You may consider this evidence, if at all, for the limited purpose of determining whether the acts charged in this case were mistaken or accidental. This evidence has not been admitted to prove a character trait of the defendant or to show that he acted in a manner consistent with such a trait. Keep in mind that the defendant is on trial for the crimes charged in this case, and for those crimes only. You may not convict a person simply because you believe he may have committed some other act at another time.

INSTRUCTION NO. 50

[Josie Tobiason—Rule 404(b)]

Each crime charged involves both an act prohibited by law and a corresponding mental state specified by law.

You have heard testimony from Josie Tobiason about treatments she received from Dale Heath in 2011 before the crimes alleged in this case. You may consider this evidence, if at all, for the limited purpose of determining whether Dale Heath acted with the mental state specified by law. However, you may not consider this evidence for the purpose of determining whether Dale Heath committed the act prohibited by law—the unlawful touching of Joy Cootey.

This evidence is not admitted to prove a character trait of the defendant or to show that he acted in a manner consistent with such a trait. Keep in mind that the defendant is on trial for the crimes charged in this case, and for those crimes only. You may not convict a person simply because you believe he may have committed some other act at another time.

INSTRUCTION NO. 51

[Emily Bean—Rule 404(b)]

Each crime charged involves both an act prohibited by law and a corresponding mental state specified by law.

You have heard testimony from Emily Bean about treatments she received from Dale Heath in 2015 after the crimes alleged in this case. You may consider this evidence, if at all, for the limited purpose of determining whether Dale Heath acted with the mental state specified by law. However, you may not consider this evidence for the purpose of determining whether Dale Heath committed the act prohibited by law—the unlawful touching of Joy Cootey.

This evidence is not admitted to prove a character trait of the defendant or to show that he acted in a manner consistent with such a trait. Keep in mind that the defendant is on trial for the crimes charged in this case, and for those crimes only. You may not convict a person simply because you believe he may have committed some other act at another time.

THE UTAH COURT OF APPEALS

STATE OF UTAH,  
Appellee,

*v.*

DALE HARLAND HEATH,  
Appellant.

Opinion

No. 20180076-CA

Filed November 21, 2019

Fourth District Court, Provo Department  
The Honorable Derek P. Pullan  
No. 151402675

Ann M. Taliaferro, Attorney for Appellant  
Sean D. Reyes and Jeffrey S. Gray, Attorneys  
for Appellee

JUDGE JILL M. POHLMAN authored this Opinion, in which  
JUDGES MICHELE M. CHRISTIANSEN FORSTER and DAVID N.  
MORTENSEN concurred.

POHLMAN, Judge:

¶1 A woman (Victim) suffered from back pain. She visited Dale Harland Heath's chiropractic offices, where Heath treated her over the course of nine visits. Based on his conduct during some of those visits, Heath was convicted of sexual battery (three counts), forcible sexual abuse, and object rape. Heath appeals and we affirm.

BACKGROUND<sup>1</sup>

¶2 When Victim could not find relief from chronic back pain, her mother recommended that Victim seek treatment from Heath, mother's chiropractor. From October 2012 to December 2012, Victim, then age 20, saw Heath nine times. The first four visits were mostly uneventful, though by the fourth visit she was starting to feel "a little uncomfortable." Heath's conduct at the next four visits forms the basis of Heath's criminal case.

*Count 1—Sexual Battery*

¶3 On November 3, 2012, Victim visited Heath for the fifth time. To prepare for treatment, she changed into a medical gown but kept her yoga pants on. Heath added "a new massage" on this visit, rubbing Victim's inner thigh with one hand and rubbing "right over [her] vaginal area with the other hand." His hand was "going up and down, back and forth, right over the seam of [Victim's] yoga pants, right on [her] vagina." Victim "opened [her] eyes for a moment," noticed that the lights were off, and asked Heath what he was doing. Heath said he was massaging a psoas attachment.<sup>2</sup> Victim, not knowing what

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1. "On appeal from a jury verdict, we view the evidence and all reasonable inferences in a light most favorable to that verdict and recite the facts accordingly." *State v. Pinder*, 2005 UT 15, ¶ 2, 114 P.3d 551 (cleaned up). In our recitation of the facts, we rely primarily on Victim's trial testimony.

2. The psoas muscles are in the lower back, originating at the spine and running down to the femur. William C. Shiel Jr., *Medical Definition of Muscle, Psoas*, MedicineNet.com, <https://www.medicinenet.com/script/main/art.asp?articlekey=9654> [<https://perma.cc/F8V6-35C9>].

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treatment was necessary to relieve her symptoms, “closed [her] eyes and just waited for it to be over.”

¶4 The rubbing lasted a few minutes, and Victim had an orgasm. She gave no outward indication of it, and Heath acted like “nothing was wrong” and did not say anything. After paying for the visit, Victim “cr[ie]d the whole way home” while trying to “explain it away” in her mind.

*Count 2—Sexual Battery*

¶5 On November 24, 2012, Victim returned for her sixth session with Heath. She decided to return because she “was in a lot of pain” and “didn’t really want to believe that it had happened.” She trusted Heath, and his treatment had been helping to reduce her back pain.

¶6 Heath again massaged Victim’s “clitoral or vaginal area” over her clothes. Victim asked what he was doing, and Heath responded that he was working the gracilis muscle.<sup>3</sup> He did this for a few minutes, and Victim had another orgasm. When Victim’s sister—who accompanied Victim to her appointment on this occasion—entered the room, Heath moved his hand away from Victim’s vagina and massaged her thigh with two hands as he talked to her sister. Heath did not put his hand back on Victim’s vagina while Victim’s sister was in the room.

*Count 3—Sexual Battery*

¶7 On December 1, 2012, Victim had her seventh visit with Heath, again after “convincing [herself] that everything was

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3. “The gracilis muscle is a long, strap-like muscle that passes from the pubic bone to the tibia in the lower leg.” Tim Barclay, *Gracilis Muscle*, Innerbody.com, [https://www.innerbody.com/ima ge\\_muscfov/musc67-new.html](https://www.innerbody.com/ima ge_muscfov/musc67-new.html) [<https://perma.cc/CGZ2-298E>].

fine” and that she must have “imagined it.” Heath started with a stomach massage, which was routine by this point, but then he went “lower and lower than ever before,” with his fingers going past her waist “into [her] underpants.” Victim was frozen. She did not say anything but felt Heath’s fingers “stopping right on the left side of [her] vagina . . . where [her] leg starts.” His fingers went “in a circular motion, which would move [the] outer lip of [Victim’s] vagina over.” At trial, Victim further described this as a touching of her labia majora, which she described as “the starting of the vagina, but not the . . . inner, not the opening, not the clit[oris].”

*Counts 4 & 5—Forcible Sexual Abuse and Object Rape*

¶8 Victim returned again on December 8, 2012. This visit was the same as the last. Heath went under Victim’s underpants and moved his fingers in a circular motion, touching the “outer lip of [Victim’s] vagina, moving it around and around and around.” Then, Victim clearly felt Heath move one finger over (likely the pinky finger of Heath’s right hand), and touch her “right on [her] clitoris . . . in the middle of [her] vagina.” Victim flinched, and Heath moved his finger away.

¶9 Victim described this touching at trial. The prosecutor asked if Heath had to “go beyond the labia majora to touch [her] clitoris.” Victim responded affirmatively. She similarly testified that she “felt” his finger “actually go beyond [her] labia majora.”<sup>4</sup>

¶10 Victim did not immediately tell anyone what had happened because “if [she] said it out loud then it meant it was

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4. Victim visited Heath one last time on December 15, 2012. Nothing relevant to the criminal case against Heath happened at that visit.

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real and it really happened, and [she] didn't want to believe it." But a little more than a month later, Victim reported the touching to her mother and then to the police.

*Other Incidents with J.T. and E.B.*

¶11 Before Victim began visiting Heath in 2012, Heath was treating J.T. in 2011. J.T., a licensed massage therapist, visited Heath for hip and leg pain. Heath worked along the top of J.T.'s pubic bone and then started "grinding back and forth in [J.T.'s] crotch," touching and rubbing her clitoris. J.T. opened her eyes and saw that Heath "looked very different," "like he was . . . enjoying what he was doing." J.T. ended the appointment and never returned.

¶12 As a massage therapist, J.T. knew "there's absolutely no reason to" touch that area because there are "no muscles that attach right there." J.T. reported the incident to the police and the Division of Professional Licensing (DOPL). Though DOPL had some concerns, it declined to "investigate the matter any further" or "seek formal action against [Heath's] license." Heath had promised to examine and adjust his practices, and DOPL encouraged him to do so.

¶13 Then, in 2015, Heath treated E.B., who visited Heath a total of four times. On the third and fourth visits, Heath touched E.B.'s genital area, including the clitoris, over her clothes. At first it seemed unintentional, but throughout the treatment it became apparent to E.B. that it "was completely intentional" and that "there was no excuse for it." She too filed a complaint with DOPL and reported the incident to the police.

*Procedural History*

¶14 In 2015, the State charged Heath with sexual crimes against Victim and E.B. The charges with respect to each victim were severed, and the State filed an amended information

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relating to the five sexual offenses against Victim: three counts of sexual battery, *see* Utah Code Ann. § 76-9-702.1 (LexisNexis 2017); one count of forcible sexual abuse, *see id.* § 76-5-404 (2012); and one count of object rape, *see id.* § 76-5-402.2 (2017).

¶15 Heath filed a motion in limine to exclude certain other acts evidence at trial, including testimony from J.T. and E.B., primarily under rule 404(b) of the Utah Rules of Evidence. Under a doctrine of chances theory, the trial court allowed the State to use J.T.'s and E.B.'s testimonies to prove mens rea but not to prove actus reus. When it came to proving actus reus, the court concluded that the State had "failed to prove the foundational requirement of frequency," which it described for purposes of the actus reus as "the frequency with which chiropractors are falsely accused of inappropriate touching during treatment." There was no evidence on this statistic, and the court reasoned that any conclusion on this point "would be nothing more than conjecture."

¶16 But regarding mens rea, the court found that the relevant inquiry was "the frequency of [Heath's] involvement in a type of event—the accidental touching of his patients' genitals." Reasoning that "the mistaken touching of another's genitals would be a once in a lifetime event" for the general population and that chiropractors could take precautions to avoid accidental touching that would make chiropractors as a class "indistinct from people generally," the court allowed the other acts evidence to prove mens rea—that is, to prove that Heath touched Victim not by mistake or accident incidental to treatment, but rather with the intent to arouse or gratify sexual desire.

¶17 Heath was tried before a jury. Among other witnesses, the State called a doctor of chiropractic (Doctor) to testify about the standard of care practiced by chiropractors in Utah. Doctor opined that chiropractors should "avoid any accidental,

incidental or intentional touching of sensitive areas” through “draping techniques” or “physical blockage.” He also testified that there would be no medical reason to touch Victim below the “top of the pubic bone.”

¶18 Heath testified in his own defense. As relevant here, he testified that he did not intentionally touch Victim’s vaginal area but that incidental, over-the-clothing touching during the treatment was possible. He also stated that he was unaware that Victim had been sexually stimulated and that she gave no indication that she was uncomfortable. He admitted that there is no reason to intentionally touch a patient’s labia or clitoris when treating lower back pain, whether under or over the clothing.

¶19 The jury found Heath guilty of all charges. After reviewing this court’s decision in *State v. Patterson*, 2017 UT App 194, 407 P.3d 1002, the trial court on its own motion requested briefing on whether judgment should be arrested on count 5 on the basis that penetration of the genital opening may not have been established. Heath then filed his own motion to arrest judgment, contending that the evidence was insufficient on counts 4 and 5 for forcible sexual abuse and object rape. Specifically, he argued that the State did not prove “penetration” of the “genital or anal opening,” as required by the object rape statute. *See* Utah Code Ann. § 76-5-402.2(1). He additionally argued that, for purposes of forcible sexual abuse, the State did not prove his specific intent “to arouse or gratify the sexual desire of any individual.” *See id.* § 76-5-404(1).

¶20 The trial court rejected both arguments. It first stated that penetration “means entry between the outer folds of the labia” and concluded that the evidence was sufficient to show penetration, “meaning [Heath’s] fingers entered between the outer folds of [Victim’s] labia.” It then determined that a reasonable jury could find specific intent for forcible sexual abuse, reasoning that the “nature, duration and progression of

the touching described by [Victim] all give rise to a reasonable inference” about Heath’s intent to arouse or gratify sexual desire. The court also noted that there was “no medical purpose” for the touching. So concluding, the court declined to arrest judgment.

¶21 The trial court sentenced Heath to concurrent prison terms of up to one year on each sexual battery count, one to fifteen years for forcible sexual abuse, and five years to life for object rape. Heath appeals.

#### ISSUES AND STANDARDS OF REVIEW

¶22 Heath raises challenges to the admission of other acts evidence at trial, the sufficiency of the evidence on all counts, and the jury instructions.

¶23 Trial courts “are afforded a great deal of discretion in determining whether to admit or exclude evidence.” *State v. Martin*, 2017 UT 63, ¶ 18, 423 P.3d 1254 (cleaned up). Barring an “error of law,” we will reverse a trial court’s evidentiary decision under rule 404(b) of the Utah Rules of Evidence “only if that decision is beyond the limits of reasonability.” *Id.* (cleaned up); *see also State v. Thornton*, 2017 UT 9, ¶ 56, 391 P.3d 1016 (“[T]he question . . . is whether the [trial court] abused [its] broad discretion in [admitting rule 404(b) evidence].”).

¶24 We review Heath’s sufficiency challenges “under well-settled standards of review—yielding deference to the jury’s determination of the sufficiency of the evidence but addressing the legal questions he raises de novo.” *State v. Barela*, 2015 UT 22, ¶ 17, 349 P.3d 676 (cleaned up); *see also State v. Nielsen*, 2014 UT 10, ¶ 46, 326 P.3d 645 (stating that, in any sufficiency challenge, we “review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict” (cleaned up)).

¶25 In the instances where Heath’s sufficiency challenges are unpreserved, he asks that we review them for plain error and ineffective assistance of counsel.<sup>5</sup> To prevail on plain error review, not only must Heath show “that the evidence was insufficient to support a conviction of the crime charged,” he must also show “that the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury.” *State v. Holgate*, 2000 UT 74, ¶ 17, 10 P.3d 346. “An example of an obvious and fundamental insufficiency is the case in which the State presents *no* evidence to support an essential element of a criminal charge.” *State v. Prater*, 2017 UT 13, ¶ 28, 392 P.3d 398 (cleaned up). Further, “an ineffective assistance of counsel claim raised for the first time on appeal presents a question of law,” *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162 (cleaned up), and to prevail on his ineffective assistance of counsel claims, Heath must demonstrate that counsel’s failure to raise the sufficiency issues to the trial court’s attention was both objectively deficient and prejudicial, *see State v. Guzman*, 2018 UT App 93, ¶ 55, 427 P.3d 401 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Among other things, the failure to raise futile motions or objections challenging the sufficiency of the evidence does not constitute ineffective assistance. *State v. Stringham*, 2013 UT App 15, ¶ 5, 295 P.3d 1170 (per curiam).

¶26 Finally, Heath’s jury instruction challenge is unpreserved, and he seeks review only under the ineffective assistance of

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5. Heath also asks that we review the unpreserved sufficiency claims for manifest injustice. As Heath acknowledges, “manifest injustice” is generally synonymous with “plain error,” *see State v. Alinas*, 2007 UT 83, ¶ 10, 171 P.3d 1046, and Heath argues his sufficiency claims as though the two standards are synonymous. We accordingly follow suit.

counsel doctrine.<sup>6</sup> As explained above, to prevail on this challenge Heath must demonstrate that his counsel performed deficiently with respect to the jury instruction errors and that the deficient performance prejudiced him. *State v. Parkinson*, 2018 UT App 62, ¶ 9, 427 P.3d 246.

## ANALYSIS

### I. The Other Acts Evidence

¶27 Before trial, the court ruled that certain evidence would be admissible at trial under rule 404(b) of the Utah Rules of Evidence. This evidence included testimony from J.T. and E.B., statements Heath made in police interviews, a 2011 DOPL letter issued to Heath, and the 2014 DOPL probation and reprimand orders (collectively, the Other Acts Evidence).

¶28 As a general matter, rule 404(b) bars propensity evidence: “Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular

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6. In his opening brief, Heath additionally sought review of this issue under the plain error and manifest injustice doctrines. But he concedes in reply that he invited the error, and thus he abandons those doctrines and narrows his challenge to one for ineffective assistance of counsel. *See State v. Crespo*, 2017 UT App 219, ¶ 22 n.5, 409 P.3d 99 (noting that this court may not review a challenge to jury instructions for plain error if the error was invited); *see also State v. Geukgeuzian*, 2004 UT 16, ¶ 9, 86 P.3d 742 (“While a party who fails to object to or give an instruction may have an instruction assigned as error under the manifest injustice exception, a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error.”(cleaned up)).

occasion the person acted in conformity with the character.” Utah R. Evid. 404(b)(1). However, the evidence “may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” *Id.* R. 404(b)(2); *see also State v. Verde*, 2012 UT 60, ¶ 15, 296 P.3d 673 (explaining that this list is not exhaustive), *abrogated on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016.

¶29 Heath argues that the trial court erred in admitting the Other Acts Evidence at trial, raising two main challenges to its admission. First, he argues that the court erroneously admitted this evidence to prove mens rea. Second, he argues that the admission of this evidence allowed the State to derail the trial with “irrelevant and prejudicial evidence” and contends that the court should have required the jury to “decide the issue of guilt or innocence solely on the basis of the demeanor and testimony of [himself] and [Victim].”<sup>7</sup> We address each challenge in turn and ultimately reject them.

A. Admitting the Other Acts Evidence to Prove Mens Rea

¶30 Heath argues that the trial court erred in admitting the Other Acts Evidence to prove mens rea, asserting two specific challenges to its admission for this purpose. First, he contends that the testimony of J.T. and E.B. should not have been admitted under the doctrine of chances exception to rule 404(b) because

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7. Heath also argues that “the jury was never asked in the first instance to make the foundational factual determination that the conduct alleged by J.T. and E.B. was actually committed” and asserts that this was error. This claim, however, was not preserved, and Heath has not asked us to review it under an exception to the preservation rule. Thus, we do not address it further.

the State failed to establish the frequency element required under that exception. Second, he contends that the trial court erred in allowing the evidence to be admitted to prove the specific intent requirement of his offenses as opposed to “the general intent to commit the act.”

1. The Doctrine of Chances

¶31 The doctrine of chances is a unique analytical framework used to admit evidence of other acts that would otherwise be excluded by rule 404(b)(1). *See State v. Lane*, 2019 UT App 86, ¶ 18, 444 P.3d 553. The doctrine is “a theory of logical relevance that rests on the objective improbability of the same rare misfortune befalling one individual over and over.” *Verde*, 2012 UT 60, ¶ 47 (cleaned up). The Utah Supreme Court has explained,

As the number of improbable occurrences increases, the probability of coincidence decreases, and the likelihood that the defendant committed one or more of the actions increases. An innocent person may be falsely accused or suffer an unfortunate accident, but when several independent accusations arise or multiple similar accidents occur, the objective probability that the accused innocently suffered such unfortunate coincidences decreases. At some point, the fortuitous coincidence becomes too abnormal, bizarre, implausible, unusual or objectively improbable to be believed.

*Id.* ¶ 49 (cleaned up). “[F]or evidence to be admitted under the doctrine of chances, it must meet four foundational requirements: materiality, similarity, independence, and frequency.” *State v. Lopez*, 2018 UT 5, ¶ 54, 417 P.3d 116. The requirement of frequency is at issue here.

¶32 The trial court carefully analyzed whether to admit the Other Acts Evidence concerning J.T. and E.B. under the doctrine of chances. It noted that the doctrine can be used to prove either the actus reus or the required mens rea. *See State v. Lowther*, 2017 UT 34, ¶¶ 23, 25, 398 P.3d 1032. And it concluded that the relative frequency required for application of the doctrine of chances depends on the purpose for which the doctrine is being used. *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, 597 (1990) [hereinafter Imwinkelried]. “When the prosecutor invites the court to apply the doctrine to prove the actus reus, the focus is on the frequency of a particular type of loss—the death of a child in a person’s custody or the fire at a person’s building.” *Id.*; *see also Verde*, 2012 UT 60, ¶ 61 & n.36 (relying on Imwinkelried in discussing the frequency requirement of the doctrine of chances). But “[w]hen the prosecutor asks the court to employ the doctrine to establish mens rea, the relevant frequency is the incidence of the accused’s personal involvement in a type of event—the discharge of a weapon . . . , the possession of contraband drugs, or the receipt of stolen property.” Imwinkelried at 597.

¶33 Here, the trial court allowed J.T.’s and E.B.’s testimonies to prove only mens rea—that Heath did not touch Victim’s genitals accidentally. Thus, the question of frequency centered on Heath’s personal “involvement in a type of event”—the accidental touching of his patients’ genitals during treatment. In comparison to actus reus, where there is a greater likelihood that relevant statistical data will be available, a trial court “is more likely to have to rely on [its] common sense and knowledge of human experience” when determining the level of frequency for mens rea. Imwinkelried at 597–98.

¶34 In this regard, we agree with the trial court that the State satisfied the frequency requirement with respect to J.T.’s and

E.B.'s testimonies. As the trial court observed, "For the average person, the mistaken touching of another's genitals [of the nature at issue here] would be a once in a lifetime event." But Heath was accused of inappropriate touching of another's genitals by at least three people over roughly a five-year period. Though the trial court noted that "the frequency of unintended touching may be markedly higher" for chiropractors than those in the general population, it reasoned on the basis of testimony the State intended to (and did) present at trial that chiropractors could take precautions to avoid inappropriate touching that would make chiropractors "indistinct from people generally." In this respect, after the incident with J.T., DOPL sent a letter to Heath encouraging him to adjust his practices to avoid similar incidents in the future, yet Heath continued to be accused of inappropriate touching. Based on the DOPL letter, Heath knew the risks of inappropriate touching and the discomfort it caused his patients.

¶35 Moreover, frequency "interact[s] with" similarity "to become a safeguard against the doctrine of chances becoming a work-around for the admission of otherwise improper propensity evidence." *Lopez*, 2018 UT 5, ¶ 57. And here, the touching described by J.T. and E.B. was highly similar to the touching described by Victim. Each was a patient of Heath, and each described touching of her genital area, including the clitoris, during treatment. J.T. testified that Heath "grind[ed] back and forth in [her] crotch," while Victim testified that, on one occasion, Heath's hand went "up and down, back and forth, right over the seam of [her] yoga pants." Similar to E.B.'s testimony, the invasiveness of Heath's touching of Victim progressed in intensity from treatment to treatment, with Heath waiting until later visits to touch the genital area. While at first the touching seemed unintentional to E.B. and Victim, it became apparent to both of them as the visits progressed that Heath was touching their genitalia intentionally. As the trial court observed, the high degree of similarity between the incidents involving J.T.

and E.B. and those involving Victim simply made “a repeated mistake . . . less likely.”

¶36 In these circumstances, we agree with the trial court that J.T.’s and E.B.’s testimonies were helpful in proving Heath’s mens rea when he touched Victim. Accordingly, the trial court did not abuse its discretion in determining that the State had sufficiently shown the foundational requirement of frequency for purposes of admitting J.T.’s and E.B.’s testimonies under the doctrine of chances.

## 2. Admission of the Other Acts Evidence for Specific Intent

¶37 Heath also challenges the admission of the Other Acts Evidence in general, contending that the trial court failed to limit the jury’s use of the evidence to establishing only general intent. He argues that the evidence could perhaps be relevant to “counter a claim of mistake or accident for the touch” itself but that it had “no bearing on or relevance to the specific intent requirement” of the charged offenses. He thus asserts that the trial court erred by failing to limit the jury’s consideration of the Other Acts Evidence to only countering a claim of mistaken or accidental touch.

¶38 We reject this argument. Heath fails to point us to any place in the record where he raised this issue—limiting the jury’s consideration of the Other Acts Evidence to general rather than specific intent—to the trial court. *See Salt Lake City v. Josephson*, 2019 UT 6, ¶¶ 10–12, 435 P.3d 255 (setting forth the preservation doctrine and its underlying policies, which require a party to present the issue “to the trial court in such a way that the trial court has an opportunity to rule on that issue” (cleaned up)); *Holladay v. Storey*, 2013 UT App 158, ¶ 34, 307 P.3d 584 (stating that “it is not the appellate court’s burden to comb through the record to verify whether, and where, [the appellant] preserved

this issue,” and declining to address an issue raised on appeal on that basis); *see also* Utah R. App. P. 24(a)(5)(B).

¶39 Further, even assuming that this issue was preserved, Heath does not develop his argument with citation to authority and instead advances this point through conclusory statements about the trial court’s supposed error. We decline to take up the burden of research and argument that would be necessary to resolve this issue. *See Cheek v. Iron County*, 2018 UT App 116, ¶¶ 24–25, 427 P.3d 522 (stating that “[a]n issue is inadequately briefed when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court,” and concluding that the appellant had not carried her burden on appeal because “she ma[de] no attempt to present reasoned analysis supported by citations to legal authority,” as required by our appellate rules (cleaned up)), *aff’d sub nom. Cheek v. Iron County Attorney*, 2019 UT 50, 448 P.3d 1236; *see also* Utah R. App. P. 24(a)(8).

B. Weighing Probative Value Against Unfair Prejudice

¶40 Heath also challenges the Other Acts Evidence by asserting that the evidence was “only minimally relevant” and that its admission prejudiced him. Specifically, he contends that the “critical factual issue” for the jury was the respective credibility of Heath and Victim and that, accordingly, the jury should have been “required to decide the issue of guilt or innocence solely on the basis of [his and Victim’s] demeanor and testimony.” And by admitting the broad range of the Other Acts Evidence, Heath asserts, the trial court allowed the case to become “about everything and anything except for” proving the elements of the charged offenses.

¶41 Heath does not develop his argument that the probative value of the Other Acts Evidence was substantially outweighed by unfair prejudice. The trial court determined under rule 403 of

the Utah Rules of Evidence that the probative value of the Other Acts Evidence was not substantially outweighed by the danger of unfair prejudice or confusion of the issues, particularly where limiting instructions were available.<sup>8</sup> *See generally* Utah R. Evid. 403; *State v. Balfour*, 2018 UT App 79, ¶ 28, 418 P.3d 79 (explaining that, in deciding whether to admit other acts evidence, the trial court must determine whether that evidence satisfies rule 403). Heath challenges these determinations by labeling the State’s case as weak and asserting that the trial court erred in allowing the State to hide that weakness by resorting to “distraction with innuendo and speculation,” which forced him to “expend significant resources and trial time responding.” But he does not otherwise explain why the trial court’s rule 403 analysis was erroneous, why the limiting instructions failed to mitigate any potential in the evidence toward unfair prejudice, confusion, or distraction, or why any error in admitting the evidence was harmful. Thus, Heath has not carried his burden of persuasion on appeal. *See* Utah R. App. P. 24(a)(8); *Cheek*, 2018 UT App 116, ¶¶ 24–25.

¶42 In sum, we conclude that Heath has not demonstrated that the trial court exceeded “the limits of reasonability” when it admitted the State’s rule 404(b) evidence. *See State v. Martin*, 2017 UT 63, ¶ 18, 423 P.3d 1254 (cleaned up). We thus affirm the court’s evidentiary decision.

## II. Sufficiency of the Evidence

¶43 Heath contends that there was insufficient evidence to convict him of any of the charges brought against him. Below, we detail Heath’s contentions with respect to each conviction, review the relevant statute, and recount the most important

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8. To that end, limiting instructions were given to the jury for each piece of the Other Acts Evidence.

evidence presented at trial. We conclude that none of Heath's challenges require reversal of his convictions.

A. Sexual Battery—Counts 1–3

¶44 Heath contends that the evidence at trial supporting the sexual battery counts “fail[ed] to demonstrate in any manner the element of [his] *knowledge* that his behavior would likely cause affront or alarm *to the person touched.*” He asserts that he “always acted normal” and that Victim returned for treatment multiple times and “never once voiced any complaint or concern.” He concedes that this particular sufficiency challenge was not preserved.

¶45 Utah Code section 76-9-702.1 defines the crime of sexual battery:

A person is guilty of sexual battery if the person . . . intentionally touches, whether or not through clothing, the anus, buttocks, or any part of the genitals of another person, . . . and the actor's conduct is under circumstances the actor knows or should know will likely cause affront or alarm to the person touched.

Utah Code Ann. § 76-9-702.1(1) (LexisNexis 2017).<sup>9</sup>

¶46 The evidence presented at trial allowed the jury to find that Heath knew or should have known his actions would likely cause Victim affront or alarm. Heath had been personally advised that such touching is distressing. By the time he treated Victim in 2012, Heath had received a complaint from J.T. relating to the touching of her labia and a letter from DOPL instructing

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9. Because there have been no material changes to this statute since the crimes occurred, we cite the current version.

him to adjust his practices and confirming his representation that he would adjust his practice to avoid any inappropriate touching of patients. Thus, Heath knew that his touching of J.T., which was similar to his touching of Victim, would likely cause affront or alarm.

¶47 Further, the evidence established that there was no medical purpose for the touching. Doctor testified at trial that chiropractors should “avoid any accidental, incidental or intentional touching” through various techniques and opined that there would have been no medical reason to touch Victim’s genital area. Heath himself acknowledged that there is no clinical reason to intentionally touch a woman’s genitalia when treating lower back pain. Despite this, Heath rubbed Victim’s genitalia long enough for Victim to experience an orgasm on two occasions. Without any medical purpose for the touching, it was reasonable for the jury to conclude Heath knew or should have known that such touching would likely cause Victim—who was seeking treatment from Heath for her lower back pain—affront or alarm.

¶48 And contrary to Heath’s argument, Victim did express some concern over Heath’s conduct. The first time Heath started rubbing her genital area, Victim asked Heath what he was doing. Heath said he was massaging a psoas attachment. The next visit, Heath again started rubbing Victim’s genital area. Victim again asked what he was doing, and Heath answered that he was working the gracilis muscle. When Victim’s sister entered the room, Heath moved his hand away from Victim’s genitalia and worked instead on Victim’s thigh. This evidence further supports a reasonable inference that Heath knew or should have known his touching would likely affront or alarm Victim.

¶49 Finally, we reject Heath’s contention that the jury could not reasonably conclude that he knew his touching would likely affront or alarm Victim because Victim returned for treatment.

As we recently explained in *State v. Jok*, 2019 UT App 138, 449 P.3d 610, victims of sexual abuse “display a diverse range of reactions to the harm they suffered,” including confusion and disbelief. *Id.* ¶ 24. Given the varied possible responses to sexual abuse, Heath should have known—even with Victim’s choice to return—that his touching of her genitalia was likely to cause affront or alarm. Victim was coming to Heath for treatment for lower back pain. She gave no indication that she welcomed the touching, and her inquiries to Heath suggested that she was trying to convince herself that the touching was medically appropriate.

¶50 In sum, the evidence was sufficient—or at least not so obviously insufficient that the trial court committed plain error “in submitting the case to the jury,” *see State v. Holgate*, 2000 UT 74, ¶ 17, 10 P.3d 346—to find that Heath knew or should have known his massaging of Victim’s vaginal area while purporting to treat lower back pain would likely cause Victim affront or alarm, *see Utah Code Ann. § 76-9-702.1(1)*. Thus, we affirm Heath’s three convictions for sexual battery.<sup>10</sup>

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10. In addition to arguing plain error, Heath contends that defense counsel was ineffective for not recognizing the same alleged deficiencies in the State’s evidence on the sexual battery counts. We reject Heath’s contention and conclude for the reasons above either that any objection would have been futile, *see State v. Bell*, 2016 UT App 157, ¶ 22, 380 P.3d 11 (“Failing to file a futile motion does not constitute ineffective assistance of counsel.” (cleaned up)), or that Heath has otherwise not shown that “no reasonable attorney” would have failed to object to the sufficiency of the evidence, *see State v. Roberts*, 2019 UT App 9, ¶ 29, 438 P.3d 885 (“Only when no reasonable attorney would pursue the chosen strategy will we determine that counsel has been constitutionally ineffective.” (cleaned up)).

B. Forcible Sexual Abuse—Count 4

¶51 Heath contends that there was insufficient evidence to support the count 4 conviction of forcible sexual abuse for two reasons: (1) the State failed to present evidence of specific intent to arouse or gratify anyone’s sexual desire, and (2) the State failed to present evidence of Victim’s nonconsent and Heath’s mental state as to Victim’s nonconsent.

¶52 At the time of the offenses, Utah Code section 76-5-404 defined the crime of forcible sexual abuse as follows:

A person commits forcible sexual abuse if . . . under circumstances not amounting to . . . object rape, . . . the actor touches the anus, buttocks, or any part of the genitals of another, or touches the breast of a female, or otherwise takes indecent liberties with another, . . . with the intent to arouse or gratify the sexual desire of any individual, without the consent of the other . . . .

Utah Code Ann. § 76-5-404(1) (LexisNexis 2012).

1. Specific Intent

¶53 Heath argues that while the jury was instructed as to the statute’s requirement of specific intent to arouse or gratify sexual desire, “the State failed in presenting evidence of it.” He asserts that he acted normally, he did not say anything of a sexual nature to Victim, and Victim “never gave any outward indication he was doing something wrong.” He concludes that “the surrounding circumstances do not evidence the requisite specific intent” and that “the jury’s verdict [was] based purely upon improper speculation.”

¶54 “[P]roof of a defendant’s intent is rarely susceptible of direct proof . . . .” *State v. Murphy*, 617 P.2d 399, 402 (Utah 1980).

*State v. Heath*

Accordingly, circumstantial evidence has long been used to prove specific intent. *See State v. Garcia-Mejia*, 2017 UT App 129, ¶ 31, 402 P.3d 82; *see also State v. Kennedy*, 616 P.2d 594, 598 (Utah 1980) (“Wherever a special intent is an element of a criminal offense, its proof must rely on inference from surrounding circumstances.”); *State v. Minousis*, 228 P. 574, 576 (Utah 1924) (“It is . . . well settled that . . . specific intent may be proved by circumstantial, as well as direct, evidence . . . .”). When circumstantial evidence is relied on to prove that element of an offense, we follow two steps:

We must determine (1) whether the State presented any evidence that [the defendant] possessed the requisite intent, and (2) whether the inferences that can be drawn from that evidence have a basis in logic and reasonable human experience sufficient to prove that [the defendant] possessed the requisite intent.

*Holgate*, 2000 UT 74, ¶ 21 (cleaned up); *see also Garcia-Mejia*, 2017 UT App 129, ¶¶ 30–34 (applying these steps and holding that there was evidence of specific intent to arouse or gratify sexual desire despite the defendant not saying anything during his abusive interactions with his children).

¶55 First, we ask whether the State presented *any evidence* that Heath touched Victim with intent to arouse or gratify sexual desire. *See Garcia-Mejia*, 2017 UT App 129, ¶ 32. We conclude that it did. Victim explained the progression of Heath’s treatment. On the fifth visit, Heath began to touch Victim over the clothes. By the seventh visit, Heath “put his hands in [Victim’s] underpants” and did so again at the eighth visit on December 8. On December 8 specifically, Heath put his hands under her underpants and moved his fingers in a circular motion, moving the outer lip of Victim’s vagina “around and around and around” for a few minutes. As the State points out,

Heath testified that treatment of the inner thigh could result only in incidental or accidental contact with the labia, but the touching Victim described was more than brief accidental or incidental touching. And according to Doctor, there was no medical reason for the touching and it could have been avoided through a number of relatively simple techniques. In addition, the State presented the Other Acts Evidence that, as shown, is relevant to Heath's intent. *Supra* ¶¶ 27–42. For example, the State presented J.T.'s and E.B.'s testimonies about similar incidents with Heath, which tended to prove Heath's mens rea with respect to the charged offenses under the doctrine of chances. And the State presented Heath's statements to police, the 2011 DOPL letter, and the 2014 DOPL report and order, which tended to rebut Heath's defense of mistaken or accidental touching.<sup>11</sup> *Id.*

¶56 Second, we must ask whether the inferences to be drawn from the State's evidence "have a basis in logic and reasonable human experience sufficient to prove that" Heath possessed the intent to arouse or gratify sexual desire. *See Garcia-Mejia*, 2017 UT App 129, ¶ 33 (cleaned up). Again, we conclude that they do. The nature, duration, and progression of Heath's touching of Victim all give rise to a reasonable inference, completely in line with human experience, that Heath acted with intent to arouse or gratify sexual desire. There was no medical reason for the touching, and Heath had been advised to take the necessary precautions to avoid it. Not only did Heath not take precautions with Victim, he touched Victim on several occasions, sometimes

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11. The jury was instructed to consider the Other Acts Evidence as evidence of Heath's mental state at the time he treated Victim and as bearing on whether the charged acts were mistaken or accidental. As noted earlier, *supra* ¶¶ 37–39, Heath did not preserve any challenge to these instructions. Thus, we assume, for purposes of argument, that this evidence was properly considered.

for several minutes at a time. For example, he put his hand under her pants and moved the outer lip of her vagina “around and around and around.” And on previous visits, Heath had rubbed Victim’s genital area for several minutes, causing Victim to experience an orgasm. These facts lead to a reasonable inference that Heath’s touching was not merely incidental to treatment of Victim’s lower back. Thus, Heath has not persuaded us that no reasonable jury could find that he acted with specific intent “to arouse or gratify . . . sexual desire” when he touched Victim’s genitalia for minutes at a time. *See* Utah Code Ann. § 76-5-404(1). We therefore decline to reverse Heath’s conviction on count 4.

2. Victim’s Nonconsent and Heath’s Mental State Regarding Victim’s Nonconsent

¶57 Heath also challenges his conviction for forcible sexual abuse on the grounds that “the State failed to prove non-consent” and that “Heath acted with the requisite mens rea as to any purported lack of consent.” In doing so, he largely repeats his other arguments—Victim did not express a lack of consent, did not resist, returned for subsequent treatments, and gave no indication that she was uncomfortable. Further, he asserts that “[w]ithout having been informed by any verbal or non-verbal cues whatsoever indicating [Victim] was uncomfortable,” he cannot have acted with the requisite mens rea as to Victim’s nonconsent. These arguments were unpreserved.

¶58 Utah Code section 76-5-404 includes the victim’s nonconsent as an element of forcible sexual abuse. Utah Code Ann. § 76-5-404(1) (LexisNexis 2012). And the code “requires proof . . . that [the defendant] had the requisite mens rea as to the victim’s nonconsent.” *See State v. Barela*, 2015 UT 22, ¶ 26, 349 P.3d 676. Nonconsent and, additionally, the defendant’s mental state regarding nonconsent, “cannot be determined simply by

asking whether [the alleged victim] physically fought back or attempted to escape.” See *State v. Cady*, 2018 UT App 8, ¶ 11, 414 P.3d 974 (cleaned up). Normally, consent (or the lack of it) “is a fact-intensive, context-dependent question, decided on a case-by-case basis.” *Barela*, 2015 UT 22, ¶ 39. As such, the question of consent “has long [been] left . . . in the hands of the jury.” *Id.*

¶59 Utah Code section 76-5-406 identifies a number of circumstances in which the crime of forcible sexual abuse “is without consent.” Utah Code Ann. § 76-5-406(2) (LexisNexis Supp. 2019). One of these circumstances concerns health-care professionals, including chiropractors. *Id.* § 76-5-406(1)(a). An act of forcible sexual abuse “is without consent” if

the actor is a health professional . . . , the act is committed under the guise of providing professional diagnosis, counseling, or treatment, and at the time of the act the victim reasonably believed that the act was for medically or professionally appropriate diagnosis, counseling, or treatment to the extent that resistance by the victim could not reasonably be expected to have been manifested.

*Id.* § 76-5-406(2)(l). Heath makes the conclusory assertion that the State did not establish that this health-professional circumstance applied. But he does not address the evidence showing that Heath was a chiropractor, Heath claimed to be treating Victim’s psoas and gracilis muscles as he touched her genitalia, Victim trusted Heath because his treatments were helping, and Victim’s mother had recommended Heath as a chiropractor—all evidence that supports the legal conclusion that Victim did not (and could not) consent under the health-professional circumstance. In short, Heath must show an “obvious and fundamental” insufficiency on questions that are particularly fact-intensive. See *Holgate*, 2000 UT 74, ¶ 17. And having failed to engage with this

evidence, he has not done so here.<sup>12</sup> We therefore affirm his conviction for forcible sexual abuse.<sup>13</sup>

C. Object Rape—Count 5

¶60 Heath contends that the State failed to prove penetration of the genital opening for purposes of object rape. He asserts that Victim never used the word “penetration” and instead described Heath as having touched the “outer lip of [her] vagina”<sup>14</sup> and “on [her] clitoris.” He argues that her clitoris is not the requisite “genital opening” contemplated by the object rape statute. In his view, the “genital opening” means the “vaginal opening,” and he points to supposed contextual cues in the statute, particularly

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12. Heath also briefly argues that the State failed to prove that he acted with “the requisite mens rea as to any purported lack of consent” where the State did not present evidence showing that he was at least reckless with respect to Victim’s nonconsent. However, the same evidence discussed above also supports a finding that Heath was at least reckless with respect to Victim’s nonconsent.

13. Heath also makes an ineffective assistance of counsel claim with respect to his unpreserved arguments on count 4. Heath, however, has not shown that it was unreasonable under these circumstances for defense counsel to not object to the sufficiency of the evidence on the issues of nonconsent. *See Roberts*, 2019 UT App 9, ¶ 29. Accordingly we reject this argument.

14. Victim and counsel often referred to the “vagina” at trial when it is clear based on context that they intended to refer to the vulva—the external part of a female’s genitalia. As Heath notes in his briefing on appeal, the term vagina is “quite often used colloquially to refer to the vulva” despite the fact that the vagina is part of a female’s internal genitalia. (Cleaned up.)

the statute's use of the parallel term "anal opening," to support his interpretation.

¶61 Utah Code section 76-5-402.2 defines object rape as:

A person who, without the victim's consent, causes the penetration, however slight, of the genital or anal opening of another person . . . by any foreign object, . . . including a part of the human body other than the mouth or genitals, . . . with the intent to arouse or gratify the sexual desire of any person, commits [object rape] . . . .

Utah Code Ann. § 76-5-402.2(1) (LexisNexis 2017).<sup>15</sup> "Penetration" was first defined by our case law in *State v. Simmons*, 759 P.2d 1152 (Utah 1988), in the context of rape of a child. *Id.* at 1153–54. The definition was then extended to object rape in *State v. Patterson*, 2017 UT App 194, 407 P.3d 1002. *Id.* ¶ 3. These cases hold that "penetration" in both the rape and object rape context means "entry between the outer folds of the labia."<sup>16</sup> *Id.* (cleaned up). In *Simmons*, our supreme court then

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15. Because there have been no material changes to this statute since the crime occurred, we cite the current version.

16. It appears that numerous courts agree, holding that "entry of the anterior of the female genital organ, known as the vulva or labia, is sufficient penetration to constitute rape." James L. Rigelhaupt Jr., Annotation, *What Constitutes Penetration in Prosecution for Rape or Statutory Rape*, 76 A.L.R.3d 163 (1977); see, e.g., *State v. Toohey*, 2012 SD 51, ¶ 22, 816 N.W.2d 120 (interpreting statutory language similar to Utah's "to mean that evidence of vulvar or labial penetration, however slight, is sufficient to prove penetration"); *State v. Bowles*, 52 S.W.3d 69, 74 (Tenn. 2001) (defining penetration and stating that "it is not (continued...)

discerned insufficient evidence of penetration when the alleged victim testified only that the defendant “had placed his penis *on* her labial folds.” 759 P.2d at 1154 n.1. *But see id.* at 1161 (Hall, C.J., concurring and dissenting) (stating that combined with other facts in the case this conclusion “insult[ed] common sense and the experience of all those sexually literate”). Conversely, in *Patterson*, we held that there was sufficient evidence of penetration when the victim testified that the defendant “tr[ie]d to put his fingers up” her genitalia, that he “separated the labia” using two fingers, and that “[i]t really hurt.” 2017 UT App 194, ¶¶ 8, 19.

¶62 Here, Victim testified that Heath’s finger touched her “right on [her] clitoris . . . in the middle of [her] vagina.” In response to questions, Victim clarified that Heath had to “go beyond [her] labia majora to touch [her] clitoris” and that she “felt” his finger “actually go beyond [her] labia majora.” Elsewhere in her testimony, Victim described the labia majora as “the soft skin that’s the starting of the vagina, but not the . . . inner, not the opening, not the clit[oris].”

¶63 Heath argues that this testimony was insufficient to prove that he penetrated Victim’s genital opening. To do so, he contends that *Simmons* and *Patterson*’s “penetration” definition should not be credited. He points out that *Simmons* was a rape case, not an *object* rape case, and asserts that neither *Simmons* nor *Patterson* actually reviewed, interpreted, or “consider[ed] the specific requirement of the object rape statute to penetrate the

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(...continued)

necessary that the vagina be entered or that the hymen be ruptured; the entering of the vulva or labia is sufficient” (cleaned up)). Though this secondary source and the cases it cites discuss rape and not object rape, the definition of “penetration” of the female genitalia is consistent.

genital or anal opening.” Rather, according to Heath, *Patterson* merely imported the definition of “penetration” announced in *Simmons* without dealing with the fact that the rape statute and object rape statute differ with respect to the “*specific body part* required to be penetrated.”

¶64 To that end, Heath argues for a different interpretation of “penetration” in relation to the genital opening under section 76-5-402.2. He asserts that, properly construed, section 76-5-402.2’s reference to “genital . . . opening” means “vaginal opening.” He advances his conclusion by analogizing the reference in the statute of “genital opening” to that of the “anal opening,” arguing that, when read in context, the “anal opening” means “the actual opening [where the gastrointestinal tract ends and exits the body] and not the surrounding skin and folds.” Extending the analogy, Heath argues that “genital opening” must then mean the “vaginal opening” or, alternatively, the vaginal “hole.” Thus, in his view, “an inappropriate touch of the clitoris or even an inappropriate touch of the protective skin and folds surrounding the clitoris and the vulva” may be sexual battery or forcible sexual abuse but it is not object rape, “because *no opening has been penetrated.*” We first address Heath’s statutory construction argument, and we then address the sufficiency of the evidence supporting his conviction of object rape.

¶65 It is true that the rape and object rape statutes use slightly different terminology with respect to “penetration.” The rape statute refers to “sexual penetration,” Utah Code Ann. § 76-5-407(2)(a)(iii) (LexisNexis Supp. 2019), while the object rape statute refers to “penetration . . . of the genital or anal opening,” *id.* § 76-5-402.2(1) (2017). And as Heath points out, neither *Simmons* nor *Patterson* interpreted the meaning of “penetration” specifically with respect to a “genital opening.” However, we conclude that the plain meaning of the phrase “penetration . . . of the genital . . . opening” in section

76-5-402.2(1) is consistent with the definition of “penetration” announced in *Simmons* and applied in *Patterson*. We thereby reject Heath’s proffered interpretation.

¶66 The “primary goal” of statutory interpretation “is to evince the true intent and purpose of the Legislature,” and the “best evidence of the legislature’s intent is the plain language of the statute itself.” *Marion Energy, Inc. v. KFJ Ranch P’ship*, 2011 UT 50, ¶ 14, 267 P.3d 863 (cleaned up). It is well-settled that in interpreting statutes we presume that “the legislature used each term advisedly according to its ordinary and usually accepted meaning,” and that “the expression of one term should be interpreted as the exclusion of another.” *Id.* (cleaned up); *see also State v. Sanders*, 2019 UT 25, ¶ 17, 445 P.3d 453 (“As we examine the text, we presume that the legislature used each word advisedly.” (cleaned up)). *See generally State v. Robertson*, 2017 UT 27, ¶ 40, 438 P.3d 491 (stating that the judiciary is tasked with “interpreting and applying legislation according to what appears to be the legislature’s intent, neither inferring substantive terms into the text that are not already there nor taking away from the statutory text by ignoring it or rendering it superfluous” (cleaned up)).

¶67 Heath’s argument turns in part on the meaning of “opening” in the object rape statute; he asserts that “opening” in this context means a “specified anatomical *hole*.” (Emphasis added.) But the ordinary dictionary meaning of the term “opening” is not so limited, and common synonyms include, among other things, a “gap,” “vent,” “breach,” “space,” and “slot.” *See Opening*, Dictionary.com, <https://www.dictionary.com/browse/opening?s=t> [<https://perma.cc/ST8P-SQXP>]; *Opening*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/opening> [<https://perma.cc/EJ3W-55DZ>]; *Opening*, Thesaurus.com, <https://www.thesaurus.com/browse/opening?s=t> [<https://perma.cc/7Y8Q-D3QL>]; *see also State v. Lambdin*, 2017 UT 46, ¶ 22, 424 P.3d 117 (“When interpreting statutes, we look

to the ordinary meaning of the words, using the dictionary as our starting point.”).

¶68 Further, in the context of the object rape statute, it is plain that the term “opening” is not limited to the vaginal opening. See *Lambdin*, 2017 UT 46, ¶ 22 (“After determining our starting point [from the dictionary definitions], we then must look to the context of the language in question.” (cleaned up)). The legislature used the term “*genital . . . opening*” in the object rape statute, not “vaginal opening.” Utah Code Ann. § 76-5-402.2(1) (emphasis added). The term “genital” is broadly defined as “of or relating to the sexual organs.” *Genital*, Dictionary.com, <https://www.dictionary.com/browse/genital?s=t> [<https://perma.cc/9VBP-GFKE>]; *Genital*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/genital> [<https://perma.cc/J6TR-LMLT>] (defining “genital” as “of, relating to, or being a sexual organ”). And indeed, as the State points out, accepted medical understanding establishes that female genitalia have more than one opening, including the vaginal opening and the opening between the labial folds. See Jennifer Knudtson & Jessica E. McLaughlin, *Female External Genital Organs*, Merck Manual, <https://www.merckmanuals.com/home/women-s-health-issues/biology-of-the-female-reproductive-system/female-external-genital-organs> [<https://perma.cc/GD4X-P5LX>] (identifying a female’s external genital organs, including the various “openings,” and explaining that the labia majora are “folds of tissue that enclose and protect the other external genital organs”).

¶69 Given this, if the legislature intended to limit the meaning of “penetration” to only the *vaginal* opening, it could have done so. But it did not, and instead used the more inclusive term “genital opening”—a choice in terminology that we must presume was intentional. See *Marion Energy*, 2011 UT 50, ¶ 14. Because the plain meaning of the term “genital opening” necessarily includes more than simply the “vaginal opening,”

we disagree with Heath's assertion that, in context, the meaning of "genital opening" is strictly limited to the "vaginal opening." We also discern no other indication in the object rape statute that the legislature intended "genital opening" to be narrowly interpreted as "vaginal opening." Thus, we cannot read into the object rape statute the limitation that Heath urges. *See Robertson*, 2017 UT 27, ¶ 40. The statute's plain language simply does not support doing so.

¶70 The plain language reading of the term "genital opening" in the object rape statute is consistent with the interpretation of "penetration" decided in *Simmons* and applied in *Patterson*. The courts in both cases determined that the "penetration" element in the context of either rape or object rape is satisfied when the penetration occurs "between the outer folds of the labia." *Simmons*, 759 P.2d at 1154; *Patterson*, 2017 UT App 194, ¶ 3. Because the object rape statute uses the general and inclusive "genital opening" terminology, and because one of the medically acknowledged female genital openings is that between the labial folds, it follows that the penetration element is satisfied upon proof of entry "between the outer folds of the labia." *Simmons*, 759 P.2d at 1154; *Patterson*, 2017 UT App 194, ¶ 3. And Heath has not otherwise shown error in how the statute was interpreted in *Simmons* and *Patterson*.<sup>17</sup> Thus, we conclude that, in defining object rape, the legislature did not intend to limit the required penetration of the "genital opening" to the "vaginal opening" and that the interpretation of "penetration" set forth in *Simmons* and *Patterson* are in line with a plain language reading of the object rape statute.

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17. We reiterate that numerous courts define penetration of the female genitalia this way. *See supra* note 16. Though of course not necessary to rule for Heath on his statutory argument, Heath cites no case in which a court has interpreted statutory language similar to Utah's to require penetration of the vaginal opening.

¶71 Next, having interpreted the relevant terms, resolving Heath’s sufficiency challenge is straightforward. Victim explicitly testified that Heath went “beyond [her] labia majora to touch [her] clitoris” “in the middle of [her] vagina.” Unlike in *Patterson*, in which the victim did not explicitly state that the defendant penetrated her genital opening and the jury had to rely on competing inferences, no inferences were required here. Victim testified directly to the question of penetration and, though not using that exact word, described Heath touching her clitoris and confirmed that he had to “go beyond [her] labia majora” to do so. Thus, the jury reasonably found that Heath penetrated Victim’s genital opening when he touched her clitoris. See Utah Code Ann. § 76-5-402.2(1); see also *State v. Lerman*, 2018 MT 5, ¶ 13, 408 P.3d 1008 (holding that there was sufficient evidence of penetration based on “common sense anatomy” because “[t]he outer portions of the vulva necessarily are penetrated, however slightly, when the clitoris is touched” (cleaned up)); *Jett v. Commonwealth*, 510 S.E.2d 747, 749 (Va. Ct. App. 1999) (“[T]he clitoris lies within the labia majora; therefore, evidence of penetration or stimulation of the clitoris is sufficient to establish penetration of the labia majora . . . .”). We accordingly affirm his conviction for object rape.<sup>18</sup>

### III. Jury Instructions

¶72 Heath contends that he received ineffective assistance of counsel in regard to the jury instructions at his trial. We have no need to describe the challenges in detail. Heath paints with a

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18. Heath challenges his conviction for object rape with the same argument he did with respect to his conviction for forcible sexual abuse—namely, that there was no evidence of his specific intent to arouse or gratify sexual desire. This argument fails for the same reasons discussed above. See *supra* ¶¶ 53–56.

broad and indiscriminate brush, and he has failed to meet his burden of demonstrating prejudice.

¶73 “To succeed on an ineffective assistance of counsel claim, [a defendant] must demonstrate that his trial counsel’s performance was deficient and that he suffered prejudice as a result.” *State v. Vallejo*, 2019 UT 38, ¶ 36, 449 P.3d 39 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). There is no need for us “to address both components of the inquiry,” *id.* ¶ 40 (cleaned up), and courts often analyze prejudice without opining on any objective deficiency in the representation, *see Strickland*, 466 U.S. at 697 (“If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.”); *State v. Reid*, 2018 UT App 146, ¶ 20, 427 P.3d 1261.

¶74 The burden to prove prejudice is on the defendant. *State v. Garcia*, 2017 UT 53, ¶¶ 36–37, 424 P.3d 171. And it is no light undertaking. *Id.* ¶ 44. The defendant must show that “but for the error, there is a reasonable probability that the verdict would have been more favorable to him.” *State v. Apodaca*, 2019 UT 54, ¶ 50, 448 P.3d 1255 (cleaned up). “[A] mere potential effect on the outcome is not enough.” *Id.* Rather, the defendant must show a “substantial” likelihood of a different result as a “demonstrable reality and not [merely as] a speculative matter.” *State v. Nelson*, 2015 UT 62, ¶¶ 10, 28, 355 P.3d 1031 (cleaned up); *see also Apodaca*, 2019 UT 54, ¶ 50 (stating that the prejudice requirement “is a relatively high hurdle to overcome” in that “the likelihood of a different result must be substantial” (cleaned up)).

¶75 Heath has not met his burden of demonstrating prejudice. He asserts that the instructions were prejudicial because they were “incomplete, legally inaccurate, and confusing.” But this does not establish prejudice. Even if the instructions were problematic, Heath must still show a prejudicial effect on the outcome given the totality of the evidence at trial. Considering

the evidence in this case—Victim’s testimony, the Other Acts Evidence, Doctor’s testimony, and Heath’s own admissions—it is difficult to say that it is reasonably likely the jury would have come to a different conclusion had the instructions been different. At least, Heath has not hoed that row. We therefore conclude on this basis that there was no demonstrable ineffective assistance of counsel in regard to the jury instructions.<sup>19</sup>

### CONCLUSION

¶76 The trial court did not abuse its discretion in admitting the Other Acts Evidence. Based in part on that evidence, there was sufficient evidence for the jury to convict Heath of sexual battery, forcible sexual abuse, and object rape. Finally, Heath’s counsel was not constitutionally ineffective in not objecting to jury instructions because Heath has not shown prejudice from the lack of an objection. We affirm Heath’s convictions.

---

19. Heath also argues that if we determine “that the errors set forth herein do not individually warrant reversal,” we should “find the cumulative effect of all such errors do.” But there are no errors to cumulate, and therefore cumulative error does not apply. *See State v. Squires*, 2019 UT App 113, ¶ 45 n.10, 446 P.3d 581.



REPORT OF THE JUDICIAL CONFERENCE ON ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES

Reprinted below is a report by the Judicial Conference of the United States concerning changes in the Federal Rules of Evidence. The report is a response to a mandate from Congress contained in Section 320935 of the 1994 Violent Crime Control and Law Enforcement Act, 55 CrL 2411.

JUDICIAL CONFERENCE OF THE UNITED STATES WASHINGTON, D.C. 20544

THE CHIEF JUSTICE OF THE UNITED STATES Presiding

L. RALPH MECHAM Secretary

February 9, 1995

Honorable Newt Gingrich Speaker, United States House of Representatives Washington, D.C. 20515

Dear Mr. Speaker:

By direction of the Judicial Conference of the United States, I am honored to transmit to you a report containing recommendations regarding the admission of character evidence in certain cases under the Federal Rules of Evidence.

This report is submitted to Congress in accordance with section 320935 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (September 13, 1994). The section adds new Evidence Rules 413, 414, and 415 to the Federal Rules of Evidence.

The Act defers the effective date of new Evidence Rules 413-415 until February 10, 1995 pending a report from the Judicial Conference. Under the Act the effective date is delayed for an additional 150 days after transmittal of the Conference report, if the Conference makes alternative recommendations to the new rules. The recommendations in the report are different from the Act's new rules. Accordingly, Rules 413-415 will take effect 150 days after the transmittal of this report, unless Congress adopts the alternative recommendations or provides otherwise by law.

Sincerely,

[Handwritten signature of L. Ralph Mecham]

L. Ralph Mecham Secretary

Enclosure

REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES

February 1995

I. INTRODUCTION

This report is transmitted to Congress in accordance with the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (September 13, 1994). Section 320935 of the Act invited the Judicial Conference of the United States within 150 days (February 10, 1995) to submit "a report containing recommendations for amending the Federal Rules of Evidence as they affect the admission of evidence of a

defendant's prior sexual assault or child molestation crimes in cases involving sexual assault or child molestation."

Under the Act, new Rules 413, 414, and 415 would be added to the Federal Rules of Evidence. These Rules would admit evidence of a defendant's past similar acts in criminal and civil cases involving a sexual assault or child molestation offense for its bearing on any matter to which it is relevant. The effective date of new Rules 413-415 is contingent in part upon the nature of the recommendations submitted by the Judicial Conference.

After careful study, the Judicial Conference urges Congress to reconsider its decision on the policy questions underlying the new rules for reasons set out in Part III below.

If Congress does not reconsider its decision on the underlying policy questions, the Judicial Conference recommends incorporation of the provisions of new Rules 413-415 as amendments to Rules 404 and 405 of the Federal Rules of Evidence. The amendments would not change the substance of the congressional enactment but would clarify drafting ambiguities and eliminate possible constitutional infirmities.

II. BACKGROUND

Under the Act, the Judicial Conference was provided 150 days within which to make and submit to Congress alternative recommendations to new Evidence Rules 413-415. Consideration of Rules 413-415 by the Judicial Conference was specifically exempted from the exacting review procedures set forth in the Rules Enabling Act (codified at 28 U.S.C. §§ 2071 - 2077). Although the Conference acted on these new rules on an expedited basis to meet the Act's deadlines, the review process was thorough.

The new rules would apply to both civil and criminal cases. Accordingly, the Judicial Conference's Advisory Committee on Criminal Rules and the Advisory Committee on Civil Rules reviewed the rules at separate meetings in October 1994. At the same time and in preparation for its consideration of the new rules, the Advisory Committee on Evidence Rules sent out a notice soliciting comment on new Evidence Rules 413, 414, and 415. The notice was sent to the courts, including all federal judges, about 900 evidence law professors, 40 women's rights organizations, and 1,000 other individuals and interested organizations.

III. DISCUSSION

On October 17-18, 1994, the Advisory Committee on Evidence Rules met in Washington, D.C. It considered the public responses, which included 84 written comments, representing 112 individuals, 8 local and 8 national legal organizations. The overwhelming majority of judges, lawyers, law professors, and legal organizations who responded opposed new Evidence Rules 413, 414, and 415. The principal objections expressed were that the rules would permit the admission of unfairly prejudicial evidence and contained numerous drafting problems not intended by their authors.

The Advisory Committee on Evidence Rules submitted its report to the Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) for review at its January 11-13, 1995 meeting. The committee's report was unanimous except for a dissenting vote by the representative of the Department of Justice. The advisory committee believed that the concerns expressed by Congress and embodied in new Evidence Rules 413, 414, and 415 are already adequately addressed in the existing Federal Rules of Evidence. In particular, Evidence Rule 404(b) now allows the admission of evidence against a criminal defendant of the commission of prior crimes, wrongs, or acts for specified purposes, including to show intent, plan, motive, preparation, identity, knowledge, or absence of mistake or accident.

Furthermore, the new rules, which are not supported by empirical evidence, could diminish significantly the protections that have safeguarded persons accused in criminal cases and parties in civil cases against undue prejudice. These protections form a fundamental part of American jurisprudence and have evolved under long-standing rules and case law. A significant concern identified by the committee was the danger of convicting a criminal defendant for past, as opposed to charged, behavior or for being a bad person.

In addition, the advisory committee concluded that, because prior bad acts would be admissible even though not the subject of a conviction, mini-trials within trials concerning those acts would result when a defendant seeks to rebut such evidence. The committee also noticed that many of the comments received had concluded that the Rules, as drafted, were mandatory -- that is, such evidence had to be admitted regardless of other rules of evidence such as the hearsay rule or the Rule 403 balancing test. The committee believed that this position was arguable because Rules 413-415 declare without qualification that such evidence "is admissible." In contrast, the new Rule 412, passed as part of the same legislation, provided that certain evidence "is admissible if it is otherwise admissible under these Rules." Fed. R. Evid. 412 (b) (2). If the critics are right, Rules 413-415 free the prosecution from rules that apply to the defendant -- including the hearsay rule and Rule 403. If so, serious constitutional questions would arise.

The Advisory Committees on Criminal and Civil Rules unanimously, except for representatives of the Department of Justice, also opposed the new rules. Those committees also concluded that the new rules would permit the introduction of unreliable but highly prejudicial evidence and would complicate trials by causing mini-trials of other alleged wrongs. After the advisory committees reported, the Standing Committee unanimously, again except for the representative of the Department of Justice, agreed with the view of the advisory committees.

It is important to note the highly unusual unanimity of the members of the Standing and Advisory Committees, composed of over 40 judges, practicing lawyers, and academicians, in taking the view that Rules 413-415 are undesirable. Indeed, the only supporters of the Rules were representatives of the Department of Justice.

For these reasons, the Standing Committee recommended that Congress reconsider its decision on the policy questions embodied in new Evidence Rules 413, 414, and 415.

However, if Congress will not reconsider its decision on the policy questions, the Standing Committee recommended that Congress consider an alternative draft recommended by the Advisory Committee on Evidence Rules. That Committee drafted proposed amendments to existing Evidence Rules 404 and 405 that would both correct ambiguities and possible constitutional infirmities identified in new Evidence Rules 413, 414, and 415 yet still effectuate Congressional intent. In particular, the proposed amendments:

- (1) expressly apply the other rules of evidence to evidence offered under the new rules;
- (2) expressly allow the party against whom such evidence is offered to use similar evidence in rebuttal;
- (3) expressly enumerate the factors to be weighed by a court in making its Rule 403 determination;
- (4) render the notice provisions consistent with the provisions in existing Rule 404 regarding criminal cases;
- (5) eliminate the special notice provisions of Rules 413-415 in civil cases so that notice will be required as provided in the Federal Rules of Civil Procedure; and
- (6) permit reputation or opinion evidence after such evidence is offered by the accused or defendant.

The Standing Committee reviewed the new rules and the alternative recommendations. It concurred with the views of the Evidence Rules Committee and recommended that the Judicial Conference adopt them.

#### IV. RECOMMENDATIONS

The Judicial Conference concurs with the views of the Standing Committee and urges that Congress reconsider its policy determinations underlying Evidence Rules 413-415. In the alternative, the attached amendments to Evidence Rules 404 and 405 are recommended, in lieu of new Evidence Rules 413, 414, and 415. The alternative amendments to Evidence Rules 404 and 405 are accompanied by the Advisory Committee Notes, which explain them in detail.

#### FEDERAL RULES OF EVIDENCE

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes\*

\* \* \* \* \*

(4) Character in sexual misconduct cases. - Evidence of another act of sexual assault or child molestation, or evidence to rebut such proof or an inference therefrom, if that evidence is otherwise admissible under these rules, in a criminal case in which the accused is charged with sexual assault or child molestation, or in a civil case in which a claim is predicated on a party's alleged commission of sexual assault or child molestation.

(A) In weighing the probative value of such evidence, the court may, as part of its rule 403

\* New matter is underlined and matter to be omitted is lined through.

determination, consider:

(i) proximity in time to the charged or predicate misconduct;

(ii) similarity to the charged or predicate misconduct;

(iii) frequency of the other acts;

(iv) surrounding circumstances;

(v) relevant intervening events; and

(vi) other relevant similarities or differences.

(B) In a criminal case in which the prosecution intends to offer evidence under this subdivision, it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(C) For purposes of this subdivision,

(i) "sexual assault" means conduct - or an attempt or conspiracy to engage in conduct - of the type proscribed by chapter 109A of title 18, United States Code, or conduct that involved deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person irrespective of the age of the victim regardless of whether that conduct would have subjected the actor to federal jurisdiction.

(ii) "child molestation" means conduct - or an attempt or conspiracy to engage in conduct - of the type proscribed by chapter 110 of title 18, United States Code, or conduct, committed in relation to a child below the age of 14 years, either of the type proscribed by chapter 109A of title 18, United States Code, or that involved deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person - regardless of whether that conduct would have subjected the actor to federal jurisdiction.

(b) Other crimes, wrongs, or acts. - Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith except as provided in subdivision (a). . . .

Note to Rule 404(a)(4)

The Committee has redrafted Rules 413, 414 and 415 which the Violent Crime Control and Law Enforcement Act of 1994 conditionally added to the Federal Rules of Evidence.\* These modifications do not change the substance of the congressional enactment. The changes were made in order to integrate the provisions both substantively and stylistically with the existing Rules of Evidence; to illuminate the intent expressed by the principal drafters of the measure; to clarify drafting

\* Congress provided that the rules would take effect unless within a specified time period the Judicial Conference made recommendations to amend the rules that Congress enacted.

ambiguities that might necessitate considerable judicial attention if they remained unresolved; and to eliminate possible constitutional infirmities.

The Committee placed the new provisions in Rule 404 because this rule governs the admissibility of character evidence. The congressional enactment constitutes a new exception to the general rule stated in subdivision (a). The Committee also combined the three separate rules proposed by Congress into one subdivision (a)(4) in accordance with the rules' customary practice of treating criminal and civil issues jointly. An amendment to Rule 405 has been added because the authorization of a new form of character evidence in this rule has an impact on methods of proving character that were not explicitly addressed by Congress. The stylistic changes are self-evident. They are particularly noticeable in the definition section in subdivision (a)(4)(C) in which the Committee eliminated, without any change in meaning, graphic details of sexual acts.

The Committee added language that explicitly provides that evidence under this subdivision must satisfy other rules of evidence such as the hearsay rules in Article VIII and the expert testimony rules in Article VII. Although principal sponsors of the legislation had stated that they intended other evidentiary rules to apply, the Committee believes that the opening phrase of the new subdivision "if otherwise admissible under these rules" is needed to clarify the relationship between subdivision(a)(4) and other evidentiary provisions.

The Committee also expressly made subdivision (a)(4) subject to Rule 403 balancing in accordance with the repeatedly stated objectives of the legislation's sponsors with which representatives of the Justice Department expressed agreement. Many commentators on Rules 413-415 had objected that Rule 403's applicability was obscured by the actual language employed.

In addition to clarifying the drafters' intent, an explicit reference to Rule 403 may be essential to insulate the rule against constitutional challenge. Constitutional concerns also led the Committee to acknowledge specifically the opposing party's right to offer in rebuttal character evidence that the rules would otherwise bar, including evidence of a third person's prior acts of sexual misconduct offered to prove that the third person rather than the party committed the acts in issue.

In order to minimize the need for extensive and time-consuming judicial interpretation, the Committee listed factors that a court may consider in discharging Rule 403 balancing. Proximity in time is taken into account in a related rule. See Rule 609(b). Similarity, frequency and surrounding circumstances have long been considered by courts in handling other crimes evidence pursuant to Rule 404(b). Relevant intervening events, such as extensive medical treatment of the accused between the time of the prior proffered act and the charged act, may affect the strength of the propensity inference for which the evidence is offered. The final factor -- "other relevant similarities or differences" -- is added in recognition of the endless variety of circumstances that confront a trial court in rulings on admissibility. Although subdivision (4) (A) explicitly refers to factors that bear on probative value, this enumeration does not eliminate a judge's responsibility to take into account the other factors mentioned in Rule 403 itself -- "the danger of unfair prejudice, confusion of the issues, . . . misleading the jury,

. . . undue delay, waste of time, or needless presentation of cumulative evidence." In addition, the Advisory Committee Note to Rule 403 reminds judges that "The availability of other means of proof may also be an appropriate factor."

The Committee altered slightly the notice provision in criminal cases. Providing the trial court with some discretion to excuse pretrial notice was thought preferable to the inflexible 15-day rule provided in Rules 414 and 415. Furthermore, the formulation is identical to that contained in the 1991 amendment to Rule 404(b) so that no confusion will result from having two somewhat different notice provisions in the same rule. The Committee eliminated the notice provision for civil cases stated in Rule 415 because it did not believe that Congress intended to alter the usual time table for disclosure and discovery provided by the Federal Rules of Civil Procedure.

The definition section was simplified with no change in meaning. The reference to "the law of a State" was eliminated as unnecessarily confusing and restrictive. Conduct committed outside the United States ought equally to be eligible for admission. Evidence offered pursuant to subdivision (a) (4) must relate to a form of conduct proscribed by either chapter 109A or



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110 of title 18, United States Code, regardless of whether the actor was subject to federal jurisdiction.

FEDERAL RULES OF EVIDENCE

Rule 405. Methods of Proving Character

(a) Reputation or opinion. - In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion except as provided in subdivision (c) of this rule. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

\* \* \* \* \*

(c) Proof in sexual misconduct cases. - In a case in which evidence is offered under rule 404(a)(4), proof may be made by specific instances of conduct, testimony as to reputation, or testimony in the form of an opinion, except that the prosecution or claimant may offer reputation or opinion testimony only after the opposing party has offered such testimony.

Note to Rule 405(c)

The addition of a new subdivision (a)(4) to Rule 404 necessitates adding a new subdivision (c) to Rule 405 to govern methods of proof. Congress clearly intended no change in the preexisting law that precludes the prosecution or a claimant from offering reputation or opinion testimony in its case in chief to prove that the opposing party acted in conformity with character. When evidence is admissible pursuant to Rule 404(a)(4), the proponents proof must consist of specific instances of conduct. The opposing party, however, is free to respond with reputation or opinion testimony (including expert testimony if otherwise admissible); as well as evidence of specific instances. In a criminal case, the admissibility of reputation or opinion testimony would, in any event, be authorized by Rule 404(a)(1). The extension to civil cases is essential in order to provide the opponent with an adequate opportunity to refute allegations about a character for sexual misconduct. Once the opposing party offers reputation or opinion testimony, however, the prosecution or claimant may counter using such methods of proof.

## COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of the Meeting of January 11-13, 1995  
San Diego, California

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in San Diego, California on Wednesday, Thursday, and Friday, January 11-13, 1995. All the members were present:

Judge Alicemarie H. Stotler, Chair  
Professor Thomas E. Baker  
Judge William O. Bertelsman  
Judge Frank H. Easterbrook  
Judge Thomas S. Ellis, III  
Professor Geoffrey C. Hazard, Jr.  
Judge Phyllis A. Kravitch  
Judge James A. Parker  
Alan W. Perry, Esquire  
George C. Pratt, Esquire  
Sol Schreiber, Esquire  
Alan C. Sundberg, Esquire  
Chief Justice E. Norman Veasey  
Judge William R. Wilson

Representing the Department of Justice on the committee were Deputy Attorney General Jamie S. Gorelick and Geoffrey M. Klineberg, Special Assistant to the Deputy Attorney General.

Supporting the committee were Professor Daniel R. Coquillette, reporter to the committee, Peter G. McCabe, secretary to the committee, John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office, and Mark D. Shapiro, senior attorney in the office.

Representing the advisory committees at the meeting were:

Advisory Committee on Appellate Rules -  
Judge James K. Logan, Chair  
Professor Carol Ann Mooney, Reporter  
Advisory Committee on Bankruptcy Rules -  
Judge Paul Mannes, Chair  
Professor Alan N. Resnick, Reporter  
Advisory Committee on Civil Rules -  
Judge Patrick E. Higginbotham, Chair  
Professor Edward H. Cooper, Reporter  
Advisory Committee on Criminal Rules -  
Judge D. Lowell Jensen, Chair

Professor David A. Schlueter, Reporter  
Advisory Committee on the Rules of Evidence -  
Judge Ralph K. Winter, Chair  
Professor Margaret A. Berger, Reporter

Also participating in the meeting were: Joseph F. Spaniol Jr. and Bryan R. Garner, consultants to the committee, Mary P. Squiers, project director of the local rules project, and William B. Eldridge, director of the Research Division of the Federal Judicial Center.

### INTRODUCTORY REMARKS

Judge Stotler reported that the Judicial Conference at its September 1994 meeting had rejected the proposal of the Court Administration and Case Management Committee to promulgate national guidelines governing cameras in courtrooms in civil cases. It then proceeded to disapprove the Standing Committee's proposed amendment to Fed. R. Crim. P. 53, which would have removed the rule's absolute ban on cameras in the courtroom in criminal cases.

The members discussed generally the policy that should be followed in providing information about pending committee business to the public and the media. Judge Stotler pointed out that the rules process is very open and provides numerous opportunities for the public to provide input to the committees. She added that recent correspondence between Administrative Office Director Mecham and Chief Judge Newman had left the door open on the issue of committee members having contacts with the media and the public. She stated that members were free to give their personal views, but should do so with discretion.

Judge Stotler also emphasized the importance of maintaining contacts with other committees of the Judicial Conference, especially the Court Administration and Case Management Committee. Judge Easterbrook added that Judge Ann Williams, chair of the Court Administration and Case Management Committee, had agreed to share with the Standing Committee preliminary results of the RAND Corporation's evaluation of the Civil Justice Reform Act (CJRA) pilot programs as soon as the results become available.

The members expressed concern that the timetables established by the CJRA were unrealistically short and did not allow sufficient time for the Judicial Conference and its committees to analyze the RAND data in a meaningful manner and to prepare meaningful recommendations for national rules changes. It was suggested that the committee communicate these concerns to members and staff of the judiciary committees of the Congress.

### APPROVAL OF THE MINUTES OF THE LAST MEETING

**The committee unanimously approved the minutes of its June 23-24, 1994 meeting.**

#### REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported on recent legislative developments amending or affecting the federal rules.

*First*, the Congress had made a technical change, as requested by the Judicial Conference, in Fed. R. Crim. P. 46(i), correcting an erroneous statutory reference to the Bail Reform Act.

*Second*, the Congress had enacted Fed. R. Evid. 412 in the version approved by the Judicial Conference. In so doing, the Congress did not accept the changes made by the Supreme Court that would have limited the rule's application to criminal cases only. The Congressional conference committee explicitly adopted as part of the legislative history the committee note prepared by the Advisory Committee on the Rules of Evidence.

*Third*, the Congress had amended Fed. R. Crim. P. 32 to require victim allocation in cases involving a crime of violence or sexual abuse. The amendment was made effective on December 1, to coincide with the timing of all other changes in the rules under the Rules Enabling Act.

*Fourth*, the Congress had amended Fed. R. Bank. P. 7004 to require that service on insured depository institutions under the rule be made by certified mail.

Mr. Rabiej also reported that Senator Heflin had introduced a bill to require that each rules committee be comprised of a majority of practicing attorneys. He noted that the Chief Justice had been advised of the matter and had addressed it in his year-end report. The Chief Justice stated that the rulemaking system was working well, and that Congress should not seek to regulate further the composition of the rules committees.

#### CONTRACT WITH AMERICA

Mr. Rabiej reported that a bill had been introduced in the Senate, the counterpart of the House's Taking Back Our Streets bill, that included a provision

requiring that the number of Department of Justice representatives of each rules committee be equal to the number of members who represent defendants in criminal cases. It would affect the composition of the Standing Committee, the Advisory Committee on Criminal Rules, and the Advisory Committee on the Rules of Evidence.

Mr. Rabiej stated that the Judicial Conference had already taken a position on the House bill and had requested the Standing Committee to consider taking a position on this particular bill. The committee agreed with the views of the Chief Justice that the rulemaking system had worked well and Congress should not seek to regulate the composition of the rules committees any more than it had. It was pointed out that many members of the rules committees have had prior prosecutorial experience and that committee votes are neither prosecution-oriented nor defense-oriented. Several members noted, too, that the Department of Justice had provided *ex officio* members to the Standing Committee and the advisory committees for many years. Accordingly, the committee voted to recommend that the Judicial Conference oppose legislation regulating the composition of the rules committees appointed to advise the Judicial Conference and the Supreme Court.

The consensus of the members was that there was no need to communicate further with the Congress on the legislation.

Judge Stotler reported that the responsibility over most of the Contract With America had been assigned to other committees of the Judicial Conference. Judge Higginbotham pointed out that many of the substantive areas assigned to other committees are laced with procedural issues. The Advisory Committee on Civil Rules was looking at the legislation, but only with regard to their impact on procedural issues.

Judge Winter pointed out that the Advisory Committee on the Rules of Evidence had reviewed Article VII of the Federal Rules of Evidence. It had concluded that since the Supreme Court's decision in the *Daubert* case was relatively new, it was premature to consider either amendments to Article VII or legislation to regulate scientific and technical evidence. He advised that pending legislation to revise Fed. R. Evid. 702 was flawed and that Congress should be persuaded to leave the rule alone. Professor Berger added that there were also difficulties with the proposed legislative redraft of Fed. R. Evid. 702(c), dealing with compensation of expert witnesses.

Judge Logan reported that the Advisory Committee on Appellate Rules had considered a proposed legislative amendment to Fed. R. App. P. 22, dealing with certificates of probable cause. The advisory committee had decided not to take a position on the merits of the proposal.

#### REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Eldridge described several research projects that the Federal Judicial Center had undertaken to assist the rules committees. He offered the services of the Center to evaluate the impact of rules changes and provide other help that the committees might want.

#### REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Logan presented the report of the advisory committee, as set forth in his memorandum of December 8, 1994. (Agenda Item 6) He noted that the committee was not presenting any items that would require action.

Judge Logan reported that the advisory committee had reviewed the Style Subcommittee's draft revisions of Rules 1-23 and planned to review Rules 24-48 as soon as its agenda permitted. He stated that the advisory committee intended eventually to present a restyled revision of all 48 rules to the Standing Committee as part of a single package.

Judge Logan stated that the advisory committee had approved substantive changes in Fed. R. App. P. 26, 29, 35, and 41, but would defer seeking approval of the changes until the July 1995 meeting of the Standing Committee.

Professor Mooney stated that the appellate advisory committee had voted—as had the other advisory committees—not to expand from 3 days to 5 days the additional time a party is given to act where service on the party has been made by mail.

#### REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Mannes and Professor Resnick presented the report of the advisory committee, as set forth in Judge Mannes' memorandum of December 14, 1994. (Agenda Item 8)

Judge Mannes stated that the advisory committee had approved several proposed

amendments at its September 1994 meeting, but had decided to defer them for presentation to the Standing Committee at its July 1995 meeting. He also advised that the committee had held a special meeting in December to consider amendments to the Federal Rules of Bankruptcy Procedure made necessary by enactment of the Bankruptcy Reform Act of 1994.

Professor Resnick stated that the Act was very comprehensive and contained 60 operative sections. The advisory committee concluded that most of the rules changes to implement the Act did not require expedited action and could be promulgated under the normal Rules Enabling Act schedule. Accordingly, several proposed amendments would be brought before the Standing Committee for consideration at its July 1995 meeting.

The advisory committee determined, however, that certain matters required urgent attention through immediate: (1) amendment of the Official Forms, and (2) issuance of model interim rules.

The Official Forms, which are widely used by creditors and the general public, did not yet reflect important changes enacted by the 1994 law. Therefore, they were misleading to creditors in such matters as filing proofs of priority claims. Professor Resnick pointed out that the Official Forms are promulgated by the Judicial Conference directly and do not have to be submitted to the Supreme Court and the Congress. Accordingly, the necessary corrective changes could be implemented by the Judicial Conference at its March 1995 meeting.

**The committee voted unanimously to approve the proposed amendments in the Official Forms and send them to the Judicial Conference for promulgation.**

Under section 104 of the Bankruptcy Code, dollar amounts in the Code are adjusted every three years on the recommendation of the Judicial Conference. The advisory committee recommended that the Judicial Conference automatically change the Official Forms to reflect the periodic adjustments made in the statutory dollar amounts. The Standing Committee asked the advisory committee to return at the next meeting with a specific suggestion for effectuating the automatic adjustments in the Official Forms.

The advisory committee recommended three Suggested Interim Bankruptcy Rules for adoption as local court rules. (These rules would eventually be superseded by amendments to the national bankruptcy rules under the Rules Enabling Act process.) The three interim rules were considered necessary by the advisory committee to implement provisions of the Bankruptcy Reform Act of 1994 immediately. They dealt, respectively, with: (1) election of chapter 11 trustees, (2) special procedures for small business chapter 11 cases, and (3) jury trials.

Professor Resnick stated that the advisory committee had distributed model, interim rules directly to the courts in 1979 and 1987. This time, however, the committee was seeking approval of the Standing Committee to distribute the interim rules to the district and

bankruptcy courts.

**The committee voted unanimously to authorize the distribution of the Suggested Interim Bankruptcy Rules.**

Professor Resnick pointed out that the advisory committee planned to engage in a dialogue with the new National Bankruptcy Review Commission, which had been given two years in which to report to the Congress with respect to further changes that may be appropriate in the bankruptcy laws. He also noted that the 1994 bankruptcy legislation had changed the effective date of amendments to the Federal Rules of Bankruptcy Procedure to December 1 of each year, making it consistent with the effective date for the other federal rules. It was the consensus of the committee that it would be appropriate for the advisory committee to deal directly with the National Bankruptcy Review Commission.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Higginbotham presented the report of the advisory committee, as set forth in his memorandum of December 13, 1994. (Agenda Item 9)

He stated that the advisory committee requested action by the Standing Committee on five items.

*First*, the committee recommended that the Judicial Conference ask the Congress to delete the service provisions from the Suits in Admiralty Act, 42 U.S.C. § 742. The Act requires that a libellant "forthwith" serve a libel on the United States attorney and the attorney general. "Forthwith" has been interpreted by some courts to require service within a period shorter than the 120-day period specified in Fed.R.Civ.P. 4(m), creating a trap for practitioners.

**The committee approved the recommendation unanimously.**

*Second*, the advisory committee recommended that amendments to Fed. R. Civ. P. 26(c), dealing with protective orders, be approved by the Judicial Conference at its March 1995 meeting. Judge Higginbotham pointed out that legislation introduced by Senator Kohl would cause difficulty because it focused too much on products liability litigation and would require a judge to conduct a hearing and make explicit findings before entering a protective order. He noted that he had met with the senator and his staff, had corresponded with them, and had carried on a dialogue in an attempt to accommodate competing policy considerations. As a result, the advisory committee voted by mail ballot to make some changes in its original proposal to amend Rule 26(c).

Judge Higginbotham stated that the rule had been changed by the advisory committee

after publication to make it clear that nonparties may intervene for the limited purpose of questioning a protective order, thereby reflecting current practice in the courts. The committee expanded the enumerated grounds for dissolving a protective order. It also provided explicitly in the rule for entry of a protective order on stipulation of the parties. In addition, the advisory committee note had been amended to explain more clearly the balancing required by the rule.

Judge Higginbotham stated that these changes would not require a republication of the amendments since they should follow closely the proposal that had been published.

**The committee voted unanimously to send the amendments to Fed. R. Civ. P. 26(c) to the Judicial Conference for approval.**

**The committee further agreed to proceed on an expedited basis by seeking Judicial Conference approval of the amendments to Rule 26(c) at the March 1995 meeting.**

Judge Higginbotham expressed his appreciation to Assistant Attorney General Frank Hunger for his assistance on Rule 26(c).

*Third*, the advisory committee recommended changes to Fed. R. Civ. P. 43(a): (1) to eliminate the requirement that testimony of witnesses at trial be taken "orally," and (2) to allow the court "for good cause shown in compelling circumstances" to permit presentation of testimony in open court by contemporaneous transmission from a different location.

**The committee voted unanimously to approve the proposed amendments to Fed. R. Civ. P. 43(a), but to delay transmitting them to the Judicial Conference for approval until the Conference's fall 1995 meeting.**

*Fourth*, the advisory committee recommended for publication amendments to Fed. R. Civ. P. 48 to return to the 12-person jury in civil cases. Judge Higginbotham traced the history of the judiciary's move to 6-person juries, following the Supreme Court decisions in *Duncan v. Louisiana* and *Williams v. Florida*. He argued that the literature demonstrates that 12-person juries are more stable in their decision-making than juries of 6 persons. Moreover, 12-person juries are more representative of the community.

Judge Higginbotham stated that the advisory committee had coordinated with other committees of the Judicial Conference on this issue, including the Space and Facilities Committee and the Court Administration and Case Management Committee.

**The committee voted without objection to publish the amendments to Fed. R. Civ. P. 48 for public comment.**

*Fifth*, the advisory committee recommended for publication amendments to Fed. R. Civ. P. 47(a) to provide counsel with a right to participate in the examination of prospective

jurors. Judge Higginbotham pointed out that the proposal would keep the judge in control of the voir dire process, but would give counsel an opportunity to supplement the court's questioning under limits set by the judge.

He stated that many judges are deeply concerned about the proposal, but that it is strongly supported by legal associations and had been approved by the advisory committee on a unanimous vote. He noted that trial lawyers offer two arguments in support of the change: (1) voir dire in civil cases conducted exclusively by judges is often inadequate, and (2) lawyers know more about the details and nuances of their case than the judge. He also pointed out that recent research shows that more than 60 percent of district judges currently allow some form of voir dire by the lawyers. Finally, he mentioned that as a result of the *J.E.B.* and *Batson* cases, lawyers have a greater need for effective voir dire in order to articulate nondiscriminatory reasons for striking potential jurors.

Judge Jensen stated that the Advisory Committee on Criminal Rules had reached the same conclusions, but had not decided on the final language of a proposed amendment. He stated that his advisory committee would attempt to return to the Standing Committee in July 1995 with a common proposal to cover attorney participation in voir dire in both civil and criminal cases.

**The committee voted without objection to table action on publishing Fed. R. Civ. P. 47 until the July 1995 meeting.**

Judge Higginbotham reported, as an information matter, that the advisory committee was continuing to conduct research and to consult with the bar and academia on class actions. It had scheduled a special meeting in February at the University of Pennsylvania to hear the views of practitioners and academics expert in class actions. It also had planned to hold its regular meeting in New York in connection with a symposium on class actions conducted by the New York University Law School.

He also reported that he had appointed a subcommittee, chaired by Judge Scirica, to monitor legislative developments in the area of securities litigation and class actions.

### REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Jensen presented the report of the advisory committee, as set forth in his memorandum of November 29, 1994. (Agenda Item 10)

He stated that the advisory committee had no matters requiring action, but would present some proposed amendments to the Standing Committee at the July 1995 meeting, including an amendment to Rule 24 (attorney participation in voir dire) and Rule 16 (pretrial discovery). He noted that in enacting Fed. R. Evid. 413-415, the Department of Justice and the Congress had both taken the position that it is necessary for purposes of a fair trial, when the prosecution intends to introduce propensity evidence, to have pretrial disclosure of witness statements, notwithstanding the Jencks Act.

### REPORT OF THE ADVISORY COMMITTEE ON THE RULES OF EVIDENCE

Judge Winter presented the report of the advisory committee, as set forth in his memorandum of November 22, 1994. (Agenda Item 7)

He reported that the advisory committee had published for public comment its tentative decision not to amend 25 rules of evidence, but it had received only one comment. On the other hand, the committee had spent a great deal of its time in connection with evidentiary matters in which the Congress had taken an interest.

He stated that the advisory committee had made a tentative decision not to amend another three rules: Fed. R. Evid. 406, 605, and 606. He agreed to defer seeking authority to publish these rules until the July 1995 meeting of the Standing Committee, at which time the advisory committee would have other rules to present as part of a more comprehensive package.

Judge Winter requested authority to publish for public comment proposed amendments to Fed. R. Evid. 103(e) and 407.

#### *Fed. R. Evid. 103(e)*

The proposed new Rule 103(e) would make it clear that any pretrial objection to a proffer of evidence be renewed by counsel in a timely fashion at trial—unless the court expressly states on the record, or the context clearly demonstrates, that the court's ruling on the objection is final. Judge Winter pointed out that the case law among the circuits on the effect of a pretrial ruling is unclear, and the advisory committee had decided unanimously that a default rule would be very helpful to practitioners.

He added that some members of the advisory committee had thought that the default rule should be the converse, i.e., that a pretrial ruling by the court should normally be considered final and should not have to be renewed. A majority of the committee believed, however, that attorneys normally will raise issues again at trial in any event. Moreover, many rulings on admissibility are subject to change because of changed circumstances at the time of trial.

**Mr. Perry moved: (1) to publish the advisory committee's proposed amendments to Fed. R. Evid. 103(e), incorporating several style improvements accepted by Judge Winter, and (2) to state explicitly in the accompanying note that the committee was also considering an alternative version of the default rule.** By so doing, there would clearly be no need to republish the rule if the committee later accepted the alternate provision.

Other members suggested, however, that it would not be necessary to republish since a committee is always free to reach a different conclusion on a proposal, based on the comments it receives during the publication period. Judge Winter expressed concern that the alternative default rule might overrule the Supreme Court's decision in the *Lucas* case. Professor Schlueter suggested that a better approach would be to explain clearly in the advisory committee note that the committee had considered and rejected the converse approach, thereby directing public attention to the issue.

**Mr. Perry's motion to include a description of the alternate default provision in the publication failed by a vote of 3-7.**

**Mr. Sundberg then moved to add a sentence to the note declaring that the committee had considered a default rule—providing that counsel would not have to renew an objection at trial—but had rejected it.**

**The motion was approved by a vote of 9-1.**

**The committee then voted unanimously to approve publication of Rule 103(e).**

*Fed. R. Evid. 407*

Judge Winter stated that the advisory committee was proposing two amendments to Fed. R. Evid. 407 (subsequent remedial measures). The first would apply the rule expressly to product liability actions, thereby reflecting the position of a majority of the federal circuit courts (although state law is generally to the contrary). Second, the rule would be clarified to provide that it applies only to changes made after the occurrence that produced the damages giving rise to the action.

Judge Winter agreed to accept stylistic changes suggested by the members.

**The committee voted 9-4 to publish Fed. R. Evid. 407 for public comment.**

*Fed. R. Evid. 413-415*

Judge Winter stated that new Fed. R. Evid. 413-415 had been enacted as part of the 1994 omnibus crime legislation. The rules provide that in a civil or criminal action involving sexual assault or child molestation evidence of the defendant's commission of a prior sexual assault or child molestation "is admissible."

Judge Winter pointed out that the new rules have a very sparse legislative history, consisting principally of floor statements made by members after the bill had been passed. He reported that the rules would go into effect in 150 days after enactment—February 10, 1995—unless the Judicial Conference recommended otherwise. In that event, the rules would take effect in an additional 150 days.

He reported that the Administrative Office had distributed the new rules to thousands of people for comment and that the comments had been overwhelmingly negative. Opponents argued that: (1) the criminal justice system had a long tradition against allowing the introduction of propensity evidence, and (2) there was no empirical support for the change.

Judge Winter stated that there was virtually unanimous belief among the critics—which the advisory committee shared—that the rules as written were unclear as to whether the proffered evidence was subject to the balancing test of Rule 403 and to the other rules of evidence designed to protect against unreliable evidence (such as the hearsay provisions). Rule 403, for example, excludes evidence if its probative value is substantially outweighed by the danger of unfair prejudice or other specified factors. Accordingly, the new rules presented a constitutional problem, because the defendant's evidence would be subject to the balancing test, while that of the prosecution would not. Moreover, Rules 413-415 were inconsistent philosophically with Rule 412. The latter rule shields against earlier events, while the former makes them admissible.

Judge Winter reported that the Advisory Committee on the Rules of Evidence had passed a resolution with only a single dissenting vote by the representative of the Department of Justice that disagreed with Fed. R. Evid. 413-415 on policy grounds: (1) because the rules breached the traditional propensity bar, and (2) because of the high possibility that the prior acts evidence would be unduly prejudicial. The committee agreed, further, that the rules as drafted did not accomplish what their proponents wanted them to accomplish. Accordingly, the advisory committee had decided to assist the Congress by redrafting the rules to capture what appeared to be the intent of the proponents.

Judge Winter pointed out that in redrafting the rules, the advisory committee decided that the provisions belonged logically in Fed. R. Evid. 404 and 405, rather than as new Rules 413-415. He emphasized that the committee's draft would permit evidence of an earlier act of sexual assault or child molestation to be introduced only "if otherwise admissible under these rules." It also included an explicit balancing test in the rule.

Judge Jensen stated that the Advisory Committee on Criminal Rules had examined Rules 413-415 and had agreed with the evidence committee that the rules were unsound as a matter of evidentiary policy and should not be enacted. He added that, as a matter of drafting, the Advisory Committee on the Rules of Evidence had made all the appropriate corrections in the rules. Professor Schlueter noted that the criminal advisory committee had considered the rules in 1991, when they were before the Congress, and had opposed them by a vote of 8-1. He added that the committee was also deeply concerned about the sidestepping of the Rules Enabling Act process.

Judge Higginbotham stated that the Advisory Committee on Civil Rules had also concluded that the rules were unwise, but had deferred to the evidence committee on matters of style. Professor Coquillette stated that he had read the public comments and that nearly all were negative, including those from child abuse organizations, which had stated that the rules would do more harm than good.

The consensus of the members following lengthy discussion, was stated by Professor Hazard and accepted by Judge Winter:

- (1) The committee should express its opposition to the new rules because they are ill-founded and wrong as a matter of policy.
- (2) If the Congress wishes to proceed with the rules, it should be encouraged to substitute the corrected and improved language drafted by the Advisory Committee on the Rules of Evidence.
- (3) The committee should enumerate the deficiencies in the rules in its report to the Congress.
- (4) No attempt should be made to supersede the rules through the Rules Enabling Act process.
- (5) Members should communicate the committee's views personally to the House and Senate committees and staff.

Ms. Gorelick stated that the Department of Justice could not oppose adoption of the rules, nor could it support a delay in their effective date. The Department believed that the new rules must be read together with Fed. R. Evid. P. 403 and the hearsay rules. On the other hand, the Department would be pleased to participate in making improvements in the rules through the normal Rules Enabling Act process. Thus, the Department would vote against a motion to delay implementation of the rules for another 150 days, but would abstain on a motion for substitute language.

In light of the committee's deliberations, Judge Winter and Professor Berger drafted a revised report overnight and accepted style improvements in the rules, presenting them to the committee on Friday morning.

After reviewing the revised draft of the report to the Congress, Ms. Gorelick suggested

that it was too forceful in interpreting Rules 413-415 as requiring that evidence of past acts of sexual abuse or child molestation be admitted regardless of the limitations imposed by the other rules of evidence. She recommended that alternate language be used stating that the legislative history suggested that the rule might be interpreted as incorporating the hearsay rule and the Rule 403 balancing test. Judge Winter agreed to consider Ms. Gorelick's edits in preparing the final report.

Judge Stotler stated that there appeared to be a consensus on the committee that the report to the Congress should not include an absolute statement that evidence of prior acts of sexual abuse or child molestation is admissible regardless of the hearsay rules or Rule 403. She recommended that this view be incorporated in the final report. She suggested, though, that it would be impractical for the committee to draft the report as a committee of the whole.

**Judge Stotler recommended that the committee endorse in principle the draft report to the Congress on Fed.R.Evid. 413-415, with the final language to be prepared by Judge Winter and distributed to the members as soon as possible.**

**The recommendation was approved unanimously.**

#### NINTH CIRCUIT LOCAL RULE ON CAPITAL CASES

The Chief Justice had referred to the committee a request by the attorneys general of five states that the Judicial Conference exercise its power under 28 U.S.C. § 331 to invalidate Local Rule 22 of the United States Court of Appeals for the Ninth Circuit on the grounds that it was "inconsistent" with "federal law." The local rule prescribes procedures for processing capital cases in the Ninth Circuit.

The committee's discussion centered on a memorandum prepared by the reporter, Professor Coquillette. (Agenda Item 5) The members also had before them the brief of the state attorneys general and the response of the Ninth Circuit, submitted by Chief Judge Wallace.

Professor Coquillette posed two questions for the committee to consider:

- (1) whether the Ninth Circuit rule is inconsistent with federal law under 28 U.S.C. § 331, and
- (2) what action the Judicial Conference should take if the rule is in fact in conflict with federal law.

Professor Coquillette stated that the attorneys general had set forth nine legal arguments for holding the rule inconsistent with federal law. He found two areas where Local Rule 22 was most arguably inconsistent with federal law.

The first is that the Ninth Circuit rule authorizes a single judge to invoke an in banc hearing. Under 28 U.S.C. § 46 and Fed.R. App. P. 35, however, a majority vote of the judges of the court in regular active service is required for in banc consideration. He pointed out that the Ninth Circuit had defended the legality of the rule on the grounds that Rule 22 itself had been adopted by a majority of the circuit judges in regular active service.

The second is that Rule 22 provides for automatic issuance of a certificate of probable cause on the appellant's first petition. But the federal habeas corpus statute and case law require a determination on the merits for the issuance of a certificate of probable cause. The Ninth Circuit had defended the rule on the grounds that it had by majority vote delegated its power to act.

Professor Coquillette concluded that there is nothing in the pertinent statutes and rules that permits a court to delegate its judicial responsibility: (1) to act by majority vote on each suggestion for an in banc hearing, or (2) to consider each certificate of probable cause on the merits. He pointed out, however, that his memorandum contained a suggestion by Judge Easterbrook on how the Ninth Circuit might redraft the rule to deal with both problems.

Judge Easterbrook recommended that the committee express its considered view that Rule 22 was inconsistent in two respects with federal law and invite the Ninth Circuit to modify it. This procedure would give the court a formal opportunity to take action to correct the problems and avoid potential abrogation of the rule by the Judicial Conference.

**Judge Ellis moved Judge Easterbrook's suggestion that the committee: (1) express its sense that there is an inconsistency in two respects between Ninth Circuit Rule 22 and the pertinent federal statutes and rules, and (2) invite the court to reconsider the rule and take whatever steps it deems appropriate.**

**The motion was approved unanimously.**

Judge Stotler thanked Professor Coquillette for an excellent memorandum and expressed the committee's appreciation to Judge Easterbrook, Judge Logan, and the Advisory Committee on Appellate Rules for their work on the matter.

### ATTORNEY DISCIPLINE RULES

The committee engaged in a general discussion of state Supreme Court rules and local United States district court rules that regulate attorney conduct. Professor Coquillet had prepared and distributed to the members a comprehensive chart surveying the content of each district court's local rule. Much of the committee's deliberations centered on a July 1994 regulation promulgated by the Department of Justice to govern the conduct of United States attorneys in making contacts with represented parties.

Deputy Attorney General Gorelick explained that federal criminal investigations and prosecutions had become more complex in recent years and that government lawyers had become more involved in investigations, particularly in undercover operations involving criminal conspiracies. Government attorneys, moreover, were faced with enormous variations in the rules of the 50 states and the federal district courts. She stated that in some cases government attorneys had experienced practical difficulties in complying with state ethical rules that prohibit attorney contacts with represented parties (as under Rule 4.2 of the A.B.A. model rules). The Department of Justice took the position that their attorneys do not have to comply with this specific ethical prohibition. Accordingly, it promulgated a national regulation to supersede state ethical obstacles in discrete circumstances. In some states, however, assistant United States attorneys have been threatened with the loss of their license if they follow the Department's rule.

Ms. Gorelick emphasized that the Department's rule was legally supportable and would be applied thoughtfully and narrowly. She stated that government attorneys should comply with state ethical rules generally, and she expressed the desire of the Department to reach agreement with the states on this sensitive and controversial issue.

Chief Justice Veasey framed the issue as one of authority and federalism. He asserted that the state chief justices have agreed unanimously that the regulation of the Department of Justice was without authority and posed a threat to federalism. He added that the state chief justices were willing to meet further with Department of Justice officials in an effort to resolve their differences.

### REPORT OF THE LONG RANGE PLANNING SUBCOMMITTEE

Professor Baker presented an information report on behalf of the subcommittee. He noted that the subcommittee had distributed its draft report and welcomed any comments, especially from the advisory committees following their next meetings. He stated that the subcommittee would present a final report for action by the Standing Committee at the July 1995 meeting.

### REPORT OF THE STYLE SUBCOMMITTEE

Judge Pratt reported that the Style Subcommittee had sent its completed revision of the civil rules to the Advisory Committee on Civil Rules. The advisory committee had made considerable progress on the revisions, but was facing competing demands on its time.

He reported that the restyled appellate rules had been sent to the Advisory Committee on Appellate Rules. The advisory committee had completed its revisions of half the rules, and the Style Subcommittee was in the process of reviewing the revisions.

Judge Pratt stated that the subcommittee was about to begin work on the criminal rules.

He stated that the subcommittee had always operated on the assumption that once the rules had been restyled, the Standing Committee would authorize their publication for a considerable period of public comment. After the comment period, the rules would be reviewed again by the advisory committees and the Standing Committee under the normal rulemaking process.

Finally, Judge Pratt reported that Bryan Garner had completed work on a new style guide to rule drafting that had been approved by the subcommittee. He stated that it had been distributed to the advisory committees and would be published by the Administrative Office.

### NEXT MEETINGS OF THE COMMITTEE

The next meeting of the committee had been scheduled for July 5-7 in Washington, D.C. The committee decided to hold the following meeting on January 10-12, 1996. The chair would determine the location.

Respectfully submitted,

Peter G. McCabe,  
Secretary

[https://www.uscourts.gov/sites/default/files/  
fr\\_import/CR1995-04.pdf](https://www.uscourts.gov/sites/default/files/fr_import/CR1995-04.pdf)

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**ADVISORY COMMITTEE  
ON  
CRIMINAL RULES**

**Washington D.C.  
April 10-11, 1995**

**AGENDA  
CRIMINAL RULES COMMITTEE  
MEETING**

**April 10-11, 1995  
Washington, D.C.**

**I. PRELIMINARY MATTERS**

- A. Administrative Announcements and Comments by Chair**
- B. Approval of Minutes of October 1994, Meeting in Santa Fe, New Mexico**

**II. CRIMINAL RULES UNDER CONSIDERATION**

- A. Rules Approved by the Supreme Court and Forwarded to Congress: Effective December 1, 1994 (No Memo).**
  - 1. Rule 16(a)(1)(A), Disclosure of Statements by Organizational Defendants
  - 2. Rule 29(b), Delayed Ruling on Judgment of Acquittal
  - 3. Rule 32, Sentence and Judgment (Further amendment by Congress re Victim Allocution)
  - 4. Rule 40(d), Conditional Release of Probationer
- B. Rules Approved by Judicial Conference and Forwarded to Supreme Court (No Memo)**
  - 1. Rule 5(a), Initial Appearance Before the Magistrate
  - 2. Rule 43, Presence of Defendant
  - 3. Rule 49(e), Filing of Dangerous Offender Notice (Repeal of Provision).
  - 4. Rule 57, Rules by District Courts

**C. Rules Published for Public Comment & Pending Further Review by Advisory Committee:**

1. (a) Rule 16(a)(1)(E), (b)(1)(C), Discovery of Experts
- (b) Rule 16(a)(1)(F), (b)(1)(D), Disclosure of Witness Names and Statements. (Memo)
2. Rule 32(d). Sentence and Judgment; Forfeiture Proceedings Before Sentencing. (Memo)

**D. Rules Under Consideration by Advisory Committee**

1. Rule 11, Pleas; Questioning Defendant Re Discussions With Prosecution; Proposal to Delete (Memo).
2. Rule 24(a). Trial Jurors; Proposal Re Voir Dire by Counsel (Memo).
3. Rule 26, Trial Testimony; Proposal to Require Advice to Defendant re Testimonial Rights (Memo).
4. Rule 35(c); Possible Amendment to Further Define "Imposition of Sentence." (Memo).
5. Rule 58, Procedure for Misdemeanors and Other Petty Offenses; Proposal to Amend Rule to Address Issue of Forfeiture of Collateral (Memo).

**E. Rules and Projects Pending Before Standing Committee and Judicial Conference**

1. Status Report on Local Rules Project; Compilation of Local Rules for Criminal Cases
2. Status Report on Crime Bill Amendments Affecting Federal Rules of Criminal Procedure
3. Status Report on Proposed Federal Rules of Evidence 413-415.

**III. MISCELLANEOUS**

1. ABA Proposal to Establish Liason With Committee (Memo)
2. Other Matters

**IV. DESIGNATION OF TIME AND PLACE OF NEXT MEETING**

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**I. Rule 10. Arraignment; Proposal to Consider Amendment.**

Judge Crigler suggested that the Committee consider an amendment to Rule 10 which would provide that a guilty plea may be entered at an arraignment. The Reporter indicated that he would contact Judge Crigler about possibly placing the issue on the agenda for the Spring 1995 meeting.

**VII. RULES AND PROJECTS PENDING BEFORE THE STANDING COMMITTEE AND JUDICIAL CONFERENCE.**

**A. Local Rules Project for Criminal Cases.**

Professor Coquillette gave a full report on the background of the local rules project, which had originally focused on civil cases. He noted that with the cooperation of the Committee, he and Mary Squires had continued the project in order to study local rules governing the trial of criminal cases. He noted that the main complaint with regard to local rules was from practitioners that out-of-state lawyers may be able to quickly locate the pertinent rule. To that end, the project would focus on the possibility of uniform number among the districts. The second point, he added, is that the project would assist the district courts in reviewing their own rules and how they related to the national rules. Following a brief discussion about what if any steps could be taken if it appeared that a local rule was in conflict with the national rule, Professor Coquillette indicated that the project would be coordinated with the Committee.

**B. The 1994 Crime Bill**

Mr. Rabiej briefly noted several statutory changes which had resulted from the Crime Bill. First, a typographical error in Rule 46 had been remedied as a part of the bill. Second, Title 18 had been amended to with regard to presentence reports in death penalty cases. And finally, Title 18 was amended to reflect that in capital cases, the government is required to disclose the names of its witnesses to the defense three days before trial unless it can show by a preponderance of the evidence that doing so would endanger the witness.

**VIII. EVIDENCE RULES UNDER CONSIDERATION:  
RULES 413, 414 & 415**

Judge Jensen and the Reporter provided a brief overview of recent Congressional promulgation of Federal Rules of Evidence 413, 414, and 415 which address the admissibility of propensity character evidence. They noted that those evidence rules are being considered by the Evidence Advisory Committee at an upcoming meeting and that the Committee's position or comments on the proposals might be helpful. Professor Saltzburg was connected through telephone conference call to the Committee and offered

additional background discussion on the issue. During the ensuing discussion the Committee considered the rules promulgated by Congress as part of the Crime Bill, and memos from Professors Margaret Berger and Steve Saltzburg concerning possible changes to Congress' version of the rules. The Reporter suggested that rather than endorse any particular language or draft, the Committee might instead address specific policy issues and transmit its views to the Evidence Committee and indicate a willingness to assist that Committee in any way it felt appropriate.

**A. Rules Enabling Act Process.**

Before addressing the specifics of the evidence rules, the Committee, at the suggestion of Professor Coquillette, noted its deep concern over the last minute addition of key evidence rules which will in effect drastically change the rules governing the admissibility of other offense, or extrinsic act, evidence -- a controversial and complicated topic in its own right. There was a general consensus that the Congress should be apprised of that concern and the need for initial input from the Judicial Conference before such rules are promulgated. The Committee was convinced that the Rules Enabling Act process is sound and that it insures that a broad cross-section of view points and suggestions will be heard on proposed amendments.

**B. The Need for Rules Governing Propensity Evidence.**

Several members of the Committee also expressed the view that Rule of Evidence 404(b) provides an adequate vehicle for introducing other offense evidence against a criminal defendant. Given the sensitive nature of this evidence, and the special dangers attending such information in a criminal trial, several members seriously questioned whether Rules 413-415 are worth the danger of convicting a defendant for his past, as opposed to charged, behavior. The Reporter noted that similar rules were before Congress in 1991 and at that time the Criminal Rules Committee voted by a margin of 8 to 1 to oppose such amendments. Judge Dowd moved that the Committee oppose the adoption of the rules. Judge Davis seconded the motion which carried by a vote of 8 to 1.

**C. The Need for Three Separate Rules; Cross-Over Evidence.**

Judge Marovich moved that the three other offense evidence rules adopted by Congress be combined into one rule which would be applicable in both civil and criminal cases. The motion was seconded by Judge Smith passed by a vote of 8 to 0 with one abstention. The Committee believed that so combining the rules would make it easier for practitioners and courts to locate and apply the applicable provision or rule. The Reporter suggested that because the rules deal with the admissibility of other offenses or extrinsic acts, it might be advisable to include the new provisions in Rule 404, which already deals with that topic, as exceptions to the general rule that extrinsic act evidence is not admissible to prove circumstantially that a person acted in conformity with those previous acts and thus committed the charged offense.

In addressing the question of whether the three rules should be combined, the Committee also noted some ambiguity on whether there could be any cross-over of other offense evidence from sexual assault cases to child molestation cases. That is, could the prosecution in a rape case offer evidence that on prior occasions the defendant had committed acts of child molestation or vice versa? The Committee expressed doubt whether there is justification for any cross-over offense propensity evidence and recommended that that particular issue should be addressed in any proposed alternatives to the Congressional versions of the rules.

**E. Balancing Test.**

Upon motion by Judge Marovich (seconded by Judge Crigler), the Committee voted 7 to 2 to recommend that no new balancing test be adopted for other offense evidence regarding sexual propensities. During the discussion, it was suggested that perhaps the evidence should be admissible only if the probative value of the evidence outweighed the prejudicial dangers. Although the Committee was concerned about the special dangers presented by the evidence, in the end it concluded that the balancing test in Rule 403 would suffice. In this regard, the Committee noted that any redraft should make it clear that the admissibility of any proffered evidence under the new rule must be subject to Rule 403 analysis by the court.

**F. Burden of Proof.**

The Committee next considered the question of whether any particular or different balancing test should be placed on the admissibility of a defendant's prior acts of sexual misconduct where there has been no conviction. Following a discussion of the current rules applicable to admitting a defendant's prior acts under Rule 404(b), Judge Davis moved that the prosecution be required to prove by clear and convincing evidence in a Rule 104 proceeding that the alleged act occurred before the evidence could be submitted to the jury. The motion was seconded by Judge Dowd and passed by a vote of 6 to 3.

**G. Notice Provision.**

The Congressional version of Rules 413-415 include notice provisions which require the prosecution to inform the defense of its intent to introduce extrinsic act evidence. During the discussion, the Committee considered the issue of whether such notice should be dovetailed with Rule of Criminal Procedure 16 or adopt the more generalized notice provision in Rule 404(b). Judge Crow moved that the 404(b) notice provision be adopted as a recommended notice provision. The motion was seconded by Marovich and failed by a vote of 3 to 5, with one abstention. Judge Dowd then moved that the notice provisions remain as they appear in the Congressional version of the rules. That motion, which was seconded by Judge Davis, passed by a vote of 8 to 0, with one abstention.

**H. Requirement that Sexual Act Resulted in a Conviction.**

The suggestion was made during the Committee's discussion that to be admissible under the proposed rules, the defendant's prior sexual conduct must have resulted in a conviction. Several members noted that Rule 404(b) permits non-conviction evidence. Ms. Harkenrider moved that the proposed rules should not be limited to prior convictions. Judge Crow seconded the motion, which carried by a vote of 7 to 2.

**I. Timing Requirement.**

Finally, the Committee discussed the question of whether any particular provision should be made for remote sexual conduct, in a manner currently noted in Rule of Evidence 609 for remote convictions. The Committee believed that the balancing test in Rule 403 would adequately cover the court's consideration of prior sexual misconduct. Judge Marovich moved that no specific time limits be established and Judge Crow seconded the motion. It passed by a margin of 7 to 1, with one abstention.

**MEMO TO: Members, Criminal Rules Advisory Committee**

**FROM: Professor Dave Schlueter, Reporter**

**RE: Status of Federal Rules of Evidence 413-415**

**DATE: 3/13/95**

Attached are pages from a recent issue of the Criminal Law Reporter which provide information on the Judicial Conference's action regarding Congress' versions of Federal Rules of Evidence 413-415.

reach of state disciplinary authorities for their official conduct. The Justice Department worked for years on the rules by which federal attorneys would not be subject to state discipline for one type of misconduct, ex parte contacts with represented persons; its final product was released last August, see 55 CrL 2269.

But S. 3 paints with a much broader brush. The relevant section states, in its entirety: "Notwithstanding the ethical rules of the court of any State, Federal rules of conduct adopted by the Attorney General shall govern

the conduct of prosecutions in the courts of the United States."

The same bill also addresses frivolous filings in criminal proceedings and sets up a penalty far more severe than any contemplated in civil litigation by Fed.R.Civ.P. 11 in its current or proposed versions. S. 3 states that an attorney who in a federal criminal proceeding files a signed document "that the attorney knows to contain a false statement of material fact or a false statement of law, shall be found guilty of obstruction of justice."

## REPORTS AND PROPOSALS

### JUDICIAL CONFERENCE SUBMITS REPORT ON NEW EVIDENCE RULES

*Report responds to mandate in 1994 crime bill.*

The Judicial Conference of the United States has forwarded to Congress its recommendations on the three new rules of evidence contained in the crime bill Congress passed last summer. The rules, which would allow the admission of character evidence in sexual misconduct cases, are not needed, according to the report. However, if Congress should decide to implement the changes embodied in the new rules, it should do so by amending existing evidence rules, the report recommends.

The report is reprinted in full at 56 CrL 2139.

Under Section 320935 of the Violent Crime Control and Law Enforcement Act of 1994, 55 CrL 2411, three new rules—Fed.R.Ev. 413, 414, and 415—would be added to the Federal Rules of Evidence. Rule 413 would admit evidence of a defendant's "commission of another offense or offenses of sexual assault" in a sexual assault criminal case. Rule 414 would admit analogous evidence in a child molestation criminal case. Rule 415 is the civil counterpart to the two criminal rules.

"After careful study," and following the recommendations of three of its advisory committees (the committees on evidence, criminal procedure, and civil procedure) and the Committee on Rules of Practice and Procedure, the Judicial Conference "urges Congress to reconsider its decision on the policy questions underlying the new rules." Alternatively, "if Congress does not reconsider its decision on the underlying policy questions," the Judicial Conference recommends "incorporation of the provisions of new Rules 413-415 as amendments to Rules 404 and 405 of the Federal Rules of Evidence." Those amendments, the report observes, "would not change the substance of the congressional enactment but would clarify drafting ambiguities and eliminate possible constitutional infirmities."

The version proposed by the Judicial Conference would add a sexual misconduct exception, Rule 404(a)(4), to the general rule against admission of character evidence to prove how a person acted on a particular occasion. The proposal would also add a conforming amendment to Rule 405, which governs methods of proving character.

### COMMITTEES' REVIEW

The report of the Judicial Conference was requested by Congress in the crime bill. The Judicial Conference's

input was required within 150 days of the passage of the bill, which meant by February 10. The rules passed by Congress were specifically exempted from the usual procedural hurdles set forth in the Rules Enabling Act, which would have required review by the U.S. Supreme Court before congressional review.

The advisory committees that considered the new rules found that they were unwarranted and that their drafting presented constitutional and evidentiary problems. The concerns expressed by Congress in drafting the new rules, the committees believed, are adequately addressed in the existing Federal Rules of Evidence—specifically by Rule 404(b), which allows the admission of evidence against a criminal defendant of prior crimes or bad acts under certain conditions. But recognizing that Congress would institute the changes embodied in Rules 413-415, the Advisory Committee on Evidence incorporated the substance of the changes into the proposed amendments to Rule 404(a) and made conforming changes to Rule 405. The Standing Committee on the Rules of Practice and Procedure followed the advisory committees' lead and, in January, voiced objection to Rules 413-415. The vote was nearly unanimous; only the representative from the U.S. Department of Justice expressed support for what Congress had proposed.

### CONFERENCE'S REPORT

In its report to Congress, the Judicial Conference recounts the "unusual unanimity of the members of the Standing and Advisory Committees . . . taking the view that Rules 413-415 are undesirable." The report complains that Rules 413-415 would permit the introduction of "unreliable but highly prejudicial evidence that would complicate trials by causing minitrials of other alleged wrongs." Additionally, it points out that critics of the rules drafted by Congress objected to the mandatory character of the rules—the fact that the "evidence had to be admitted regardless of other rules of evidence such as the hearsay rule or the Rule 403 balancing test." If these critics are right, the conference report concludes, "Rules 413-415 free the prosecution from rules that apply to the defendant—including the hearsay rule and Rule 403. If so, serious constitutional questions would arise."

### IN CONGRESS' LAP

Under the terms of the 1994 crime bill, Congress has 150 days to consider the Judicial Conference's Report. If it does not act within that time, Rules 413-15 as set out in the crime bill will go into effect automatically.



REPORT OF THE JUDICIAL CONFERENCE ON ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES

Reprinted below is a report by the Judicial Conference of the United States concerning changes in the Federal Rules of Evidence. The report is a response to a mandate from Congress contained in Section 320935 of the 1994 Violent Crime Control and Law Enforcement Act, 55 CrL 2411.

JUDICIAL CONFERENCE OF THE UNITED STATES WASHINGTON, D.C. 20544

THE CHIEF JUSTICE OF THE UNITED STATES Presiding

L. RALPH MECHAM Secretary

February 9, 1995

Honorable Newt Gingrich Speaker, United States House of Representatives Washington, D.C. 20515

Dear Mr. Speaker:

By direction of the Judicial Conference of the United States, I am honored to transmit to you a report containing recommendations regarding the admission of character evidence in certain cases under the Federal Rules of Evidence.

This report is submitted to Congress in accordance with section 320935 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (September 13, 1994). The section adds new Evidence Rules 413, 414, and 415 to the Federal Rules of Evidence.

The Act defers the effective date of new Evidence Rules 413-415 until February 10, 1995 pending a report from the Judicial Conference. Under the Act the effective date is delayed for an additional 150 days after transmittal of the Conference report, if the Conference makes alternative recommendations to the new rules. The recommendations in the report are different from the Act's new rules. Accordingly, Rules 413-415 will take effect 150 days after the transmittal of this report, unless Congress adopts the alternative recommendations or provides otherwise by law.

Sincerely,

[Handwritten signature of L. Ralph Mecham]

L. Ralph Mecham Secretary

Enclosure

REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES

February 1995

I. INTRODUCTION

This report is transmitted to Congress in accordance with the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (September 13, 1994). Section 320935 of the Act invited the Judicial Conference of the United States within 150 days (February 10, 1995) to submit "a report containing recommendations for amending the Federal Rules of Evidence as they affect the admission of evidence of a

defendant's prior sexual assault or child molestation crimes in cases involving sexual assault or child molestation."

Under the Act, new Rules 413, 414, and 415 would be added to the Federal Rules of Evidence. These Rules would admit evidence of a defendant's past similar acts in criminal and civil cases involving a sexual assault or child molestation offense for its bearing on any matter to which it is relevant. The effective date of new Rules 413-415 is contingent in part upon the nature of the recommendations submitted by the Judicial Conference.

After careful study, the Judicial Conference urges Congress to reconsider its decision on the policy questions underlying the new rules for reasons set out in Part III below.

If Congress does not reconsider its decision on the underlying policy questions, the Judicial Conference recommends incorporation of the provisions of new Rules 413-415 as amendments to Rules 404 and 405 of the Federal Rules of Evidence. The amendments would not change the substance of the congressional enactment but would clarify drafting ambiguities and eliminate possible constitutional infirmities.

II. BACKGROUND

Under the Act, the Judicial Conference was provided 150 days within which to make and submit to Congress alternative recommendations to new Evidence Rules 413-415. Consideration of Rules 413-415 by the Judicial Conference was specifically exempted from the exacting review procedures set forth in the Rules Enabling Act (codified at 28 U.S.C. §§ 2071 - 2077). Although the Conference acted on these new rules on an expedited basis to meet the Act's deadlines, the review process was thorough.

The new rules would apply to both civil and criminal cases. Accordingly, the Judicial Conference's Advisory Committee on Criminal Rules and the Advisory Committee on Civil Rules reviewed the rules at separate meetings in October 1994. At the same time and in preparation for its consideration of the new rules, the Advisory Committee on Evidence Rules sent out a notice soliciting comment on new Evidence Rules 413, 414, and 415. The notice was sent to the courts, including all federal judges, about 900 evidence law professors, 40 women's rights organizations, and 1,000 other individuals and interested organizations.

III. DISCUSSION

On October 17-18, 1994, the Advisory Committee on Evidence Rules met in Washington, D.C. It considered the public responses, which included 84 written comments, representing 112 individuals, 8 local and 8 national legal organizations. The overwhelming majority of judges, lawyers, law professors, and legal organizations who responded opposed new Evidence Rules 413, 414, and 415. The principal objections expressed were that the rules would permit the admission of unfairly prejudicial evidence and contained numerous drafting problems not intended by their authors.

The Advisory Committee on Evidence Rules submitted its report to the Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) for review at its January 11-13, 1995 meeting. The committee's report was unanimous except for a dissenting vote by the representative of the Department of Justice. The advisory committee believed that the concerns expressed by Congress and embodied in new Evidence Rules 413, 414, and 415 are already adequately addressed in the existing Federal Rules of Evidence. In particular, Evidence Rule 404(b) now allows the admission of evidence against a criminal defendant of the commission of prior crimes, wrongs, or acts for specified purposes, including to show intent, plan, motive, preparation, identity, knowledge, or absence of mistake or accident.

Furthermore, the new rules, which are not supported by empirical evidence, could diminish significantly the protections that have safeguarded persons accused in criminal cases and parties in civil cases against undue prejudice. These protections form a fundamental part of American jurisprudence and have evolved under long-standing rules and case law. A significant concern identified by the committee was the danger of convicting a criminal defendant for past, as opposed to charged, behavior or for being a bad person.

In addition, the advisory committee concluded that, because prior bad acts would be admissible even though not the subject of a conviction, mini-trials within trials concerning those acts would result when a defendant seeks to rebut such evidence. The committee also noticed that many of the comments received had concluded that the Rules, as drafted, were mandatory -- that is, such evidence had to be admitted regardless of other rules of evidence such as the hearsay rule or the Rule 403 balancing test. The committee believed that this position was arguable because Rules 413-415 declare without qualification that such evidence "is admissible." In contrast, the new Rule 412, passed as part of the same legislation, provided that certain evidence "is admissible if it is otherwise admissible under these Rules." Fed. R. Evid. 412 (b) (2). If the critics are right, Rules 413-415 free the prosecution from rules that apply to the defendant -- including the hearsay rule and Rule 403. If so, serious constitutional questions would arise.

The Advisory Committees on Criminal and Civil Rules unanimously, except for representatives of the Department of Justice, also opposed the new rules. Those committees also concluded that the new rules would permit the introduction of unreliable but highly prejudicial evidence and would complicate trials by causing mini-trials of other alleged wrongs. After the advisory committees reported, the Standing Committee unanimously, again except for the representative of the Department of Justice, agreed with the view of the advisory committees.

It is important to note the highly unusual unanimity of the members of the Standing and Advisory Committees, composed of over 40 judges, practicing lawyers, and academicians, in taking the view that Rules 413-415 are undesirable. Indeed, the only supporters of the Rules were representatives of the Department of Justice.

For these reasons, the Standing Committee recommended that Congress reconsider its decision on the policy questions embodied in new Evidence Rules 413, 414, and 415.

However, if Congress will not reconsider its decision on the policy questions, the Standing Committee recommended that Congress consider an alternative draft recommended by the Advisory Committee on Evidence Rules. That Committee drafted proposed amendments to existing Evidence Rules 404 and 405 that would both correct ambiguities and possible constitutional infirmities identified in new Evidence Rules 413, 414, and 415 yet still effectuate Congressional intent. In particular, the proposed amendments:

- (1) expressly apply the other rules of evidence to evidence offered under the new rules;
- (2) expressly allow the party against whom such evidence is offered to use similar evidence in rebuttal;
- (3) expressly enumerate the factors to be weighed by a court in making its Rule 403 determination;
- (4) render the notice provisions consistent with the provisions in existing Rule 404 regarding criminal cases;
- (5) eliminate the special notice provisions of Rules 413-415 in civil cases so that notice will be required as provided in the Federal Rules of Civil Procedure; and
- (6) permit reputation or opinion evidence after such evidence is offered by the accused or defendant.

The Standing Committee reviewed the new rules and the alternative recommendations. It concurred with the views of the Evidence Rules Committee and recommended that the Judicial Conference adopt them.

#### IV. RECOMMENDATIONS

The Judicial Conference concurs with the views of the Standing Committee and urges that Congress reconsider its policy determinations underlying Evidence Rules 413-415. In the alternative, the attached amendments to Evidence Rules 404 and 405 are recommended, in lieu of new Evidence Rules 413, 414, and 415. The alternative amendments to Evidence Rules 404 and 405 are accompanied by the Advisory Committee Notes, which explain them in detail.

#### FEDERAL RULES OF EVIDENCE

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes\*

\*\*\*\*\*

(4) Character in sexual misconduct cases. - Evidence of another act of sexual assault or child molestation, or evidence to rebut such proof or an inference therefrom, if that evidence is otherwise admissible under these rules, in a criminal case in which the accused is charged with sexual assault or child molestation, or in a civil case in which a claim is predicated on a party's alleged commission of sexual assault or child molestation.

(A) In weighing the probative value of such evidence, the court may, as part of its rule 403

\* New matter is underlined and matter to be omitted is lined through.

determination, consider:

(i) proximity in time to the charged or predicate misconduct;

(ii) similarity to the charged or predicate misconduct;

(iii) frequency of the other acts;

(iv) surrounding circumstances;

(v) relevant intervening events; and

(vi) other relevant similarities or differences.

(B) In a criminal case in which the prosecution intends to offer evidence under this subdivision, it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(C) For purposes of this subdivision,

(i) "sexual assault" means conduct - or an attempt or conspiracy to engage in conduct - of the type proscribed by chapter 109A of title 18, United States Code, or conduct that involved deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person irrespective of the age of the victim regardless of whether that conduct would have subjected the actor to federal jurisdiction.

(ii) "child molestation" means conduct - or an attempt or conspiracy to engage in conduct - of the type proscribed by chapter 110 of title 18, United States Code, or conduct, committed in relation to a child below the age of 14 years, either of the type proscribed by chapter 109A of title 18, United States Code, or that involved deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person - regardless of whether that conduct would have subjected the actor to federal jurisdiction.

(b) Other crimes, wrongs, or acts. - Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith except as provided in subdivision (a). . . .

Note to Rule 404(a)(4)

The Committee has redrafted Rules 413, 414 and 415 which the Violent Crime Control and Law Enforcement Act of 1994 conditionally added to the Federal Rules of Evidence.\* These modifications do not change the substance of the congressional enactment. The changes were made in order to integrate the provisions both substantively and stylistically with the existing Rules of Evidence; to illuminate the intent expressed by the principal drafters of the measure; to clarify drafting

\* Congress provided that the rules would take effect unless within a specified time period the Judicial Conference made recommendations to amend the rules that Congress enacted.

ambiguities that might necessitate considerable judicial attention if they remained unresolved; and to eliminate possible constitutional infirmities.

The Committee placed the new provisions in Rule 404 because this rule governs the admissibility of character evidence. The congressional enactment constitutes a new exception to the general rule stated in subdivision (a). The Committee also combined the three separate rules proposed by Congress into one subdivision (a)(4) in accordance with the rules' customary practice of treating criminal and civil issues jointly. An amendment to Rule 405 has been added because the authorization of a new form of character evidence in this rule has an impact on methods of proving character that were not explicitly addressed by Congress. The stylistic changes are self-evident. They are particularly noticeable in the definition section in subdivision (a)(4)(C) in which the Committee eliminated, without any change in meaning, graphic details of sexual acts.

The Committee added language that explicitly provides that evidence under this subdivision must satisfy other rules of evidence such as the hearsay rules in Article VIII and the expert testimony rules in Article VII. Although principal sponsors of the legislation had stated that they intended other evidentiary rules to apply, the Committee believes that the opening phrase of the new subdivision "if otherwise admissible under these rules" is needed to clarify the relationship between subdivision(a)(4) and other evidentiary provisions.

The Committee also expressly made subdivision (a)(4) subject to Rule 403 balancing in accordance with the repeatedly stated objectives of the legislation's sponsors with which representatives of the Justice Department expressed agreement. Many commentators on Rules 413-415 had objected that Rule 403's applicability was obscured by the actual language employed.

In addition to clarifying the drafters' intent, an explicit reference to Rule 403 may be essential to insulate the rule against constitutional challenge. Constitutional concerns also led the Committee to acknowledge specifically the opposing party's right to offer in rebuttal character evidence that the rules would otherwise bar, including evidence of a third person's prior acts of sexual misconduct offered to prove that the third person rather than the party committed the acts in issue.

In order to minimize the need for extensive and time-consuming judicial interpretation, the Committee listed factors that a court may consider in discharging Rule 403 balancing. Proximity in time is taken into account in a related rule. See Rule 609(b). Similarity, frequency and surrounding circumstances have long been considered by courts in handling other crimes evidence pursuant to Rule 404(b). Relevant intervening events, such as extensive medical treatment of the accused between the time of the prior proffered act and the charged act, may affect the strength of the propensity inference for which the evidence is offered. The final factor -- "other relevant similarities or differences" -- is added in recognition of the endless variety of circumstances that confront a trial court in rulings on admissibility. Although subdivision (4) (A) explicitly refers to factors that bear on probative value, this enumeration does not eliminate a judge's responsibility to take into account the other factors mentioned in Rule 403 itself -- "the danger of unfair prejudice, confusion of the issues, . . . misleading the jury,

. . . undue delay, waste of time, or needless presentation of cumulative evidence." In addition, the Advisory Committee Note to Rule 403 reminds judges that "The availability of other means of proof may also be an appropriate factor."

The Committee altered slightly the notice provision in criminal cases. Providing the trial court with some discretion to excuse pretrial notice was thought preferable to the inflexible 15-day rule provided in Rules 414 and 415. Furthermore, the formulation is identical to that contained in the 1991 amendment to Rule 404(b) so that no confusion will result from having two somewhat different notice provisions in the same rule. The Committee eliminated the notice provision for civil cases stated in Rule 415 because it did not believe that Congress intended to alter the usual time table for disclosure and discovery provided by the Federal Rules of Civil Procedure.

The definition section was simplified with no change in meaning. The reference to "the law of a State" was eliminated as unnecessarily confusing and restrictive. Conduct committed outside the United States ought equally to be eligible for admission. Evidence offered pursuant to subdivision (a) (4) must relate to a form of conduct proscribed by either chapter 109A or



## THE CRIMINAL LAW REPORTER

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110 of title 18, United States Code, regardless of whether the actor was subject to federal jurisdiction.

FEDERAL RULES OF EVIDENCE

Rule 405. Methods of Proving Character

(a) Reputation or opinion. - In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion except as provided in subdivision (c) of this rule. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

\* \* \* \* \*

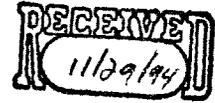
(c) Proof in sexual misconduct cases. - In a case in which evidence is offered under rule 404(a)(4), proof may be made by specific instances of conduct, testimony as to reputation, or testimony in the form of an opinion, except that the prosecution or claimant may offer reputation or opinion testimony only after the opposing party has offered such testimony.

Note to Rule 405(c)

The addition of a new subdivision (a)(4) to Rule 404 necessitates adding a new subdivision (c) to Rule 405 to govern methods of proof. Congress clearly intended no change in the preexisting law that precludes the prosecution or a claimant from offering reputation or opinion testimony in its case in chief to prove that the opposing party acted in conformity with character. When evidence is admissible pursuant to Rule 404(a)(4), the proponents proof must consist of specific instances of conduct. The opposing party, however, is free to respond with reputation or opinion testimony (including expert testimony if otherwise admissible); as well as evidence of specific instances. In a criminal case, the admissibility of reputation or opinion testimony would, in any event, be authorized by Rule 404(a)(1). The extension to civil cases is essential in order to provide the opponent with an adequate opportunity to refute allegations about a character for sexual misconduct. Once the opposing party offers reputation or opinion testimony, however, the prosecution or claimant may counter using such methods of proof.

United States Court of Appeals

SECOND CIRCUIT



(203) 773-2353

CHAMBERS OF  
RALPH K. WINTER  
U.S. CIRCUIT JUDGE  
55 WHITNEY AVENUE  
NEW HAVEN, CT 06510

November 22, 1994

To: Honorable Alicemarie H. Stotler, Chair, and  
Members of the Standing Committee on Rules  
of Practice and Procedure

From: Honorable Ralph K. Winter, Chair  
Advisory Committee on Evidence Rules

The Advisory Committee on Evidence Rules submits the following items to the Standing Committee on Rules:

I. Proposals Concerning Amendments to Federal Rules of Evidence 404 and 405 as Alternatives to Rules 413, 414, and 415 as Promulgated by the Congress.

The Advisory Committee adopted recommendations regarding amendments to Federal Rules of Evidence 404 and 405 pursuant to Section 320935 of the Violent Crime Control and Law Enforcement Act of 1994. The Advisory Committee requests that the Standing Committee recommend to the Judicial Conference that these proposals be submitted to the Congress pursuant to Section 320935.

II. A Resolution Concerning Rules 413, 414, and 415.

The Advisory Committee adopted a resolution stating its views on Rules 413, 414, and 415. The Advisory Committee requests that this resolution be submitted to the Judicial Conference with Item I.

III. Proposed Amendments to the Rules of Evidence.

The Advisory Committee has proposed amendments to the Federal Rules of Evidence 103 and 407. The Advisory Committee requests the Standing Committee's approval of these amendments for publication and comment.

Hon. Alicemarie H. Stotler, Chair  
November 22, 1994  
Page Two

IV. Tentative Decision Not To Amend.

The Advisory Committee has tentatively decided not to propose amendments to the following Rules of Evidence and asks the Standing Committee to submit these tentative decisions for publication and comment:

Rule 406. Habit; Routine Practice

Rule 605. Competency of a Judge as Witness.

Rule 606. Competency of a Juror as Witness.

The Advisory Committee requests that the Standing Committee submit for publication and comment these tentative decisions, utilizing the same procedure followed at the last Standing Committee meeting.

ADMINISTRATIVE OFFICE OF THE  
UNITED STATES COURTS

L. RALPH MECHAM  
DIRECTOR

CLARENCE A. LEE, JR.  
ASSOCIATE DIRECTOR

WASHINGTON, D.C. 20544

JOHN K. RABIEJ  
CHIEF, RULES COMMITTEE  
SUPPORT OFFICE

December 2, 1994

MEMORANDUM TO STANDING COMMITTEE

SUBJECT: *Materials on Item I Dealing with Evidence Rules 413-415*

Item I contains the following materials:

1. Proposed amendments to Evidence Rules 404 and 405 recommended by the Advisory Committee on Evidence Rules as an alternative to new Evidence Rules 413-415.
2. Correspondence from the committee's chair inviting public comment on new Evidence Rules 413-415, including a copy of the new rules. The invitation was sent to the courts, 900 professors of evidence law, publishers of legal periodicals, 40 women rights organizations, and 1,000 other interested individuals and organizations.
3. A chart summarizing the comments received from the public on Evidence Rules 413-415.
4. Correspondence from the Advisory Committees on Civil and Criminal Rules regarding Evidence Rules 413-415.

*John K. Rabiej*

John K. Rabiej

Attachments

[Add to Rule 404(a)]

1           (4) **Character in sexual misconduct cases.** If otherwise  
2           admissible under these rules, in a criminal case in which  
3           the accused is charged with sexual assault or child  
4           molestation, or in a civil case in which a claim is  
5           predicated on a party's alleged commission of sexual assault  
6           or child molestation, evidence of another act of sexual  
7           assault or child molestation, or evidence to rebut such  
8           proof or inference therefrom.

9           (A) In weighing the probative value of such  
10          evidence, the court, as part of its rule 403  
11          determination, may consider:

12                 (i) proximity in time to the charged or  
13          predicate misconduct;

14                 (ii) similarity to the charged or predicate  
15          misconduct;

16                 (iii) frequency of the other acts;

17                 (iv) surrounding circumstances;

18                 (v) relevant intervening events; and

19                 (vi) other relevant similarities or  
20          differences.

21          (B) In a criminal case in which the prosecution  
22          intends to offer evidence pursuant to this subdivision,  
23          it must disclose the evidence, including statements of  
24          witnesses or a summary of the substance of any

1 testimony, at a reasonable time in advance of trial, or  
2 during trial if the court excuses pretrial notice on  
3 good cause shown.

4 (C) For purposes of this subdivision,

5 (i) "sexual assault" means conduct of the  
6 type proscribed by chapter 109A of title 18,  
7 United States Code, or conduct that involved  
8 deriving sexual pleasure or gratification  
9 from the infliction of death, bodily injury,  
10 or physical pain on another person  
11 irrespective of the age of the victim, or an  
12 attempt or conspiracy to engage in either  
13 type of conduct, regardless of whether that  
14 conduct would have subjected the actor to  
15 federal jurisdiction.

16 (ii) "child molestation" means conduct of the  
17 type proscribed by Chapter 110 of Title 18,  
18 United States Code, or conduct, committed in  
19 relation to a child below the age of 14  
20 years, either of the type proscribed by  
21 chapter 109A of title 18, United States Code,  
22 or that involved deriving sexual pleasure or  
23 gratification from the infliction of death,  
24 bodily injury, or physical pain on another  
25 person or an attempt or conspiracy to engage  
26 in any of these types of conduct, regardless

1                   of whether that conduct would have subjected  
2                   the actor to federal jurisdiction.

3           (b) Other crimes, wrongs, or acts. - Evidence of other  
4 crimes, wrongs, or acts is not admissible to prove the character  
5 of a person in order to show action in conformity therewith  
6 except as provided in subdivision (a). . . .

Note to Rule 404(a)(4)

The Committee has redrafted Rules 413, 414 and 415 which the Violent Crime Control and Law Enforcement Act of 1994 conditionally added to the Federal Rules of Evidence.\* These modifications do not change the substance of the congressional enactment. The changes were made in order to integrate the provisions both substantively and stylistically with the existing Rules of Evidence; to illuminate the intent expressed by the principal drafters of the measure; to clarify drafting ambiguities that might necessitate considerable judicial attention if they remained unresolved; and to eliminate possible constitutional infirmities.

The Committee placed the new provisions in Rule 404 because this rule governs the admissibility of character evidence. The congressional enactment constitutes a new exception to the general rule stated in subdivision (a). The Committee also combined the three separate rules proposed by Congress into one subdivision (a)(4) in accordance with the rules' customary practice of treating criminal and civil issues jointly. An amendment to Rule 405 has been added because the authorization of a new form of character evidence in this rule has an impact on methods of proving character that were not explicitly addressed by Congress. The stylistic changes are self-evident. They are particularly noticeable in the definition section in subdivision

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\* Congress provided that the rules would take effect unless within a specified time period the Judicial Conference made recommendations to amend the rules that Congress enacted.

(a)(4)(C) in which the Committee eliminated, without any change in meaning, graphic details of sexual acts.

The Committee added language that explicitly provides that evidence under this subdivision must satisfy other rules of evidence such as the hearsay rules in Article VIII and the expert testimony rules in Article VII. Although principal sponsors of the legislation had stated that they intended other evidentiary rules to apply, the Committee believes that the opening phrase of the new subdivision "if otherwise admissible under these rules" is needed to clarify the relationship between subdivision(a)(4) and other evidentiary provisions.

The Committee also expressly made subdivision (a)(4) subject to Rule 403 balancing in accordance with the repeatedly stated objectives of the legislation's sponsors with which representatives of the Justice Department expressed agreement. Many commentators on Rules 413-415 had objected that Rule 403's applicability was obscured by the actual language employed.

In addition to clarifying the drafters' intent, an explicit reference to Rule 403 may be essential to insulate the rule against constitutional challenge. Constitutional concerns also led the Committee to acknowledge specifically the opposing party's right to offer in rebuttal character evidence that the rules would otherwise bar, including evidence of a third person's prior acts of sexual misconduct offered to prove that the third person rather than the party committed the acts in issue.

In order to minimize the need for extensive and time-

consuming judicial interpretation, the Committee listed factors that a court may consider in discharging Rule 403 balancing. Proximity in time is taken into account in a related rule. See Rule 609(b). Similarity, frequency and surrounding circumstances have long been considered by courts in handling other crimes evidence pursuant to Rule 404(b). Relevant intervening events, such as extensive medical treatment of the accused between the time of the prior proffered act and the charged act, may affect the strength of the propensity inference for which the evidence is offered. The final factor -- "other relevant similarities or differences" -- is added in recognition of the endless variety of circumstances that confront a trial court in rulings on admissibility. Although subdivision (4)(A) explicitly refers to factors that bear on probative value, this enumeration does not eliminate a judge's responsibility to take into account the other factors mentioned in Rule 403 itself -- "the danger of unfair prejudice, confusion of the issues, . . . misleading the jury, . . . undue delay, waste of time, or needless presentation of cumulative evidence." In addition, the Advisory Committee Note to Rule 403 reminds judges that "The availability of other means of proof may also be an appropriate factor."

The Committee altered slightly the notice provision in criminal cases. Providing the trial court with some discretion to excuse pretrial notice was thought preferable to the inflexible 15-day rule provided in Rules 414 and 415. Furthermore, the formulation is identical to that contained in the 1991 amendment

to Rule 404(b) so that no confusion will result from having two somewhat different notice provisions in the same rule. The Committee eliminated the notice provision for civil cases stated in Rule 415 because it did not believe that Congress intended to alter the usual time table for disclosure and discovery provided by the Federal Rules of Civil Procedure.

The definition section was simplified with no change in meaning. The reference to "the law of a State" was eliminated as unnecessarily confusing and restrictive. Conduct committed outside the United States ought equally to be eligible for admission. Evidence offered pursuant to subdivision (a)(4) must relate to a form of conduct proscribed by either chapter 109A or 110 of title 18, United States Code, regardless of whether the actor was subject to federal jurisdiction.

Rule 405

[Add to first sentence in Rule 405(a)]

1 except as provided in subdivision (c) of this rule.

[Add]

1 (c) Proof in sexual misconduct cases. In a case in which  
2 evidence is offered pursuant to rule 404(a)(4), proof may be made  
3 by specific instances of conduct, testimony as to reputation or  
4 testimony in the form of an opinion, except that the prosecution  
5 or claimant may offer reputation or opinion testimony only after  
6 the opposing party has offered such testimony.

### Note to Rule 405(c)

The addition of a new subdivision (a)(4) to Rule 404 necessitates adding a new subdivision (c) to Rule 405 to govern methods of proof. Congress clearly intended no change in the preexisting law that precludes the prosecution or a claimant from offering reputation or opinion testimony in its case in chief to prove that the opposing party acted in conformity with character. When evidence is admissible pursuant to Rule 404(a)(4), the proponents proof must consist of specific instances of conduct. The opposing party, however, is free to respond with reputation or opinion testimony (including expert testimony if otherwise admissible) as well as evidence of specific instances. In a criminal case, the admissibility of reputation or opinion testimony would, in any event, be authorized by Rule 404(a)(1). The extension to civil cases is essential in order to provide the opponent with an adequate opportunity to refute allegations about a character for sexual misconduct. Once the opposing party offers reputation or opinion testimony, however, the prosecution or claimant may counter using such methods of proof.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

**ALICEMARIE H. STOTLER**  
CHAIR

**PETER G. McCABE**  
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

**JAMES K. LOGAN**  
APPELLATE RULES

**PAUL MANNES**  
BANKRUPTCY RULES

**PATRICK E. HIGGINBOTHAM**  
CIVIL RULES

**D. LOWELL JENSEN**  
CRIMINAL RULES

**RALPH K. WINTER, JR.**  
EVIDENCE RULES

September 9, 1994

**TO THE BENCH, BAR, AND PUBLIC**

The House of Representatives and the Senate have passed H.R.3355, the Violent Crime Control and Law Enforcement Act of 1994. The President is expected to sign the bill soon. Section 320935 of the Act adds three new Evidence Rules 413-415, which would make evidence of a defendant's past similar acts admissible in a civil and a criminal case involving sexual assault or child molestation offense. A copy of the rules is attached.

Under the Act, the three new evidence rules take effect 180 days after the President signs the bill, unless the Judicial Conference makes alternative recommendations to Congress within 150 days. The review procedures under the Rules Enabling Act explicitly do not apply to these rules.

The Judicial Conference's Advisory Committee on Evidence Rules will meet on October 17-18, 1994, in Washington, D.C., and it will consider Rules 413-415. In making its recommendations, the committee will benefit from public comment. To accommodate the deadlines imposed under the Act, the committee requests that all suggestions and comments, whether favorable, adverse, or otherwise, be placed in the hands of the Secretary as soon as convenient and in any event, no later than **October 11, 1994**.

All communications on these rules should be addressed to:

Secretary of the Committee on Rules of Practice and Procedure  
Administrative Office of the United States Courts  
Washington, D.C. 20544.

Ralph K. Winter, Jr.  
Chair, Advisory Committee on  
Evidence Rules

SEC. 320935 ADMISSIBILITY OF EVIDENCE OF SIMILAR CRIMES IN SEX OFFENSE CASES.

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

**"Rule 413. Evidence of Similar Crimes in Sexual Assault Cases**

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

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

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

"(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

"(1) any conduct proscribed by chapter 109A of title 18, United States Code;

"(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

"(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

"(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

"(5) an attempt or conspiracy to engage in conduct described in paragraph (1)–(4).

**"Rule 414. Evidence of Similar Crimes in Child Molestation Cases**

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

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

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

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

"(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

"(2) any conduct proscribed by chapter 110 of title 18, United States Code;

"(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

"(4) contact between the genitals or anus of the defendant and any part of the body of a child;

"(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

"(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5).

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

"(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

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

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

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

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

(d) CONGRESSIONAL ACTION.—

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

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

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

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

**SUMMARY OF COMMENTS ON NEW EVIDENCE RULES 413-415**

	OPPOSE	SUPPORT	NEUTRAL/ RECOMMEND MODIFICATIONS
LAWYERS*	- 11 -	- 0 -	- 1 -
PROFESSORS OF EVIDENCE LAW*	- 56 -	- 3 -	- 7 -
JUDGES*	- 19 -	- 1 -	- 9 -
OTHERS	- 2 -	- 3 -	- 0 -
<i>SUBTOTALS</i>	- 88 -	- 7 -	- 17 -
<hr/>			
ORGANIZATIONS:			
NATIONAL	- 7 -	- 1 -	- 0 -
LOCAL	- 5 -	- 2 -	- 1 -
<i>SUBTOTALS</i>	- 12 -	- 3 -	- 1 -
<hr/>			
<b>TOTALS</b>	<b>- 100 -</b>	<b>- 10 -</b>	<b>- 18 -</b>

\*Includes all individual signatories.

(Prepared by Rules Committee Support Office,  
Administrative Office of the United States Courts)

## REASONS FOR OPPOSITION TO EVIDENCE RULES 413-415

	LAWYERS	PROFESSORS	JUDGES	ORGANIZATIONS	TOTALS
Circumvents Rules Enabling Act	- 1 -	- 0 -	- 2 -	- 4 -	- 7 -
Constitutional Concerns	- 2 -	- 15 -	- 1 -	- 1 -	- 19 -
Insufficient Data on Propensity	- 0 -	- 31 -	- 0 -	- 2 -	- 33 -
Unfair	- 9 -	- 40 -	- 4 -	- 5 -	- 58 -
Unnecessary	- 2 -	- 5 -	- 6 -	- 3 -	- 16 -
Impact on Native Americans	- 3 -	- 0 -	- 0 -	- 1 -	- 4 -
Drafting Problems	- 2 -	- 35 -	- 7 -	- 3 -	- 47 -

**ITEM II**

**RESOLUTION ON RULES 413-415**

Suggested Language for Transmittal Statement for Rule 404  
(Broun Draft #2)

The attached suggested rule represents the Committee's attempt to draft a rule that would more effectively carry out the policies embodied in Rules 413-415, as expressed by supporters of those rules, while at the same time providing essential integration with the existing Federal Rules of Evidence.

This Committee had earlier expressed the opinion that the changes now encompassed in these rules were not warranted. Our initial response was reinforced by comments from the overwhelming majority of the large number of lawyers, judges and law professors responding to Rules 413-415. We believe, with these commentators, that the existing Rules of Evidence are adequate to deal with the concerns expressed by members of Congress. Furthermore, we are concerned that the enacted rules may work to diminish significantly the policies established by long standing rules and case law guarding against undue prejudice to persons accused in criminal cases and parties in civil cases.

We do not believe that it is our role to prepare alternative rules that dilute the policies articulated by Congress. Instead, we have attempted to draft a rule that would both correct ambiguities and possible constitutional infirmities identified by the commentators in Rules 413-415 and remain consistent with Congressional intent.

We urge Congress to reconsider its decision on the policy questions. If it does not do so, we recommend that our alternative be adopted.

## MINUTES

### ADVISORY COMMITTEE ON CIVIL RULES

OCTOBER 20 and 21, 1994

The Advisory Committee on Civil Rules met on October 20 and 21, 1994, at the Westin La Paloma in Tucson, Arizona. The meeting was attended by Judge Patrick E. Higginbotham, Chair, and Committee Members Judge David S. Doty, Justice Christine M. Durham, Carol J. Hansen Fines, Esq., Francis H. Fox, Esq., Assistant Attorney General Frank W. Hunger, Mark O. Kasanin, Esq., Judge David F. Levi, Judge Paul V. Niemeyer, Professor Thomas D. Rowe, Jr., Judge Anthony J. Scirica, Judge C. Roger Vinson, and Phillip A. Wittmann, Esq.. Edward H. Cooper was present as Reporter. Judge William O. Bertelsman attended as Liaison Member from the Standing Committee on Rules of Practice and Procedure, and Professor Daniel R. Coquillette attended as Reporter of that Committee. Judge Jane A. Restani, a member of the Bankruptcy Rules Advisory Committee, attended. Thomas E. Willging of the Federal Judicial Center was present. Peter G. McCabe, John K. Rabiej, and Mark Shapiro represented the Administrative Office. Observers included Robert S. Campbell, Jr., Esq., Alfred W. Cortese, Jr., Esq., John P. Frank, Esq., Barry McNeil, Esq., and Fred S. Souk, Esq.

The Chairman introduced the new members of the Committee, Justice Durham and Judge Levi.

The Minutes for the April 28 and 29, 1994 meeting were approved, subject to correction of typographical errors.

#### *Rule 4(m): Suits in Admiralty Act*

The Suits in Admiralty Act, 46 U.S.C. § 742, requires that the libelant "forthwith serve" the libel on the United States Attorney and the Attorney General of the United States. "Forthwith" has been read to require service within a period much shorter than the 120-day period provided for effecting service under Rule 4(m). Several courts, moreover, have ruled that Rule 4(m) does not supersede the statute because the service requirement is a condition on the United States's waiver of sovereign immunity. Concerns have been expressed that Rule 4(m), in conjunction with Rule 4(i), has become a trap for the unwary.

The Committee considered this problem at the meeting in April, 1994, and concluded that rather than amend Rule 4 to provide warning of an exception for cases governed by § 742, § 742 should be amended to delete the service requirement. Section 742 was enacted before the Civil Rules were adopted, and there is no reason that justifies a distinctive service procedure for actions brought under the Suits in Admiralty Act. Further discussion reinforced this conclusion. The Maritime Law Association has recommended amendment of § 742 for years. There has not been any indication that the Department of Justice believes there are special reasons

that require special rules for these cases.

A motion was adopted by consensus to recommend to the Standing Committee that it recommend Judicial Conference approval of a recommendation that Congress delete the service provisions from 46 U.S.C. § 742.

*Rule 5(e)*

A proposed amendment of Rule 5(e) was published for comment on September 1, 1994. Discussion of the proposal began with a reminder of the process that led to publication. Publication of electronic filing rules was proposed at the June, 1994 meeting of the Standing Committee by the Appellate and Bankruptcy Rules Advisory Committees. Because the proposals ran parallel to the present provisions of Rule 5(e), it seemed desirable to publish an amended version of Rule 5(e) for comment at the same time. A draft was circulated to the members of this Committee, and was approved for publication by mail vote. The October meeting afforded the first opportunity for Committee discussion of the proposal.

The amended version of Rule 5(e) deletes the present express reference to facsimile filing, but it is intended that facsimile transmission be one of the means of electronic filing that may be authorized by local rule. (A suggestion that the reference to facsimile filing be restored was rejected, on the grounds that it is better to adhere to the phrasing used in other sets of rules and that this point is made clear in the Committee Note.) The amendment would effect two significant changes in the role assigned to the Judicial Conference of the United States. Under the present rule, a district court can authorize filing by facsimile or other electronic means only if the Judicial Conference has authorized filing by such means. This requirement is deleted from the amended rule. The present rule also requires that a local rule be consistent with standards established by the Judicial Conference. The amended rule limits the role of Judicial Conference standards by referring to them as "technical" standards.

There was lengthy discussion of the burdens that may be imposed by facsimile filing. At the same time, the practicing members of the Committee noted that the opportunity to file by means that avoid physical delivery will be welcome. There is no reason to wait until every court can be set up to permit electronic filing. The present situation seems to be that many courts do not have the equipment or staffing required to support filing by electronic means. Other courts, however, may be able to accommodate such filing. These courts should be allowed to proceed.

The question whether the Enabling Act permits delegation to the Judicial Conference of power to establish technical standards was explored. It might be feared that the Enabling Act process cannot be used to delegate the power to proceed without following the complete Enabling Act process in each instance. The fact that the present rule delegates more extensive powers to the Judicial Conference does not of itself answer the question whether this delegation is proper. It was concluded that the power to adopt technical standards can properly be lodged in the Judicial Conference. Great benefits would flow from adherence by all federal courts to common technical standards, facilitating ready compliance by all who wish to accomplish electronic filing. Absent common technical standards, it seems inevitable that different courts will adopt different standards, unless there is common acquiescence in the standards first adopted by a belwether court. As compared to adoption and regular revision of standards by the Judicial Conference, adherence by acquiescence is not likely to achieve as desirable results. Alternatively, common standards might be established by the bureaucratic processes through which the Administrative Office undertakes to support acquisition of electronic filing equipment by district courts. These processes are less open than the processes of the Judicial Conference, and are entirely outside the Enabling Act system. These considerations persuaded the Committee that the various advisory Committees and the Standing Committee have been right all along - the Enabling Act does authorize adoption of rules that delegate the standards-setting function to the Judicial Conference.

There followed substantial discussion of two elements of the published draft. The first was the substitution of "documents" for "papers" in the provision that a court may "permit ~~papers~~ documents to be filed \* \* \*." A motion to restore "papers" passed by vote of 12 to 0, restoring the word used throughout the rest of Rule 5(e). The second was the sentence stating: "An electronic filing under this rule has the same effect as a written filing." It was urged that this sentence, which parallels similar provisions in the other rules published for comment at the same time, is unnecessary. The full effect of this sentence is accomplished by the initial permission to adopt rules that permit a paper to be "filed, signed, or verified." A motion to delete this sentence passed by vote of 10 to 0.

Possible changes in the Committee Note were discussed without final resolution. One would add a suggestion that local rules address the steps required to have the effect of filing a physical paper - one requirement, for example, might be that a physical paper be delivered to the court by some means such as ordinary mail. Another would add a statement that local rules or Judicial Conference technical standards should ensure that a reliable physical record is made of what was done, and how. Yet another

would delete the final two sentences of the Committee Note, which suggest that few courts should want to authorize filing by facsimile transmission. It was concluded that these matters could be addressed when the period for public comment has closed and the time comes for final Committee action on recommendations to the Standing Committee.

*Rule 6(e)*

At the June, 1994, meeting of the Standing Committee, it was suggested that the several Advisory Committees study the question whether the additional time provided for acting after service by mail should be extended from 3 days to 5 days. Rule 6(e) now provides that whenever an act is required within a prescribed period after service of a notice or other paper, the period is extended by 3 days if service is made by mail. Similar provisions appear in other sets of court rules, all setting the extension at 3 days. See Appellate Rule 26(c), Bankruptcy Rule 9006(f), and Criminal Rule 45(e).

The Bankruptcy Rules Advisory Committee considered amendment of Bankruptcy Rule 9006(f) shortly before this Committee met. The Bankruptcy Rules Committee concluded that the 3-day period should not be extended to 5 days. Some of the considerations that weighed in that decision seem to be peculiar to bankruptcy practice. Others, however, are common to all the sets of rules. The effect of all time periods is affected by the extension of time that occurs when the last day of a specified period is a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible. The effect of time periods less than 11 days is affected by the extension that results from exclusion of intermediate Saturdays, Sundays, and legal holidays, a question that was last studied with the 1985 amendment of Rule 6(e). Any change in the rule, even an extension of time, will result in confusion and resentment. A change in one set of rules but not others will result in worse confusion, and occasional losses of rights as parties mistakenly rely on the longer provision in one set of rules when operating under the shorter provision of a different set of rules. All rules should continue to adhere to the same period. And there is no sufficient reason to believe that postal service has deteriorated so markedly, or will have deteriorated so markedly by the time an amended rule would take effect, as to justify amendment now.

These considerations led the Committee to conclude that there is no present need to amend Rule 6(e).

*Rule 9(h)*

Section 1292(a)(3) of the Judicial Code provides for appeal

from "Interlocutory decrees of \* \* \* district courts \* \* \* determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." The final sentence of Rule 9(h) provides: "The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h)." The meaning of this provision is unclear when a single case includes both an admiralty claim and a nonadmiralty claim. There is some authority that an appeal can be taken from an order that determines the rights and liabilities of the parties with respect to a nonadmiralty claim so long as the case also includes an admiralty claim. If this position is desirable, it can be made secure by revising Rule 9(h). Adhering to current style conventions, the final sentence could read: "A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3)."

The Appellate Rules Committee considered this question and concluded that it should be addressed by this Committee.

It was urged that the proposed amendment should be recommended. The values of interlocutory appeal are as great for nonadmiralty claims in an admiralty case as they are for the admiralty claims. The chair of the Practice and Procedure Committee of the Maritime Law Association has expressed the same view. Such scant authority as there is interpreting the present rule reaches the result that would be expressed more clearly by the amended version. Action would simply clarify, not extend or change present appeal doctrine.

This view was met with expressions of hesitation. Section 1292(a)(3) has been construed narrowly, limiting the opportunities for interlocutory appeal in light of final judgment appeal values. Appeal of nonadmiralty claims under § 1292(a)(3) could be seen as a matter of pendent appellate jurisdiction, although it also could be seen as simple interpretation of the statute in light of the consolidation of admiralty procedure with civil procedure. The question can be seen in at least two perspectives: one is that the interlocutory appeal device is a good thing in admiralty cases, and should be made as useful as possible; the other is that there is no apparent justification for treating admiralty cases differently than other cases, and the unique but somewhat antique interlocutory appeal statute should be circumscribed as narrowly as possible.

A motion to adopt the draft amendment was carried forward without immediate decision. It was left to the discretion of the chair to determine whether to submit the issue to vote by mail ballot after submitting additional materials on practice under § 1292(a)(3). The advice of the Maritime Law Association will be sought if the question is not submitted to mail ballot in time for

making recommendations to the January, 1995 meeting of the Standing Committee.

*Rule 23*

Rule 23 was discussed briefly at the beginning of the meeting, noting that there is nothing on the agenda for action at this meeting. The Federal Judicial Center is just ready to begin the fieldwork in its Rule 23 study. The topic will be the focus of the agenda for the February, 1995 meeting and an important part of the work to be done in conjunction with the ensuing meeting in April. It was recalled that the current draft was sent to the Standing Committee in June, 1993, but pulled back because of the press of other business. If further information shows that the present rule is working reasonably well, perhaps it would be better to avoid modest amendments that might cause more disruption than improvement. In addition, it has become clear that we need to reexamine Rule 23 in terms more fundamental than those underlying the current draft. The focus of concern is on mass torts.

Mass settlement classes are perhaps the most important unknown factor. Recent developments have brought new practices to our experience, particularly in asbestos and silicone gel breast implant litigations. In both, defendants have initiated class actions in an effort to settle and buy peace. In exploring these problems, it would be a mistake to focus attention on approaches that fall within the reach of the Rules Enabling Act. If a careful view of the whole problem suggests that it is better addressed by other means, it could easily be a mistake to attempt a less satisfactory solution by changing the rules.

*Rule 26(c)*

Proposed amendments to Rule 26(c) were published in October, 1993. The proposal, and public comments on the proposal, were discussed at the April, 1994 meeting of the Committee. The proposal was not acted on at the April meeting. New materials were provided for consideration at this meeting, including two alternative drafts of Rule 26(c) and a proposed amendment of Rule 5(d).

The draft Rule 5(d) amendment would add a new sentence: "A party may agree to destroy unfiled discovery materials, or return them to the person who produced them, only if the person who produced them undertakes to retain the materials and the corresponding discovery requests for five years after the conclusion of all discovery in the action." The Committee did not consider this amendment, and did not consider whether it should remain on the agenda for consideration at a future meeting.

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One of the alternative Rule 26(c) drafts was included with the agenda materials for the meeting. This version was intended to incorporate all of the comments on the published draft that urged various proposals for narrowing the scope of protection afforded by a protective order. The other alternative draft incorporated additional provisions capturing concerns reflected in ongoing legislative proposals, and was presented to Committee members for the first time at the meeting in an effort to focus discussion on the differences between the 1993 proposal and the legislative proposals.

Discussion began with review of the history of attempts to consider legislative proposals to amend Rule 26(c). As at the April meeting, it was agreed that careful attention should be paid to the concerns reflected in these legislative proposals. Although the Committee cannot urge adoption of undesirable rules changes for purposes of political expediency, it must be sensitive to the concerns of Congress. Just as public comment on proposed rules provides much valuable information for consideration by the Committee, so legislative proposals reflect information gathered by the legislative process that can prove invaluable in framing the best possible rules proposals. Thoughtful consideration of the concerns that trouble Congress can have a real impact on Congressional deliberations.

It is clear that there is much concern that materials in the federal judicial system "ought to be public." The ongoing political debate is not limited to the particulars of discovery practice, but focuses on larger issues of public information. There is a natural and sharp focus on discovery protective orders, however, and legislation has been proposed that would alter the framework for dealing with protective orders. Judge Higginbotham testified before a Senate Committee, where attention focused on protective orders in products liability and other mass tort settings. It is clear that there is continuing concern in Congress that protective orders may have the effect of preventing access to information that is important to protect the public health and safety, and of making it more costly to litigate parallel claims. There is a risk that this concern, whether or not well-founded in light of actual present practice, will lead to remedies that interfere with the vital lubricating function of discovery protective orders. Over-eager remedies could greatly increase the number of litigated discovery disputes, and ultimately restrict the actual flow of discovery information. It is most important to attempt to achieve a rule that addresses all legitimate needs for limiting protective orders without imposing undue burdens on the courts or causing positive harm to the discovery process.

The proposal published in 1993 dealt with modification or dissolution of protective orders, not with the standards for

initial consideration of protective orders. A deliberate decision was made not to address the questions whether modification or dissolution can be sought by nonparties, or whether action is proper after judgment as well as before judgment. In his Senate committee testimony, however, Judge Higginbotham noted that courts frequently have permitted nonparties to seek modification or dissolution and that the 1993 proposal would permit continuation of this practice.

Preliminary results of the Federal Judicial Center study of protective orders were presented in a paper by Elizabeth C. Wiggins and Melissa J. Pecherski. Several aspects of the study were noted during the discussion. Studying three different districts for three years each, there was protective order activity in a range of 4.7% to 10.0% of all cases. Of course the figure would be higher as a percentage only of cases in which there was some discovery. It seems likely that the figure would be higher still as a percentage of cases in which there was a substantial amount of discovery activity, but the preliminary data do not provide this information. Most protective order activity is initiated by motion, not by stipulation of the parties; the highest figure for initiation by party stipulation was 26%. It was noted, however, that the data do not permit differentiation between types of cases; it would be consistent with these data to find that stipulated protective orders are commonplace in "complex" litigation. Approximately half the motions are met by a response in opposition; almost none were met by a "response in concurrence." The rate of hearings on motions was highly variable: in the District of Columbia, it was 12%, in Eastern Michigan 59%, and in Eastern Pennsylvania, 2%. Of the motions that were ruled upon by a judge, approximately equal numbers were denied, or granted in whole or in part. (By some chance, in all three districts 41% of the motions were granted in whole or in part.) Protective orders included a wide variety of provisions, but many included restrictions on disclosure or established procedures for handling confidential material. Of the suits in which an order was entered to restrict access to discovery materials, contract, civil rights, and "other statutes" actions accounted for large portions of the total. Personal injuries accounted for 8% or 9% of the total, depending on the district. Protective orders were modified or dissolved, whether by court order or agreement, in very few of the cases; there is no indication yet as to the types of cases involved or the reasons for modification or dissolution.

The first change in the 1993 draft would incorporate in (c)(1) an express provision recognizing and confirming the common practice of entering protective orders on stipulation by the parties. This change was accepted, on the express understanding that the court may refuse to enter an order notwithstanding stipulation of all parties. Rule 26(c)(1), as redrafted, simply provides that the

court "may" enter the order; in keeping with the Committee's style conventions, "may" is a word of permission, not mandate.

Throughout the discussion of other proposed changes, several members voiced concern with the substantive effects of protective orders. Information produced in discovery often is not public information. It can be reached, if at all, only by specified procedures limited to specified purposes. There is a substantive right of privacy that should not be violated by rules of procedure. The determination that privacy can be compromised by discovery appropriate to the needs of particular litigation does not justify allowing access to private information for other purposes. Public access to personnel files produced for employment discrimination litigation, for example, cannot be justified by vague invocations of the "public interest." Private information may be property protected against taking by the Fifth Amendment.

The distinction between limiting the scope of protective orders and establishing a positive right of access also ran throughout the discussion. The mere absence of a protective order does not establish a right of public access to discovery information that has not been filed with the court, nor to discovery proceedings. Care must be taken in drafting lest inadvertent references to "access" create a freedom-of-information act in the guise of protective order limits.

Discussion of the alternative draft began with paragraph (2). The draft provided that the court might protect materials only to the extent that the interest in confidentiality substantially outweighs the interest in access to the materials. It was suggested that the burden should lie in the opposite direction - that the rule should provide that discovery material should be protected unless the public interest substantially outweighs the interest in privacy. It also was suggested that the unrestricted reference to denying protection "when a nonparty has an interest in access" was too broad. Concern was expressed that as with other proposals, this approach might require extensive satellite litigation of the questions of public interest and the balance between the interests in access and in privacy. Such attempts to add to the open-ended "good cause" approach of paragraph (1) were feared as adding another layer of litigation. Concern also was expressed that there is a tension with the provision that expressly permits entry of a protective order on stipulation of the parties: that the draft might be read to limit the court's power to enter a stipulated protective order by requiring that it independently determine the balance between the interests in confidentiality and openness. It was suggested that in most litigation there is no public interest, but the draft might require explicit consideration and rejection of this possibility in all cases. Even imposing the burden on the person asserting that the public interest overcomes

the interest in confidentiality does not clearly avoid this problem. All of these shortcomings could be addressed by limiting these issues to consideration on a motion to modify or dissolve. Present practice could continue. There has been no showing that protective orders are entered improvidently, or that they conceal the very nature or existence of the litigation. Allowing unimpeded entry of protective orders, perhaps with greater guidance as to the circumstances that justify modification or dissolution, would be better.

A motion to delete paragraph (2) of the alternative draft, leaving its provisions for incorporation in the provision on modification or dissolution, carried by vote of 9 to 3.

Paragraph (5) of the alternative draft provided that the court must allow a nonparty access to protected materials if the nonparty agreed to submit to the terms of the protective order and either had a claim or defense factually related to the protected materials or was a state or federal agency with jurisdiction over matters related to the protected materials. Discussion of this paragraph included reference again to the concern that there is a difference between denying protection and ordering access. It also was asked why this provision should be separate from the more general modification or dissolution provisions of the following paragraph (6). As with paragraph (2), it was suggested that this provision should be combined with the more general provisions on modification or dissolution. As a more specific matter, it was urged that a public agency should not be allowed access to materials without regard to whether it would have authority to compel production by its own independent proceedings. In the same vein, it was suggested that submission to the protective order might not be enough to protect against forced disclosure under a freedom-of-information act, not only with respect to federal agencies but also with respect to state agencies governed by a wide variety of state acts. Discussion of the aspect of the draft that would require the court to defeat protection produced general agreement that the verb should be changed to provide that the court "may," not must, defeat protection. No formal action was taken on paragraph (5).

Subparagraph (6) of the alternate draft provided detailed guidance for modification or dissolution of a protective order. One feature was discarded by consensus. The draft would have allocated the burden of justification according to the nature of the protective order. If the order had been entered on stipulation of the parties, the burden of establishing the need for continued protection would be on the party asserting the need. If the order was contested, the burden of establishing the need for modification or dissolution would be on the person seeking access to protected material. This distinction had been vigorously urged by a committee of the Association of the Bar of the City of New York in

commenting on the October, 1993 published draft. Concern was expressed that it might be difficult to determine whether an order had been contested, and that the distinction almost certainly would discourage stipulated orders because of the desire to secure the greater protection of a contested order. Half-hearted contests could lead to further confusion through arguments that an order was not genuinely contested. The values of stipulated protective orders should not be defeated by this provision.

The procedures for nonparty motions to modify or dissolve were discussed at length. It was recognized from the outset that the question of procedures is bound up with the importance of permitting extensive nonparty applications. Although it was noted that one possible means of raising the issue would be a subpoena issued in separate proceedings, commanding production of material subject to a protective order, there was no suggestion that such procedures should be encouraged. A protective order in one action ordinarily does not protect against production in independent proceedings by the party who initially controlled information that has been produced under a protective order. An effort to get the material from a party who received the information subject to a protective order, however, is better made by application to the court that entered the protective order. The alternative draft provided for motions in the court that entered the order by nonparties as well as parties. The motive for this approach was the belief that it should be as easy to deny an ill-founded motion directly as to deny intervention. Intervention, on the other hand, avoids the awkwardness of recognizing a nonparty's standing to make a motion.

Discussion of intervention by nonparty applicants began with recognition that intervention has been the procedure regularly used as the foundation for a motion to modify or dissolve. The rule could provide for use of an intervention procedure without invoking the intervention standards of Rule 24, and without directly addressing the question of "standing" to seek intervention. Intervention, moreover, makes it clear that the nonparty has submitted to the jurisdiction of the court to make binding orders that limit the use of any information released from the full reach of the original protective order.

Robert Campbell observed that the Federal Rules Committee of the American College of Trial Lawyers had spent several hours discussing the Rule 26(c) proposal, but had not anticipated this particular turn of the discussion to intervention. He asked, however, how Rule 24 intervention tests would apply to an applicant urging a public interest, particularly a generalized public interest in health or safety. It was responded that Rule 24 intervention tests are elastic, as shown by regular invocation of Rule 24 in present practice dealing with motions to modify or

dissolve. It was further suggested that an open invitation for nonparty motions might lead to unnecessary work for everyone involved - that an intervention procedure would permit an initial narrow focus on the question whether a plausible claim for modification or dissolution had been stated, sorting out claims that do not justify the burdens of full-scale argument and consideration.

A motion was made to adopt the first sentence of the alternative draft paragraph (6) as modified to refer to intervention. As a working model, it might begin: "A party - or a nonparty who has been granted intervention for this purpose - may move at any time before or after judgment to dissolve or modify \* \*." This motion was not acted on. Discussion of the motion, however, further explored the usefulness of intervention along lines similar to the earlier discussion. Although Rule 24 intervention standards may seem to fit poorly the situation of a person who is not interested in the merits of an action, the intervention device allows a court to focus on the nature of the interest asserted as a matter separate from actual application of the standards for modifying or dissolving a protective order. If an applicant obviously cannot justify full-scale consideration of the issue, intervention can be denied. One approach would be to refer to intervention in the text of Rule 26(c) and to explain in the Note that Rule 24 does not identify the standards for intervention.

Another motion was made to strike paragraphs (2), (5), and (6) of the alternative draft. In their place, paragraph (3) of the October 1993 draft would be restored with additional discussion of public interest factors. The problems of nonparty motions, motions after judgment, and other matters would be left to continuing decisional development. This motion rested on doubts about the capacity of the Committee to discharge well the responsibility of drafting in greater detail. It was suggested that this motion was premature because the Committee had not yet finished discussion of all possibilities. The motion was not brought to a vote.

Further discussion noted that relief from a protective order might be sought by a nonparty bound by the order, as well as by a nonparty who simply wished to free someone else from the order.

Discussion of these issues led the Committee to conclude by consent that it would be better to avoid immediate decisions. One or two revised drafts will be prepared, reflecting the discussion, and circulated to the Committee. One draft might hew rather close to the 1993 proposal, while the other might venture into greater detail. If agreement can be reached, either to adhere to the proposal published in October, 1993, or to adopt a revised draft, the topic will be reported to the Standing Committee in time for

its January, 1995 meeting. It was agreed that if the recommendation should be adoption of a draft with significant additions to the published draft, the recommendation would include publication for comment before reaching a final recommendation to the Standing Committee.

Rule 43(a)

A revision of Rule 43(a) was published for comment in October, 1993. The revision was considered in light of the comments at the April, 1994 meeting of the Committee. No difficulty was caused by the first revision, which strikes the requirement that testimony be taken "orally." This revision makes it clear that testimony can be taken in open court from a witness who is unable to communicate orally but is able to communicate by other means.

The other revision added a new provision that the court may, for good cause, permit testimony "by contemporaneous transmission from a different location." This provision provoked substantial discussion and uncertainty. Doubts were expressed about moving toward "the courtroom of the future" in which everyone participates by remote electronic means from many scattered locations. A motion to send the revised rule forward to the Standing Committee for recommendation to the Judicial Conference failed by even division of the Committee.

Reconsideration of the Rule 43(a) proposals again produced no disagreement as to deletion of the requirement that testimony be given orally.

Discussion of the provision for transmitting testimony from a different location began with a protest that this device can appeal only to those anxious to be "trendy," "with it," and adept with "all the new toys." A lawyer confronted with a proposal to transmit testimony must face the choice of trusting to unseen arrangements made by others or of arranging to be present with the witness in person or by representative. Only physical presence with the witness can ensure that there is no improper coaching. If testimony is needed from a witness who cannot be present, the party desiring the testimony should arrange a video deposition after notice that ensures the opportunity to be present.

These concerns were met with various reassurances. Transmission of testimony could be useful in prisoner cases. State courts have substantial experience with conducting arraignments in this way. Transmission of testimony works well in admiralty proceedings. The lawyers for other parties can choose between participating through the system used to transmit the testimony or participating by arranging for someone to be present with the witness.

Facing these concerns, it was moved that the draft be amended for purposes of further discussion by retaining the requirement of good cause and adding a requirement that compelling circumstances justify transmission of testimony. This amendment was adopted without dissent.

Further discussion of the amended proposal provoked new expressions of doubt whether available technology is yet sufficiently reliable to support transmission of testimony. It was observed again that it works in admiralty. Another illustration offered was the need to take formal authenticating testimony from the custodian of records in a remote location; this illustration was met by the response that ready resort to deposition or other means should show that there is no compelling need in such circumstances.

The next illustration was the witness who has an accident, a death in the family, or like calamity. Transmission is better than a "deposition" during trial. It is not a response that an earlier deposition should have been taken - the party calling a witness often will not seek to frame a deposition, no matter by whom taken, in the shape of expected trial testimony.

It was moved to delete the entire sentence providing for contemporaneous transmission of testimony from a remote location. The motion failed by vote of 5 in favor, 7 against.

The proposal, as amended to require "good cause shown in compelling circumstances," was then adopted with a recommendation that the Standing Committee recommend its adoption to the Judicial Conference. It was concluded that since the only change from the published version is to narrow the availability of transmission, there is no need to republish the proposal for an additional period of comment. It also was concluded that the Committee Note should be revised to make clear that remote transmission should be permitted only for truly compelling reasons.

#### *Rule 47(a)*

Several draft variations of Rule 47(a) were considered. Each variation would establish a right of party participation in the examination of prospective jurors. The variation most extensively discussed framed the right as one to supplement examination by the court, subject to reasonable limits set by the court.

Discussion was introduced with the observation that for many years, the Judicial Conference has opposed legislation that would establish a right for attorneys to participate in voir dire examination. Bills continue to be introduced. The most recent form of proposed legislation would set a minimum period that must

be allowed for party participation, expanded according to the number of parties but subject to a ceiling beyond which the number of parties makes no difference.

A major reason for examining the question again arises from the limits that have been placed on peremptory challenges. It has become increasingly important to establish information that supports a peremptory challenge that might be attacked on the ground that it seems based on stereotyped views of race, ethnicity, gender, or perhaps some other protected characteristic. If lawyers must explain peremptory challenges, the voir dire process must be sufficient to support them. The Supreme Court, moreover, has recognized that adequate voir dire is essential to get a fair jury. It is particularly important to have lawyer participation in capital punishment cases. The Criminal Rules Committee has decided to go forward with a proposal to establish a right of party participation, but has not worked out precise language. An effort should be made to draft common language for both the Civil and Criminal Rules.

It also was observed that federal judges fear lawyer participation because of the results that have occurred in some state courts, where lawyers drag voir dire out to undue length. Lawyers sometimes manage to make long argumentative statements about the case, concluding with a question mark. Attempts may be made to ingratiate the lawyer with the jury, to secure commitments to hypothetical positions, or worse. Any right of lawyer participation must be subject to judicial control that eliminates these dangers. A specific time limit, however, probably does not make sense.

Additional information was provided by a survey of current federal practice conducted by John Shapard and Molly Johnson of the Federal Judicial Center at the request of the Committee. The survey was mailed to 150 active district judges; 124 responded. The responses showed that 59% of the responding judges allow some form of attorney participation in voir dire. The average time spent in voir dire was essentially the same across all forms of lawyer participation, ranging from allowing counsel to conduct most or all of the voir dire to limiting counsel to suggesting additional questions to be asked by the court. Judges who allow questioning by counsel listed a number of means used to prevent improper or unduly extended use of voir dire. Forty-four percent responded that it was rarely necessary to do anything, perhaps in part because 79% responded that they make it clear at the outset that inappropriate behavior is not permitted. Fifty percent generally limit the time for voir dire. Among specific limits listed were rules that prohibit addressing a question to an individual juror if it can be addressed to the panel as a whole, prohibit attempts to "instruct" jurors, and prohibit any effort to

seek a juror's commitment to support a position based on a hypothetical fact statement.

Turning to the question of drafting, it was urged that it is important to define the right as one to supplement the court's voir dire. This perspective makes it clear that the court is in control, and establishes the foundation for the court's power to establish reasonable limits that respond to many case-specific factors, including the extent of examination by the court. The Committee was informed that the Criminal Rules Advisory Committee concluded that there must be an "escape clause" to ensure authority to control abuse by pro se defendants. It was agreed that this power of control must be included in the power of the court to limit the time, manner, and subject matter of the examination.

District judge members noted that each of them now allows attorney participation in voir dire. But caution was expressed about incorporating this practice in the rule as a "right." Although the rule would establish the authority to limit lawyer participation, creation of even a limited right expands the possibility of appellate reversal on finding one limit or another unreasonable. One judge, for example, is "very tough" on argumentative questions. A rule requiring that limits be reasonable would exert some pressure to lighten up on this stance. It would not be enough simply to allow exceptions "in the interest of justice." Another judge noted that he had seated perhaps 1,000 juries. Lawyers, when given the chance to participate in voir dire, have done it properly. In addition, he and many others have found that it is helpful to use questionnaires to get information that is difficult to elicit in open court. Many judges conduct the first stage of juror examination, and then allow lawyers to participate.

Lawyer members of the Committee stated that often they do not get enough information to make intelligent challenges. This problem is particularly acute with judges that do not use questionnaires and who conduct ineffective voir dire examinations. Judges who do not allow lawyers to participate often do a poor job. State courts in such states as Louisiana and California do a good job of controlling lawyer participation.

Robert Campbell noted that the Federal Rules of Civil Procedure Committee of the American College of Trial Lawyers generally supports the proposal to establish a right of lawyer participation, but recognizes that this is a tricky question. Lawyers are concerned about judges who believe that expedition is the key to justice, racing through a meaningless voir dire — perhaps in the belief that it makes no difference — to select a jury quickly. But there also is a risk created by lawyers who continually push as close as possible to the mistrial line in

seeking to misuse voir dire to persuade or intimidate jurors.

Barry McNeil urged that there is no issue more important to trial lawyers than participation in voir dire. Often it does not take long. Often the questions go to knowledge, not to bias. Mandatory language is highly desirable.

These concerns were translated into a motion to revise the final draft variation to read as follows: "The court must conduct the examination of prospective jurors. The parties are entitled to examine the prospective jurors to supplement the court's examination within reasonable limits of time, manner, and subject matter set by the court in its discretion." The motion passed by vote of 12 to 0.

Two suggestions were made for additions to the draft Committee Note to reflect the changes in the text of the rule and the discussion. The Note should describe the virtues of juror questionnaires as a means of eliciting useful information and providing the foundation for effective but efficient voir dire examination. And it should stress the importance of appellate deference to trial court discretion in setting limits on the time, manner, and subject matter of attorney questions.

#### Rule 48

The proposal to amend Rule 48 to require 12-member juries was supported by a separate volume of readings on jury size. These readings underscore many of the issues discussed in brief compass, or simply assumed, in the Committee discussion.

The introductory comments began by observing that the path by which 6-person juries became the norm, replacing 12-person juries, has been a source of uneasiness from the beginning. Reduction of jury size by local court rules was urged in the interests of efficiency and cost. The decisions that due process allows state courts to try criminal cases to juries with as few as 6 members paved the way for the decision that the Seventh Amendment also permits 6-person juries. The rulemaking process of course does not provide the occasion for reconsidering Supreme Court interpretations of the Seventh Amendment. Sound procedure, however, may justify means that are not constitutionally required.

The recent elimination of alternate jurors has been welcomed, because it avoids the need to excuse alternates at the end of trial without an opportunity to participate in the process of deliberation and decision. The Committee Note to the 1991 Rule 48 amendments observed that ordinarily it is "prudent and necessary" to seat more than 6 jurors in order to guard against sickness or disability. It further observed that use of more than 6 jurors is

desirable because it increases the representativeness of the jury, and that smaller juries "are more erratic and less effective in serving to distribute responsibility for the exercise of judicial power." These concerns underlie the common practice of seating 8 or even 10 jurors in trials that seem likely to go more than 3 days. The more apt comparison is between 8- and 12-person juries, not 6- and 12-person juries.

Many scholars agree that 12-member juries are better. The vast weight of history and tradition creates a strong presumption in favor of 12. A 12-person jury, moreover, makes it much more probable that any single jury will include representatives of significant minority groups. The importance of representativeness has been underscored by recent decisions that limit the use of peremptory challenges for the purpose of striking minority members from a jury; it is ironic that one of the surest safeguards of representativeness should be sacrificed in the name of expediency. Smaller jury verdicts, moreover, are more erratic, less stable, for a variety of reasons. In many ways, the capacities and behavior of a group of 6 are different from those of a group of 12. It is more difficult for a single aggressive juror to dominate a larger group. Larger juries bring broader ranges of experience and values to the deliberation, and are better able to recall trial evidence.

The argument for smaller juries is that they perform as well and cost less. It is difficult to generate useful estimates of the added costs. Much depends on efficient management of the jury pool. Use of "staggered starts," for example, with different judges of the same court setting different times for beginning the jury selection process, can achieve significant efficiencies. Without attempting to assume any new efficiencies on this score, however, initial rough estimates suggest that the additional annual cost of returning to 12-person juries would range from a low estimate of about \$4,000,000 to higher estimates of three or four times that much. These sums are not insignificant. All estimates, however, are a fraction of one percent of the judiciary budget, an infinitesimal fraction of one percent of the national budget, and only a few cents per person each year.

Turning to detailed drafting issues, it was agreed that the present rule means that the parties can stipulate to a nonunanimous verdict, or to a jury of fewer than 6 members, at any time through verdict.

Robert Campbell told the Committee that the Federal Rules of Civil Procedure Committee of the American College of Trial Lawyers feels strongly about returning to 12-person juries. They also believe that there should be alternates. The 12-person jury has been used for a long time. It is much easier for one juror to manipulate a 6-person jury than a 12-person jury.

A motion was made to adopt "Variation 1" of the alternative drafts submitted for consideration. This version requires that the court seat a jury of 12 members. The balance of Rule 48 is retained with only stylistic changes. The motion was adopted by a vote of 12 to 0.

It was moved that the rule be amended to require a jury of "no fewer than" 12 members, so that a larger number could be seated for a long trial. A parallel suggestion was that the use of alternates should be restored. If more than 12 are seated, either some must be treated as alternates or all must be allowed to deliberate. It was suggested that it would be unwise to have more than 12 deliberate. Designation as alternates could be left to the end of trial, however, even by some device such as drawing lots. If the parties were concerned about a larger jury, they could stipulate to a smaller one. This approach, however, would leave the parties subject to persuasion by the trial judge. Another problem seen with a jury of more than 12 members was that the number of peremptory challenges is set by statute. It would be necessary to determine whether an increase beyond 12 jurors would warrant an increase in the number of peremptory challenges, and if so how to accomplish the change. The motion to amend failed by vote of 0 to 12.

A motion was then made to begin the rule with a power to stipulate to a jury of fewer than 12 members: "Unless the parties stipulate to a smaller jury, the court must seat a jury of twelve members." This motion failed by vote of 2 to 11.

The draft variations that tied jury size to various nonunanimous verdict formulas were discussed briefly. It was agreed that the unanimity requirement has profound effects on the dynamics of deliberation. These variations were dismissed without further discussion.

### Rule 53

Discussion of the Rule 53 draft began with the statement of the chair that Judge Wayne Brazil had been deeply involved in the back-and-forth process of generating the draft. Great appreciation was expressed by the Committee both for this assistance and for Judge Brazil's great services to the Committee during his period as a member.

The Rule 53 draft was submitted in two forms. The earlier form set out three related rules. Draft Rule 53 rewrote present Rule 53. Draft Rule 53.1 invoked Rule 53 but added separate provisions for pretrial masters. Draft Rule 53.2 likewise invoked Rule 53 but added separate provisions for post-trial masters. This form reflected the history of the project. An initial suggestion

for a modest amendment to reflect the growing role of pretrial masters led to a Committee recommendation that a rule be prepared governing pretrial masters in some detail. Consideration of that draft persuaded the Committee that if the subject were to be approached, it might be better to undertake a more thorough revision of Rule 53. One of the major reasons for this conclusion was the level of detail with which the pretrial master draft regulated topics also involved with trial or post-trial masters. The first response to this conclusion was the set of three related rules. A later response was to fold all three into a single revised Rule 53.

Several distinguished academics had provided reactions to these drafts. One of the common reactions was surprise that masters are used for trial purposes - these observers have become so accustomed to the pretrial and post-trial functions of masters that they were uncomfortable with the traditional trial role of masters. These reactions were supplemented with the observation that there has been concern about the dissonance between Rule 53 as a trial master rule and the flourishing use of pretrial masters. One question is whether Rule 53 should continue to provide for trial masters at all. The role of the trial master's report is uncertain, particularly in a jury trial. The tracks for presenting pretrial-gathered evidence now include the 700 series Evidence Rules, and Evidence Rule 1006. These did not exist as such when special masters were taking root. If a master is to be a witness at trial, should it be by other means? And if the traditional trial function of masters were to be abolished, should the remaining roles be covered by a rule outside the Rule 53 framework?

John Frank observed that with masters, we are dealing with the "fourth tier" in relation to Article III. This issue was faced in the 1980s with the question whether a new court should be created as an intermediary between the circuit courts of appeals and the Supreme Court. Bankruptcy courts and magistrate judges both function as fourth tiers. Masters are another fourth tier. We should not "create" this practice. To the extent that trial master practice is dwindling, it is a good process. We should not encourage a separate fourth-tier process that competes with magistrate judges.

It was asked whether there are any abuses that might demonstrate the need for a rule amendment. The response was that the question is not so much one of abuses as one of a large practice that does not appear to be supported by present Rule 53. A revised rule could validate this practice and regulate it. There are, however, no rigorous data detailing the developing use of pretrial or post-trial masters. Professor Margaret Farrell has done a recent study for the Federal Judicial Center, but it proceeds by systematic review of specific experiences rather than

a generalized survey.

Experience with trial masters was described from a practitioner's perspective. The device can be useful as a means of addressing part of a complicated case that requires detailed evidence, leaving the rest of the trial for the court. Usefulness, however, depends on the agreement of the parties to accept the master's report as final. Trial masters should be used only if the parties agree to treat the report as final. In one jury trial, with the consent of the parties, the master's report was submitted to the judge, objections were made to the judge, and the report as thus finalized was read to the jury as dispositive on the issues involved. In another case, the report was offered as a piece of evidence, to be supported or rebutted by other evidence. That experience was "a zoo."

It was noted that maritime damages cases often are tried to a master. Another experience involved use of a master in a massive foreclosure to rule on the priority of liens and to distribute a \$25,000,000 fund among 260 applicants. Superfund and like litigation frequently involves resort to masters. In California, experts often are used as masters in leaking underground storage tank litigation. Other experiences involved use of a master in a three-judge court redistricting case, in a class action with 20,000 claims; in an action parcelling out a complex real estate division; and in attorney fee disputes.

A master also may have the advantage of expert experience. John Frank noted a case in which this advantage was in fact realized.

Returning to pretrial masters, it was asked whether Rule 53 authorizes developing practices. Inherent power was noted as an alternative source of authority. A rule that - as Rule 53 - approaches a procedure without authorizing it does not always, by negative implication, preempt the field and oust reliance on inherent power. Consensual use should not be troubling. The structural components of Article III and the Seventh Amendment are satisfied by consent of the parties; the master becomes essentially an arbitrator operating within the framework of an Article III tribunal.

Greater difficulties are presented by nonconsensual use. Unique and complicated subject matters often present courts with a need for assistance. Reliance on private individuals who serve as masters can, however, present problems of competence. Lawyer-masters, moreover, also present problems of conflicting interests.

Thomas Willging noted that when he and Joe Cecil studied court-appointed expert witnesses, they found judges using the

witnesses as expert advisers. Evidence Rule 706 experts are used not just as witnesses. Their sense was that there is little authority, apart from inherent power.

It was suggested that discussion should focus on the contested use of a master. Parties may agree even on the use of an expert as adviser to the court; agreement means there is little problem. If there is a large not-consented use of masters, there are serious questions of authority, proper practice, and the like.

At the end, it was concluded that there is no apparent need for imminent action. The Rule 53 drafts will be treated as an information-study item for the time being. Should reason appear for further work, they may provide a useful starting point.

#### *Rule 68*

Rule 68 has been before the Committee for some time. At the April, 1994 meeting, it was concluded that further action should await completion of the Federal Judicial Center study of Rule 68. John Shapard, who is in charge of the study, put it aside over the summer for the purpose of completing the survey of practices surrounding attorney participation in voir dire examination of prospective jurors. See the discussion of Rule 47(a) above.

An informal survey of California practice was described. California "section 998" uses costs as an offer-of-judgment sanction, but costs commonly include expert witness fees in addition to the more routine items of costs taxed in federal courts. Generally this sanction is seen as desirable, although respondents generally would like more significant sanctions. Most thought the state practice was more satisfactory than Rule 68. There was no strong feeling against the state practice. One lawyer thought the state practice restricts his freedom in negotiating for plaintiffs. This state practice seems preferable to the complicated "capped benefit-of-the-judgment" approach embodied in the current Rule 68 draft.

Another comment was that Rule 68 becomes an element of gamesmanship in fee-shifting cases. It is like a chess game - an extra shield and tool in civil-rights litigation. It is working close to a casino mentality. But Rule 68 has meaning only in cases where attorney fees are thus at stake. It would be better to abandon it.

Professor Rowe described his ongoing empirical work with Rule 68, investigating the consequences of adding attorney-fee sanctions. The work does not answer all possible questions. An offer-of-judgment rule may have the effect of encouraging strong small claims that otherwise would not support the costs of suit;

this hypothesis has not yet been subjected to effective testing. There does seem to be an effect on willingness to recommend acceptance of settlement offers, and perhaps to smoke out earlier offers. Results are mixed on the question whether such a rule may moderate demands or, once an offer is made, encourage the offeror to "dig in" and resist further settlement efforts in hopes of winning sanctions based on the offer. And there is a possible "high-ball" effect that encourages defendants to settle for more, just as there may be a "low-ball" effect that encourages plaintiffs to settle for less.

John Frank reminded the Committee of the reactions that met the efforts in 1983 and 1984 to increase Rule 68 sanctions. At the time, he had feared that efforts to pursue those proposals further might meet such protest as to bring down the Enabling Act itself. He also noted that there are other means of encouraging settlement, and imposing sanctions, that involve less gamesmanship and more neutral control. "Michigan mediation," which was recognized as a form of court-annexed arbitration with fee-shifting consequences for a rejecting party who fails to do almost as well as the mediation award, was described. The view was expressed that this and other alternate dispute resolution techniques have made Rule 68 antique in comparison.

Some members of the Committee suggested that the best approach would be to rescind Rule 68. It might work well between litigants of equal sophistication and resources, but it is not fair in other cases, even if it is made two-way. A motion to abrogate Rule 68 was made and seconded twice. Brief discussion suggested that there was support for this view, but also support for an attempt to provide more effective sanctions in a form less complicated than the present draft.

Alfred Cortese noted that Rule 68 has been "studied to death." An ABA committee looked at it but could not reach any consensus. Most lawyers are adamantly opposed to fee-shifting sanctions.

After further discussion, it was concluded that the time has not come for final decisions on Rule 68. It has significant effect in actions brought under attorney fee-shifting statutes that characterize fees as costs. Repeal would have a correspondingly significant effect on such litigation. Even if the present rule seems hurtful, there should be a better idea of the consequences of repeal. It was agreed that the motion to repeal would be carried to the next meeting, or until such time as there is additional information to help appraise the effects of the present rule or the success of various alternative state practices.

New Evidence Rules 413 to 415 were enacted as part of the Violent Crime Control and Law Enforcement Act of 1994. These Rules take effect 180 days after the bill was signed unless the Judicial Conference recommends alternative provisions to Congress within 150 days after signing. The deadline is February 10, 1995. The Evidence Rules Committee has recommended alternative provisions; its deliberations were summarized. The Criminal Rules Committee has reviewed the Evidence Rules Committee recommendations and has voted to support them.

It was further noted that the author of the provisions enacted by Congress apparently thought that a Rule 403 balancing test applies to the decision whether to admit evidence apparently admissible under the new rules. There is history to support this view. But the plain language of the Rules shows that they were not drafted to say what they intended to say. The Evidence Rules Committee responded to this information by drafting its alternative recommendations as Evidence Rule 404(a)(4). The approach taken was only to improve the drafting to reflect Congressional intent, not to change the substance of what Congress intended. This approach may be bolstered by the view that the purpose of providing 150 days for alternative Judicial Conference recommendations was to seek drafting suggestions, not comment on the wisdom of the choices made by Congress.

Substantial discomfort was expressed with the substance of the Congressional provisions. It was urged that this Committee should draft an alternative provision that would hew as close as possible to the views that have been expressed repeatedly in recent years by Judicial Conference committees, substantially different from the provisions adopted by Congress. A "mere hortatory response" would be lost without a trace in the echoes of history. An alternative draft would at least give the Standing Committee an alternative to consider if it should decide to take a more aggressive stance than that adopted by the Evidence Rules Committee.

These sentiments were met by concerns that although the substance of the Congressional approach leaves much to be desired, the views of Judicial Conference committees have been made clear to Congress. Vigorous efforts were made to advance these views during the legislative process, without significant success. Rejection of these views was particularly clear with respect to the argument that "other crimes" evidence should be limited to cases of actual convictions. To engage in a process of competing with the Evidence Rules Committee draft might simply vitiate the effectiveness of any response by the Standing Committee.

At the conclusion of this discussion, the sense of the Committee was that the Committee should support the conclusions of the Evidence and Criminal Rules Committees that as narrow an

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approach as possible should be taken in attempting to improve the drafting of the Rules adopted by Congress. This support should be conveyed to the Standing Committee.

*Next Meetings*

The next two meetings of the Committee were set. One will be in Philadelphia on Thursday and Friday, February 16 and 17, 1995. The agenda for this meeting will focus solely on Rule 23. Several experienced class-action litigators and a few scholars will be invited to describe their experiences and thoughts for the Committee. The following meeting will be in New York on April 20 to 22, 1995. This meeting will be held in sequence with the mass tort symposium of the Institute for Judicial Administration at New York University. It is hoped that members of the Committee will be able to attend the symposium as another element in the continuing study of Rule 23.

Respectfully submitted,

Edward H. Cooper, Reporter

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## **CONFERENCE ON POSSIBLE AMENDMENTS TO FEDERAL RULES OF EVIDENCE 404(B), 807, AND 801(D)(1)(A) <sup>a1</sup>**

### **MODERATOR**

*Professor Daniel J. Capra*

### **CHAIR**

*Hon. William K. Sessions III*

### **PANELISTS**

*Mary Carter Andruess, Esq.*

*James Asperger, Esq.*

*Hon. James P. Bassett*

*Hon. David G. Campbell*

*Professor Carol Chase*

*Wendy Coats, Esq.*

*Philip Kent Cohen, Esq.*

*Daniel P. Collins, Esq.*

*Professor Daniel R. Coquillette*

*Christopher Dybwad, Esq.*

*Brandon Fox, Esq.*

*Professor Victor Gold*

*Professor Kenneth Graham*

*Hon. David Hamilton*

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*Virginia Milstead, Esq.*

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*Hon. Virginia A. Phillips*

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## **I. WELCOME AND INTRODUCTORY REMARKS**

PROFESSOR CAPRA: Well, welcome, everybody. I appreciate you coming today and it's going to be an exciting conference. I want to turn it over first to the new chair of the Committee on Rules of Practice and Procedure, which means our boss, and that's Judge David Campbell.

JUDGE CAMPBELL: Thank you, Dan. Thank you all for being here, and thank you especially to Pepperdine for hosting us in this incredible place. I've heard several people comment that if they lived here they would never get any work done. I can relate to that since I'm regularly distracted by my office view of the parking lot. [Laughter] I don't know what I would do with this view out the window.

But for those who were here last night, Dean Tacha was as kind and gracious as she could have been. She greeted us like we were long lost family members and just really welcomed us, and thank you to everybody else at Pepperdine who has made this possible.

It's great to be with the Committee.<sup>1</sup> This is my first evidence meeting; as for a few others, it's their first meeting as well. This Committee is a remarkably talented and experienced group of people. And it's good to know that the Rules,<sup>2</sup> which are so critical to our system of justice, are in such capable hands and, particularly, chaired by somebody as capable and experienced as Judge Sessions.

Additionally, thank you for those of you who have come to help us think through these issues. I just finished about ten years on the Civil Rules Committee, and it was the practice of that Committee to regularly meet with experts, people who are really knowledgeable and experienced in the application of the Rules, and to me that is the most important thing that the Committees do--to get experience from folks like you on how the Rules are working and where changes could be made and what might or might not improve the system. I think to the extent we get it right, it's because of the benefit of the input folks like you provide. So thank you very much for taking time to be here. We know that you have busy lives and that this is a sacrifice to come and we really appreciate it.

\*1519 And thanks to Dan Capra. I tell you, Dan, I got exhausted reading your materials. [Laughter] What an amazing effort in putting together these materials and organizing this conference.

So it's great to be with you, and I look forward to the discussion today.

PROFESSOR CAPRA: Thanks, Judge Campbell. I turn it over to my direct boss now, Judge William Sessions.

JUDGE SESSIONS: Yeah, right. Am I your boss? [Laughter]

You know, I was reading the materials that Dan had submitted, and I've been on the Committee for a long time now, and those materials are just phenomenal. In some ways you get the sense that he's able to write these materials with footnotes and citations from memory and observation, but I found a typo. [Laughter]

I asked myself, "Can I call him out?" He can't--you can't.

Well, thanks very much to Pepperdine for hosting us. We had an incredible dinner with Judge Tacha, and I'll just say a little bit about why we're here in Los Angeles. Number one, it's all Dan Collins's fault. He travels across the country for all of our meetings and nobody seems to come out West, so it's important, I think, for the Committee to come out West. This is my only power. I get to pick where the meetings are.

Anyway, the other thing was that Judge Tacha and I have been friends for a long time, going way back into the late '90s and early 2000s. She retired, and she is a star in the judiciary. She's done phenomenal work for all of us in the judiciary, and I just thought it was really a good thing to have a Committee of the Judicial Conference come here just before she retires as a statement to her and to Pepperdine really respecting the work that she's done. You'll find that these symposia are just fascinating. We invite--we will be inviting--everyone to contribute, including the members of our Committee that have observations to make and also all of the experts who have been asked to join us. It's an earnest effort to try to get as much information as we possibly can before we make decisions in regard to changes of the Rules.

We've done this on a number of occasions in the past. It's almost always followed by changes in the Rules of Evidence. Based upon the history of this Committee, the relevance of these particular discussions is very clear.

With that, thank you very much for contributing, and I look forward to the discussion.

PROFESSOR CAPRA: Thank you, Judge. So let's start today with some basic details. There will be a transcript of these proceedings, and it will be published in the *Fordham Law Review*. I'd like to thank the *Fordham Law Review* for taking this on and agreeing to do it.

I want to thank Dan Collins for his help in rounding up some excellent participants and Carol Chase for her help in rounding up the other half of the participants. And thanks to Shelly Cox of the Administrative Office, without whom we could not have convened. She did a wonderful job to get us here and to get this conference functioning.

This is the fifth year in a row that the Committee has convened one of these kinds of conferences, and there have been various goals. Sometimes a goal \*1520 is to see how a Rule is working, so we had a conference on Rule 502<sup>3</sup> about five years after it had been enacted to see how that was working.<sup>4</sup>

One goal at some of these conferences is to deal with new developments that may require attention. So, the Committee did a conference on the challenges of electronic evidence,<sup>5</sup> for example, and another on Judge Posner's views on how the hearsay rule should be changed.<sup>6</sup>

Finally, in these conferences the Committee has been considering evidentiary developments that are worth exploring, whether or not there's going to be Rule amendments. If developments are having a significant impact, this Committee should monitor them--that's part of the Committee's goal and structure.

Another motivation that Judge Campbell referred to is to look at a possible amendment before it is issued for public comment by convening a conference with experts in the field. The usual practice is to develop an amendment and then send it out for public comment. The public comment these days is sometimes very useful but sometimes not. So it can be very valuable to get expert comments, through a conference, before a rule gets sent out for public comment. And that is a critical part of this conference.

So we have three topics on the agenda today, but before we get to that we should all introduce ourselves. We'll just go around, and we'll start with Judge Sessions.

JUDGE SESSIONS: My name is Bill Sessions. I'm a district court judge in Vermont. No, senior district court judge in Vermont and chair of this Committee.

JUDGE CAMPBELL: I'm Dave Campbell, a district judge in Phoenix, Arizona, and I'm on the Standing Committee.

JUDGE LIVINGSTON: I'm Debra Livingston. I'm a judge on the Second Circuit, and I'm on this Committee.

PROFESSOR COQUILLETTE: I'm Dan Coquillette. I teach at Boston College and Harvard Law School. And I'm Reporter to the Standing Committee.

JUDGE MARTEN: I'm Tom Marten. I'm a district court judge in Wichita, Kansas, and a member of the Committee.

JUSTICE BASSETT: I'm Jim Bassett. I'm a new member of the Committee. I'm on the New Hampshire Supreme Court.

JUDGE OLIVER: I'm Solomon Oliver, and I'm chief judge of the District Court for the Northern District of Ohio, and I'm the liaison for the Civil Rules Committee.

MS. LOVITT: My name is Traci Lovitt. I'm also one of the new members of the Committee and I'm a partner at Jones Day.

**\*1521** MS. SHAPIRO: I'm Elizabeth Shapiro from the Department of Justice on the Evidence Committee.

MR. COLLINS: I'm Dan Collins from Munger, Tolles & Olson here in Los Angeles, and I'm also a member of the Committee.

MR. KRAMER: I'm A.J. Kramer, the Federal Public Defender in Washington, D.C., and a member of the Committee.

MR. GRAHAM: I'm Ken Graham. I'm a retired law professor at UCLA Law School.

PROFESSOR GOLD: Victor Gold, a professor at Loyola Law School here in Los Angeles.

PROFESSOR SCALLEN: I'm Eileen Scallen, and I'm Associate Dean for Curriculum and Academic Affairs and an adjunct professor of law at UCLA School of Law.

MR. ASPERGER: And I'm Jim Asperger. I am a partner at Quinn Emanuel Urquhart & Sullivan here in Los Angeles.

MR. COHEN: Philip Cohen, criminal defense attorney, Los Angeles.

MS. ANDRUES: Mary Andruess, partner at Arent Fox.

MR. DYBWAD: Chris Dybwad, Chief Deputy, Federal Public Defender, Los Angeles.

MS. ZUSMAN: Kelly Zusman, U.S. Attorney's Office, Portland, Oregon.

MR. FOX: Brandon Fox, U.S. Attorney's Office here in Los Angeles.

MR. HOLSCHER: I'm Mark Holscher, a partner at Kirkland & Ellis in Los Angeles.

MS. COATS: I'm Wendy Coats. I'm appellate counsel at Fisher Phillips, and I sit in San Francisco.

MS. MILSTEAD: I'm Virginia Milstead from Skadden Arps here in Los Angeles.

MR. JACKSON: Alan Jackson, criminal defense attorney here in Los Angeles.

PROFESSOR CHASE: Carol Chase, professor at Pepperdine.

PROFESSOR LEVENSON: Laurie Levenson, a professor at Loyola Law School, currently teaching evidence at UCLA School of Law.

JUSTICE MANELLA: I'm Nora Manella. I sit on the California Court of Appeal.

JUDGE PHILLIPS: I'm Virginia Phillips. I'm the chief district judge for the Central District of California in Los Angeles.

JUDGE HAMILTON: And I'm David Hamilton, a judge at the Seventh Circuit headquartered in Bloomington, Indiana.

PROFESSOR CAPRA: And I'm Dan Capra, Fordham Law School, Reporter to the Committee. But before me that was really impressive. That was--that's impressive.

I'm going to turn to the first topic on the agenda today, which is Rule 404(b) and developments in Rule 404(b), the Rule which prohibits evidence of crimes, wrongs, or other acts to prove a person's propensity to commit \*1522 those acts.<sup>7</sup> And I'm going to turn with gratitude to Judge Hamilton, who wrote many of the opinions that we are investigating, including the opinion in *United States v. Miller*,<sup>8</sup> which has changed the way that courts have started to think about Rule 404(b).

So, Judge Hamilton, please.

## II. TOPIC ONE: DEVELOPMENTS IN RULE 404(b)

JUDGE HAMILTON: Thank you, and thanks to the Committee for the invitation to be here. This is about as tough an audience as it gets. I usually get to ask questions, but I can't imagine the questions I'm going to be subjected to here.

Rule 404(b) is obviously a constant source of disputes. I have to say that I got some great advice as a brand new district judge from my colleague, John Tinder, who was a veteran prosecutor and criminal defense lawyer. He said, "Dave, just remember you can never get reversed for keeping out 404(b) evidence." It's not quite true, but it's pretty close. I generally took a pretty conservative approach to admitting 404(b) evidence as a trial judge.

And, at the risk of telling everybody here what they already know, this evidence, particularly about prior convictions, just has enormous power. In the years I was a district judge I would always talk with jurors after every verdict and every jury in every criminal case had the same first question: “Has he done this before?” That’s what they wanted to know to reinforce the guilty verdict. And, in the course of the work that I’ve done on the issue, I’ve also had occasion to look at academic and experimental efforts to test the effects of limiting instructions on 404(b) evidence. The results are not encouraging for appellate courts that say so often, “Well, we count on the jurors to follow the district judge’s limiting instructions.”

In our circuit, we’ve had several developments that I want to just talk briefly about how we administer 404(b). The discomfort with excessive use and automatic admission, or nearly automatic admission, of prior bad acts evidence was becoming troubling to a number of judges on our court. This does not track with perceived etiologies, identities, or parties of Presidents who appointed the particular judges. It’s across the board.

Just for those of you who know our court well, Frank Easterbrook and I are probably the principal allies pushing this particular development in 404(b) evidence.

What we were seeing was just too much 404(b) evidence without any careful thought in the record from district judges about why this evidence was being admitted. So we have taken steps in a series of cases to try to insist on increased rigor and discipline in making decisions about admitting Rule 404(b) evidence.

**\*1523** Probably the most significant step is a case, an en banc decision called *United States v. Gomez*,<sup>9</sup> which Dan has written about in the materials,<sup>10</sup> where we were dealing with a drug distribution conspiracy, and one of the fellows had evidence admitted against him that a few weeks after the conspiracy came to an end, he was in possession of a user quantity of cocaine.<sup>11</sup> How this was supposed to be relevant to anything in the distribution charges was unclear. I’ll spare you the procedural saga that led to Judge Sykes’s opinion for our en banc court, but she did several things that are worth noting.

First, she wrote off the old four-prong test of 404(b). That is: Is the evidence directed toward a matter and issue other than propensity?<sup>12</sup> Is the evidence similar enough and close in time to be relevant?<sup>13</sup> Is the evidence sufficient to support a jury finding that the defendant committed the similar act?<sup>14</sup> And its probative value, is it not substantially outweighed by the danger of unfair prejudice?<sup>15</sup> Kind of a familiar litany for trial lawyers and trial judges, at least in criminal cases.

She concluded and we concluded unanimously in this part of the opinion that it was time to abandon that and to focus more on the text of the Rules and reconstruct a test based on 401, 402, 404(b), and 403.<sup>16</sup> The effort in *Gomez*, following up on a series of cases that had been building up to this (where Easterbrook and I had done some of the writing) is to try to insist that district judges lay out on the record the chain of reasoning--not just identifying a particular item from the list in 404(b) but to describe the chain of reasoning that takes you from the 404(b) evidence to some probative indication of intent, knowledge, identity, motive, et cetera.<sup>17</sup> So, if I may quote briefly from the opinion:

[W]e have cautioned that it’s not enough for the proponent of the other-act evidence simply to point to a purpose in the “permitted” list and assert that the other-act evidence is relevant to it. Rule 404(b) is not just concerned with the ultimate conclusion, but also with the chain of reasoning that supports the non-propensity purpose for admitting the evidence.<sup>18</sup>

**\*1524** And then reviewing several recent cases:<sup>19</sup>

The principle that emerges from these recent cases is that the district court should not just ask *whether* the proposed other-act evidence is relevant to a non-propensity purpose but *how* exactly the evidence is relevant to that purpose--

or more specifically, how the evidence is relevant without relying on a propensity inference. Careful attention to these questions will help identify evidence that serves no permissible purpose.<sup>20</sup>

Now I don't have any district judges from within our circuit here, but I believe that message has been getting through. I don't know whether this winds up motivating the Committee, or whether it's the kind of thing that can be done by changing the Rule text, but what we've done is basically say from the Rule text, we think to implement it effectively, you've got to impose this disciplined form of thought before 404(b) evidence is admitted.

In your written materials, there was some discussion about the extent to which a particular issue must be placed at issue in the trial in deciding to gauge what 404(b) evidence might or might not come in.<sup>21</sup> I would say our court's response, at least as I understand it, was to avoid bright-line rules on that question. We certainly have tried to get across the idea that the mere fact that a defendant pleads guilty does not mean that intent is always at issue and, therefore, you can put in bad prior acts and prior convictions to show intent.

What we have advised in the *Gomez* opinion is to wait and see--for a trial judge--to see how the case develops before making a final commitment about admitting or keeping out 404(b) evidence.<sup>22</sup>

Then I think I'll just say one other thing briefly, which was about five or six years ago--our circuit also deep-sixed the inextricably intertwined category of evidence that lies somewhere between actual evidence of the crime charged and 404(b) evidence. In our court's experience, we just found that it was an incoherent mess that contributed nothing of value to making the decisions and tended to produce fuzzier thinking and, to the extent that's possible, deny defendants the right to advance notice and the kind of opportunities to resolve such important 404(b) issues before trial. That was in a case called *United States v. Gorman*<sup>23</sup> from 2010.

PROFESSOR CAPRA: Judge, can I ask you a question about the *Gomez* case?

JUDGE HAMILTON: Yes.

PROFESSOR CAPRA: So what's required in the Seventh Circuit is that the district judge must state on the record the chain of inferences that leads to the particular not prohibited purpose.

JUDGE HAMILTON: The probative value, yes. Yes.

\*1525 PROFESSOR CAPRA: That's going to be a requirement, so that's the way you regulate it.

JUDGE HAMILTON: That's the way we do that, and obviously it's with the judge typically saying to the prosecutor, "Explain to me how do we get ...." In *Gomez*, it was preposterous.

PROFESSOR CAPRA: Yeah. Well, right, because the only reason that the drug act was probative is that it made it more likely that he was the one who did the charged crime. There's a recent case kind of like that--it's a constructive possession of a firearm case--and the government wants to introduce the fact that the defendant possessed a different firearm about a year ago.<sup>24</sup> The only way that act is probative for any mental state is to go through the propensity inference.

MR. COHEN: I just had one follow-up question for Judge Hamilton. When jurors ask you if the defendant had done this before, do you tell them?

JUDGE HAMILTON: Yeah. After they've delivered the verdict, yes, I do.

MR. COHEN: Hopefully not before. [Laughter]

JUDGE HAMILTON: Precisely.

JUDGE OLIVER: When you talk about the example you gave whether it goes to propensity, is it a constructive possession case?

PROFESSOR CAPRA: Constructive possession case.

JUDGE OLIVER: So it may not be propensity then. If it's constructive, then it may go to intent and so forth in turn.

PROFESSOR CAPRA: What does the fact that he had a gun previously say about intent, other than that he is a guy who has a propensity to possess guns? I guess that's the question.

JUDGE OLIVER: Well, I guess when you get something that goes both to propensity and to something else then the question is what do you do? I think it could go to whether he was likely to possess--to have possessed--a gun at that time, depending on the facts.

PROFESSOR CAPRA: Any help on this from my professors here?

PROFESSOR GOLD: Well, I guess what I would say is if you don't take the approach that the *Gomez* Court takes, then I'm not sure what 404 does for us. In other words, if you're able to proceed down a logical train that involves a propensity inference, you can almost always get to a 404(b) point as well.

He's a bad guy, thus he must have had the intent to do this. He's a bad guy, thus that's the guy's identity. So, if we don't follow *Gomez*, what's left of 404?

I think, speaking as someone who's taught probably thousands of evidence students over the years, the position I take is of course you can't proceed through a propensity inference to get to a 404(b) conclusion; otherwise the Rule doesn't mean much. But then I've got to force my students to slow down and think very logically about how is this evidence getting to the 404(b) conclusion. It takes some time, and thus I think the idea of asking the trial judge to state on the record or the prosecutor to state on the record how we get there is important. It could be of significant value; otherwise I don't see what 404 does for us.

PROFESSOR CAPRA: It actually could be the subject of a Rule, right? The Rule could provide that "the trial judge must state on the record" or something like that. Eileen. I'm going to go with first names even though you're all like famous people. Go ahead.

PROFESSOR SCALLEN: I am intrigued by this approach in *Gomez* because this is exactly what I also try to get students to do. It's just very good at building their legal analysis skills as well as to understand the final purpose of the Rule. However, in practice, especially at trial, I think it's very, very hard to do on the fly. Although some of these difficult cases would be raised by motion in limine, I warn students that it's very hard if you're the defense lawyer when the prosecutor throws all the 404(b) rationales at the trial judge and, of course, the favorite, "It goes to state of mind, Judge." And trying to get judges to understand that state of mind is not a catchall can sometimes be difficult.

I did a lot of training of district judges in Minnesota on evidence rules before I came back to California a few years ago, and 404(b) was one of the major problems that they recognized needed attention. Look at what Minnesota did in 2006;<sup>25</sup> Minnesota is one of the forty-four states that follow the Federal Rules of Evidence. Every change this Committee makes has reverberations throughout the country.

PROFESSOR CAPRA: I think the Committee is well aware of that responsibility.

PROFESSOR SCALLEN: Right, right. So what Minnesota did is to amend 404(b) very specifically to set out a checklist because trial judges love checklists.<sup>26</sup> They just want to be shown what they need to do. And so it now has five basic parts.

One of the parts is the notice requirement that 404(b) has,<sup>27</sup> but the second part is the prosecutor clearly indicates what the evidence will be offered to prove.<sup>28</sup> So it really highlights this relevance portion. You know, what element or what theory under 404(b) are you requiring?

It also, however, takes 404(b) to a new level, and this would require some substantial discussion on the federal part. Minnesota requires, as the third element, that the other crime, wrong, or act be proven by clear and convincing evidence.<sup>29</sup>

PROFESSOR CAPRA: We can talk about that, too, what standard of proof that requires.

\*1527 PROFESSOR SCALLEN: If we really felt 404(b) is out of control, that's another step.

PROFESSOR CAPRA: Yes, Ken.

MR. GRAHAM: Well, one of the problems I think students have dealing with this is the way we tend to teach relevance. Thinking about relevance does not come naturally, and so you've got to spend a lot of time with the students getting them to do that because unless they get that, then they're going to miss that completely.

The other suggestion that I was going to make is if you're going to address a problem, then it's got to be in the text of the rule because I don't think you can accomplish anything with something in the Advisory Committee Note. At least that would be my position until somebody does a study of how often Advisory Committee Notes are actually cited. My off-the-cuff impression is that they almost never see them.

PROFESSOR CAPRA: We actually did a study on Rule 702, the Committee Note from 2000.<sup>30</sup> It's been cited more than 800 times and relied upon, actually.

PROFESSOR SCALLEN: Yeah. Very helpful.

PROFESSOR CAPRA: But, for the record, we don't write Committee Notes like that anymore because they're too treatise-like. The Standing Committee is currently of the position that you shouldn't include cases in a Committee Note, and so it's a different world today. So I think you are right that any change must be to the text of the rule.

Yes, Brandon.

MR. FOX: I probably should say for all of us with the Department of Justice, none of our comments are necessarily those of the Department of Justice--

JUDGE SESSIONS: Do we have to turn off the microphones? [Laughter]

MR. FOX: I practiced in Chicago for nine years as an AUSA and then came here to Los Angeles, and the Ninth Circuit has the same standard that the Seventh Circuit used to apply before *Gomez*. Reading *Gomez*, I find it to be very clear and straightforward. I think what we're looking at is a 403 analysis<sup>31</sup> where the probative value has to be one of the permitted purposes under Rule 404(b), and part of your analysis about whether there's an unfair prejudice is whether this is being used for propensity or not.

And I think that that's a very simple analysis. I think the four-part test that we've used in most of the circuits really goes to that. But I think doing away with that four-part test and just looking at it from a 403 perspective in the way that I've talked about and the way it's in *Gomez* is the way to do it, and I think it makes it so much easier for practitioners.

**\*1528** Maybe things are different in different cases. Actually, Chris Dybwad here from the Federal Public Defender's office will probably tell you how it is on the defense side in L.A. But I think with 404(b) it should be very rare that we're addressing these issues on the fly. I think that most of these issues are going to be addressed up front, in motions in limine. Even if they're not decided before trial, they're at least briefed or argued before trial, if I'm not mistaken.

PROFESSOR CAPRA: So about 404(b) and 403, I can see how you would come to a different conclusion on which Rule is being applied in a case like *Gomez*. For the Committee the question is, then, which Rule gets amended, and nobody's going to amend Rule 403, right? So, if there were going to be an amendment it would seem to be Rule 404(b). It's an interesting question.

MR. FOX: I don't know that it needs to be amended.

PROFESSOR CAPRA: I understand.

MR. FOX: I have a couple things for Judge Hamilton, if I can turn the table and actually ask another question.

JUDGE HAMILTON: Sure. Fair enough.

MR. FOX: Yes. So two things. If it had been, let's say, a counterfeit case, like production of counterfeit money, and the counterfeit money that looks like it's similar to the kind that was seized a month ago is in his room, do you get to a different place there in *Gomez*?

Two, a separate issue, I read your concurring opinion and dissent in part and the jury instruction that you offered.<sup>32</sup> I assume that that has not been implemented currently in the Seventh Circuit, but you instruct a couple things that I have questions about. You say before using this evidence you must decide whether it's more likely than not.<sup>33</sup> I'm wondering if you're saying that the jury needs to do that unanimously or each individual juror can make that decision.

JUDGE HAMILTON: Ouch.

MR. FOX: Well, I think that matters because you want jurors to take different facts and come to conclusions ultimately based on which facts matter to them, and I can see more jurors getting confused with that if the test is that the finding be unanimous.

JUDGE HAMILTON: Yeah, that's an interesting question. I don't think we were trying to instruct the jury that they would have to find by a preponderance unanimously. I don't think we ever do with respect to particular pieces of evidence. I mean, you have the judge making the preliminary evaluation--

MR. FOX: Right.

JUDGE HAMILTON:--as to whether it comes in and then leave it to the jurors, and they may or may not agree on their views of specific items. But **\*1529** I'm trying to imagine the appeals if we tried to order unanimity on particular items of evidence.

MR. FOX: What about the counterfeiting?

JUDGE HAMILTON: The counterfeiting example would probably be a much stronger use. In *Gomez*, what you had was the difference between a medium wholesale operation in cocaine distribution versus, if I recall correctly, about a half an ounce of

user quantity cocaine weeks after the distribution operation had been interrupted. I never really saw the nonpropensity inference there.

Before I did anything definitive, I would want to know a little bit more about what issues were being raised about the counterfeit that's charged, the counterfeit currency that's charged, and where the additional evidence comes in. It could just be evidence of the crime that's charged. So allow me to duck a little bit.

PROFESSOR CAPRA: But if his defense is he didn't know it was counterfeit, then you're going to let that in, right?

MR. FOX: Or even identity if it wasn't *Gomez*. If you say, "It's my roommate instead that did it," it seems like that is fair game. If you can show that that counterfeit money came from the production that has already been seized previously, I think that it's probably--

PROFESSOR CAPRA: The same batch.

MR. FOX: Same batch.

JUDGE HAMILTON: Yes. If you can show that he knows it's counterfeit, then that goes a longer way.

PROFESSOR CAPRA: Because that would show he knew that.

JUDGE HAMILTON: Yes.

PROFESSOR CAPRA: Chris, did you have a comment?

MR. DYBWAD: Just very briefly. As a threshold matter, the sort of rule change that we are talking about--requiring articulation of a proper purpose that does not proceed through a propensity inference--would make a lot of sense from my perspective; it encourages the type of rigorous analysis that Judge Hamilton was talking about.

I will say I agree with Brandon that the four-part test in the Ninth Circuit (as you sort of think about at the too remote in time, the substantially similar) is all much ado about nothing.<sup>34</sup> I mean, at the end of the day, I don't know what it really tells you. But actually forcing people to specify, "Here is the inferential chain," I think does make a lot of sense.

I will tell you I routinely receive discovery letters saying, "Here's your discovery. By the way, somewhere in here is something that relates to the following enumerated Rule 404(b) purposes."

PROFESSOR CAPRA: That's the "general nature" of the evidence that is required for disclosure under Rule 404(b)--not very helpful.

**\*1530** MR. DYBWAD: And even in the context of motions in limine. I'll file a motion in limine and receive a response that it's relevant to all the enumerated 404(b) purposes. So rigorous analysis, I think, certainly makes sense.

MR. COHEN: I think Brandon raises an excellent question about this unanimity requirement because--I do much more state court practice than federal as a caveat--so often the response is, "Well, now, counsel, we're getting into a trial within a trial," and my answer to that is, "We absolutely are because, as His Honor said, why ask the question about whether you tell the jury afterward whether or not he's done this." My concern is, quite candidly, I want to talk to jurors after a verdict. Facts that they learn posttrial to then support things they may have thought or conclusions they may have been on the fence about reaching during the trial may very well impact questions that I, or my investigator, then subsequently ask them about what they relied upon.

And so, when you get into this concept or objection by a judge, “Hey, we’re going to trial within a trial,” my response is “We absolutely are because, as His Honor indicates, it is so critical to human nature and human thinking ‘has this guy done it before?’” Once they reach that determination, the rest becomes so much easier.

And so here’s the problem: you have twelve people, nine may be relying on something, three may not. The nine are now trying to convince the three, “Well, he must have done this because he’s done that.” If that was, for instance, a Fifth Amendment issue and nine people were saying, “Hey, he didn’t testify, he must be guilty,” hopefully the three would say, “We can’t consider that.”

So I think it’s a great point. I don’t know what the fix is and maybe there isn’t a fix. But to require a jury to reach this first decision about this very damning evidence at a preponderance standard might be one way to try to guard against it. Then, say if you find this, you may consider it going forward for that.

MR. FOX: And just to be clear, I’m not proposing that. [Laughter]

MR. COHEN: But I am.

PROFESSOR CAPRA: That’s good. I like this. So Eileen and then Dan.

PROFESSOR SCALLEN: Going back to Brandon’s point about the relationship of 404(b) to 403, and also your point, Philip. We have a special balancing test if the defendant takes the stand and is going to be impeached with prior convictions.

One thing Minnesota does is it incorporates a similar special balancing test for 404(b) as the last element.<sup>35</sup> So there is symmetry in a sense. If you’re going to use these other bad acts against the defendant in a criminal case, you have to show that the probative value of the evidence is not outweighed by \*1531 its potential for unfair prejudice to the defendant. That’s not exactly the 609 test for defendants,<sup>36</sup> but it’s the parallel test.

And basically what it means to trial judges is if it’s a close case the evidence stays out, whereas 403 is tilted toward admissibility. So it doesn’t provide an absolute burden to the prosecution in getting it over and admitted, but it does in close cases allow the judge to exclude the evidence.

I do have to point out that despite this really tough 404(b) Rule in Minnesota, they actually do get a lot of 404(b) evidence admitted. This is not the death knell of that evidence, which can be useful.

PROFESSOR CAPRA: Dan.

MR. COLLINS: One of the questions I thought that the *Gomez* opinion raised, and I just wanted to flag for discussion, was whether the relationship between the two subparagraphs in 404(b) is clear enough and whether there should be an amendment to clarify the relationship. *Gomez* puts its finger on that issue and then derives the test that the first one would be nullified if the purpose in the second one evaded the Rule in the first. But that’s not necessarily clear from the text.

And when I looked at this issue, I thought of a case I remember from when I was clerking called *Hadley v. United States*,<sup>37</sup> which was ultimately argued the next term and then dismissed as improvidently granted. The U.S. Supreme Court never explains why, but *Hadley* was a very troubling case that sort of flags this issue, and the Ninth Circuit’s opinion in *United States v. Hadley*<sup>38</sup> takes a very different view of the relationship between the clauses.

It says, “[W]e have held that Rule 404(b) is an ‘inclusionary rule,’ under which evidence is inadmissible ‘only when it proves nothing but the defendant’s criminal propensit[y].’”<sup>39</sup> So that basically says, “Look, subparagraph (2) is a safe harbor, and certainly you look at the clauses and, you know, it’s not clear what the relationship is.”

In *Hadley*, it was sexual molestation of children, and Hadley's argument was that he didn't do the acts, but if he did do them, they couldn't have occurred by accident, so it certainly isn't an issue of intent because you couldn't do what they said he did by accident.<sup>40</sup> But the government said, "No, we're entitled to prove intent, so we're going to bring in all these other kids who are going to say what you did to them." And, if you look at a relationship between those clauses, it's obvious that it's for propensity purposes.<sup>41</sup>

**\*1532** While the Supreme Court ultimately didn't resolve it, I think it flags, particularly when you look at it with *Gomez*, what's the proper relationship between the clauses?

PROFESSOR CAPRA: It's interesting to think about what it means to be a rule of inclusion, because you've got the exclusion of character evidence in Rule 404(a) when offered to prove conduct, and then Rule 404(b) actually restates that exclusion, but then all of a sudden it's a rule of inclusion. What could that possibly mean?

So the Third Circuit's theory is kind of an interesting one about what it means to be a rule of inclusion. What it means is that the list of proper purposes is not all inclusive. That's all it means, and therefore essentially that means nothing because the Rule itself says "such as,"<sup>42</sup> so it's pretty clear that it's a rule of inclusion of other possible purposes if that's what you mean by inclusion.<sup>43</sup>

But I don't think that's what many courts are saying when they say it's a rule of inclusion. They're not saying that. They're saying virtually everything gets admitted whenever a proper purpose is articulated.

MR. COLLINS: It's a safe harbor.

PROFESSOR CAPRA: Right, it's a safe harbor. Judge Livingston.

JUDGE LIVINGSTON: I'm thinking back to when I taught this all these years ago. The Second Circuit also used the language of inclusionary approach when I was trying these cases as a prosecutor. During this period, the Second Circuit had very strong admonitions about the need to balance, to wait to the end of the trial to see how the evidence developed, and to see what nonpropensity use the jury would make of the evidence. I have two questions.

One, I have a background concern about whether this is about a textual change to the Rule or whether this is about recognizing the concepts like the difference between propensity, knowledge, and intent versus concepts like probable cause. They're such difficult and big concepts to apply in practice that judges occasionally have to remind themselves of the purposes. Whether we can capture the concerns we have in a Rule, and I was thinking of one--the counterfeiting example.

Imagine the counterfeiting case, the case for prosecution of a conspiracy to distribute counterfeit currency, and you have a prior counterfeiting conviction. The government's case is entirely circumstantial, meaning they have an undercover who's met with a person who sold counterfeit currency to the undercover--they have a mountain of evidence against this person. But the evidence is that the defendant dealing with the undercover will leave and after saying, "I'm going to go meet with my source," he goes to a place. They have pictures of him meeting at McDonald's. They never have a hand to hand. But this person is always showing up at the right place at the right **\*1533** time. It is powerful circumstantial evidence, but the government wants to introduce the counterfeiting conviction from some years ago, completely unrelated, and says, "This goes to his intent, Your Honor." What this is showing is what his intent was in showing up at these places.

PROFESSOR CAPRA: Explains why he was there.

JUDGE LIVINGSTON: What are the chances? What are the chances that he's always showing up at the right time in the right place unless he's showing up with a mind to participate? Is that propensity or is that intent? I've always found that very difficult in talking to my students and prosecutors stumble over it when they attempt to argue.

PROFESSOR CAPRA: Yes that is the heart of the problem. Justice Manella?

JUSTICE MANELLA: I think that's probably what came up in *United States v. Roux*,<sup>44</sup> mentioned in the materials, which is a sexual abuse case, a case where the testimony is a minor accusing someone of sexual abuse and the court permitted evidence of two other minors to testify to acts against them by the defendant.<sup>45</sup> While I see that they affirmed under the Federal Rules this as showing the defendant's interest in sex with young girls showed his "motive," it seems more likely in that case that using motive is really more proclivity or inclination, the same as whether if he had an inclination to eat cottage cheese that might show he was eating cottage cheese in this case. I'm not sure it gives him a motive to eat cottage cheese. It just gives him an inclination to do so.

But I will note that obviously in California, they just bit the bullet and they said in sexual abuse cases we're not going to pretend that this is anything but propensity evidence and we have section 1108 that says it comes in.<sup>46</sup>

PROFESSOR CAPRA: Right.

JUSTICE MANELLA: And at some point people, I think, we have to resolve the tension between the underlying purpose of 404(b), which is not to permit propensity evidence, and if there is a consensus reached that there are certain sorts of offenses that are so difficult to prove without it that we should just be intellectually honest and admit that we are allowing the bad act to prove the defendant's propensity to commit that crime.

PROFESSOR CAPRA: Well, that's what Congress did. They were as intellectually honest as the day is long, Rules 413 to 415 allow proof of sexual assaults to prove propensity to commit the sexual assault charged, and now prosecutors don't have to make the often false argument that they are not offering the evidence for propensity.<sup>47</sup>

Yes, Mark.

\*1534 MR. HOLSCHER: Just briefly. I'm a little concerned about this added potential test--that the defendant must have actively contested the mental state--because the government has the burden of proof beyond a reasonable doubt. I'm a former AUSA. I'm on the defense side now, so I'm of mixed minds here truly on the scales of justice. But I don't think the proper analysis is whether the defendant actively contests. I think it's whether it's an issue that potentially is in dispute, and I think my sense is all of us here think that *Gomez* and *United States v. Smith*<sup>48</sup> were properly decided. It's my sense from what people have said because it was really propensity evidence; someone tried to pigeonhole it in a permissible use under 404(b)(2).<sup>49</sup>

But I think adding something through case law that's not in the Rule in my view is a bit problematic. I don't see how you can add that just because the defendant hasn't actively contested it.

MR. HOLSCHER: The Rule says it may be admissible for another purpose.<sup>50</sup> I think that district courts have discretion with the "may be admissible" language to make that decision, and I think it is right that the court has to carefully figure out, "Is this propensity?" I think all of us can agree that someone dealing drugs at the same location where they're alleged to have possessed guns doesn't seem to really go to any element. The same thing if you're possessing drugs where you're alleged to have distributed.

But I'd be wary of adding something about contesting the element that doesn't appear to be part of the Rule.

PROFESSOR CAPRA: Judge Hamilton.

JUDGE HAMILTON: It's a really interesting question, and it's one where, let's say, we avoided bright-line rules, but to the extent you are trying to balance probative value and potential prejudice under Rule 403 it seems to me that the trial judge's understanding of what is actually in dispute figures into that balance.

For example, and this goes back to the *Miller* case, which I wrote and which is cited in some of the materials, where the drugs that were found were in a large number of sealed plastic bags, some with price tags on them.<sup>51</sup> The government has to prove intent to distribute, but there is no doubt that whoever was in possession of those drugs was intending to distribute those as a practical matter.

The question is did this defendant have sufficient ties so that you tag him with that possession with intent to distribute.

So the approach that I think we were adopting in *Gomez* on that point is not an addition of a requirement but simply an elaboration on what that balancing of probative value and potential prejudice shows.

\*1535 MR. HOLSCHER: So maybe the test is whether the mental state is actually not going to be an issue in dispute. In other words, if it's him, he had the intent. To me, it's not a focus whether a defendant contests it, it's the issue of whether it truly is relevant.

PROFESSOR CAPRA: The question is what it means to be truly in dispute. Mary.

MS. ANDRUES: I have a practical question. Mark and Brandon, and Mark and I actually were fortunate to grow up under the Honorable Norma Manella at the U.S. Attorney's Office in Los Angeles. So we had a pretty strict standard for having to give notice of Rule 404(b) evidence. I thought that there was a pretty stringent test with our district court judges. Pretty much pretrial it had to be in front of our judges, or we weren't going to be able to come in the back door with 404(b).

One of the things that concerns me listening to this now that I do defense work is the notion of reserving the ruling on the 404(b) evidence. I like the notice requirement as a defense lawyer. I never really thought much about it as a prosecutor because I was just trained that was what I had to do, but now I really like it because I want to know what the government's case is going to be, and I don't really like the idea that the court will say, "Well, counsel, we'll just wait and let you know about how we're going to rule on it."

I'm not sure I agree with an amendment to the test because I think clear guidance from the circuit court is good because you can take the factual cases under which the court has admitted it or not admitted it, and determine whether or not the test has been met, once you have the standard that you have to meet because evidence has nuances to it. But this notion that I have to worry about in my defense that the judge is reserving her ruling on the 404(b) evidence, and so I've got to navigate. So, if I know ahead of time what the ruling is, because either the government can meet its test or not, and then I know, well, boy, I sure can't put this at issue in the defense because I could see how the government could come back and what it would say on rebuttal, "Well, Ms. Andruess put this in at issue, Your Honor, and I should be able to bring it in."

So this notion of the motions go in and we just get a wait and see approach concerns me as a practitioner.

MR. COHEN: You also want to voir dire on it.

MS. ANDRUES: Yes.

MR. COHEN: And you want to give it in your opening statement. If they're going to hear it, I'd rather have them hear it from me.

PROFESSOR CAPRA: Yes, Judge Phillips.

JUDGE PHILLIPS: I just want to jump in and say that throughout this discussion, I have been thinking how important the pretrial conference is and the motions in limine, and most of the practitioners both on the defense side and the prosecution in

our district really are very good about bringing those issues up because I don't want to be surprised in the middle of trial, and I want to be able to reflect on it a little bit.

**\*1536** And I also agree with what Judge Hamilton said. I take a pretty conservative approach about letting in 404(b) evidence, but it's something I want to know about in advance and rule so there are no surprises, for example, in opening statements.

PROFESSOR CAPRA: Brandon.

MR. FOX: I want to go back to what Mark said, and I think that an “actively contests” standard is unfair to the prosecutors. I think defense attorneys can passively contest things. You could just talk about reasonable doubt, it won't meet your burden beyond a reasonable doubt. You can just say that in opening statement about anything very generic and we're stuck with having to prove all of the elements, and you haven't actively contested a point yet, but you never know how a juror thinks. That's the other thing that you just don't know. There are many times that, if we are able to talk to the jurors afterward, they've thought something completely different than what the attorneys had thought of or what we've argued.

Also, they're not required to accept any stipulations. That's the other thing that we need to keep in mind is that they don't have to agree with our stipulations. I think they generally do, but we just never know what a juror thinks. So I think that a lot of things are at issue even if it's not “actively contested.”

PROFESSOR CAPRA: Jim.

MR. ASPERGER: Yeah, Dan, I wanted to come back and just build upon a point that Chris and Philip were making, which I think dovetails with something Brandon was saying on what the jury is thinking.

We all know these are difficult issues, but having more rigor in how they're approached pretrial and how they're decided, and also using that rigor, such as the analysis in the *Gomez* case, is very important in order to have the court have more consistency and play a gatekeeper role. We don't know how the jury is thinking, but there's a very real risk no matter what instruction is given that the jury is going to use bad act evidence for the improper purpose of propensity, and I saw that on both sides of the table as a prosecutor and defense attorney. But in addition, in the last five years I've been on two juries, two criminal juries. I'm not sure why they let me stay. [Laughter]

But it was very instructive in a number of ways. One was a capital case and it wasn't a 404(b) issue, but it does go to the question of what juries actually consider. It was in the death penalty phase, and for those of you who aren't familiar with the instructions given in that phase, one instruction is in deciding whether to impose the death penalty you should not consider the cost. It's a very clear instruction. It's a standard instruction.

And in our case it was a very close case because there were a number of mitigating circumstances, including that the defendant had an IQ of about 70. But there are other ones as well, and over the course of what was a very interesting debate on what penalty to impose, one of the jurors raises his hand and he says, “I know the judge told us we're not supposed to consider this, but I'm in the insurance business, and if we don't impose the death penalty, based upon the actuarial tables, it's going to be a huge cost to the people of the State of California.”

**\*1537** MR. COHEN: He whipped out his chart at that point. [Laughter]

MR. ASPERGER: And so, in any event, I think that bears on the 404(b) point because the gatekeeper role is important in having more certainty and more rigor even though the standards are hard to apply. That was one of the things I very much liked about *Gomez*. I think it's very, very helpful in dealing with those sorts of issues that really are a reality.

I will say that sitting on the jury it was very heartening to see how conscientious they take their roles. Just to close the story, I was the foreperson, and I told the jury, you know, the judge said we're not supposed to consider this, but I know whether it's more costly or not, and I'm not going to tell you what the answer is, but don't assume he's right. [Laughter]

JUDGE PHILLIPS: Thank you for your service. [Laughter]

Very seriously. I think it makes such a big difference in selecting a jury during voir dire when lawyers aren't trying to get off. It must have been a big sacrifice for you to serve.

MR. ASPERGER: Two months.

JUDGE PHILLIPS: So thank you so much. What a great example.

PROFESSOR CAPRA: Carol.

PROFESSOR CHASE: Yes, going back to whether such an issue is actively contested, one of the things that strikes me about 404(b) is not all of the proper purposes necessarily should have to fall within that category. For example, if you're using a signature crime to prove identity, that should be part of the prosecutor's case. You shouldn't have to wait for the defendant to say, "No, it wasn't me." I mean, nothing beyond a not guilty plea should be necessary in that example. Other purposes like lack of knowledge, maybe you do want to wait for that to be contested.

So maybe the thing to do is amend the Rule by saying it's admissible for another purpose such as refuting a claim by the opponent of lack of intent, lack of knowledge, or to show identity or motive or some other purposes. So you've got it in two different categories, one where it would normally be in the prosecutor's case-in-chief, and the other where it probably is going to be more prejudicial and less probative in the absence of it being actively contested by the defendant.

PROFESSOR CAPRA: That's an interesting thing to think about, to figure out how it works and how and whether to distinguish among proper purposes.

MR. FOX: I just want to say I think that those distinctions would all be covered by the 403 analysis.

PROFESSOR CAPRA: Judge Campbell.

JUDGE CAMPBELL: I just wanted to raise a question about another word in 404(b)(2), which is the word "purpose."<sup>52</sup>

When I'm confronted with 404(b) issues, it's often the case as we've seen in the hypotheticals discussed today. The evidence goes to one or more of the purposes listed in 404(b), but it also clearly goes to propensity. It can be **\*1538** used for both purposes. And the rule says that I am to consider whether the evidence is admissible for the purpose of proving intent, and I sometimes ask: Whose purpose?

The prosecutor will say, "Well, my purpose for getting this in is to prove intent, and the way you solve that problem, Judge, is tell the jury this is coming in for intent and not for propensity." Clearly the evidence can have the effect of both propensity and intent.

And I've wrestled with the issue and I'm tempted at times to fall back on this assumption that the jury will follow the instruction, but the reality is-- particularly with this evidence--it's very hard for them to do.

And so I don't know the answer, but I wondered if we shouldn't be focusing on the purpose for the evidence versus the effect or potential effect of the evidence on the jury.

PROFESSOR CAPRA: That's a good point. Judge Marten next.

JUDGE MARTEN: Thank you. Frankly, I think that what has thrown us into a state of some disarray is subsection (2) of 404(b) which talks about permitted uses, and if it were up to me, I'd get rid of that altogether--the list--and just leave section (1), subsection (1).

I'd get rid of the permitted uses. You'll notice we have a pretrial order that we use in criminal cases in our district that requires the government within a certain time period to make the disclosure. So we also order reciprocal discovery to the extent that it's allowed, and that eliminates a lot of--at least the last minute--kinds of things that come up and which sometimes lead to knee-jerk rulings when they can be avoided.

But it seems to me that subsection (1), prohibited uses, pretty much covers the waterfront, then you can go to a 403 analysis and determine if there is some other appropriate use for it.

PROFESSOR CAPRA: So get rid of 404(b)(2).

JUDGE MARTEN: Right.

PROFESSOR CAPRA: So, at the future meeting when the Committee did that, you wouldn't be able to get out of the meeting room because there would be lines of DOJ lawyers waiting for you. [Laughter]

JUDGE MARTEN: No, I think you could use the argument--

PROFESSOR CAPRA: Bolt out the back door. Is that what you do? [Laughter]

JUDGE MARTEN: Not at all. Show just with subsection (1) that this is not a prohibited use. Instead of having a finite list which has been interpreted expansively or limiting it in some way, let them make their best pitch, and then use a 403 analysis if you get past such. I'm not too worried about the government's response, actually, to that kind of thing because they've got so many weapons at their disposal anyway.

MS. ZUSMAN: You raised a concern in the materials that I don't think we've addressed yet this morning and that is that 404(b) is not a Rule that only applies to criminal cases. It also applies in civil cases and, in particular, employment discrimination cases.

**\*1539** And I guess I'm concerned. I think we all recognize that evidence is messy. It doesn't fit neatly within either a propensity box or a nonpropensity box. So I think the real concern is does propensity predominate versus is there a propensity element in there at all. And my concern about this requirement of a propensity-free chain of reasoning as applied in the civil context is then that's going to knock out the plaintiff's "me too" evidence in employment discrimination cases, and I'm not sure how we work around that.

PROFESSOR CAPRA: I don't know that the proposal would be for a work-around. It would be that the "me too" evidence, as you describe it, would be prohibited. If all the plaintiff is doing is using prior acts of discrimination to prove propensity, that would be barred under the requirement of propensity-free inferences. You're right. It does have civil consequences. Judge Sessions.

JUDGE SESSIONS: I would like to ask a question more than make a statement. I know that there are a lot of judges who, faced with a 404(b) issue, turn to the government and ask the proper purpose--what's essentially the exception. They identify state of mind, and that's it. That's the level of review.

So, if we as a Committee really want to get judges to think more deeply about propensity, you can either change the Rule or you can do it through Reporter's Notes. Obviously, it's much easier to do the Reporter's Notes. And you made an observation, I think, that nobody reads the Reporter's Notes. Is that correct?

I'm interested to know if, in fact, we came up with this idea of just describing this issue in greater depth and requiring judges to make a more detailed analysis of propensity, would that have any effect or is that worth anything?

PROFESSOR CAPRA: Good question. Laurie.

PROFESSOR LEVENSON: And I'd like to respond to that and respond to Judge Marten as well. I actually think that the rules serve dual purposes: first they govern judges' decision making but also it's very much an information rule, an educational book for the advocates and for the judge when the judge is making her decision, and that's why I think keeping some form of 404(b)(2) is really important to get the judges thinking away from propensity, whether there are credible proper purposes for the evidence.

To respond to you, Judge Sessions, I actually do at least require from my students that they be familiar with the Advisory Notes. It is the best treatise, and, as some of you know, many of us go around the country, whether for the Federal Judicial Center or otherwise. We engage in educational programs with judges. I do think that having Reporter's Notes and Advisory Comments will lead to a rash of education, highlighting this as an issue, being able to give judges' hypotheticals in groups they can work together with and so that there will be a better understanding of them.

This is a hot issue. I actually think that's one way to try to improve the practice, rather than jumping into changing the Rule, changing and alerting the judges through an Advisory Reporter's Notes. I'm hopeful that they can be helpful.

\*1540 PROFESSOR COQUILLETTE: Dan?

PROFESSOR CAPRA: Yes, I know what you're going to say. [Laughter]

PROFESSOR COQUILLETTE: He knows what I'm going to say. I'm Reporter to the Standing Committee on Rules of Practice and Procedure. The Standing Committee has always been very skeptical about putting substance in the Reporter's Notes that are not in the Rule itself. There are a couple reasons for that. One of them is the longstanding practice that you do not change the Reporter's Notes unless you change the Rule itself.

So the idea that you're going to change the Reporter's Notes and not change the Rule is something that we've always avoided.

PROFESSOR CAPRA: Well, we'll just change like three words of the Rule, then have a very lengthy Committee Note.

PROFESSOR COQUILLETTE: This time we'll put in a comma. [Laughter] The second thing is that the Supreme Court, officially, when it promulgates a Rule, does not approve the Notes. So the Notes have a different authority behind them. And the third is just practical, which is that you don't want to create a dichotomy between what's in the Rule itself and what's in the Notes. You don't want something in the Notes that really changes the Rules. So, in general, the Standing Committee, which has to look at suggestions from the five Advisory Committees, is going to be skeptical about a solution that is a Note-based solution.

JUDGE SESSIONS: Can I just respond? I mean, this is not changing the Rule. This is just explaining the process. I mean, you're taking *Gomez*, you're basically using that as a process analysis of 404(b), and then you're just exploring that in the Reporter's Notes. It's not changing the words. It's not changing the Rule. It's just explaining the process by which judges should come to the ultimate decision, right?

PROFESSOR COQUILLETTE: If you're not changing the Rule, you can't change the Notes.

JUDGE CAMPBELL: I think another thought that I've been sensitive to is that this is a Committee under the Rules Enabling Act that's authorized to write rules.<sup>53</sup> It doesn't say anything about writing Notes, and I think we need to be sensitive to our role as rulemakers and not general commenters or general advisers or general educators. It's really not the role of the Advisory Committee to go around and start telling people what we think about the Rules or how they should be applied unless we've done it in a Rule.

We could take a very expanded role, hold seminars and become the experts on what the Rules mean, and that would be stepping well outside of our commission, I think.

So I've always been of the view if we have a change worth making we need to make it in the Rules and provide a sufficient explanation in the Committee Notes, but we shouldn't step outside of the rulemaking function and become general advisors through the Committee Notes.

\*1541 PROFESSOR CAPRA: There was one judge on the Standing Committee several years ago, Dan knows who I'm talking about, who said every Committee Note should have five words: "The Rule speaks for itself." [Laughter] Ken?

MR. GRAHAM: Well, I was just going to say I don't know what people's experience has been, but I've written a lot on Rule 404(b), and I've read a lot of 404(b) cases, and I will tell you that the Notes figured almost nothing in the 404(b) cases.

PROFESSOR CAPRA: The original Note.<sup>54</sup>

MR. GRAHAM: The Notes don't. The 404(b) cases I've read almost never make any mention of the Notes. But, of course, one could say well, that's because they make no mention of the law. [Laughter]

MR. DYBWAD: Very quickly in favor of a textual change to the Rule. Basically national uniformity. If I were in the Seventh Circuit or the Third Circuit right now, I'd certainly be a happy person, and when I'm in the Ninth Circuit I can quote the Seventh and Third Circuit cases, but I have a whole body of case law that says it's a rule of inclusion. Just because it goes to propensity but it could also go to another purpose it comes in. So a textual change of the Rule to promote uniformity seems valuable.

PROFESSOR CAPRA: It would be great if all the courts were of one mind about this, but when they're not, that's traditionally been a problem that should be addressed by rulemaking. That's what the Federal Rules of Evidence are about. They're supposed to be uniform.

PROFESSOR LEVENSON: I'm throwing this out there sort of out of the blue, but in listening to the discussion it strikes me that there's a concern that some judges are not considering all the factors that should be considered under the case law. So, if there were an inclination--I'm not pushing it--to change the Rule, it might be an additional provision that says in making this determination the court may and should or might consider the extent to which the issue gets contested, whether under 403 this is properly considered.

The factors that we hear being discussed here, maybe it's premature right now to come up with the language of that Rule, but if the main concern is that judges are not giving all the factors consideration, maybe that's a change to the Rule that would lead to more focus on those factors.

PROFESSOR CAPRA: I was thinking that the Federal Judicial Center might have something to do here, in the judicial training programs that the Center sponsors. On the other hand what would you be doing? You would be educating a particular circuit that its law was behind the developments in the Seventh Circuit? [Laughter] I don't know. I don't want to be that lecturer. [Laughter]

PROFESSOR LEVENSON: No, no, I wouldn't think that judges would read it that way. I think judges would be excited about the fact that there are a group of judges who have identified a concern. They found an approach, and they welcome others to use that as their own.

\*1542 PROFESSOR CAPRA: So maybe there is a Federal Judiciary Center role here. Yes, Justice Manella.

JUSTICE MANELLA: Just as a practical question. I understand the reasoning behind Judge Marten's suggestion that you eliminate subdivision (2), but then what is it that's going to trigger the kind of pretrial inquiry that I think we all agree is desirable to have these issues fleshed out beforehand?

If you only have (1), and it just says you can't get it in for propensity, and some prosecutor sits back and when trial begins says, "I'm not offering it for that. I'm offering it for a perfectly legitimate purpose." I think you need some mechanism that triggers the inquiry that allows for the pretrial resolution of the issue.

Now I admit in state court, which some people here are familiar with, you don't often get that same level of pretrial vetting and that--

PROFESSOR CAPRA: You get it right before they call the witness. [Laughter]

JUSTICE MANELLA: And that explains a lot, including sometimes the rulings from the hurried trial judge who perhaps didn't have the time to make these kind of nuanced decisions. But that would be my concern. I think you have to have some mechanism that triggers fronting the issue.

PROFESSOR CAPRA: Now that I think about it, Judge Marten's proposal would change Rule 404(b) to what the hearsay rule is like. For an out-of-court statement, it's a prohibited use if it's offered for its truth, but the Rules don't articulate any proper purpose, such as for effect on the listener or as a verbal act.

JUSTICE MANELLA: But that's usually one question and answer. Rule 404(b) evidence may be calling up an entirely new witness to testify to a series of events.

PROFESSOR CAPRA: Yes.

JUSTICE MANELLA: It's not always getting in a prior conviction.

PROFESSOR CAPRA: Right.

JUSTICE MANELLA: I think everyone here seems to think it's desirable to be able to confront those issues earlier rather than later. It's often said, if you want to surprise a judge, send flowers. [Laughter] So that's my concern. I don't think any of us, regardless of what happens to the Rule, would want to diminish the likelihood that these issues would be confronted before the trial is underway.

PROFESSOR CAPRA: Good point. Kelly.

MS. ZUSMAN: I guess the argument in favor of a rule change is that there's a problem, as described by Judge Sessions. I can only speak to Oregon, and in Oregon we always lose 404(b) at least initially. I mean, we just do. All of our judges are concerned about reversals on appeal. The Ninth Circuit hasn't adopted the Seventh Circuit's approach, and yet it's still very restrictive.

And so I guess at least in my district I think the Rule has been working very well. Our trial judges have been very rigorous with us. They don't \*1543 allow 404(b) in unless there's a very good reason for it, which becomes apparent usually over the course of a trial. I see you shaking your head.

PROFESSOR CAPRA: Yes. I mean, I have too many cases in my backpack there where the opinion takes one sentence and that's it, offered for intent, end of story; offered for intent, end of story. So, I mean, with all due respect, but go ahead.

MS. ZUSMAN: That's not the experience in Oregon. So, in terms of the concern about our judges getting it, again, some of them are applying the Rule as it is currently written in the manner in which I think it was intended to be employed.

PROFESSOR CAPRA: Judge Sessions.

JUDGE SESSIONS: The Committee is in fact going to make one change to 404(b) after unanimous agreement. The defendant has to ask for notice before the government must provide notice, and the Committee has determined that this triggering requirement is just a trap for incompetent defense counsel, and there's no reason for that. So we're going to change the Rule at least in that respect.

Okay. So, if you're going to change the Rule, then you better find some way to change the Advisory Notes. I mean, I was a criminal defense lawyer in real life, and so you start thinking about all these manipulations along the way. Can you just change the Rule?

PROFESSOR CAPRA: That is three words. I think that's our hypothetical, three words. [Laughter]

JUDGE SESSIONS: We can remove that notice requirement and then change the Advisory Notes.

PROFESSOR CAPRA: I like that. Carol.

PROFESSOR CHASE: Yes, just again working off of what Judge Marten said and also what Justice Manella said, the concern she's raised: What if we just have the first paragraph and then had a provision that if the evidence is going to be offered for a purpose other than to show propensity, the proponent of the evidence must provide notice, state specifically what the purpose is and how the purpose is fulfilled without relying on propensity?

PROFESSOR CAPRA: That ends up changing the tone clearly, right, and providing a little bit more guidance?

PROFESSOR CHASE: But it still includes the notice requirement, which would trigger the pretrial motions that Justice Manella was concerned about.

JUDGE SESSIONS: So you would raise the concerns in the notice provision right within the Rule--that's brilliant.

PROFESSOR CHASE: Thank you.

JUDGE SESSIONS: I wouldn't put that in my resume, though, except that it's brilliant.

PROFESSOR CAPRA: Dan.

MR. COLLINS: I just wanted to raise, since we have this distinguished panel here, I wanted to raise one other issue that I also saw in some of the case law. I agree with the judgment that is behind Rule 404(b) and, as you can tell from my description of the *Hadley* case, which as Dan noted, \*1544 Congress settled that rule when it had 413 and 415 basically do away with 404(b) in *Hadley*-type cases.

But others have criticized 404(b). When the D.C. Circuit had an en banc around the time of the *Old Chief v. United States*<sup>55</sup> decision, three judges wrote separately and said that

evidence that a defendant charged with drug distribution crime has previously committed drug distribution crimes should be admissible to show likelihood, (propensity, if you will) that the defendant did it again. Probably no segment of American society, other than many of its lawyers (and judges) would think that such reasoning is somehow unreliable.<sup>56</sup>

I just wondered is there anyone who shares that view or thinks there's something wrong with the value judgment in 404(b)?

PROFESSOR CAPRA: Given no response, I think that the record should show general agreement by the panel with the principle that the propensity inference should be barred. Virginia.

MS. MILSTEAD: Well, just following up on that comment about to what extent judges are or are not struggling with the Rule as written or letting bad acts in or not, what we all seem to agree on is that the jury certainly struggles with a limiting instruction once they get it. And what I like about the Seventh Circuit's rule is it seems to shift some of that burden from the jury to the judge to make those distinctions between propensity purposes and permissible purposes, and then that type of evidence that's more likely to cause a problem for a jury is not going to reach them, and so I think that's a good result to lessen some of the difficulty with following instructions.

JUDGE PHILLIPS: But doesn't that go back to one of the themes that's come out from several of the participants today? I've really struggled with this; I read all of this, and most of these issues that come up with 404(b) evidence are really resolved by applying 403.

MR. COHEN: Yes. And the problem with that is the weak--I mean, we heard from Judge Livingston, the weaker that the case-in-chief was, the more reason there was to bring in 404(b).

JUDGE PHILLIPS: Bring in 404(b) evidence.

MR. COHEN: Right. But it shouldn't be. It shouldn't be, "Hey, I really need this, that's why you've got to let it in."

JUDGE PHILLIPS: I have had that exact discussion with counsel.

MR. COHEN: It's Alice in Wonderland thinking. Your case is your case. If you can't prove it with your case, I shouldn't bend the Rules or the Constitution or whatever you want to frame it to help you prove your case. Get a better case.

JUDGE PHILLIPS: I think you must have read one of the transcripts recently where I said the amount that you need is not one of the bases for admission.

**\*1545** MR. COHEN: Really, really important.

JUDGE PHILLIPS: Because "you want it" doesn't count.

MR. COHEN: Because imagine the defense arguing, "Your Honor, I need this stuff to come in because it really, really helps to prove he's not guilty." Come on.

JUDGE PHILLIPS: Either side can make that argument. I've heard it.

MR. FOX: I hope it wasn't one of our fine AUSAs that made that argument, Judge.

JUDGE PHILLIPS: I will just say that the issues come up a lot in civil cases, particularly § 1983 cases.

MR. FOX: So what I wanted to ask about actually goes to the notice requirement, and I think the amendment already agreed upon is right. The Department of Justice has taken the position it's right. It's part of our practice, as Mary said, it's been part of our practice forever to provide notice, without a request from the defendant. But if we are getting rid of the "inextricably intertwined" rule, as the Seventh Circuit has done--

PROFESSOR CAPRA: Yes, let's get to that.

MR. FOX: Yes, so my concern is that with no request from the defendant and no inextricably intertwined rule, if I don't know what 404(b) evidence necessarily is as the other side or the judge would view it, how do I provide that notice?

So the example that I thought of in my head is possession of a firearm. A felon in possession of a firearm robs a liquor store or holds up a woman two blocks away from where he's ultimately caught with a gun. Is that going to be 404(b) evidence? Is that direct evidence of the crime? And if we're not in agreement of what that is, how am I supposed to provide notice?

PROFESSOR CAPRA: Shouldn't the distinction be between direct and indirect evidence, the latter being covered by Rule 404(b)?

Have you got a comment, Judge Hamilton?

JUDGE HAMILTON: Yes. In short, when in doubt, give the notice I think is the response.

PROFESSOR CAPRA: Yes, there you are. Right.

JUDGE HAMILTON: It doesn't hurt to at least signal--in terms of the fairness of the overall trial and the ability of everybody to prepare to meet the real issues--a little advance notice about the evidence the government intends to put on should not disrupt it.

MR. FOX: So what type of notice is required? If I disclose a summary of a witness's statements, and the witness states that he held a gun to my head, and we say we intend to call this witness, is that good enough?

PROFESSOR CAPRA: Yes, I think under Rule 404(b) it is. Rule 404(b) merely requires a description of the general nature of the evidence.

MR. FOX: So we will not have a problem--you know, you don't think that we'd have a problem with the district judges. You don't think that we'd have a problem on appeal if all we did was turn over that witness statement.

MS. ANDRUES: Are you asking for an advisory opinion?

MR. FOX: Yes. [Laughter]

**\*1546** JUDGE HAMILTON: And I'm going to duck on the details there simply because I just have not dealt before with any of the fine-grain disputes about the sufficiency of 404(b) and notice, and I'm grateful for that. The prosecution is in the position to take care of that issue and say we're going to put this in. If you might think this is 404(b) evidence, here's the notice.

PROFESSOR CAPRA: You know, the idea of giving notice in doubtful situations is comparable to Rule 701 where the question is: Are they an expert witness or are they a lay witness? The prosecutor has a duty of disclosure for experts but not for lay witnesses. And the Department of Justice was all concerned about figuring out whether to disclose when it was unclear whether the witness was giving expert or lay testimony.

My understanding is what's happened is the prosecutor discloses if there's any doubt in order to avoid a discovery sanction, and I think that would be the same kind of thing happening with evidence that might be considered inextricably entwined with the charged crime, I think. Ken Graham.

MR. GRAHAM: One problem with civil cases and Rule 404(b) is that a lot of those cases involve corporations, which then raises the question of whether a corporation can have character or not because obviously, if corporations can't have character, Rule 404(b) doesn't apply and you're just back to general principles of relevance.

PROFESSOR CAPRA: Laurie.

PROFESSOR LEVENSON: I was just going to piggyback on what Brandon was saying, the way that inextricably intertwined evidence often comes in is when a defendant talks big during the crime, so they say, "I'm going to make this deal like the six other major cocaine deals I did before," and prosecutors see that as opening a door. Now I get to put on all those six priors.

I do think it's appropriate, absolutely, to give notice for even a logistical reason. I think the judge needs to know how many trials she is going to have to hear, one on this drug deal or six other ones.

PROFESSOR CAPRA: It would be interesting to figure out how to write an inextricably intertwined takeout. That is to say, not to allow the exception to Rule 404(b) anymore. And the circuit court opinions that are in the reading, to me, they say, well, we're not going to do it anymore, but then, then there's a direct/indirect distinction that you have to deal with. And the line between direct and indirect evidence can be fuzzy, as seen in some of the cases.

So maybe this just can't be solved. But on the other hand, many courts retain this broad inextricably intertwined doctrine that's problematic because it limits the scope of Rule 404(b) and it means that defendants get no notice of the evidence.

JUDGE CAMPBELL: I have found the inextricably intertwined doctrine helpful because I can ask the question: "Can I pull this piece out of your case and can you still present a coherent case?" If the answer is no, it's inextricable. If the answer is yes, then I need to set it aside and consider it under Rule 404(b), and that for me at least has been a relatively easy way to judge.

\*1547 PROFESSOR CAPRA: Well, that's an interesting thought I guess, but what if the proponent says, "Well, I need it for context, Your Honor, because the jury is not going to understand this document?"

JUDGE CAMPBELL: Well, then I consider that. If they really do, then I think it should come in.

PROFESSOR CAPRA: But that's not 404(b) evidence then for context.

JUDGE CAMPBELL: Yes. But if they can tell the story coherently and present their case without that act, then I should consider that separately under 404(b), and you can't get it in just because it's part of the chain of events or part of the story they want to tell.

PROFESSOR CAPRA: Judge Sessions.

JUDGE SESSIONS: So we're talking about quality of notice. Now let me ask the government lawyers here. So what would you think about a change in which, as a part of that notice, there is a requirement that you disclose your theory as to how it falls

within a proper, nonpropensity purpose? You disclose what the purpose is and how it's particularly relevant. You require that in the notice, and that would be within the Rule. Would you have any strenuous objection to that?

MR. FOX: My concern is exactly what I was just talking about, which is maybe I consider something to be 404(b) or not. So, if I consider it to be direct evidence of the crime, I'm not going to provide that same level of notice that you're looking for.

JUDGE SESSIONS: But then you just argue in the alternative. We think it's part of the crime, but if it's not, it's 404(b), and we suggest that it's being admitted pursuant to this particular nonpropensity purpose.

MR. FOX: I'll just tell you what my practice is. My practice is to have open communications with the defense attorney about what my case is way before trial. So we will talk about his or her theory for admissibility in discussions. If this is going to be a written requirement, that adds another element to it, but if Chris and I had a case together and he said, "Why are you calling this witness? What's the purpose?" I would absolutely tell him why we're calling this witness, and we would have a discussion about how we think it's admissible under 404(b).

MR. ASPERGER: I mean, the challenge from the defense side is not all prosecutors do that. [Laughter] There are many who don't. And so the notice on the defense side, I think, of the type you're describing would be quite helpful.

PROFESSOR CAPRA: Alan.

MR. JACKSON: Just to dovetail on that same point--I'm a former prosecutor, now a defense attorney. So, along with my colleagues, some of my colleagues, I wear two hats and struggle with this a little bit.

My question would be if the prosecutor proffers a particular theory or set of theories under 404(b) for prior bad acts, are they limited to that on appeal? \*1548 In the case that Professor Capra and I have spoken about extensively, the *People v. Spector*<sup>57</sup> case.

PROFESSOR CAPRA: Yes, let's hear about that, the *Spector* case.

MR. JACKSON: I prosecuted a famous music producer who--law school exam kind of set of facts--a classic case of no witnesses when a man walked into a foyer and a woman ends up dead after a gunshot. The man walks out, according to some witnesses, with a gun in his hand and makes a statement. The defense was that she shot herself. Obviously, I had a different theory.

There were seventeen separate events over the course of about thirty years that I could point to and I could prove fit a very specific pattern of conduct. I was limited, according to Judge Fidler's assessment, to using five prior women and seven different acts involving those women with a significant amount of similarity.

Well, I presented that as under 1101(b),<sup>58</sup> which is the 404(b) equivalent in California, almost identical.<sup>59</sup> I presented that under an absence of mistake and used what Judge Fidler thought was a relatively novel theory. It's not an absence of mistake of the defendant. It was an absence of mistake or accident of the victim. It was not her mistake. It was not her accident. It was not her suicide, and therefore I could establish a pattern to show that it was unreasonable to believe that he had all these events in his past, and yet on this occasion this woman happened to grab this gun and shoot herself.

PROFESSOR CAPRA: The only way that it's an absence of mistake that way is because he's got a propensity to do this, isn't that right?

MR. JACKSON: So that brings up the point. Exactly. And this goes to Justice Manella's point a little bit earlier. There is an intellectual struggle between propensity and what I call the rule of "of course he did it." As a prosecutor, I had a rule in my

head that was “of course he did it,” because he did all the others. If the jury, judge, or trier of fact ultimately is going to come to a conclusion of “of course they did it,” then how is that not propensity?

But much smarter than me, the Second Appellate District presented an argument and presented a theory that I had not presented, which was the theory of logical relevance. I love it. I just ate it up when I read it. It's been cited as the doctrine of chances, but we haven't discussed that, right, so that comes from the *United States v. Woods*<sup>60</sup> case, I think.

PROFESSOR CAPRA: The *Blue Baby* case.

MR. JACKSON: That's right, the *Blue Baby* case. Boy, you know your cases. Do you ever get out? [Laughter] How is it possible? How could you possibly pull that out of your head? Mention the Fourth Circuit, and you say the *Blue Baby* case. It's an infanticide case dating back some years, and in that case the court reasoned that the doctrine of chances doesn't ask the jurors to utilize the defendant's propensity as a basis for their verdict; it asks the \*1549 jurors to consider the objective improbability that this happened by chance. But I don't see the difference. But, in other words, if Brandon puts forth absence of mistake pursuant to your suggestion, which I think is a good one, as a defense attorney I want that, I want some notice, I want to hold Brandon's feet to the fire, but if he puts forth that absence of mistake theory and ultimately on appeal my question would be is he limited, or is the government relegated to that theory when there might be a smarter set of justices who come up with the doctrine of chances or something else?

JUDGE SESSIONS: But the pluses of this particular provision would be that it's out front. The fact is these issues are all resolved in motions in limine. The defense needs to know whether a criminal act is going to be coming in--

MR. JACKSON: I agree.

JUDGE SESSIONS:--before opening statements, so these are all resolved in advance. Why not require, by way of Rule, a provision that requires the government to say this is the theory by which we are seeking to introduce this 404(b) material, put the defense on notice, and then the judge is on notice?

PROFESSOR CAPRA: That's interesting; let's say the appellate court goes off on a different purpose for which the bad act evidence would be admissible.

MR. JACKSON: Right.

PROFESSOR CAPRA: That's equivalent to a trial judge admitting something under a particular hearsay exception but the appellate court says, that is wrong, but it was admissible under a different exception. And then the appellate court says, “It's harmless error”--

MR. JACKSON: Sure.

PROFESSOR CAPRA:--if it's all been argued before. But I guess if you could have made an argument on the different purpose that was never entertained, then you could argue that it's been harmful error, right?

MR. JACKSON: Or if you had put it in your notice requirement. If that becomes part of it, then it could become harmful error.

PROFESSOR CAPRA: Right.

JUDGE HAMILTON: Not to mention the role of the limiting instruction.

MR. JACKSON: I'm sorry?

JUDGE HAMILTON: If the limiting instruction is given limiting the jury to a particular purpose, and the appellate court says it could have been admitted for a different purpose, then you're going to have a problem.

MR. JACKSON: That's right.

MR. COHEN: Why is it when the government fails to argue the proper theory, there's an umpire there, supposedly an umpire who fixes it? When a defense attorney fails to argue it, it's trial strategy? [Laughter]

MR. FOX: It doesn't matter.

MS. ANDRUES: With the notice requirement the possibility is that the prosecutor will list every one of the proper purposes, and then you play a game back and forth with the prosecutors, okay, which one is it going to be? \*1550 And they say, "Well, I don't know yet. We're getting our case ready for trial." And so it then would take a motion in limine from the defense to say, okay, they haven't told--they just said 404(b), here we are, we're back at all of these different theories of the case. I think we're limited to twenty-five pages for every one of those as to why we don't think it comes in.

### III. TOPIC TWO: THE RESIDUAL EXCEPTION: PROPOSED CHANGES TO RULE 807 AND ITS BREADTH

PROFESSOR CAPRA: So now we're going to talk about the residual exception Rule 807 to the Federal Rules of Evidence,<sup>61</sup> and the Committee has, for the last couple of meetings now, been considering changes to that Rule. It comes from a number of sources of suggested change, and certainly there's been pressure coming from statements from Judge Posner and others that the residual exception might take on a whole new kind of power to substitute for some of the standard exceptions.

And while the Committee has not agreed with that provision, that idea, the Committee does think that there would be usefulness in having some changes to the residual exception. And you might argue it's because of a policy decision that it should be broader, but also the Committee is considering that there are changes that might be useful regardless of what you think about how broad the residual exception should be.

But I think we could start with just general discussions about the residual exception, its breadth, and whether it should be broadened to cover more hearsay, more reliable hearsay. Then we could talk about the specific kind of problems with the current rule that might be fixed as a matter of good rulemaking.

The working proposal for change to the residual exception provides as follows [provided to the panel on a PowerPoint presentation]:

#### **Rule 807. Residual Exception**

(a) **In General.** Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) ~~the statement has equivalent circumstantial guarantees of trustworthiness~~ *the court determines, after considering the totality of circumstances and any corroborating evidence, that the statement is trustworthy; and*

(2) ~~it is offered as evidence of a material fact;~~

(3) 2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice .

**(b) Notice.** The statement is admissible only if, before the trial or hearing the proponent gives an adverse party reasonable *written* notice of the *an* intent to offer the statement and its particulars, including the declarant's name and address, --including its substance and the declarant's name--so \*1551 that the party has a fair opportunity to meet it. *The notice must be provided before the trial or hearing--or during trial or hearing if the court, for good cause, excuses a lack of earlier notice.*

I'd like to turn to Victor, who has some thoughts about the residual exception and possible amendments to it.

PROFESSOR GOLD: Okay. Thanks, Dan. I want to talk generally about the idea of process, procedure. I'm agnostic on the subject, the specific subject of expanding or changing the residual exception. But I think it's very important whenever this group considers a change to a specific Rule that it has in mind whether that change will have unintended consequences for other Rules. And the residual exception obviously is a piece of a much larger part of the Federal Rules of Evidence, namely the hearsay law.

The residual exception used to be, of course, part of 803 and 804,<sup>62</sup> and then those sections were given their own Rule, but I think it's clear that the intention was originally that the residual exception be applied and read in light of its place in the larger part of hearsay law and specifically the other exceptions. So, as the Advisory Committee considers the possibility of expanding the residual exception, I think it's very important to think about what effect this will have on the other exceptions, on all the rest of hearsay law.

For example, we know that some courts approach or use what's been called a "near miss" approach to hearsay exceptions. If you're close to one of the existing exceptions, but you don't quite make it, maybe we can shoehorn it into 807.<sup>63</sup> If the idea is to streamline 807, make it easier to apply, I think it's natural to expect that the near miss doctrine is going to be expanding. It's important to realize that's a likely result and consider if that is the intended result.

It's also important from a process standpoint to think about how a change to the residual exception affects how lawyers and judges do their jobs. So for a trial judge, for example, if the trial judge is presented with a Rule that says well, you can take an open-ended approach to the question of what hearsay is trustworthy without it being tethered in any way, shape, or form to the other specific hearsay exceptions, what does that judge do? How does that judge approach resolving that question?

And I want to make a reference to a more recent amendment to the Rules as a possible illustration of what could happen. Rule 702<sup>64</sup> was amended in light of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>65</sup> and *Kumho Tire Co. v. Carmichael*,<sup>66</sup> when it was broken out into specific subsections to \*1552 reference aspects of what the Supreme Court was trying to do, and specifically you have 702(c) and (d), which break out the analysis concerning reliability into two parts.<sup>67</sup> Reliability is not exactly the same thing as trustworthiness, but it's a broad concept. They're both broad concepts nonetheless.

I've read a lot of 702 cases since the Rule was amended, and I can tell you roughly, if you go to Westlaw, roughly there are 1,000 cases a year that pop up citing Rule 702. Most of them are not published. Most of them are district court decisions that just make a passing reference. A tiny percentage of those cases actually refer to the specific subsections that 702 now has been divided into.

In other words, they make a passing reference to 702 and they make a beeline for the factor analysis laid out in the *Daubert* case.<sup>68</sup> That is, here are the four, five, six, seven factors that might constitute a way practically for a judge to approach judging whether evidence is reliable or not.

PROFESSOR CAPRA: So your point is that unintended consequences are that courts won't follow what you do.

PROFESSOR GOLD: So one possibility is that you can be well intentioned in changing a Rule, but in the end, if you don't do that with the thought in mind that judges are going to have to apply this Rule and a general standard doesn't give them a whole lot of help without some fleshing out, as I think was the case with the original residual exception as it was tethered right in 803 and 804 and as the current residual exception is making explicit reference, references to the existing exceptions.

Something that's completely untethered like that doesn't give the judge guidance and inevitably I think is going to lead to a lot of inconsistency at the trial court level. Then when you get to the appellate level, let's be honest: evidence rulings almost always are resolved at the appellate level on a harmless error basis.

And so, if the intention is to expand the admissible hearsay, to expand the near miss doctrine, to give trial judges a broad base of discretion, then so be it. But if that's not the intention, then we ought to proceed cautiously. Unintended consequences frequently follow from Rule changes.

PROFESSOR CAPRA: So the problem of tethering is that the current Rule tethers the court to "equivalent" circumstantial guarantees of trustworthiness--that's what we're talking about here, equivalent circumstances.

PROFESSOR GOLD: Yes.

PROFESSOR CAPRA: What in the world does that mean when you compare the residual hearsay to all the exceptions in Rule 803 and 804? The spectrum of reliability from 803 to 804 is profound.

PROFESSOR GOLD: Absolutely.

PROFESSOR CAPRA: Yes.

\*1553 PROFESSOR GOLD: So the word equivalent--

PROFESSOR CAPRA: Means nothing.

PROFESSOR GOLD:--means very little.

PROFESSOR CAPRA: It's like it's equivalent to air or something. It's so unguided. So I'm not sure that actually the tethering is useful in the existing Rule.

And if we're talking about judicial discretion, judges have tons of discretion now to pick the exception that they want to compare the hearsay to or not to compare it to. So, if a judge wants to admit the hearsay, they say well, it's just as reliable as the ancient documents exception. There's actually an opinion like that in the appendix.<sup>69</sup> Well, what does that mean?

That means it's just as reliable as a completely unreliable statement. So the equivalence standard basically allows about as much discretion as it would if you didn't have it. Yes, Judge Livingston?

JUDGE LIVINGSTON: I had a question for our distinguished group, and I'm looking forward to hearing this discussion.

Framing the question, at our last symposium, Judge Posner asked us to look at the question whether much broader discretion in the hands of a judge in admitting reliable hearsay would be a benefit at trials because most academics--he's an academic judge in the field of evidence--have argued for many years that the hearsay exceptions don't have strong justifications, that there is probably reliable hearsay that could be admitted and considered by a jury.<sup>70</sup>

So we had a symposium, and the trial lawyers said, with a great deal of passion and persuasiveness, that you really need some degree of predictability, and even though each individual hearsay exception may not have a rich justification in social science to say, for example, that the present sense impression is really reliable, we should categorically admit it. They believed the Rules work in giving the trial lawyers the predictability they need.

And so the idea with thinking of this proposal is not to open the floodgates to discretion on the trial court but to signal in some ways to the trial court that the residual exception doesn't have to be viewed as rare and exceptional as it seems to be viewed in the cases that we reviewed.

So the question is whether it's possible in the text and the Advisory Notes to communicate what Dan so aptly says in the materials. We want somewhat more of a residual exception.

PROFESSOR CAPRA: Yes. So how does that work? Let's turn to practicing lawyers. Would somewhat expanded judicial discretion to admit hearsay be a problem? Jim?

**\*1554 MR. ASPERGER:** I can start with some observations. Having been in front of a number of different judges of trials and seeing already how much discretion there is and also how common it is for judges to apply the rules differently, my concern about doing this is opening up something that looks like another broader exception that creates more discretion than intended and a lack of predictability. So my sense is once you have an exception that is fairly discretionary and untethered, it's easier to admit the evidence than not.

So, Dan, I think your paper does a very good job of pointing out the problems in the existing wording, and it does seem that it can be improved. But my concern would be that without some clear indication and guidance, this is still a limited exception and should be applied only in circumstances where there's very high reliability, that it doesn't open up the floodgates, so to speak.

PROFESSOR CAPRA: So we're in a state that doesn't have a working residual exception. There is nothing in the California Code of Evidence that is equivalent to Federal Rule 807. There's case law. There's a residual-type analysis for certain niche kinds of cases, and the case law also says, if I understand this correctly, that you never know. We might apply it more broadly. So how is that working? Justice Manella?

JUSTICE MANELLA: I just don't recall the issue coming up. I guess somebody who had done the kind of exhaustive, encyclopedic survey that you have in the federal cases might draw some conclusions that this has caused judges to stretch or torture exceptions to the hearsay rule. That's possible, but I haven't done that study, so I don't know. I guess it's one fewer thing for trial judges to think about.

PROFESSOR CAPRA: Well, there was a study done in the State of Washington, where initially there wasn't a residual exception. What happened was--and it was especially child sex abuse cases--statements were offered and admitted under 803(2), excited utterance, 803(4), statements to doctors, which the facts indicated neither applied.<sup>71</sup>

And so by the end of a five-year period, the Washington Advisory Committee saw 803(2) become this kind of formless exception where judges were admitting hearsay not covered by the exception, because it was reliable. And so the decision was made, at least that's my understanding, to have a residual exception.

JUSTICE MANELLA: I do not know whether that's under consideration now in California. I don't know.

PROFESSOR CAPRA: Kelly, did you have a comment?

MS. ZUSMAN: I think, at least in my mind, I see this in two parts. First, you've got the civil side and then on the criminal side. Criminal defendants have this notion of fairness that's associated with the Confrontation Clause, which is always going to backstop 807 and residual hearsay.

\*1555 PROFESSOR CAPRA: Agreed.

MS. ZUSMAN: The other three parties do not, so there isn't that Confrontation Clause safety net, if you will. And the concern that I have about expanding 807 too far is that it's really about fairness and it's about the notion that we want people to come into court. We want adversarial testing.

So those out-of-court declarants, and the example that you give in the materials for the *Draper v. Rosario*<sup>72</sup> case from the Ninth Circuit where you have the inmate who says "I saw the guard do X," and I'm thinking if I'm representing the guard how am I going to test that before a jury? How can I question that person's perspective or bias or motive in coming forward with that kind of an affidavit or a declaration?

So that's a concern that I have about expanding it too far. If our basic principle is we want adversarial testing, we want that in-court testimony, then I think our exceptions need to be constrained.

PROFESSOR CAPRA: Ken?

MR. GRAHAM: Well, I hate to say this, but now that Scalia is gone I think there's probably going to be a majority on the Court to overturn *Crawford v. Washington*<sup>73</sup> and return to something like the *Ohio v. Roberts*<sup>74</sup> original rules.

PROFESSOR CAPRA: Which then brings 807 back into play as it were.

MR. GRAHAM: That's right. The point is there will be no backstop to 807 in criminal cases because you'll be back to the *Roberts* thing where if it resembles one of the existing hearsay exceptions, it's okay.

PROFESSOR CAPRA: This is off point, but I'm thinking that when that change of the Court comes what gets lost is *Melendez-Diaz v. Massachusetts*,<sup>75</sup> but not a complete return to *Roberts*.

MR. GRAHAM: Yeah.

PROFESSOR CAPRA: That's my thought, but then again, since we have a minute on this and we have experts here, any thoughts?

PROFESSOR SCALLEN: I think you're right. That's been the troublesome area and--

PROFESSOR CAPRA: The certificates.

PROFESSOR SCALLEN:--you know, if you look at the other Confrontation Clause cases, a lot of them center on statements against interests, so there may be something that gets done in that context, but for the most part I think the confrontation--I agree there's going to be a shift, but the question is will they go back to what they castigated very clearly or will they do something in the middle? I think they'll do something in the middle.

PROFESSOR CAPRA: Yeah. I think members of the Court are content with the idea that you can't admit grand jury testimony against a criminal defendant who has not been cross-examined.

\*1556 The fact that it's under oath doesn't mean much and so that probably won't change, but I guess we'll see what happens. Any other comments about that? Christopher?

MR. DYBWAD: I think there is some interplay between the Confrontation Clause and a proposed expansion of the residual exception. Kelly is right. I mean, from the criminal defense perspective, the backstop we have is *Crawford*, but there could be cases where an alleged child victim makes a statement that perhaps is not considered testimonial, and that that kind of statement would start to come in under 807.

So, perhaps not a Confrontation Clause violation in terms of a testimonial statement, but any expansion would start to get outside of testing by cross-examination of pretty key witnesses.

PROFESSOR CAPRA: I guess that's true, but that's just to state it's hearsay. That's what I don't get about these opinions. You say well, we're not going to let it in. Well, why aren't we going to let it in? Well, because the guy wasn't cross-examined. Well, that's what made it hearsay, that it's an out-of-court statement that wasn't cross-examined. Why would that be a reason to exclude it when the question is should it be admitted under an exception? I don't get it.

MR. DYBWAD: To me, the difference in that one example is you really have one principal accuser and that principal accuser is making statements that you're admitting only hearsay basically, right? You could try the case by just putting it under the residual. It's all hearsay, but it's really striking at the heart of--

PROFESSOR CAPRA: You're not okay with that, but you're okay that they made a statement to a doctor, which is currently admissible, and that was the case?

MR. DYBWAD: Well, okay with it?

PROFESSOR CAPRA: My point is, what's the distinction?

MR. DYBWAD: I'd probably quibble with okay with it. I'd probably want the right to cross-examine no matter what, but I understand your point. It could fit into a different exception.

PROFESSOR CAPRA: Right.

MR. DYBWAD: Right. I worry that something that's more formless would start to come in.

PROFESSOR CAPRA: Anybody else want to weigh in about the residual or what might be done about it?

PROFESSOR GOLD: I just want to say it strikes me, Dan, that a lot of your comments go to the intelligence of the overall system, all of the old exceptions, everything in 803, 804, yet you can challenge the whole thing.

My point is simply if we try to tinker with one piece, it's going to affect the whole system. So, if you think something is fundamentally wrong with the system, that needs to be confronted, and we need to look at all the rules as one piece. And if

we try to address the issues raised by Judge Posner by tinkering with one piece, it's going to have consequences with other Rules that we probably don't want.

\*1557 PROFESSOR CAPRA: Judge Campbell?

JUDGE CAMPBELL: The general question I guess that I would put to the experts who are here is whether it is your sense that our system is unfairly or improperly excluding hearsay evidence that ought to come in.

There's lots of flaws that we identified in wording or different exceptions, but my basic question is whether our sense that the system is broken because we're not letting in enough reliable hearsay evidence. And I just have in my own little world never heard that sentiment expressed by lawyers or parties or others, and I would be interested in what this group--

PROFESSOR CAPRA: Yes, Eileen?

PROFESSOR SCALLEN: First of all, if you could get rid of the language "admitting it will best serve the purposes of these rules and the interests of justice,"<sup>76</sup> I'd be thrilled. I always feel like I have to run the flag up and salute whenever I quote that language. I have no idea what it means.

PROFESSOR CAPRA: Neither does the judge in applying it.

PROFESSOR SCALLEN: I have no idea what it does.

PROFESSOR CAPRA: Just runs the flag up and down.

PROFESSOR SCALLEN: But I am actually opposed to expanding the 807 exception. I have not seen situations that are just screaming injustice leaving out certain kinds of hearsay.

If there were those situations and they happened on a regular basis, I would expect this Committee to be presented with a proposal for a new hearsay exception, and I think that's the way it's been done in California. The child sexual abuse example is a prime case of that.

I understand why Congress passed the residual exception. I understand why states like it as a safety valve. I just think it does undermine. I like the exceptional circumstances language. I think it puts a brake on judges who feel bad that the hearsay didn't make it under the other hearsay exceptions and would like to let it in, but it's a constraining piece of language.

But I have a question for you, Professor Capra. What does the language, this one of the elements, the court determines after considering the pertinent circumstances and any corroborating evidence? I get what corroborating evidence means. I have a separate question about that. But what are the pertinent circumstances? What does that mean?

PROFESSOR CAPRA: The circumstances surrounding the statement.

PROFESSOR SCALLEN: Okay. Then that leads to my other question, which is in *Bourjaily v. United States*,<sup>77</sup> the Committee ultimately decided, my recollection is, that we can consider the circumstances surrounding the making of the statement to let in the statement, but we generally don't, I think, look at corroborating evidence. Am I remembering incorrectly?

PROFESSOR CAPRA: That's not my understanding, no.

PROFESSOR SCALLEN: Okay.

\*1558 PROFESSOR CAPRA: In *Bourjaily*, you actually are looking at corroborating evidence, the fact that the tip--

PROFESSOR SCALLEN: You're looking at other evidence in the case, not just the circumstances surrounding--the making of the statement.

PROFESSOR CAPRA: The case you're talking about I think is *White v. Illinois*,<sup>78</sup> which is a Confrontation Clause case.

PROFESSOR SCALLEN: Yes. But would you also allow them to use the statement itself?

PROFESSOR CAPRA: I think you would as part of it.

PROFESSOR SCALLEN: And the residual?

PROFESSOR CAPRA: I think that the statement itself is considered as part of the analysis.

PROFESSOR SCALLEN: Okay.

PROFESSOR CAPRA: Laurie?

PROFESSOR LEVENSON: So, to address your prior question, I don't sense that there are many situations where we're having a problem with the court not finding a way to let in an important statement in the case.

I am concerned about the expansion, and to build on what Eileen just said, the court determines after considering pertinent circumstances. My concern is wouldn't you do that for every single Rule, consider the pertinent circumstances? Then we have to identify what the pertinent circumstances are. I think that ambiguity is one that would keep judges either tied up or they would completely ignore it.

As to the interest of justice, again, isn't that the standard that in some ways when the courts have discretion on a Rule you want them to use for all the Rules? But having said that, if this is one where we want to convey the message to use this on a limited basis, only use this when you really feel a strong need to, then language along those lines seems to me not out of place.

I think the overall exception says think about the underlying principles of evidence and only go beyond the limited Rules when those principles are not being served by the other Rules.

PROFESSOR CAPRA: Alan?

MR. JACKSON: Can I offer just an outlier's opinion or an outlier's perspective? I'm a state court guy, almost twenty years in the District Attorney's Office. I have not practiced federal courts, in the federal system. In California we don't have a residual exception, as Justice Manella indicated.

My question is this: Why do you need this at all? Why do you need a big basket, a giant bucket to stick stuff in that doesn't fit anywhere else? I'd be very interested, and, Professor Capra, I bet you've done this study. I'd be very interested in finding out if anybody's looked at the cases in which material evidence has been allowed under 807 that could not have been allowed under any other exception that you all have. In other words, has a \*1559 material injustice--would a material injustice have occurred had it not been for 807?

And I'll bet you, because there's some really smart folks not just in this room but populating courtrooms throughout the country, that if this didn't exist, the Brandon Foxes of the world, the Phil Cohens of the world on the prosecution and the defense side

who operate in federal courts before you all over the country, would find another argument, would find another way to get that evidence in.

Professor Levenson makes a very good point. I fear expanding this, and why don't we pull back and pull the reins back. And my question is why not excise it? Why do you need this? Where's the justification?

PROFESSOR CAPRA: Well, I'll rely on evidence professor colleagues for an answer. I think we can all say that we've found cases where the statements wouldn't have been admissible if not for the residual exception.

PROFESSOR LEVENSON: The recent Supreme Court decision in *Ohio v. Clark*,<sup>79</sup> which was, of course where you had the child who was just too young and it didn't fall under the--

PROFESSOR CAPRA: Didn't make it to a doctor, wasn't excited.

PROFESSOR LEVENSON: Right. And yet it was the whole case and it turned out not to be testimonial, but it was initially let in under 807.

PROFESSOR CAPRA: And is that a good thing or not? I mean, that's a value judgment for sure. Mary?

MS. ANDRUES: Yes. And I see it as a weighing. And I agree with Jim. You don't want to let the floodgates open, but you have a safety net. And that's how I think of the Rule as working.

If you go through the analysis and you go through the Rules, and most of the time when I'm preparing to go to trial and I'm thinking how do I get this in, it's the old-fashioned thing. That's not going to work. That's not going to work. Where do I go? Where do I go? The residual is that safety net.

But from my perspective now as a defense lawyer--I might have liked it as a prosecutor, but now as a defense lawyer, I feel like it's going to go way too far. So I'd like some structure to it.

JUSTICE MANELLA: I was just going to say it's a fair question to ask, whether there has been miscarriages of justice without the rule. The problem I think is in measuring that. We simply don't know what case the District Attorney did not file on, or plead down to something far less serious because of that. I mean, unfortunately we can't know the unknowable.

PROFESSOR CAPRA: Right. And that goes back to Judge Campbell's do we know of instances in which there's been hearsay that has been rejected but should be allowed? It's really hard to find on the record. But that doesn't mean it doesn't exist.

JUSTICE MANELLA: Isn't the only way you can really look is to look at the cases where it's come in under the exception and where you've read the opinion and said, you know, that seems to me consonant with the interests \*1560 of justice and with the safeguards that the rules of evidence as a whole are designed to provide.

PROFESSOR CAPRA: So that's what I tried to do with those 200 cases.

JUSTICE MANELLA: You're the only one who really knows here.

PROFESSOR CAPRA: I don't actually know. I have to rely on the court's description of the evidence. What does it mean? For example, there's a letter from a doctor. They don't produce it as an exhibit that you can read. They don't put it in context. So it's really hard to know whether it's reliable or not. And then it's described in probably a result-oriented way, so it is very difficult to get reliable empirical data. Timothy?

MR. LAU: At the last meeting, I presented a report on how you even determine what one of the excited elements and present sense impression hearsay exceptions is all about.<sup>80</sup>

And how I even get to that was you have to go through 100 to 200 scientific articles and read a lot of them and try to get to some synthesis of the whole, and you get to some answer that is like, not a bulletproof case, but maybe good enough. So how you would even do that for other types of evidence and do 100 to 200 scientific articles to get to that point, assuming that all of them you could do the same, is problematic.

PROFESSOR CAPRA: Yes, it is. Wendy?

MS. COATS: Alan, I am appellate counsel in a management side defense firm. I reached out to our trial people with this same question of whether this is a problem. Do you have cases where if this Rule changed, it would have let stuff in that arguably as defense side would have most likely hurt us more than helped us? And also our teams are uniquely in California, so they operate both in state and federal court--and so in their trial prep in state court they don't even have to deal with this exception. And largely the response that I got back was we don't think this is that much of a problem because the residual exception right now as applied is so rare we don't worry about it except in really rare cases. Now, in candidness, my friends in the plaintiffs' bar, who I don't necessarily see as much with us today at the moment, would probably feel very differently because it would play out more so in their arsenal.

PROFESSOR CAPRA: Something they would want.

MS. COATS: So it wasn't surprising that to some extent we didn't feel we had much of a problem keeping the exception limited to rare cases so that we could plan for it and know it isn't coming unless the facts of that specific case were unusual.

PROFESSOR CAPRA: Judge Campbell?

JUDGE CAMPBELL: Well, I guess it's a question I have. One question is whether we think not that can we find specific cases where there isn't any justice, but rather, whether system-wide, it is a problem that we're not getting enough reliable hearsay in.

**\*1561** But the second question I have is how often folks are encountering this. In thirteen years on the trial court and over 100 trials, my experience, and I don't know if it's representative, is that 95 percent of the hearsay submissions are made under an exception. Now the lawyers will often say if it doesn't come in under that we'll get it in under 807, but the focus is on the exception and that's where the battle is, and there are very few instances where the battle really is 807. It just doesn't come up very often, but I'm interested in if that is the general experience.

JUDGE PHILLIPS: I have seventeen years on the district court, and when I was reviewing these materials I really struggled to think of more than one time that--maybe less than five times would be more accurate, and usually when it's being argued that something should come in under the residual exception it falls in the category that we were talking about earlier of but I really need it. I really, really have to have it because I don't have a case or a defense otherwise, but it comes up so rarely.

PROFESSOR CAPRA: It is kind of interesting that of the over 200 cases I looked through, none of the panel had written an opinion on any of these. I don't know if that's just chance. Judge Oliver?

JUDGE OLIVER: Yes. I just want to chime in on that. I've been on the court now about twenty-three years, and I can't say stuff has never been raised, but I don't recall it ever being raised, and I don't ever remember having to definitively rule on it.

PROFESSOR CAPRA: Judge Sessions?

JUDGE SESSIONS: One of the advantages of Rule 807 is that you don't have to manipulate the other exceptions to get evidence in. And so I agree with Professor Gold that everything is related, and if you don't have a fallback position, then all of a sudden you start manipulating the various exceptions, and they no longer become sacrosanct or reliable, and that's one of the big advantages of having the residual exception.

I mean, I will say from our own experience on this Committee we talked about removing the ancient documents exception, then we talked about a provision in there which suggested well, if you've got a problem with not being able to get in your ancient document because we've removed the rule, well, then you just go to 807, right? And so in fact that is becoming more and more, it seems to me, prevalent as a backstop because there are exceptions to every rule, and rather than bend the rule turn to 807.

PROFESSOR CAPRA: Right. Betsy?

MS. SHAPIRO: Judge Sessions said exactly what I was going to say is that one of the quantification problems is that you can't just look at 807 cases. You have to look at the other exceptions and see whether they are meaningful anymore or whether we've distorted the other exceptions because of the absence of a residual exception that truly works. And that was I think one of the primary rationales that we started talking about the expansion of 807 so that we didn't have to do that.

PROFESSOR CAPRA: Professor Gold?

PROFESSOR GOLD: Well, I was just going to say if 807 is the backstop and the sense is that that's the appropriate role that it should play, going back \*1562 to my initial issue, which is let's not have unintended consequences, we ought not to want to streamline 807 in a way that makes it the exception of first resort.

If it's stated so broadly, well, if the hearsay is trustworthy you can admit it, then there aren't many lawyers that aren't going to go there first as opposed to trying to shoehorn their hearsay into much more complicated exceptions. So that would be my concern, that we undermine the other exceptions by creating such a broad--

JUDGE SESSIONS: Can I just respond to that?

PROFESSOR GOLD: Sure.

JUDGE SESSIONS: What you're really talking about is the rare and exceptional language.

PROFESSOR GOLD: Yes.

JUDGE SESSIONS: We want to make sure we leave the exception to the rare and exceptional, which is really not a part of the Rule, but is the precedent.

PROFESSOR GOLD: We don't lose that.

JUDGE SESSIONS: You want to leave that. That's fine. If you have 807, you agree to the idea of a backstop so that these exceptional circumstances are warranted. Well, then why not correct the language in 807 as long as you don't do it in such a way as to make rare and exceptional no longer relevant, right?

PROFESSOR GOLD: Agreed.

JUDGE SESSIONS: So, as far as the changes that Dan is suggesting here, I mean, they seem to be fairly obvious. As long as they don't necessarily open up the floodgates, what's the problem with making a rule which was wrong in the first place better?

PROFESSOR GOLD: Most of the changes Dan has suggested--I agree streamlining it would not change the position that it currently occupies in a structure of hearsay law. My concern is removing the reference to the other exceptions. We can tinker with that language, but once we completely untether this from the other exceptions, then the trial judge doesn't have the point of reference that the trial judge currently has.

PROFESSOR CAPRA: So speaking of unintended consequences, when this Rule got moved to 807, there was an unintended consequence because originally, when you had an unavailable declarant you compared to 804 exceptions, and when you had an available declarant you compared to the Rule 803 exceptions.

PROFESSOR GOLD: Right.

PROFESSOR CAPRA: Now it's just a mishmash and you're comparing to both 803 and 804 no matter whether the declarant is unavailable or not. I believe that was an unintended consequence of the move to Rule 807. Mark?

MR. HOLSCHER: I've got a little bit different view than Professor Gold. First, I think that as currently under 807(a)(1), the statement has to have equivalent circumstantial guaranteed trustworthiness, and that goes back to 803 and 804. To me, that's something that's impossible to apply. So I think \*1563 the change makes it much better. And so also I don't think you're opening the floodgates, because you're requiring written notice in advance, including the substance and declarant's name. So, if I'm in a trial setting and I'm floundering, I can't say, "Oh, Your Honor, 807." And so I don't think you're opening the floodgates. I think you're actually bringing some rigor and some gate check to do it in advance. In fact, so as to 803, 804, 807, you have to do more for 807 in advance. So I think the language is much better and I think what you're saying is you have to consider the circumstance of corroborating evidence, which is the test you want applied rather than saying okay, there's thirty different exceptions in 803 and 804, so in that world how does this fit?

And so I hear people saying we're not sure we should even bother. No one will use this Rule, so should we change it? I guess I'm here just in this conference room looking at the language, so if you've already passed that threshold, this is much improved language. I don't think it opens the floodgate. I think you're replacing a test--807(a)(1)<sup>81</sup>--that's deeply flawed; in my view, a deeply flawed language with something that can be applied.

PROFESSOR CAPRA: We got that down on record, right? That's an excellent comment. Brandon?

MR. FOX: I think that having rules of evidence that are very clear on what comes in or not helps us out so much in making charging decisions, determining when do we have enough evidence, where do we go, how do we find this evidence, and the clearer we are with what would come in helps us out so much, and I think it also helps out the defense bar as well.

PROFESSOR CAPRA: Virginia?

MS. MILSTEAD: Looking at the proposed language of an amendment to Rule 807, my assumption is that it's not intending to limit it to the consideration of corroborating evidence, but a judge would also be able to consider contradictory evidence. But I wonder if by calling out corroborating evidence that somehow could be read as a limitation on what the court can consider as far as the circumstances.

PROFESSOR CAPRA: Well, the proposed change would require consideration of the pertinent circumstances and any corroborating evidence. That's two things. And it definitely can be improved. This is just like a working draft.

So the reason that corroborating evidence is added to the proposal is that there are courts that don't allow a judge applying the residual exception to look at the corroborating evidence, which I think is wrong.

MS. MILSTEAD: But even if the phrasing was something like any corroborating or contradictory evidence, or any pertinent evidence.

PROFESSOR CAPRA: Any corroborating evidence or the lack of corroborating evidence.

MS. MILSTEAD: Right.

\*1564 PROFESSOR CAPRA: Well, no. You're saying more. Not just the lack of, but contradictory evidence.

MS. MILSTEAD: Right. It's almost like the totality of the circumstances. Instead of just pertinent circumstances or corroborating evidence, it's looking at everything.

PROFESSOR CAPRA: The totality, yes. Got it.

MS. MILSTEAD: Look at the evidence that supports it, the evidence that contradicts it.

PROFESSOR CAPRA: That's good.

MS. MILSTEAD: Lack of evidence, all those things.

PROFESSOR CAPRA: Good. That's very helpful. Eileen?

PROFESSOR SCALLEN: I just wondered why you shied away from the word "reliability" in that same provision.

PROFESSOR CAPRA: Instead of trustworthy?

PROFESSOR SCALLEN: Yes.

PROFESSOR CAPRA: Well, just carrying on from the original, right?

PROFESSOR SCALLEN: Yes. Okay. And I just wanted to make clear--assuming you work out any tinkering with that language, once you explained what you meant by pertinent circumstances--I love these changes.

The thing that I was concerned about is this impetus to get rid of the notion that this would be used in exceptional circumstances. And I wanted to ask Judge Sessions, were you suggesting that the exceptional circumstances language be moved into the text of the rule or--

JUDGE SESSIONS: No. I wasn't suggesting that. I mean, I may disagree. I'm not concerned about exceptional circumstances frankly. But regardless, the fact it is used rarely and as long as we make it clear in Dan's Notes--we won't call the Reporter.

PROFESSOR CAPRA: Or the Committee Notes.

PROFESSOR SCALLEN: Right.

PROFESSOR CAPRA: Actually, they're not even our Committee's Notes. They're the Standing Committee's Notes technically. Anyway, in the Note you can make it clear that this is not intended to open up the floodgates with some language.

PROFESSOR CAPRA: Judge Hamilton?

JUDGE HAMILTON: At the risk of stating the obvious on this, in that language you're suggesting, would it be appropriate to say that the court determines that the statement is trustworthy notwithstanding the opponent's inability to cross-examine the declarant, just to emphasize? I know that's implicit in all this in any of the hearsay points, but--

PROFESSOR CAPRA: That's good. I like it.

JUDGE HAMILTON:--since you've got such an exceptional situation we're talking about.

PROFESSOR CAPRA: Yes. An informal poll has said--an instant poll.

JUDGE SESSIONS: All the heads are going up and down.

\*1565 PROFESSOR CAPRA: Yeah. That's our informal poll; Judge Hamilton's suggestion will be added to the working draft. Judge Campbell?

JUDGE CAMPBELL: Well, the general concern I have is if we use the language in (a)(1), how is it that that does not become an eye-of-the-beholder standpoint? If the judge looks at all the facts and says this looks trustworthy to me, it comes in.

And how do lawyers know before trial whether or not any hearsay is going to be excluded? It can't fit under any of the exceptions, but they don't know if this judge will look at all the circumstances and say well, that's trustworthy enough for me.

PROFESSOR CAPRA: Right. We're back to where we started. That actually is the problem of the residual exception itself.

JUDGE LIVINGSTON: And this is the debate that was had at the last symposium.

PROFESSOR CAPRA: And the debate that was had in Congress when the Rule was first developed.

JUDGE CAMPBELL: But if that's true, that it really is going to depend on how that judge happens to look at the facts.

PROFESSOR CAPRA: Correct.

JUDGE CAMPBELL: It seems to me we've lost predictability and we have made this the exception of first choice because why not take a ruling of the judge saying it's trustworthy before you go through the steps of 803(6).<sup>82</sup>

PROFESSOR CAPRA: But this is what happens now under the current Rule. In other words, it's very judge dependent and judges can find hundreds of ways to admit residual hearsay as being reliable and hundreds of ways to deny it, and I think the cases show that. So I don't know that it changes.

It's actually the real fundamental argument about do you want a residual exception because it's going to give rise to judges saying I find it trustworthy--I might have a little explanation for why and the appellate court is going to affirm--or I find it untrustworthy. And that's what's happening, and the appendix cases indicate that.<sup>83</sup> That's the challenge we face.

JUDGE SESSIONS: And if you don't have an exception, people are going to shoehorn every issue into the standard exceptions.

JUDGE CAMPBELL: But we've got the exception now. We're not talking about eliminating that.

JUDGE SESSIONS: Right.

PROFESSOR CAPRA: But this exception, it already--and actually that was when the Committee was working on limiting or eliminating the ancient documents exception, and the comments were we can't use a residual exception because it's too unpredictable. Some judges might allow it. Other judges won't allow it.

\*1566 JUDGE CAMPBELL: Well, let me ask one other question, just to play devil's advocate. Congress created this. Congress said in its legislative history it should be exceptional and rare. This Rule has to go back before Congress. If we were to adopt this language and it's in front of Congress and Congress says to us why isn't this broadening the rule? Why is this not getting rid of our exceptional, rare intention--

PROFESSOR CAPRA: In terms of the statutory rare and exceptional.

JUDGE CAMPBELL: You're changing what we intend, as clearly stated in our legislative history.

PROFESSOR CAPRA: Right.

JUDGE CAMPBELL: What's our answer?

PROFESSOR CAPRA: Well, that would be a challenge for the Committee, but I think the answer is we've lived with the Rule for a long time and found out that the standard of equivalent circumstance guarantees of trustworthiness does not work, so we are fixing it with a less clumsy standard.

And so without any intent to expand it, just fixing up the language, I guess that would be the pitch. Judge Marten?

JUDGE MARTEN: Well, it seems to me that we could modify the language of 807(a) to some extent to put the focus back on the enumerated exceptions and put this in the place of last resort by saying a hearsay statement not specifically covered by a hearsay exception in Rule 803 or 804 is not excluded by the rule against hearsay if--and I think that puts the focus on 803 and 804 to start with--that is where we begin with this being the last place.

I agree totally with the people who have said that if we don't have a residual exception we're going to end up with tortured interpretations of exceptions in an effort to try and let otherwise reliable statements in. And I agree that eliminating the language about admitting it will best serve the purposes of these rules is a good idea. That's a judgment call about as nebulous as anything could possibly be, and I think that we have at the same time sharpened what the judge needs to do and the test that's to be used without the fear of actually opening the floodgates.

I think this strikes a nice balance. We need the residual exception, and I think that we can modify the language a bit just to say look at 803 and 804 first, and this is the exception of last resort.

PROFESSOR CAPRA: Right. And there is case law on that where a judge says I'm not looking at the residual exception until we go through 803, 804, and that is a good point. It would probably be useful to add in a Committee Note as well. Judge Hamilton?

JUDGE HAMILTON: At the risk of just a war story that's on my mind, on the eye-of-the-beholder point, our court recently split very sharply en banc<sup>84</sup> not under residual hearsay but on the constitutional exception under *Chambers v. Mississippi*<sup>85</sup> in a capital murder case where essentially the only \*1567 evidence other than the defendant's denial indicating he was not guilty was a videotaped statement by a nine-year-old girl about having seen two of the victims at a time and place that would have exonerated the defendant.

She didn't remember giving the statement.<sup>86</sup> She didn't remember the circumstances years later.<sup>87</sup> It doesn't qualify as past recollection recorded, and the question was did it come in under the constitutional standard for critical, reliable evidence under *Chambers*, which Dan may tell me I'm hopelessly fuzzing up there.

But in a life and death circumstance, our court divided very sharply on whether that should be deemed sufficiently reliable, and if you want the details, Judge Wood, who wrote for the majority--I dissented--put the full transcript of the little girl's interview in the opinion.

It's a case called *Kubsch v. Neal*,<sup>88</sup> and it's a good signal of just how difficult and how critical some of these--it would be easy to treat that under federal law as a residual question and very, very difficult to apply.

PROFESSOR CAPRA: Another thing to note is while the court has discretion under the residual exception, there's a lot of discretion under the generalized exceptions, too. Is something excited enough? What's the time between the event and the statement for present sense impressions? We can go on and on in terms of discretion. Mark?

MR. HOLSCHER: A procedural question. Can you put something in the Advisory Committee Notes that says this is intended to clarify the test that appears to apply to the notice requirement and this is intended to remain an exceptional circumstance?

PROFESSOR CAPRA: That's an improvement because you then have it in a Note as opposed to somewhere in some legislative history that's forty years old.

MR. HOLSCHER: Because my response to you, Judge, is that I understand you're worried about the district courts having discretion, but they have it now under a test of: Has equivalent circumstance guaranteed the trustworthiness across a whole set of different hearsay exceptions?

I don't even know how a district court judge could ever really apply that test without literally--if you rigorously can apply that--you need to go through every 803, 804 exception, how credible and reliable those statements would be under those exceptions versus this, which is an impossible task.

But I think you're replacing a horrible standard with something better and more straightforward. I hear the concerns you don't want to open the floodgates, but if you could put something in the Notes that this is to clarify the test to be applied, but this is meant to be a rare exception, you may have solved the problem.

PROFESSOR CAPRA: Virginia.

MS. MILSTEAD: Well, just to follow up whether there might even be a justification for putting the rare exceptional standard into the Rule.

\*1568 PROFESSOR CAPRA: Yes. Oklahoma does that, puts exceptional in there,<sup>89</sup> but I don't know. I don't even know what that means.

MS. SHAPIRO: I just think we need to be honest with ourselves. I mean, one of the reasons that we talked about amending 807 was so that it wouldn't be so rarely and exceptionally limited because if you're going to change the Rule in order to not torture the other Rules and to have a meaningful rule of last resort, then judges can't be afraid to use it, and right now the reason 807 is never used is because it's so embedded in our collective practice that it's so rare and exceptional.

If we're putting that in the Rule or in the Note, then I'm not sure that there's much point in changing the Rule.

PROFESSOR CAPRA: Yes, Kelly?

MS. ZUSMAN: And so, if we want to move away from that but not too far away from that--

PROFESSOR CAPRA: That's what we're trying to do.

MS. ZUSMAN:--and to build on simply what Judge Hamilton mentioned, instead of amending subpart (1), what if subpart (2) were amended, for example, along the lines of if the proponent establishes that the probative value substantially exceeds any prejudice to the opposing party it's admissible so that we place a higher burden on the proponent to rely upon 807 as kind of a gatekeeping function?

PROFESSOR CAPRA: But you already have 403. I don't get how that works. You're going to reverse 403.

MS. ZUSMAN: Right.

PROFESSOR CAPRA: I don't know, because these are still regulated under 403 in terms of once we get past the hearsay regulation.

MS. ZUSMAN: Could there be some symmetry?

PROFESSOR CAPRA: Okay.

JUDGE LIVINGSTON: Kelly made my point. I was just going to say that the idea as to maybe not rare and exceptional, and there are two things about this modification and I think I agree with both of them. One, that maybe the rule doesn't have to be rare and exceptional, but it can't displace the general hearsay rules.

So we're talking about a little bit of somewhat, and it will focus the district court on what it should be focused on, not on these equivalent circumstantial guarantees of trustworthiness, but whether this evidence is reliable so that it should come in.

In this narrow circumstance--not Judge Posner's big circumstance--the district court has to judge reliability in every case, but in the narrow residual exception, that's where we should want the district court to be focused.

PROFESSOR CAPRA: One more. Sol?

JUDGE OLIVER: I was looking at the rule where we say the statement has the equivalent circumstantial guarantees of trustworthiness as it relates to the other hearsay, 803 and 804. I never read that to mean that I had to go \*1569 through every single one of those as I was analyzing that. The way I read it was when you talk about what other things that undergird the reliability in 803 or 804 if you were to sit down and discuss and talk about them, then the question is whether there is something similar to the things that undergird the different hearsay exceptions that are there in regard to the statement you're looking at. So I didn't take it that I had to go through each and every one.

PROFESSOR CAPRA: But even as limited you've got a problem there because 804(b)(1), it's reliable because it was cross-examined and there's a similar motive. 804(b)(2) is reliable because the person is dying. And so on: 804(b)(3) is reliable because it is against interest, state of mind because of a unique perception.<sup>90</sup>

How do you put all that together when you're just evaluating a single statement? I guess that's the difficulty, right? I mean, even if you don't go through every one, any two exceptions have different guarantees. I guess that's the problem.

JUDGE OLIVER: Well, I thought it was a statement that was more of a general nature that if you look at the bases for why we accept these exceptions, is there something of equivalent value in terms of--

PROFESSOR CAPRA: Well, it's an interesting take. Like the Second Circuit says, what we look at is the hearsay problem. That problem is inability to regulate sincerity, faulty narration, misperception, and bad memory. And let's look at our statement--is

there anything in the circumstances that address those four problems? But the flaw in that analysis is that not all the hearsay exceptions actually regulate all those problems.

#### **IV. TOPIC THREE: THE ADMISSIBILITY OF PRIOR INCONSISTENT STATEMENTS TO INCLUDE VIDEO RECORDS AVAILABLE FOR PRESENTATION AT TRIAL**

PROFESSOR CAPRA: So we'd like to spend the remaining ten minutes on the final proposal, which I'm going to put up on PowerPoint, which is a proposal to expand the substantive admissibility of prior inconsistent statements<sup>91</sup> to include those where they were video recorded and available for presentation at trial. [The PowerPoint provided as follows]:

**\*1570 Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay**

....

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) *A Declarant-Witness's Prior Statement*. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was :

(i) was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; *or*

(ii) was recorded on video and is available for presentation at trial; *or*

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; *or*

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; *or*

(C) identifies a person as someone the declarant perceived earlier.

PROFESSOR CAPRA: Jim, let's go to you for this to start this off.

MR. ASPERGER: I was talking to Dan at the break. The second jury I was on involved precisely this issue, not with the video recording, but it was a gang shooting where there was a code of silence so the prosecution couldn't bring any live witness to trial that would identify the defendant in court.

There was one witness, though, the victim, who identified the defendant in a statement to one of the police officers when he was in the hospital and so the whole case turned upon that, and that was problematic for a number of reasons because it was in dispute. It was not recorded. It was the police officer testifying, and we found out afterward there was a second police officer that they didn't even bring to testify to give more added reliability to the case.

And the bottom line is that the case hung. It probably never should have been brought based upon that evidence alone, but that's sort of the flip side of what you have here. I think what it does is reinforce that the Committee has picked out a very narrow circumstance where you've got a recording and the jury can evaluate it and it falls on a much more reliable part of the spectrum.

And so, as I look at the proposal, my only question was if somebody tries to do that how much of the statement can come in because, based upon my experience as a prosecutor is you have one statement that's helpful, but the defendant is going to make a lot of statements that are exculpatory and so the defense is going to want to get those in, and it could happen in a civil case as well.

PROFESSOR CAPRA: Yes, Justice Manella?

JUSTICE MANELLA: Most of the people in this room, perhaps with the exception of Alan, who are prosecutors were in federal court, and the complement of cases is very different. In state court the case Jim saw was not unusual, and as you all know in California these inconsistent statements \*1571 come in for their substantive value without the limitation of having been tape recorded. The only limitation is section 770,<sup>92</sup> and that's a very low bar to me. And even that is subject to the interest of justice, so, basically, it can come in and they do come in quite commonly, at least the cases I see coming up. Criminal cases, gang cases, it is not at all uncommon.

The case you described may have been pretty thin, but it is not--I would say it is almost the norm in the cases I see where a victim has identified his or her assailant in the hospital or shortly thereafter but will not do so at trial. Other witnesses have done so but will not do so at trial. If those statements were admissible only for impeachment, you couldn't possibly bring these cases.

And the other area in which it's the most common, maybe even more common, is domestic violence. It is the norm. I mean, it really is the norm that police are called, victim gives a statement to police, police record it, sometimes bruises, physical injuries, sometimes not, comes to trial--

PROFESSOR CAPRA: And the prosecutor calls the witness--

JUSTICE MANELLA: Calls the witness first.

PROFESSOR CAPRA:--solely to introduce their inconsistent statement.

JUSTICE MANELLA: Well, calls the witness first. The witness will not testify, yes, consistent with, let's say in this case, her prior statement. The prosecutor goes through. The witness either says I don't recall or whatever. The prosecutor calls the arresting officer at the scene and that's the case. And Alan probably has a lot more experience in seeing that than I do.

MR. JACKSON: I spent about five and a half years doing nothing but gang cases, and I was sort of salivating when you were telling me about that case. I was like, God, that's a good case.

It is the norm. My wife currently is a prosecutor with the DA's Office and she works in family violence and does domestic violence cases, sort of high-level domestic violence cases every day. Every day she has to do a preliminary hearing or a trial with evidence exactly as Justice Manella suggested.

And if we didn't have some way to *California v. Green*<sup>93</sup> when these--I mean, to *Green* a witness. *Green* is the case that gives us the opportunity to do that. If we didn't have that opportunity, we simply could not try hardcore gang cases in Los Angeles. Couldn't do it.

PROFESSOR CAPRA: Interesting. Chris, can I ask you, when this happens here and when it would be expanded this way--

MR. DYBWAD: You know, I actually think the expansion in the limited way of videotape makes some amount of sense. I must say in federal court it comes up I think much more rarely and it's usually the AUSA who's going to have the opportunity to use it and it's usually a grand jury transcript, so in the more complicated cases perhaps a number of witnesses have been put in front of the grand jury. And so at the moment the only person who has the \*1572 opportunity to admit substantive prior inconsistent statements in federal court is the prosecutor.

PROFESSOR CAPRA: Yes. It's not going to be you, right?

MR. DYBWAD: It is not me. Actually, it's come up at least once in my time when it was a state cop who testified contrary to a prior testimony he'd given in state court that he didn't know we had, so yes, but the videotape would actually probably expand it somewhat for us to get prior inconsistent statements in substantively, and it would create an incentive to videotape.

PROFESSOR CAPRA: Yes, Carol?

PROFESSOR CHASE: This is just a minor point. I don't think I'd refer to it as recorded on video. I wouldn't refer to the technology. I would refer to it as maybe audiovisual recording because a lot of it's going to be digital or who knows what the next--

PROFESSOR CAPRA: So video recorded would be antiquated.

PROFESSOR CHASE: Yes. I would say audiovisual recording if you want both, but--

PROFESSOR CAPRA: No, we don't. No. The idea was to keep it visual.

PROFESSOR CHASE: You want visual. Okay. Audiovisual would be both, audio and visual. Then that was my next point was well, what about an audio recording?

PROFESSOR CAPRA: In the long history of this proposal, the concerns were that the prior statements would be made up and then they couldn't be cross-examined because the witness would just deny the statement. The argument was that you can't cross-examine a declarant who doesn't even admit he made the statement.

What about audio recording? Well, the thought was that somebody could say, "Well, that's not my voice." What they can't say is, "That's not my face."

PROFESSOR CHASE: Could the jury listen to the voice and make the comparison?

PROFESSOR CAPRA: That is interesting. Arguably that will lead to a collateral inquiry. I don't mean to speak for the Committee about this; adding admissibility for audio recordings might be something to consider. Judge Phillips?

JUDGE PHILLIPS: Well, I was just going to add I've had cases where the issue comes up that well, not who's speaking, but has it been altered.

JUSTICE MANELLA: Has it been manipulated? Altered?

PROFESSOR CAPRA: Right. Well, you have the authentication rules that would apply here, right? But, yes.

JUSTICE MANELLA: The other issue, of course, is the effectiveness of a limiting instruction. It's my belief that it's very difficult to let one portion of a cat out of a bag. If you've ever tried to put a cat in a cage, you know that as soon as the word is out. And so I recognize and the rules recognize that we do give limiting instructions, and God knows how many times I've written an opinion that says that the court presumes the jury followed the judge's instructions. But if you're really talking about a prior inconsistent \*1573 statement and the jury hears it, the notion that the jury individually or as a whole will be able to compartmentalize that and say of course we can't consider that for its substantive meaning, whatever the hell that means, but only for impeachment, I just think we're kidding ourselves.

PROFESSOR CAPRA: Judge Campbell?

JUDGE CAMPBELL: I was just going to ask would this include off-camera statements? I've had a wrongful death case with a police officer's chest camera. There's a bunch of people talking. It's video recorded, but it's not an interrogation in my witness room.

PROFESSOR CAPRA: Draftspersonship is required for drawing that line. It is certainly a question to consider. I think the goal was to make sure that the statement could not be denied and so some visual indication that it was the witness talking would be required. Judge Hamilton?

JUDGE HAMILTON: Just one quick thought as I was thinking about this was I had some concern about the asymmetry that this sets up. Assume that the technology is cheap enough so that both sides, both defense and prosecution, plaintiff and defense in civil cases, can afford the technology. But I'm thinking in civil cases, for example, about a rather asymmetric ability for an employer say to lock its witnesses in to ex parte video recordings that the plaintiff will not have an opportunity to do with the other employees.

PROFESSOR CAPRA: What should be done about that?

JUDGE HAMILTON: I don't know. I want to throw out the strategic use and exploitation of some of those asymmetries in power that may be a problem.

PROFESSOR CAPRA: Thank you.

JUDGE SESSIONS: I had just one other question. And that's a public policy issue. Of course, there's probably a related issue as to whether we should be involved in public policy questions, but when you highlight video as opposed to audio, I think it was your observation, Chris, and I agree with that, that the Rule will encourage law enforcement agencies to use video.

We were told that the government has the pattern of taking wobbly witnesses and bringing them before the grand jury so that their testimony under Rule 801(d)(1)(a) will come in. Well, does that mean that with this particular provision, when a person is arrested and they're taken down before a federal agent, they turn on the video machine because they know that evidence is now coming in if the witness changes his tune at trial, and so that becomes a public policy issue as to whether we encourage use of videos in law enforcement?

JUDGE CAMPBELL: And a related question is every criminal defense attorney is going to be turning on their iPhone to get a video recording of every witness interview so they can come within this.

PROFESSOR CAPRA: That would be a consequence.

PROFESSOR LEVENSON: An added complication to that is--

PROFESSOR CAPRA: Is that a complication or--

PROFESSOR LEVENSON: No. I just raise the concern that videotaping people without their permission differs by states. In some states, it's illegal. \*1574 In some states, it's permissible. So it's going to be hard to have a national standard.

PROFESSOR CAPRA: I can see that point, but that can't determine the Rule, right?

PROFESSOR LEVENSON: I think it can raise concerns about whether you're going to have a Rule that's going to provide the type of uniformity and fairness that you want to have. That's all.

PROFESSOR CAPRA: So your point was that there should be no Rule because of these different state statutes?

PROFESSOR LEVENSON: I think we should appreciate how that as we start to think who's going to have the advantage of using the provisions how it will be applied differently in different parts of the country.

PROFESSOR CAPRA: That's interesting. Brandon?

MR. FOX: Judge Hamilton brought up a point that just reminded me of a string of cases that I've prosecuted, and it involved a police agency here that in its jails had a pattern and practice that's been alleged and they've agreed to of abusing inmates.

And during that time, they would get a bunch of inmates around who saw the incident, and they would have the same deputies who were involved in the abuse interview on videotape the inmates, and with those cases the inmates would invariably say I didn't see anything or the other inmate who had been abused was the aggressor. They were doing that because they were afraid a lot of the time that they would be subject to retribution.

And again, there's a history that that was happening. So I hadn't thought about that until Judge Hamilton raised the point, but just because it's videotaped does not mean that it's necessarily reliable. It may be. So that's one thing.

But I think that the other thing that Judge Hamilton raised is usually here we've got a binary choice, and I don't know how much the Rule actually matters about whether it's substantive or not because if you're going to cross-examine a witness, whether it's on videotape or not, a prior inconsistent statement, they're saying now the light is red. Before they said it was green. Any attorney is going to argue the light was green at that point, and a witness limiting instruction will not really matter in that instance, so--

PROFESSOR CAPRA: Yes. It probably doesn't matter to the jury, but it matters in summary judgment.

MR. FOX: It matters.

PROFESSOR CAPRA: It matters. Or on a directed verdict. That's where it matters.

MR. FOX: Of course. I'm just pointing out that you're right. It does matter there. So anyway, going back to my earlier point, I think that there also needs to be consideration about what are the circumstances of these interviews.

PROFESSOR CAPRA: You're right. It doesn't mean it's reliable, but actually that's not the point of the exception. The exception is not there \*1575 because the statements are reliable. The exception is there because the witness can be cross-examined about it.

So I assume then in your situation, if a person was legitimately intimidated, if they came up on the stand and they had a prior inconsistent statement, you could cross-examine them and that would come out.

MR. FOX: You're absolutely right.

MR. ASPERGER: And, Dan, I also assume you're doing this so you can watch to see the demeanor of the witness when they made the hearsay statement.

PROFESSOR CAPRA: That's a good point in response to Judge Campbell's case about the body camera. An off-camera statement shouldn't count under the Rule because you can't see the declarant's demeanor.

MR. ASPERGER: It should be where the declarant can be seen.

PROFESSOR CAPRA: How do you write "on-camera" is the question. We have to think about it.

MR. ASPERGER: The flip side of that, though, is if it's a live officer recording and a bunch of things are going on, nobody knows they're being videotaped, so it might be reliable. There are a lot of facts and circumstances that are going to go into the reliability.

PROFESSOR CAPRA: Are we saving all our best comments for overtime, I see? Mark?

MR. HOLSCHER: On the federal criminal side, one of the real problems is the use of 302s,<sup>94</sup> where there's a strong incentive not to videotape, not to record. The agents give their depiction of what occurred, and in the bigger cases they actually do composite 302s where they take five, six, seven statements where they may well have been inconsistent for the witnesses they intend to use, and they make one composite 302 and make it impossible to use.

So I think any Rule that encourages the videotape in the criminal system encourages the accuracy of the prior statements, and I think the idea that the FBI now still writes up 302s and takes hours and hours and hours rather than push a button on an iPhone is wrong--and I'm a former federal prosecutor. I'm not a bleeding heart here. There's a real problem with the system, and anything to do with these Rules to encourage the video and the actual testimony is helpful.

MR. DYBWAD: So please note my prior enthusiasm for the recording because I spend my days reading 302s.

MS. ANDRUES: Something that the defense can do defensively is to videotape a witness after the government has not. And so the video isn't actually being used as the Rule would allow it as an inconsistent statement. It's impeaching the practice of the law enforcement officers as well.

PROFESSOR CAPRA: Okay. I'm going to turn to Judge Sessions for a closing statement.

**\*1576** JUDGE SESSIONS: Yes. I want to thank you all. I actually want to thank a number of people. First, Dan. [Applause]

His work continues to amaze me, but in running and conducting this conversation, he does it so effortlessly and engages everyone. I think that's an incredibly difficult task, but he does it beautifully.

So to Pepperdine also to host us both last night and today. This is one of the most beautiful places for a law school or actually one of the worst because I can't imagine how you can concentrate.

But then for all of you who have obviously busy lives. I really hope that you enjoyed the discussion. I want to say that I found this to be fascinating. All of your observations from all of your experiences are just incredibly valuable to this process, and little things and pieces may be taken out of this conversation, and quite frankly you may very well see them in a Rule or--

PROFESSOR CAPRA: Your name up in lights.

JUDGE SESSIONS:--you may see them hidden down there somewhere in the Notes. But hopefully we'll take what you've said in good faith, and I really thank you all.

PROFESSOR CAPRA: And I thank you all as well personally. [Applause]

Footnotes

- a1 This conference was held on October, 21, 2016, at Pepperdine University School of Law, under the sponsorship of the Judicial Conference Advisory Committee on Evidence Rules. The transcript has been lightly edited and represents the panelists' individual views only and in no way reflects those of their affiliated firms, organizations, law schools, or the judiciary.
- 1 The Advisory Committee on Evidence Rules (“the Committee”).
- 2 The Federal Rules of Evidence (“the Rules”).
- 3 FED. R. EVID. 502 (establishing the attorney-client privilege, the work product privilege, and the limitations on waiving these privileges).
- 4 *See generally Reinigorating Rule 502*, 81 FORDHAM L. REV. 1533 (2013).
- 5 *See generally Symposium on the Challenges of Electronic Evidence*, 83 FORDHAM L. REV. 1163 (2014).
- 6 *See, e.g.,* Richard A. Posner, *On Hearsay*, 84 FORDHAM L. REV. 1465 (2016).
- 7 FED. R. EVID. 404(b) (establishing the prohibited and permitted use of past crimes, wrongs, or other acts in a current case).
- 8 673 F.3d 688 (7th Cir. 2012).
- 9 763 F.3d 845 (7th Cir. 2014).
- 10 *See* Memorandum Regarding Conference on Evidentiary Developments: The Residual Exception, Rule 801(d)(1)(A), and Rule 404(b) from Daniel J. Capra, Reporter for Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules 6 (Oct. 1, 2016) [hereinafter Memorandum Regarding Conference on Evidentiary Developments] (on file with the *Fordham Law Review*).
- 11 *See Gomez*, 763 F.3d at 851.
- 12 *See id.* at 852.
- 13 *See id.*
- 14 *See id.*
- 15 *See id.*
- 16 *See id.* at 853 (“Multipart tests are commonplace in our law and can be useful, but sometimes they stray or distract from the legal principles they are designed to implement.”).
- 17 *See id.*
- 18 *Id.* at 856.
- 19 *See id.* (citing *United States v. Lee*, 724 F.3d 968, 976-77 (7th Cir. 2013); *United States v. Richards*, 719 F.3d 746 (7th Cir. 2013); *United States v. Ciesiolka*, 614 F.3d 347, 355 (7th Cir. 2010)).

- 20 *Id.*
- 21 *See id.* at 845.
- 22 *See id.* at 860-61.
- 23 613 F.3d 711 (7th Cir. 2010).
- 24 *See generally* United States v. Green-Bowman, 816 F.3d 958 (8th Cir. 2016).
- 25 MINN. R. EVID. 404 committee comment to 2006 amendment (noting the rule was revised “to provide a clear balancing test to be applied in determining the admissibility of other acts evidence”).
- 26 *See id.*
- 27 *Compare* FED. R. EVID. 404(b), *with* MINN. R. EVID. 404(b).
- 28 MINN. R. EVID. 404(b).
- 29 *Id.*
- 30 *See* FED. R. EVID. 702 advisory committee's note to 2000 amendment.
- 31 *See id.* 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”).
- 32 *See* United States v. Gomez, 763 F.3d 845, 864 (7th Cir. 2014) (Hamilton, J., concurring in part and dissenting in part).
- 33 *See id.* at 865 (“[Y]ou must decide whether it is more likely than not that the defendant took the actions.”).
- 34 *See* United States v. Bailey, 696 F.3d 794, 798-99 (9th Cir. 2012).
- 35 *See* MINN. R. EVID. 404(b).
- 36 *See* FED. R. EVID. 609(a)(1)(B) (including a balancing test for impeaching criminal defendants who choose to testify: the court must determine that the probative value of admitting the impeachment evidence “outweighs its prejudicial effect to that defendant”).
- 37 506 U.S. 19 (1993).
- 38 918 F.2d 848 (9th Cir. 1990).
- 39 *Id.* at 850.
- 40 *See id.* at 851.
- 41 *See id.* at 853.
- 42 FED. R. EVID. 404(b)(2) (“[E]vidence may be admissible for another purpose, *such as* proving motive, opportunity ....” (emphasis added)).
- 43 *See* United States v. Caldwell, 760 F.3d 267, 276 (3d Cir. 2014) (discussing what it should mean to interpret Rule 404(b) as a rule of inclusion).
- 44 715 F.3d 1019 (7th Cir. 2013).
- 45 *See id.* at 1021-22.
- 46 *See* CAL. EVID. CODE § 1108 (West 2016).

- 47 See FED. R. EVID. 413-415 (providing permitted and prohibited uses for disclosing to the court a defendant's similar civil and criminal crimes involving child molestation and sexual assault).
- 48 49 F.3d 475 (8th Cir. 1995).
- 49 See FED. R. EVID. 404(b)(2) (establishing that prior crimes, other acts, or character evidence may be admissible for purposes other than impeachment in a criminal case if the defendant is notified prior to trial).
- 50 See *id.* 404(b) (providing that prior crimes, other acts, or character evidence can be used for reasons other than impeachment).
- 51 See *United States v. Miller*, 673 F.3d 688, 694 (7th Cir. 2012).
- 52 See FED. R. EVID. 404(b)(2) (“This [character evidence, crimes, or other acts] evidence may be admissible for another *purpose*, such as ....” (emphasis added)).
- 53 See 28 U.S.C. § 2072 (2012).
- 54 See FED. R. EVID. 404 advisory committee's note on proposed rule.
- 55 519 U.S. 172 (1997).
- 56 *United States v. Crowder*, 87 F.3d 1405, 1416 (D.C. Cir. 1996) (en banc) (Silberman, J., concurring).
- 57 No. BA255233, 2009 WL 1560040 (Cal. Super. Ct. 2009).
- 58 CAL. EVID. CODE § 1101 (West 2016).
- 59 Compare *id.*, with FED. R. EVID. 404(b).
- 60 484 F.2d 127 (4th Cir. 1973).
- 61 FED. R. EVID. 807 (providing a residual hearsay exception).
- 62 *Id.*; see *id.* 803(24), 804(b)(5). In 1997, these rules were combined into a single residual exception, Rule 807. See *id.* 807 advisory committee's note.
- 63 For a discussion of the near miss application of Rule 807, see 4 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL § 807.02 (11th ed. 2015).
- 64 FED. R. EVID. 702(c) (expert testimony may be allowed if “the testimony is based on sufficient facts or data”); *id.* 702(d) (providing expert testimony is admissible if “[t]he expert has reliably applied the principles and methods to the facts of the case”).
- 65 509 U.S. 579 (1993).
- 66 526 U.S. 137 (1999).
- 67 See FED. R. EVID. 702 advisory committee's note to 2000 amendment.
- 68 See *Daubert*, 509 U.S. at 593-94.
- 69 See Memorandum Regarding Expanding the Residual Exception to the Hearsay Rule from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules (Oct. 1, 2016), in ADVISORY COMMITTEE ON RULES OF EVIDENCE OCTOBER 2016 AGENDA BOOK 109 app. 1, at 226 (2016), <http://www.uscourts.gov/sites/default/files/2016-10-evidence-agenda-book.pdf> (discussing *Virola v. XO Communications, Inc.*, No. 05-CV-5056 (JG)(RER), 2008 WL 1766601 (E.D.N.Y. 2008)) [<https://perma.cc/T9GH-DHXD>].
- 70 See generally *Symposium on Hearsay Reform*, 84 FORDHAM L. REV. 1323 (2016).

- 71 WASH. CODE. EVID. 803(2), (4); *see, e.g.*, *State v. Ramirez*, 730 P.2d 98, 102 (Wash. Ct. App. 1986) (noting that addition of a residual exception will allow the court to “reinstate the integrity of the ‘spontaneous declaration’ element of the excited utterance exception” that had become stretched in the absence of a residual exception).
- 72 836 F.3d 1072 (9th Cir. 2016).
- 73 541 U.S. 36 (2004).
- 74 448 U.S. 56 (1980).
- 75 557 U.S. 305 (2009).
- 76 FED. R. EVID. 807(a)(4).
- 77 483 U.S. 171 (1987).
- 78 502 U.S. 346 (1992).
- 79 135 S. Ct. 2173 (2015).
- 80 Memorandum from Timothy Lau, Fed. Judicial Ctr., to Advisory Comm. on Rules of Evidence (Mar. 5, 2016) (on file with the *Fordham Law Review*).
- 81 FED. R. EVID. 807(a)(1) (admitting hearsay if “the statement has equivalent circumstantial guarantees of trustworthiness”).
- 82 *Id.* 803(6) (establishing the exception to the rule against hearsay for records of a regularly conducted activity).
- 83 *See* Memorandum Regarding Expanding the Residual Exception to the Hearsay Rule from Daniel J. Capra, *supra* note 69, at 128.
- 84 *See* *Kubsch v. Neal*, 800 F.3d 783, 788 (7th Cir. 2015).
- 85 410 U.S. 284 (1973).
- 86 *See Kubsch*, 800 F.3d at 793.
- 87 *See id.*
- 88 800 F.3d 783 (7th Cir. 2015).
- 89 OKLA. EVID. CODE §§ 2803-2804.
- 90 *See* FED. R. EVID. 804.
- 91 *See id.* 801.
- 92 CAL. EVID. CODE § 770 (West 2016).
- 93 399 U.S. 149 (1970).
- 94 Form FD-302 is an FBI form used for summarizing interviews.

85 FDMLR 1517

**Floor Debate Re: Federal Rules 413-415,**

U.S. Congressional Record, 1994

**140 Cong. Rec. S12487-04, 140 Cong. Rec. S12487-04, S12494, 1994 WL 461453**

Lautenberg, New Jersey

It will allow evidence of a defendant's prior sex offenses to be admitted in Federal trials so that repeat offenders will be punished with the stiff sentences they deserve.

**140 Cong. Rec. S12314-01, 140 Cong. Rec. S12314-01, S12350-51, 1994 WL 456695**

Biden, Delaware

I am also told that what they want is they want to make sure that we have the craziest rule I have ever heard of, the one thing I do not like. I fought against it on this floor, I fought against it in the conference, I fought against it in the second conference, and I fought against it when we were in that marathon session with the House Members.

You know what it says? It is called the Dole-Molinari rule of evidence. It says that if you are accused of any crime of sex, of violence against a woman, that for the first time at a Federal level in our entire history, anyone who ever made an accusation against you, even if they kept it silent, never told the police, never swore out a complaint, never were indicted, never were tried, never were convicted, never were spoken to, that prosecutor can go out and find anybody in your past, 6 months to 60 years earlier, who will say: You know he kind of did the same thing to me, too. And you can bring that person in, put them on the witness stand and they can say, yes, he kind of \*S12351 did the same thing to me, too, or the same kind of thing to me, too.

That is revolutionary. But, guess what? It is in this bill-to my great shame, but it is in this bill. You know how it is in this bill? It is in this bill the following way: The Molinari-or I guess they want to call it the Hatch-Dole-Molinari, or Dole-Molinari-Hatch, or whatever they want to call it-that provision is in the bill. When the overall crime bill passes, within 150 days the Judicial Conference, who I think probably thinks this is a crazy idea, has to write a report. They are the experts, the judges who do all this stuff. Once they write the report, we have to wait until we get to that. After that report comes in, if it disagrees with the Molinari provision, then somebody has the burden-I guess it would be me, because I am the only one out of 535

people who feels this way, or one of few. I get to stand up on the floor and say we should not do this. We should do it a different way. And anybody here can filibuster my attempt to change the law. If at the end of another 150 days I do not get a chance to vote, like I have not gotten a chance to vote on final passage of the crime bill for 6 years, I do not get a chance to vote, a highly unusual process takes place: Dole-Hatch-Molinari, et al, becomes the law. And people are saying they want the Dole provision in the bill. Maybe they should read the bill before us. I wish it were not in the bill, but it is in the bill. I could-and I will not-go on with my frustration about this for another hour. But, Madam President--

**140 Cong. Rec. S12250-02, 140 Cong. Rec. S12250-02, S12261-62, 1994 WL 455051**

Biden, Delaware

Lastly, there is one thing in here that I must tell you I do not like. I want the RECORD to reflect it. Senator DOLE and Congresswoman MOLINARI on the House side had a provision that I think is, quite frankly, outrageous, but my colleagues all liked it. Even though I authored this bill, this is one provision I did not author.

The bill says that for anybody who is charged with a sexual crime of violence or child molestation, there is going to be a different set of rules that apply to them when they go to trial.

Right now, Mr. President, if the reporter is charged with bribery or robbery-I keep picking on these people; they are nice folks and they would not be charged with anything-but if he were and he goes to trial, and the prosecutor wants to bring in someone who says, in eighth grade he stole my wallet, to prove this is the guy who has always been stealing his whole life, the court says that is crazy, you cannot do that. This has nothing to do with this crime, and it happened 31 years ago, or in the reporter's case 15 years ago. You cannot do that. If you are charged with burglary, you cannot have someone say, "By the way, when I was 26 I lent him my car and he never brought it back." "Did you ever go and report it to the police?" "No." "Was he ever charged with the crime?" "No." What proof do you have? All the witnesses are dead. It happened 40 years ago. It is just my word.

The court says, "That is crazy."

For 800 years we said that is a crazy idea to let people come in and do that. It has nothing to do with the crime.

Most all of my friends, about 80 on the Senate floor and about 300 of them on the House floor, said if it is a child molestation case or if it is a crime of sexual violence, allegation of sexual violence against a woman, the prosecutor not only can bring in evidence that relates to the crime, but can go out and find anybody who at any time in the past, a day after, 2 years before, 50 years before, who will allege that the defendant did something like that to them then.

Can you imagine how prejudicial that is going to be? You have a son who is 21 years old. He is being accused of rape. He did not do it. Or more importantly you have an employer who is 55 years old, who has a disgruntled employee who charges him with rape. It does not happen often but it can happen.

Now what happens? The prosecutor, instead of just having to deal with that witness and those facts, is able to go out and find anybody who is willing to say, "By the way, when he was 21 years old when we were parked in the car he physically molested me," without any proof of anything. Now, the people who might have been around to prove that that was not the case, the couple you double dated with in the front seat of the car, are dead. But you have a witness, the one person sitting there, who says, "But that happened to me 25 years ago."

And now, the defendant's lawyer can get up and cross-examine that person and say, "How do you know that?" and on and on and on. But how do you, in effect, defend yourself against one trial, two trials, three trials? The one trial you are in, you can bring your witnesses, it is contemporaneous, you can say, "No, I wasn't there. The rape happened at 10 o'clock and I have four witnesses that say I was at Charley's Smoke Shop at 10 o'clock."

But how about the person who comes in and says, "Twenty years ago, this happened to me"? What can the defendant do?

Then you are supposed to say the jury will not be impacted by that. I think it is a crazy idea. But I am in the minority.

And so, let me tell my friends, who I think subscribe to what I think is a crazy idea, what is in this bill. The Hatch-Molinari language, to the credit of my friend from up Utah, because he is the guy that was over there negotiating. The only two Senators involved in this whole deal was myself -that I am aware of-and the Senator from Utah. We got to know more House Members intimately than we knew before in our lives.

I was making the argument-and he won; he won that this kind of what I would call, not technically, hearsay, but I would call amounts to nothing more than hearsay, should be allowed in.

We are not talking about prior convictions, by the way. We are not talking about not letting the guy who is up for rape and was convicted three times for rape and the prosecutor, say, wants the jury to know he has been convicted three times for rape. There is already Federal rules of evidence to allow that to happen. We are not talking about that.

But, my friend won. Here is what we put in there. The Hatch-Molinari language allowing this kind of evidence in will become law immediately upon the passage of this bill, subject to the following two things: First, they have to wait 150 days to allow the mechanism that-by the way, we do not pass any rules of evidence like this. We had a mechanism set up years ago. A couple of decades ago, we decided we should not write these kinds of laws, rules of evidence; we should give that authority to the Federal courts. And they have set up a judicial conference and they make recommendations and then we either vote for or against those recommendations. If we do not vote against them, they become law, because experts who do nothing but this get to deal with them.

So I must acknowledge that the Senator from Utah compromised a little bit on this. He said we have to wait 150 days before it becomes law, to let the judicial conference look at it and make a judgment. That is the good news from my part.

Now here comes the bad news. If, within the next 150 days after that, we do not affirmatively reject the Hatch-Molinari, et al., law, then it automatically becomes law.

So I am expecting that more enlightened minds, more enlightened perspectives-that is, the Supreme Court and the Federal judges-will, when they look at this proposed law, say, "This is crazy." I do not know; I am hoping they will. If I am wrong on that, then I am totally wrong, and I yield. I am beaten.

But, if they come back and say, "No, this is a bad idea. Here is how we should change the law," then, after they do that, I have 150 days in which to get out here and affirmatively get 51 Senators to vote for that.

I am sure my friend from Utah would not do this to me, but somebody will stand up and require me-because I have to get this done-they will require me to be put in a position where I essentially have to get 60 votes. Because, as I try to pass my law that the judges think this is a

good idea, assuming they do outlaw this crazy notion, somebody is going to stand up in this place-it will not be the Senator from Utah, I hope-and say, "Well, we are not going to play fair and let BIDEN try to get 51 votes, we are going to filibuster him, because if we filibuster him and we can make it last 150 days' worth, prevent a vote, then this law automatically becomes law."

Of everything in this crime bill, the only thing that I have a moral, intellectual, and practical aversion to is this last provision I talked about.

Now I cite this not only to not kid anybody who said, "Gee, BIDEN wrote this crime bill and, man, he is tough on crime. I like him for being tough on crime."

I want to have truth in lending here. Do not give me credit for this last tough provision. I do not like it. I \*S12262 think it is wrong. I think it is unfair. I think it violates innocent people's civil liberties. That is the first reason I tell you about this.

**140 Cong. Rec. S12250-02, 140 Cong. Rec. S12250-02, S12263, 1994 WL 455051**

Hatch, Utah

You have heard the distinguished chairman of the committee, Senator BIDEN, say that he hates the Molinari-Dole-Hatch provision. That is a provision that allows into evidence prior acts by rapists and child molesters. Why should we not let the juries know and the judges know that these people have a pattern and a series of acts that they have done that have amounted to rape or child molestation, or in some cases both? Why can we not get tough on these people?

I commend my colleagues for putting that in. By the way, what does that amount to? Does that amount to letting somebody put in some allegation 31 years ago into evidence? Of course not. What it does is it simply gives a presumption in favor of bringing it in. The court still has the protective Rules of Evidence to keep it out if it is not fair. Our judges know those rules. They are not going to let in unfair information. But when you have a rapist that has committed acts of rape before, been convicted, we know that it has happened, why should it not come in? The fact is, it should.

I might add, on the mandatory HIV testing, you could not believe the left over there and here, by the way, who whined and moaned and groaned that we want to find out whether these people are HIV positive who rape these women. I kind of put myself in the shoes of the poor

woman who has been raped sitting there wondering, "Did that guy have AIDS? Was he HIV positive? Am I going to get it?" That is what these women worry about. Why are we not worried about them?

We were, because those House Members fought to get that in against the desires of many on the left. And I fought to do it and I fought to get that Molinari-Hatch-Dole or Dole-Hatch language in. You bet I did. It is about time we get tough on these sexual predators, these rapists, these child molesters. I am getting tired of it in this society and, by gosh, to their credit, Members of the House did that.

**140 Cong. Rec. E1403-02, 140 Cong. Rec. E1403-02, E1403, 1994 WL 318631**

Lewis, Florida

This title clarifies the right of judges to allow prosecutors, when appropriate, to use available evidence demonstrating that defendants in sexual assault or child molestation cases have previously committed similar sexual offenses. This section does not require such evidence to be used, but rather reinforces the judge's authority to admit such testimony when he or she sees fit.

Many of those who commit crimes of sexual assault and child molestation have a terrible history of sexually violent and abusive behavior, terrorizing victim after victim with circumstances making it difficult to prosecute effectively. This provision will help break many of these chains of violence, by allowing the relevant facts of a sexual predator's past to be used against him. I trust our judicial system to ensure this practice will not tread on the presumption of a defendant's innocence, or in any way dilute the right of a fair and speedy trial.

**140 Cong. Rec. H5437-03, 140 Cong. Rec. H5437-03, H5437-39, 1994 WL 374984**

Ms. MOLINARI, New York.

Mr. Speaker, pursuant to the provisions of rule XXVIII, clause 1(c), I offer a privileged motion to instruct conferees on the bill (H.R. 3355) to amend the Omnibus Crime Control and Safe Streets Act of 1968 to allow grants to increase police presence, to expand and improve

cooperative efforts between law enforcement agencies and members of the community to address crime and disorder problems, and otherwise to enhance public safety.

The SPEAKER.

The Clerk will report the motion.

The Clerk read as follows:

Ms. MOLINARI moves that the managers on the part of the House at the conference on the disagreeing votes of the two Houses on the House amendment to the Senate amendment to the bill H.R. 3355 be instructed not to make any agreement that does not include Subtitle E of Title VIII of the Senate amendment, providing for the admissibility of evidence of similar crimes in sex offense cases.

The SPEAKER.

The gentlewoman from New York <Ms. MOLINARI> will be recognized for 30 minutes, and the gentleman from New Jersey <Mr. HUGHES> will be recognized for 30 minutes.

The Chair recognizes the gentlewoman from New York (Ms. MOLINARI).

Ms. MOLINARI.

Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I thank the indulgence of my colleagues and I assure the Members we will move very quickly, but this is a deadly serious subject.

Mr. Speaker, this motion instructs the conferees to accept language in the Senate crime bill that changes the Federal Rules of Evidence to let prosecutors in two cases, sexual assault and child molestation, to introduce evidence that the defendant has committed similar crimes in the past. This same language was adopted by the other body 75 to 19 and is part of their crime bill.

Mr. Speaker, The People versus Hansen. In this case the defendant, Hansen, was found guilty of inducement of child prostitution and attempted sexual assault on a child. Hansen had been the subject of a police investigation after parents complained that he had engaged in obscene telephone conversations with their preteen daughters. The investigation showed that the defendant's name and phone number were common knowledge at a junior high school, and when the girls called him, he would ask them to come to his residence to have sex with him. He would then give them money and arrange necessary transportation. Conversations were taped by the police in which he made this proposition to two 11-year-old girls.

In order to apprehend Hansen, the police had one of the girls call him and have him send a cab to take her and her sisters to his residence. Hansen was arrested as he paid the girls' cab driver.

The evidence at the trial included testimony by two other young girls that the defendant had also solicited sex with them in phone conversations. However, the appellate court held that admission of the testimony with the other two girls was reversible error because this evidence was "unnecessary to establish intent" and hence, in the court's view, "was without a valid purpose."

Mr. Speaker, this happens time and time again in sexual assault and in child molestation cases where there are no witnesses other than the victim. This allows, it does not mandate, a judge's discretion in only those two instances, when he or she thinks that the cases are similar and relevant enough to introduce prior evidence of past convictions.

Mr. Speaker, this will allow the States and the Federal Government to proceed to convict and apprehend and put away child molesters and sexual assaulters without fear of technical overturning.

Mr. Speaker, I reserve the balance of my time.

Mr. HUGHES, New Jersey.

Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I rise in strong opposition to the motion to instruct conferees. I do so on two grounds. It is very difficult to argue against something that would suggest that in some way we are going to make it easier for child molesters or sexual abusers to walk.

First of all, Mr. Speaker, we in the Congress many years ago set up an extensive process called the Rules Enabling Act, which has served us well for a long time. Under this particular process, changes in the rules of evidence and procedure for Federal courts originate not in the Congress but in the federal court system. We decided that a long time ago.

The governing body of the Federal courts, the Judicial Conference of the United States, develops and proposes rules changes which must be approved by the Supreme Court before being submitted to Congress. The changes go into effect 6 months later unless rejected or modified by the Congress. The Federal Rules of Evidence, like all \*H5438 other Federal rules, affect the daily business of all of our courts, and also serve as a pattern for many State procedural rules.

In fact, on the Rules Enabling Panel we have State court justices, we have constitutional scholars, the Chief Justice makes the appointments, and it has served us well over the years.

The pervasive and substantial impact of the Federal Rules demands exacting and meticulous care in drafting amendments. This is not evident in the proposal before us. The existing rulemaking process involves a minimum of six levels of scrutiny or stages of formal review. This has gone through none. This is an amendment offered on the floor of the Senate after about 20 minutes' debate, without very much thought, and it is procedurally and substantively flawed. There has been no debate about the impact it would have on criminal or civil cases.

Mr. Speaker, I think it is the height of irresponsibility to suggest that we change our rules of evidence on the basis of no hearings, totally abandoning the process we have set up that served us well. The proposed new rules of evidence, this particular rule would create an exception to rule 404(a), which excludes admission of a person's character for the purpose of proving action in conformity therewith on a particular occasion.

In effect, Mr. Speaker, 404(a) states that we cannot convict a person for a particular crime based on past conduct of a similar nature. In prosecutions of sexual assault or child molestation offenses, this type of evidence would be particularly prejudicial.

These proposed new rules of evidence changes would go further and allow admission of evidence, not conviction. We are talking about allowing evidence, not a record of conviction. Even if the defendant had been acquitted of the charges on previous occasions, any evidence, regardless of conviction, could be offered under this particular rule of evidence.

Mr. Speaker, there is the "no need for a conviction" language in the proposal that makes admissible all evidence of the defendant's commission of another offense that is similar in nature. I know that in our actions on crime bills we all have a tendency to want to be tough, sound tough, but come on, this is ridiculous. It is ridiculous.

Frankly, Mr. Speaker, what the gentlewoman is doing, it raises serious constitutional questions. If the only evidence in the prosecution's case-in-chief is evidence that is hearsay or was rejected by a previous jury when they acquitted the defendant, it raises constitutional questions as to whether the conviction could stand.

Mr. Speaker, this has not been thought through. We ought to reject this.

Mr. Speaker, I reserve the balance of my time.

Ms. MOLINARI.

Mr. Speaker, I yield myself 1 minute to respond.

First of all, we did not have hearings on this measure in this body, that is accurate. That is not by fault of this gentlewoman. I went before the Committee on Rules for the last three years to try to get a hearing in the people's body and was denied that opportunity.

Number two, to instill a judicial conference to study this bill, this effort has been part of every crime bill that has left this House, but has failed to be passed into law by this Congress while the current system goes unchecked and unheeded.

Number three, with due respect to the gentleman from New Jersey <Mr. HUGHES>, I think if we talked to any one of the victims or the parents of the victims whose assailant has been allowed to go free because of a technical difficulty, they would not deem this measure ridiculous, and they would not agree to the statement that the current system serves us well.

Mr. Speaker, I yield 3 minutes to the gentleman from Arizona <Mr. KYL>.

(Mr. KYL asked and was given permission to revise and extend his remarks.)

Mr. KYL, Arizona.

Mr. Speaker, under the Federal Rules of Evidence, prior similar offenses may be admitted at trial even when the defendant has not been charged with offenses, but there is no Federal rule expressly authorizing such admissibility in the sex crime context. Ironically, Mr. Speaker, this is the context in which it is needed the most.

In other context, such evidence is permitted to prove motive, opportunity, intent, knowledge or absence of mistake. In sex-related crimes, it can be particularly useful to demonstrate a propensity of the accused to commit similar prior offenses.

We are not talking about allegations. We are talking about prior offenses. So that if as the gentlewoman from New York pointed out in the case that she discussed there is a clear pattern of conduct by an accused who has been convicted of similar conduct in the past and the case revolves around a question of belief of his word or her word, the evidence of that prior offense has probative value to determine the guilt of innocence of the accused. In that situation, the judge ought to have the discretion to admit the evidence.

It is not automatic. The judge simply would be permitted the discretion to admit the evidence in this limited situation. The judge still has total discretion to exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant.

Mr. Speaker, there is no taking away of the rights of the accused. It is only in a very limited circumstance in which the judge would allow the evidence but an important circumstance, a circumstance in which perhaps the only credible evidence for the jury because of the dispute between the only two people who know what happened is evidence of offenses of similar conduct in the past.

This is an important but small step for us to take to begin to grant the victims of crime equal protection in our criminal justice system.

Mr. Speaker, as the gentlewoman pointed out, the reason we did not have an opportunity to have the debate on this is because we were denied that opportunity by the Committee on Rules. But the Senate approved this language by a vote of 75-19. It is important for us to instruct our conferees to agree with the Senate provision to take this small step for justice for the victims of crime in our society. I urge a "yes" vote.

I have appreciated working with Representative MOLINARI on this important issue. Sexual violence is one of the most troubling issues facing our Nation today, and the importance of State and national commitment to strengthening laws against sexual violence cannot be underscored.

Let me start by stating some of the statistics, often heard, but important enough to this debate to mention again. Police records indicate a woman is raped every six minutes in the United States. According to the Uniform Crime Report sponsored by the FBI, four women are raped every day in Arizona. In Phoenix alone last year, there were 476 rapes reported. And, according to National Victim Center statistics, of these sexual violence victims only around 22 percent report the crime to police. According to the same group, we spend ten times more in resources defending those accused of sexual assault than we spend in helping the victims of sexual violence.

And, yet, behind the shocking statistics of sexual violence there lies a criminal justice system that oftentimes works more for the accused than for the victim. Take the following example:

On May 4, 1986, Suzanne Harrison, an 18-year-old honor student in Texas, three weeks away from high school graduation, was abducted. The next day she was found raped brutally beaten and strangled to death. She was murdered by a parolee named Jerry Walter McFadden, a man

who calls himself "Animal." McFadden had been convicted of two 1973 rapes and sentenced to two 15-year sentences. Paroled in 1978, he was again sentenced to 15 years in 1981 for a three-count crime spree in which he kidnapped, raped, and sodomized a Texas woman. Released on parole again in July of 1985, even though his record now contained three sex-related convictions and two prison sentences, McFadden raped and murdered Suzanne Harrison less than one year later.

Clearly, if a criminal justice system were better able to keep rapists in jail, Suzanne Harrison and thousands of other victims might be alive today.

Tonight, we have the opportunity to instruct conferees to make a small but important change to our criminal justice system so that victims of sexual abuse and child molestation are not revictimized once they bring charges against a perpetrator and enter into the court system. Members can do this by approving this motion to instruct crime bill conferees to accept section 831 of the Senate-passed crime bill.

\*H5439 This important provision would amend the Federal Rules of Evidence to make it easier for prosecutors in sexual violence and child molestation cases to introduce evidence showing that the accused has committed similar sexual assault crimes in the past. This very amendment, introduced by Senator DOLE, passed 75-19 during debate on the Senate crime bill. The amendment is also a provision of H.R. 688, the Sexual Assault Prevention Act, which Representative MOLINARI and I have introduced to combat sexual and domestic violence. There are currently 113 bipartisan cosponsors of our bill.

Unfortunately, House Members did not have an opportunity to vote on the Federal Rules of Evidence amendment. Representative MOLINARI and I both offered amendments during Rules Committee consideration of the crime bill to change the Federal Rules of Evidence in the same manner that Senator DOLE's amendment does; but, the Rules Committee would not permit its consideration, so this is your first opportunity to vote on this provision.

It is critical that we accept this provision of the Senate bill. Its effect is to help ensure that the criminal justice system is not skewed unfairly toward the rights of the accused at the expense of the victim.

It will go a long way toward helping to neutralize the psychological damage a sexual assault or child molestation victim experiences going through the judicial process. And, it will provide a model upon which States can base reforms of their own rules of evidence.

In most rape or molestation cases, it is the word of the defendant against the word of the victim. If the defendant has committed similar acts in the past, the claims of the victim are more likely to be considered truthful if there is substantiation of other assaults.

It is also common in rape and child molestation cases that the victim is too traumatized, intimidated, or humiliated to file a complaint and go through the full course of proceedings of a criminal prosecution. Nevertheless, the victims in such cases are often willing to bear the burden of testifying when they know that the person who marred their lives has also victimized others and that these revelations will come out at trial. According to Justice Department statistics released last week, girls under 18 are the victims of more than half the rapes reported to police. Allowing the prosecution to bring to trial similar child molestation crimes of the accused will certainly help these young victims bring their attacker to justice.

It is important to note that the Senate provision does not require that evidence of prior sexual assault be admitted. The trial court retains the total discretion to include or exclude this type of evidence moreover, under the Senate provision the defendant would have fifteen days notice of the evidence to be offered and cross examination would be allowed. Essentially what this amendment does is make it clear that a judge will not necessarily be reversed on appeal if he admits evidence of prior similar acts in sex related cases. The judge retains the discretion to exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant.

Mr. Chairman, this should not be controversial. For the thousands of individuals who are victims of sexual violence every year, we should strengthen our sexual violence laws by instructing conferees to include section 831 in the crime conference report. Members should not pass up this opportunity to make a positive difference in the lives of those who have experienced the tragedy of sexual assault and child molestation. Members should vote yes on this motion to instruct.

Mr. HUGHES.

Mr. Speaker, I yield myself such time as I may consume.

Let me just say to my colleague, the gentleman from Arizona, I do not know whether he heard my original statement, but that is not the process. We have a rules enabling act that we created. We have a process, the Judicial Conference of the United States is the one that takes the

testimony, basically decides changes in the rules of evidence and they implement them. We have the right to reject. We are basically circumventing the process that we set up. It is not the Committee on Rules of this House that basically works its will on rules of evidence. It was done so that we should have the kind of expertise and consideration that the Judicial Conference of the United States would provide.

Mr. Speaker, I yield 3 minutes to the gentleman from New York <Mr. SCHUMER>.

Mr. SCHUMER, New York.

Mr. Speaker, I thank the gentleman for yielding me the time.

Mr. Speaker, I would say to my colleagues that this is something that is one of the most inadvisable things that we could do if we believe in the criminal law.

I believe as strongly as anybody that we ought to go after people who commit crimes, sexual crimes, and rape. But we should do it based on the laws of evidence. Make no mistake about it, my colleagues, this would say, not just a conviction but any allegation at all would be admissible in a court, not for all crimes but for these crimes. That is turning our system of due process on its head.

Let me state, why do you think the NOW legal defense fund, one of the strongest women's groups in this country that has made a campaign to eliminate rape, to eliminate sexual harassment, why are they opposed to this? They are very simply opposed because this is the kind of measure that does not belong in a system where we talk about freedom, where we talk about due process, where we talk about evidence. To say that any allegation for these particular cases shall be admissible in court is a very, very serious matter, I would argue a serious mistake, but if we are going to do this, then we ought to be very careful about where and when we do it and not just rush headlong into passing a motion like this which while I know is not binding would say something terrible about our beliefs in how we prosecute criminals.

Mr. Speaker, I do not believe that the Civil Liberties Union is right on every issue, but this goes so far beyond.

Mr. Speaker, I would simply say that to say that any allegation whatsoever for these two crimes shall be admissible as evidence, not a conviction, not even something that was admitted in court, but any prior evidence would be a serious mistake. I would ask my colleagues to think

twice before we rush to pass something that so flies in the face of what Anglo-Saxon jurisprudence has stood for for 200 years.

Ms. MOLINARI.

Mr. Speaker, I yield 2 minutes to the gentleman from Oklahoma <Mr. MCCURDY>.

(Mr. MCCURDY asked and was given permission to revise and extend his remarks.)

Mr. MCCURDY, Oklahoma.

Mr. Speaker, unfortunately I believe the American public is tired of hearing about process and rules, especially when we see the fact that the gentlewoman was not offered an opportunity to present this amendment and have it fully debated.

Mr. Speaker, I rise in strong support of the gentlewoman's motion to instruct and urge its passage.

(By unanimous consent Mr. MICHEL was allowed to proceed out of order.)

. . . It is outrageous that this conference on women's rights is being held in a country which currently imprisons women for practicing their faith and forces many to have abortions.

I strongly support Senator HUTCHISON's amendment. It is essential for the rest of the world to know that Americans continue to value women in their roles of mothers, and that we believe that the traditional family is an important element to maintain a strong and healthy culture.

Several Senators addressed the Chair.

Mr. DOLE. Has the Senator from Texas finished?

Mrs. HUTCHISON. I had about 2 more minutes.

Mr. DOLE. The Senator from Texas had the floor, so I will yield the floor and then I will ask for the floor on the completion of her remarks.

The PRESIDING OFFICER. The Senator from Texas is recognized.

Mrs. HUTCHISON. Mr. President, I will just finish. I think the Senator from Indiana said very well exactly what this amendment would do. It expresses a sense of the Senate that our delegates from America should represent our American values, and the importance that we place on the family and on the role of motherhood. I think it is very important that we recognize that we have new experiences available, new opportunities for women that have come along in the last few years. But these continuing changes in our society have never diminished the unique and important value of maternal care-giving. And our amendment just says very clearly that, if we have delegates to this conference, they should express these views.

I hope our colleagues will agree to this amendment. It is a sense of the Senate. I think it is very simple and straightforward. It really is the motherhood amendment, and I hope no one would choose to vote against it.

The PRESIDING OFFICER. The distinguished Republican leader.

#### CLOTURE MOTION

Mr. DOLE. Mr. President, I send a cloture motion to the desk.

The PRESIDING OFFICER. The cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The assistant legislative clerk read as follows:

#### CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on S. 908, the State Department Reorganization bill.

Bob Dole, Jesse Helms, John McCain, Fred Thompson, Olympia Snowe, Jim Inhofe, Lauch Faircloth, Spence Abraham, Trent Lott, Strom Thurmond, Larry E. Craig, Don Nickles, Mitch McConnell, Bob Smith, John Ashcroft, Nancy Landon Kassebaum.

#### MORNING BUSINESS

Mr. DOLE. Mr. President, I ask unanimous consent there now be a period for the transaction of routine morning business with Senators permitted to speak for up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### MESSAGES FROM THE HOUSE

At 3:01 p.m., a message from the House of Representatives, delivered by Mr. Hays, one of its reading clerks, announced that the House has passed the following bill, in which it requests the concurrence of the Senate:

H.R. 1103. An act entitled, "Amendments to the Perishable Agricultural Commodities Act, 1930."

At 4:27 p.m., a message from the House of Representatives, delivered by Ms. Goetz, one of its reading clerks, announced that the House has passed the following bill, in which it requests the concurrence of the Senate:

H.R. 2017. An act to authorize an increased Federal share of the costs of certain transportation projects in the District of Columbia for fiscal years 1995 and 1996, and for other purposes.

#### MEASURES REFERRED

The following bill was read the first and second times by unanimous consent and referred as indicated:

H.R. 1103. An act entitled, "Amendments to the Perishable Agricultural Commodities Act, 1930"; to the Committee on Agriculture, Nutrition, and Forestry.

#### MEASURES PLACED ON THE CALENDAR

The following measure was read the first and second times by unanimous consent and placed on the calendar:

H.R. 2017. An act to authorize an increased Federal share of the costs of certain transportation projects in the District of Columbia for fiscal years 1995 and 1996, and for other purposes.

#### INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

The following bills and joint resolutions were introduced, read the first and second time by unanimous consent, and referred as indicated:

By Mr. BIDEN:

S. 1094. A bill to amend the Federal Rules of Evidence relating to character evidence in sexual misconduct cases, and for other purposes; to the Committee on the Judiciary.

By Mr. MOYNIHAN: (for himself, Mr. ROTH, Mrs. MURRAY, Mr. BAUCUS, Mr. D'AMATO, Mr. GRASSLEY, Mr. BREAUX, Mr. HATCH, and Mr. PRYOR):

S. 1095. A bill to amend the Internal Revenue Code of 1986 to extend permanently the exclusion for educational assistance provided by employers to employees; to the Committee on Finance.

By Mr. D'AMATO:

S. 1096. A bill to amend the Immigration and Nationality Act to provide that members of Hamas (commonly known as the Is-

lamic Resistance Movement) be considered to be engaged in a terrorist activity and ineligible to receive visas and excluded from admission into the United States; to the Committee on the Judiciary.

By Mr. HATFIELD (for himself and Mr. PACKWOOD):

S. 1097. A bill to designate the Federal building located at 1550 Dewey Avenue, Baker City, Oregon, as the "David J. Wheeler Federal Building", and for other purposes; to the Committee on Environment and Public Works.

By Mr. HELMS (for himself and Mr. DOLE):

S. 1098. A bill to establish the Midway Islands as a National Memorial, and for other purposes; to the Committee on Armed Services.

#### STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. BIDEN:

S. 1094. A bill to amend the Federal Rules of Evidence relating to character evidence in sexual misconduct cases, and for other purposes; to the Committee on the Judiciary.

#### RULE OF EVIDENCE LEGISLATION

Mr. BIDEN. Mr. President, I am introducing a bill today that I do not much like. It involves the so-called Dole-Molinari rules of evidence which the Congress included last year in the 1994 crime law. This provision made a radical change in the Federal Rules of Evidence. It took the unprecedented—and in my mind absolutely unwise and unwarranted—step of allowing unproven allegations of prior crimes to be used against a defendant at trial.

These new rules—which apply in sexual assault and child molestation cases—were added to the crime law over my strenuous objections. My objections were twofold, one substantive and one procedural. I will detail what I believe are the serious substantive problems with the new rules in a moment. First, I must point out that the way these rules were adopted by the Congress contravenes—indeed flaunts—the procedures we have used, with certain modifications, since 1948 for making alterations in the Federal rules.

I am talking about the Rules Enabling Act. That act allows for a thoughtful, inclusive process for considering any changes to the Federal Rules of Evidence—rules which have been on the books for many, many years and which have been relied upon by judges and litigants in countless cases. The Enabling Act process gives the Judicial Conference of the United States, the organization of America's Federal judges, and, ultimately, the Supreme Court a first cut at any proposed changes. The conference, through its various committees, solicits the views of judges, lawyers, and academics who have studied the rules, worked with the rules, and identified any problems with them. The process ensures that the public is given the chance to comment about proposed changes, and guarantees that these comments be considered by the rule-makers.

It is at that point—after the careful, detailed and encompassing review and drafting efforts of the conference—that the U.S. Supreme Court makes recommendations to the Congress for our acceptance or modification. This mechanism is designed to head off unwarranted changes and avoid unintended consequences. And it ensures that decisions about changes in the rules are made in a deliberative, cool-headed way, rather than in the heat of a political moment. Passing as we did the Dole-Molinari rules last year—in a whirlwind rush to bring crime bill negotiations to a close—we thumbed our noses at this most important and worthy process.

I did succeed in structuring the rule change in the crime law to ensure that we would have the benefit of the Judiciary's view, albeit after the fact. The provision was drafted to delay the implementation of the rules to allow the Judicial Conference to weigh in on the issue. This is how it works: The Dole-Molinari rules will go into effect unless we in the Congress repeal them outright or adopt the Judicial Conference recommendations.

I, for one, would prefer a complete repeal. And, I may point out, the Judicial Conference agrees with me. The Judicial Conference itself unanimously voted to oppose the new rules. They have called on us to reconsider our actions and change our minds. They, too, favor a repeal. But they are also pragmatic. So they have sent over a proposal—a most modest of proposals, in my view—to make the rules clearer, cleaner, and a little bit fairer. I am pragmatic as well, and I know that I stand no chance of having the rules repealed, so I am introducing the Judicial Conference recommendations today.

But before we discuss these modest recommendations, I would like to take a minute to talk about the Dole-Molinari rules, and why I believe they are such a bad idea. Here is the way these rules will work. A defendant is on trial for sexual assault. He claims he did not do it. He says that the complaining witness has fingered the wrong man. Under the Dole-Molinari rules, the prosecutor in this case will be able to go out and rummage around for any witness who will testify that, some long and blurry time ago, the defendant was sexually aggressive toward her.

It will not matter that this alleged prior event happened some 20 years ago. It won't matter that the woman never reported the incident to the police. It will not matter that the defendant was never charged or convicted of the crime. It won't matter that the evidence is highly unreliable.

No, none of that will matter. The only thing that will matter to the jury, when it hears this sort of evidence, is that this guy is bad news. And the jury will be able to make the following leap of logic: "Well, since he did it once, he probably did it again." Jurors will also

be able to say to themselves something like this: "I'm not so sure he committed this particular crime that he's now charged with. But he's a bad guy—he hurt that other woman, so it's OK for me to convict him today—he has it coming."

But wait a minute. It is a cardinal tenet of Anglo-Saxon criminal jurisprudence that the prosecution must prove that the accused committed the specific crime for which he now stands accused—not some other bad act and not merely that he is a lousy or wicked person. Or put another way: an accused must be tried for what he did—not for who he is.

Over 100 years ago, the Supreme Court in the case of *Boyd versus United States*, underscored the importance of the rule against character or propensity evidence. In that robbery case, the court said that evidence of earlier robberies—

Only tended to prejudice the defendants with the jurors—to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community.

Let us be honest about this. The whole point of these new rules is to increase the number of convictions in sexual assault and child abuse cases. And I believe, without a doubt, that they will do just that. But at the risk of stating what should be obvious: More convictions are not necessarily a good thing. What we want is more convictions of the guilty. If any of those who are convicted under the new rules are actually innocent—and I believe that this is precisely the danger at hand—there is cause only for horror, not celebration.

As Professor Wigmore—one of the preeminent evidence gurus of all time—has said about this sort of evidence: It is the natural tendency of the jury to give the evidence excessive weight—and either to allow it to bear too strongly on the present charge, or to see it as justifying a condemnation, irrespective of the accused's guilt of the present charge. This type of evidence has less to do—in my view—with the search for the truth, than with a blind desire for vengeance.

Now remember, I'm the guy who authored the Violence Against Women Act. It has been my crusade for the past 4 years to have violence against women taken seriously. I have increased the penalties for rape. I have talked to anyone who will listen about the epidemic of violence against women, and about our obligation—our urgent obligation—to put a stop to it now. I devoted an entire Judiciary Committee report to how the criminal justice system is not aggressive enough in its pursuit of rapists and other criminals who make women their targets. I, too, want to see more rapists and child abusers put behind bars. But not at the price of fairness. And not at the expense of what we know in our hearts to be right and just.

And let me clear up one more matter. Evidence of prior uncharged crimes is

admitted into evidence frequently. But it is admitted for a legitimate purpose—to help prove, for instance, a pattern of conduct, preparation, identity, plan, intent, or purpose. What we're talking about here is admitting evidence for what in my view—and which for hundreds of years has been considered—a patently illegitimate purpose.

But that's where we are. And the bill I'm introducing today—the Judicial Conference recommendations—doesn't change that. Like the Dole-Molinari rules, the Judicial Conference proposal makes a dramatic aboutface from current practice—and allows for the introduction of propensity or character evidence in sexual assault and child molestation cases.

But the Judicial Conference did make a few very modest changes—which the conference itself describes only as correcting ambiguities and possible constitutional infirmities while still giving effect to Congress' intent. Indeed, this proposal is so modest—and is so in keeping with the intent of the original rules' sponsors—that I will be very interested to hear what possible substantive objections anyone could have about them.

Here are the changes proposed by the Judicial Conference:

The proposal makes it clear that the rules are subject to the other Rules of Evidence. This is totally unremarkable. As everyone knows, all evidence introduced under a particular rule is subject to the other rules—like the rule against hearsay, and the rules allowing judges to balance the prejudicial impact of evidence against its probative value.

What is remarkable is that the Dole-Molinari rules were drafted in such a way as to seem mandatory—they could be read to require a judge to admit the evidence, regardless of whether its prejudice outweighs its probative value, and regardless of whether any other rule would be violated.

That would be wholly unprecedented. The rewrite simply makes it clear that these new rules will work just like all the others. And let me add: The sponsors of the new rules have consistently maintained that the rules are not meant to be mandatory rules of admission, and that the general standards of the Rules of Evidence will apply. This proposal by the Judicial Conference simply makes clear what the sponsors of the rules have forthrightly said is their intention.

The proposal itemizes the different factors that a judge should weigh in deciding whether to admit the evidence. Again, this is an unremarkable idea. It merely gives judges, who are having to completely change how they look at this evidence, some guidance.

It tells them: When you're deciding what to do about this evidence, here are some signposts to consider—like when the uncharged act took place; its similarity to the charged misconduct; the surrounding circumstances; and any relevant intervening events.

Again, there is nothing in this idea—simply to give judges some guidance—which would rub against the grain of the sponsors' intentions.

The Judicial Conference proposal would also allow the defendant to use similar evidence in rebuttal. The Dole-Molinari rules, as currently drafted, are unbalanced: under the rules, a defendant can't, in rebuttal, use prior specific instances of conduct to prove that he did not have a propensity to commit the charged crime.

Say, for example, a child testifies under the new rule that his father, the defendant, sexually assaulted him 5 years ago. The father can't put his other kids on the stand to say that he had not assaulted them—to help show that he does not have a propensity to assault children. The Judicial Conference proposal simply gives the defendant the same evidentiary rights as the prosecution.

The Judicial Conference proposal also makes a number of small minor changes. It consolidates the new rules into one—this is simply a clearer, cleaner drafting approach. The proposal also streamlines the definitions—without making any substantive changes—and makes the notice provisions a bit more flexible, and more in keeping with other notice and discovery provisions elsewhere in the rules.

As is by now clear, this is a very unassuming proposal. It allows for the introduction of propensity evidence. It doesn't require that the prior bad act have resulted in a conviction, or even that it have been the subject of a complaint or charge. It doesn't even require that the evidence of the prior uncharged act be particularly reliable.

In fact, had this rule been proposed last year, I would have opposed it. I would have opposed it because I believe that propensity or character evidence should not be admitted into trial. Period. But I can count. And I know that I'm nearly alone on this one. That is why I am introducing this bill—the Judicial Conference recommendations—which only make a handful of modest, but important changes to make the bill clearer and a little bit fairer. I urge my colleagues to support this measure.

Mr. President, I ask unanimous consent that a copy of the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 1094

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. CHARACTER EVIDENCE IN SEXUAL MISCONDUCT CASES.**

(a) IN GENERAL.—(1) Rule 404(a) of the Federal Rules of Evidence is amended by adding at the end thereof the following:

“(4) CHARACTER IN SEXUAL MISCONDUCT CASES.—(A) Evidence of another act of sexual assault or child molestation, or evidence to rebut such proof or an inference therefrom, if that evidence is otherwise admissible under these rules, in a criminal case in which the accused is charged with sexual assault or

child molestation, or in a civil case in which a claim is predicated on a party's alleged commission of sexual assault or child molestation.

“(B) In weighing the probative value of such evidence, the court may, as part of its rule 403 determination, consider—

“(i) proximity in time to the charged or predicate misconduct;

“(ii) similarity to the charged or predicate misconduct;

“(iii) frequency of the other acts;

“(iv) surrounding circumstances;

“(v) relevant intervening events; and

“(vi) other relevant similarities or differences.

“(C) In a criminal case in which the prosecution intends to offer evidence under this subdivision, it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

“(D) For purposes of this subdivision—

“(i) ‘sexual assault’ means conduct, or an attempt or conspiracy to engage in conduct, of the type proscribed by chapter 109A of title 18, United States Code, or conduct that involved deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person irrespective of the age of the victim, regardless of whether that conduct would have subjected the actor to Federal jurisdiction; and

“(ii) ‘child molestation’ means conduct, or an attempt or conspiracy to engage in conduct, of the type proscribed by chapter 110 of title 18, United States Code, or conduct, committed in relation to a child below the age of 14 years, either of the type proscribed by chapter 109A of title 18, United States Code, or that involved deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person, regardless of whether that conduct would have subjected the actor to Federal jurisdiction.”

(2) The first sentence of rule 404(b) of the Federal Rules of Evidence is amended by inserting “except as provided in subdivision (a)” after “therewith”.

(b) METHODS OF PROVING CHARACTER.—Rule 405 of the Federal Rules of Evidence is amended—

(1) in subsection (a) by inserting before the period in the first sentence “except as provided in subdivision (c) of this rule”; and

(2) by adding at the end thereof the following:

“(c) PROOF IN SEXUAL MISCONDUCT CASES.—In a case in which evidence is offered under rule 404(a)(4), proof may be made by specific instances of conduct, testimony as to reputation, or testimony in the form of an opinion, except that the prosecution or claimant may offer reputation or opinion testimony only after the opposing party has offered such testimony.”

By Mr. MOYNIHAN (for himself, Mr. ROTH, Mrs. MURRAY, Mr. BAUCUS, Mr. D'AMATO, Mr. GRASSLEY, Mr. BREAUX, Mr. HATCH, and Mr. PRYOR):

S. 1095. A bill to amend the Internal Revenue Code of 1986 to extend permanently the exclusion for educational assistance provided by employers to employees; to the Committee on Finance.

THE EMPLOYEE EDUCATIONAL ASSISTANCE ACT

Mr. MOYNIHAN. Mr. President, I rise today, on my own behalf and on behalf of Senators ROTH, MURRAY, BAUCUS, D'AMATO, GRASSLEY, BREAUX, HATCH,

and PRYOR, to introduce legislation that will reinstate and make permanent the tax exclusion for employer-provided educational assistance under section 127 of the Internal Revenue Code. This bill ensures that employees will be able to continue to receive up to \$5,250 annually in tuition reimbursements or similar educational benefits from their employers on a tax-free basis.

First enacted in 1978, section 127 has enabled over 7 million working men and women to advance their education and improve their job skills, without incurring additional income tax liabilities and a reduction in take-home pay. Without this provision, an employee would owe taxes on the value of any educational benefits provided by an employer that do not directly relate to his or her current job. For example, a clerical worker pursuing a college diploma who earns \$21,000 annually, and who receives tuition reimbursement for two semesters of night courses—worth approximately \$4,000—would owe additional Federal income and payroll taxes of \$1,200 on this educational assistance. The effects are even more severe if he or she lives in a State that uses the Federal definition of income for State tax purposes.

It is shortsighted to impose such a tax burden on employees seeking to further their education. For many low- and moderate-income employees, this cut in take-home pay is simply prohibitive, preventing them from enrolling in courses that would upgrade their job skills and improve their future career prospects. Without this investment in our employees' education, the ability of our work force to compete in the global economy erodes. By removing the requirement that educational assistance be job related in order to be tax-free, section 127 eliminates a tax burden on workers seeking to further their education and improve their career prospects.

Moreover, section 127 removes a tax bias against lesser-skilled workers. The tax bias arises because lesser-skilled workers have greater difficulty proving educational expenses are directly related to their current jobs due to their narrower job descriptions. Therefore, absent section 127, such lesser-skilled workers are more likely to owe taxes on employer-provided educational benefits than are higher-skilled, more senior workers.

Congress has never quite found sufficient revenue to enact section 127 on a permanent basis, opting instead for temporary exclusions. Since 1978, there have been 7 extensions of this provision. Most recently, the Omnibus Reconciliation Act of 1993 provided for an extension of section 127 through December 31, 1994. The exclusion has once again expired.

I hope that Congress will recognize the importance of this provision, and

enact it permanently. Temporary extensions create great practical difficulties for the intended beneficiaries. Employees cannot plan sensibly for their educational goals, not knowing the extent to which accepting educational assistance may reduce their take-home pay. As for employers, the fits and starts of the legislative history of section 127 have been a serious administrative nuisance. If section 127 is in force, then there is no need to withhold taxes on educational benefits provided; if not, the job-relatedness of the educational assistance must be ascertained, a value assigned, and withholding adjusted accordingly. Uncertainty about the program's continuance magnifies this burden, and discourages employers from providing educational benefits. The legislation that I introduce today would restore certainty to section 127 by extending it retroactively, to the beginning of this year, and then maintaining it on a permanent basis.

Mr. President, my previous efforts to extend this provision have enjoyed wide, bipartisan support. Encouraging workers to further their education and to improve their job skills is an important national priority, crucial for preserving our competitive position in the global economy. Permitting employees to receive educational assistance on a tax-free basis, without incurring significant cuts in take-home pay, is a demonstrated, cost-effective means for achieving these objectives.

Employee educational assistance is not an extravagant, free benefit for highly paid executives. It largely benefits low- and moderate-income employees seeking access to higher education and further job training. A survey undertaken by Coopers & Lybrand indicated that over 70 percent of recipients of section 127 benefits in 1986 earned less than \$30,000. In fact, lower-income employees are more likely to participate in educational assistance programs than those at the higher end of the income scale. Employees making less than \$30,000 participate at a much higher rate than those making above that income, and participation rates decline as salary levels increase. Moreover, employees making less than \$15,000 participate at almost twice the rate of those who earn over \$50,000.

Further, section 127 makes an important contribution to simplicity in the Tax Code. Without it, employers and the IRS would be required to determine, on a case-by-case basis, which employer-provided educational benefits are sufficiently related to the job to avoid treatment as taxable income.

Today, American workers are the most productive in the industrialized and developing world. Yet pressures from international competition and the pace of technological changes require continual adjustment by our work force. Retraining will thus be necessary to maintain and strengthen American industry's competitive position in the global economy. Section 127

permits employees to adapt and retrain without incurring additional tax liabilities and a reduction in take-home pay. By removing the tax burden from workers seeking retraining, section 127 enables employees displaced by foreign competition or technological change to learn new job skills.

Finally, section 127 has also helped to improve the quality of America's public education system, at a fraction of the cost of direct-aid programs. It has enabled thousands of public schoolteachers to obtain advanced degrees, augmenting the quality of instruction in our schools. A survey by the National Education Association a few years ago found that almost half of all American public school systems provide tuition assistance to teachers seeking advanced training and degrees. The Tax Code should not impose obstacles to this kind of shared effort toward improvement. This legislation, by making section 127 permanent, will ensure that it does not.

Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 1095

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. PERMANENT EXTENSION OF EDUCATIONAL ASSISTANCE EXCLUSION.**

(a) IN GENERAL.—Section 127 of the Internal Revenue Code of 1986 (relating to exclusion for educational assistance programs) is amended by striking subsection (d) and by redesignating subsection (e) as subsection (d).

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 1994.

Mr. ROTH. Mr. President, we've all heard the axiom that the cultivation of the mind is the secret to a happy and productive life. Education not only provides untold benefits to the individual, but to society as a whole. In fact, the worth of education is increasing.

In 1980, a male college graduate made about 30 percent more than a male high school graduate. By 1988, he made about 60 percent more. In just 8 years, the premium for a college degree doubled—in comparison with a high school diploma.

On a social level, education is fundamental to the future well-being and competitiveness of America. Not only are well-educated men and women able to make greater contributions to our economy, but they make unquantifiable contributions to business, academia, and agriculture, as well as to our technical and communications resources.

The irony, Mr. President, is that while the value of higher education is increasing, the confidence of Americans to receive a higher education is declining. Polls shows that our countrymen are less and less optimistic about their ability to receive higher education. A full 55 percent think pay-

ing for college is more difficult now that it was 10 years ago, and 66 percent say it will be even more difficult 10 years now. Sixty percent believe even qualified people can't afford college.

The solution? Eighty percent of those polled say the best solution is to have financial support provided through work opportunities. This compares to 43 percent who call for more direct grants to students and even 62 percent for those who want more money for student loans.

The legislation I am cosponsoring today with Senator MOYNIHAN, is a welcomed and needed measure to encourage and assist employers to provide educational opportunities for their employees. What we seek to do with this legislation is permanently extend the exclusion for employer provided educational assistance. The exclusion, section 127, expired on December 31, 1994—7 months ago—and unless it is extended, employees will be taxed on their education benefits. They will owe both Federal and FICA taxes on the assistance they have received.

Mr. President, section 127 is legislation that has been approved before. We know that it is needed—that it is important. Congress has passed it in an effort to increase the participation of employers in assisting in the education of their employees. Under previous congressional action, tax-free benefits were made available for employees who wanted to improve their knowledge and skill in job-related studies. Beyond this, the law also allowed employees to participate in other studies. The only exclusions involved education in sports, games and hobbies, unless those studies were directly associated with their employment needs or were part of an overall degree program.

Congress has already established the need for section 127 and provided the legislation. What Senator MOYNIHAN and I are doing now is simply making it permanent. Our bill will allow employees to permanently receive up to \$5,250 annually in undergraduate tuition or similar educational benefits from their employers on a tax-free basis. It will be effective retroactively, going back to January 1, 1995—thus taking care of the 7 months that have lapsed since section 127 expired.

I encourage my colleagues to join Senator MOYNIHAN and me in passing this bill, reminding them of the importance of education as it pertains to the future of America. As Daniel Webster said when he stood on the Senate floor many years ago:

If we work marble, it will perish; if we work upon brass, time will efface it; if we rear temples, they will crumble into dust; but if we work upon immortal minds . . . we are then engraving upon tablets which no time will efface, but will brighten and brighten to all eternity.

By Mr. D'AMATO:

S. 1096. A bill to amend the Immigration and Nationality Act to provide that members of Hamas (commonly

known as the Islamic Resistance Movement) be considered to be engaged in a terrorist activity and ineligible to receive visas and excluded from admission into the United States; to the Committee on the Judiciary.

THE HAMAS EXCLUSION ACT OF 1995

• Mr. D'AMATO. Mr. President, I introduce the Hamas Exclusion Act of 1995. This bill was introduced in 1993, in conjunction with Representative PETER DEUTSCH in the House. I am introducing it again this year because of Hamas' continued role in disruption of the peace process as well as the recent detention of Mousa Mohamed Abu Marzook at JFK Airport in New York.

Hamas continues to use terrorism as a tool to disrupt the peace process. In doing so, it continues to kill innocent Israelis without concern for life. Between April 1994 and July 1995, Hamas has conducted at least 8 suicide bombings against Israeli targets, killing at least 52 people. This is murder plain and simple.

When U.S. immigration officials detained Marzook at JFK last week, they detained a man who held a place on the U.S. terrorism watchlist and according to the INS, is an "excludable alien based on his participation in terrorist activities."

I applaud President Clinton's recent actions against terrorism, especially his Executive orders against terrorist fundraising in the United States and the total embargo on trade with Iran for which I pushed. This latest action signals that the United States can no longer act as a haven for those who belong to terrorist organizations whose only wish is to kill and maim.

My bill is simple. It states that an alien who is an officer, official, representative, or spokesman of Hamas, is considered to be engaged in terrorist activity and therefore eligible to be excludable under the immigration statutes.

There can be no toleration of the actions of Hamas and groups like it, nor can we allow these groups to operate in the United States. While this bill is not the panacea, it will act to keep one group out. I urge my colleagues to join me in sending this strong message by cosponsoring this legislation.

Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 1096

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SECTION 1. TERRORIST ACTIVITIES.

Section 212(a)(3)(B)(i) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(i)) is amended by adding at the end "An alien who is an officer, official, representative, or spokesman of Hamas (commonly known as the Islamic Resistance Movement) is considered, for purposes of this Act, to be engaged in a terrorist activity." •

By Mr. HATFIELD (for himself and Mr. PACKWOOD):

S. 1097. A bill to designate the Federal building located at 1550 Dewey Avenue, Baker City, OR, as the "David J. Wheeler Federal Building," and for other purposes; to the Committee on Environment and Public Works.

THE DAVID J. WHEELER FEDERAL BUILDING ACT OF 1995

Mr. HATFIELD. Mr. President, it is my honor to propose the designation of the Federal building in Baker City, OR, as the David J. Wheeler Federal Building.

Mr. David J. Wheeler was an outstanding citizen until his life came to a tragic end on April 26, 1995. Mr. Wheeler, a U.S. Forest Service engineer working the Wallowa-Whitman National Forest, was brutally murdered by two juveniles while on assignment in the Payette National Forest in Idaho. Mr. Wheeler's death has had a tremendous impact on the entire community in Baker City because he was an active civic leader involved in and committed to his hometown.

A true altruist, Mr. Wheeler was a member of the Baker City Rotary Club and was the president-elect at the time of his death. Mr. Wheeler volunteered as a coach at the local YMCA. In 1994 the Baker County Chamber of Commerce selected Mr. Wheeler as the Baker County Father of the Year. These honors are a clear illustration of the model citizen Mr. Wheeler was in his community.

The Federal building in Baker City is currently unnamed and houses the U.S. Post Office, Bureau of Land Management, and the U.S. Forest Service. To designate this building as the David J. Wheeler Federal Building is a tribute to an extraordinary American and will commemorate the contributions Mr. Wheeler selflessly provided to his community.

Mr. PACKWOOD. Mr. President, on April 26 of this year, the life of my fellow Oregonian, David Jack Wheeler, was snuffed out. He was murdered while working in the Wallowa-Whitman forest that he loved. David was an employee of the U.S. Forest Service, and he was an exemplary citizen of Baker City, OR. David was well-regarded in the community of Baker City because he was one of those individuals who didn't stop at just holding down a job and caring for a family. He gave back to his community. David worked to provide access for everyone to recreational and administrative facilities within the forest. He was a mentor and counselor to his coworkers. Because of this his community, friends, family, and employer would like to honor him by designating the Federal building located in Baker City as the David J. Wheeler Federal Building. I agree with these good people in this effort and so have sponsored a bill to make this happen. Folks in Baker City are right to honor David in this way. He gave so much to his community and this is a small thing to ask in return.

By Mr. HELMS (for himself and Mr. DOLE):

S. 1098. A bill to establish the Midway Islands as a National Memorial, and for other purposes; to the Committee on Armed Services.

THE BATTLE OF MIDWAY NATIONAL MEMORIAL ACT

Mr. HELMS. Mr. President, in less than a month, ceremonies in Hawaii will commemorate the United States victory over Japan and the end of World War II. The American people were devastated by the December 7, 1941, Japanese surprise attack on Pearl Harbor—undoubtedly, one of the most disastrous defeats in United States history. Victory at the Battle of Midway was a key element to the recovery of the United States Armed Forces and the ultimate victory on Japan.

Historians rank Midway as one of the most decisive naval battles of all time. It is only fitting, in my judgment, that American heroes of the Battle of Midway be given due recognition, and that is why the Battle of Midway National Memorial Act is so important.

Mr. President, if approved, this bill will: First, establish the Midway Islands as a National War Memorial; second, protect the historic structures associated with the Battle of Midway; and three, protect the surrounding environs, without cost to the taxpayers. The bill provides that the memorial be funded from revenues earned from private sector entities currently operating at the airstrip and the port facilities on Midway.

Historic victories such as Midway, Gettysburg, Yorktown, and Normandy are remembered by memorializing the hallowed ground upon which American blood was shed. The Midway Islands, and the surrounding seas where so many American lives were sacrificed, deserve to be memorialized as well.

Mr. President, during the month of June 1942, a badly outnumbered American naval force, consisting of 29 ships and other units of the Armed Forces, under the overall command of Adm. Chester W. Nimitz, outmaneuvered and out-fought 350 ships of the combined Japanese Imperial Fleet. The objectives of the Japanese high command were to occupy the Midway Islands and destroy the United States Pacific Fleet, but the forces under the command of Admiral Nimitz completely thwarted Japanese strategy. Victory at Midway was the turning point in the Pacific Theater.

The outcome of the conflict, Mr. President, was remarkable given the fact that U.S. Forces were so badly outnumbered. The United States lost 163 aircraft compared to 286 Japanese aircraft lost. One American aircraft carrier, the *U.S.S. Yorktown*, and one destroyer, the *U.S.S. Humman* were destroyed. On the other hand, the Japanese Imperial Navy lost five ships, four of the ships being the Imperial Navy's main aircraft carriers. Almost as devastating was the loss of most of the experienced Japanese pilots. At the end

of the day, 307 Americans had lost their lives. The Japanese navy lost 2,500 men.

So severe was the damage inflicted on the Imperial Japanese Navy by American airmen and sailors, that Japan never again was able to take the offensive against the United States or Allied forces.

Mr. President, victory over the Japanese was achieved, of course, by men and women from all the United States Armed Forces. Certainly at Midway, elements of each services—Navy, Marines, and U.S. Army Air Corps—were heavily engaged, closely coordinated, and paid a high price for their bravery. The Midway Islands should be memorialized to honor the courageous efforts of all the services when they were called upon to defend our Nation and its interests.

The heroism of many of American servicemen at Midway often required the ultimate sacrifice. Many of the Marine pilots, flying worn out and inferior planes, did not live to celebrate the victory at Midway. All but five torpedo-plane pilots who attacked the Japanese aircraft carrier task force—without protective air cover—were shot down. These pilots undoubtedly knew they were flying to an all but certain death.

But the sacrifice of these brave Americans was not in vain, Mr. President. When the battle ended, four Japanese aircraft carriers were sent to the bottom of the Pacific Ocean, and their highly experienced pilots were lost. Japanese naval aviation never recovered from this crippling blow, and the rest, as they say, is history.

Mr. President, the sacrifice and heroism of these men should never be forgotten—it is vital that our sons and daughters never forget what their fathers and grandfathers sacrificed for freedom. The Battle of Midway should be memorialized for all time, on the Midway Islands, on behalf of a grateful Nation.

Mr. President, I ask unanimous consent that a letter from four gallant Americans, each of whom was a hero of the Battle of Midway—Lt. Com. Richard H. Best, Capt. Robert M. Elder, Cap. Jack H. Reid, and Maj. J. Douglas Rollow—regarding the Midway Islands National Memorial Act, be printed in the RECORD.

Mr. President, I am grateful to these fine Americans for their service at the Battle of Midway and for their diligence in putting together this bill. I certainly commend other distinguished Americans for their contributions to this effort, including Dr. James D'Angelo, Adm. Tom Moorner, Adm. Whitey Feightner, Capt. Gordon Murray, Vice Adm. James Flatley III, Vice Adm. William Houser, William Rollow, and Anthony Harrigan.

There being no objection, the letter was ordered to be printed in the RECORD as follows:

INTERNATIONAL MIDWAY  
MEMORIAL FOUNDATION, INC.,  
Rockville, MD, May 30, 1995.

DEAR SENATOR HELMS: Please take a few minutes to read this letter to you from us, some of the survivors of the Battle of Midway. We seek nothing for ourselves—only for our Country.

Few battles in World War II were as pivotal as the Battle of Midway in 1942. Although the Battle of Britain and Stalingrad turned the course of the war in Europe, the Battle of Midway not only turned the course of the war in the Pacific, but most likely of the entire war. There the Imperial Japanese Fleet was defeated by a handful of U.S. Naval, Marine and Army aviators flying obsolescent aircraft. Lives were heroically lost. Had we not prevailed at Midway, Hawaii would have been lost, and the Pacific war fought on our West Coast.

Those of us who served in World War II have taken for granted that the generations who succeeded us would know of the enormous cost in lives paid to preserve freedom. We naively assumed that future generations would cherish and protect the values for which so many of our comrades died.

While other nations in the free world made the remembrance of World War II and the values it represented an imperative for their children, sad to say, our nation has not. Complacency replaced patriotism; revisionists replaced historians. Some would even have our children believe that the United States was the aggressor—insensitive to human life—particularly with regard to the end of the war in the Pacific.

We know the truth—we lived it; but our children do not. The International Midway Memorial Foundation believes that one of the best ways to preserve the teachings of World War II is to create World War II National Historic Battlefields. There our children, historians and others interested in that epic war for freedom can learn first hand, on site.

We now face the second battle of Midway. In September 1993, after over 90 years of stewardship, the United States Navy closed Midway as an operational base. The United States Fish and Wildlife Service (USFWS) has requested that Midway be turned over to itself primarily for use as a wildlife refuge.

The Foundation opposes the transfer of Midway to USFWS. Instead, we wish it declared a National Historic Battlefield, and administered by the U.S. National Park Service, in accordance with sound multiple use principles. Interested visitors can then not only see a beautiful island and its wildlife, but also learn of the historic battle fought there.

The Foundation will raise funds to help provide exhibits and materials to teach those visitors about the battle. Furthermore, visitors to Midway will generate funds, which in turn, will reduce if not eliminate the cost to our taxpayers of maintaining Midway.

In closing, we believe our dead at Midway deserve something better than a monument in a wildlife refuge. The few threatened species utilizing the Midway Atoll (primarily the Hawaiian Monk Seal and the Green Sea Turtle) can be amply protected under the multiple-use program we espouse.

Please help us. Please support legislation to create Midway as a National Historic Battlefield. Let us not lose the second battle of Midway.

Respectfully yours,

LCDR RICHARD H. BEST,  
*USN (Ret.).*  
CAPT. ROBERT M. ELDER,  
*USN (Ret.).*  
CAPT. JACK H. REID,  
*USN (Ret.).*  
MAJ. J. DOUGLAS ROLLOW,  
*USMCR (Ret.).*

ADDITIONAL COSPONSORS

S. 304

At the request of Mr. SANTORUM, the name of the Senator from Ohio [Mr. GLENN] was added as a cosponsor of S. 304, a bill to amend the Internal Revenue Code of 1986 to repeal the transportation fuels tax applicable to commercial aviation.

S. 448

At the request of Mr. GRASSLEY, the name of the Senator from New Hampshire [Mr. SMITH] was added as a cosponsor of S. 448, a bill to amend section 118 of the Internal Revenue Code of 1986 to provide for certain exceptions from rules for determining contributions in aid of construction, and for other purposes.

S. 529

At the request of Mr. GRAHAM, the name of the Senator from Arkansas [Mr. PRYOR] was added as a cosponsor of S. 529, a bill to provide, temporarily, tariff and quota treatment equivalent to that accorded to members of the North American Free Trade Agreement (NAFTA) to Caribbean Basin beneficiary countries.

S. 758

At the request of Mr. HATCH, the name of the Senator from Alabama [Mr. SHELBY] was added as a cosponsor of S. 758, a bill to amend the Internal Revenue Code of 1986 to provide for S corporation reform, and for other purposes.

S. 794

At the request of Mr. LUGAR, the name of the Senator from Wyoming [Mr. SIMPSON] was added as a cosponsor of S. 794, a bill to amend the Federal Insecticide, Fungicide, and Rodenticide Act to facilitate the minor use of a pesticide, and for other purposes.

S. 837

At the request of Mr. WARNER, the names of the Senator from Utah [Mr. HATCH] and the Senator from Alabama [Mr. HEFLIN] were added as cosponsors of S. 837, a bill to require the Secretary of the Treasury to mint coins in commemoration of the 250th anniversary of the birth of James Madison.

S. 864

At the request of Mr. GRASSLEY, the name of the Senator from New Mexico [Mr. BINGAMAN] was added as a cosponsor of S. 864, a bill to amend title XVIII of the Social Security Act to provide for increased medicare reimbursement for nurse practitioners and clinical nurse specialists to increase the delivery of health services in health professional shortage areas, and for other purposes.

S. 877

At the request of Mrs. HUTCHISON, the names of the Senator from Colorado [Mr. BROWN], and the Senator from North Carolina [Mr. HELMS] were added as cosponsors of S. 877, a bill to amend section 353 of the Public Health Service Act to exempt physician office laboratories from the clinical laboratories requirements of that section.

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Perspectives on Proposed Federal Rules of Evidence 413-415

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## **AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION REPORT TO THE HOUSE OF DELEGATES**

### **Recommendation**

RESOLVED, that the American Bar Association opposes the substance of Rules 413, 414, and 415 of the Federal Rules of Evidence concerning the admission of evidence in sexual assault and child molestation cases, as enacted by the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103 - 322, 108 Stat. 1796 (1994).<sup>a1</sup>

### **\*344 Report<sup>aa1</sup>**

On September 13, 1994, President Clinton signed the "Violent Crime Control and Enforcement Act of 1994,"<sup>1</sup> which contains new Rules 413, 414 and 415 of the Federal Rules of Evidence. These rules govern the admission of evidence in criminal cases in which the accused is charged with an offense of sexual assault or child molestation, and of civil cases in which a claim for damages or other relief is predicated on conduct constituting an offense of sexual assault or child molestation. Pursuant to the rules, evidence of the defendant's or party's commission of another offense or offenses is admissible, and may be considered for its bearing on any matter to which it is relevant.

The law provides for the effective date of the rules to be delayed, giving the Judicial Conference of the United States 150 days to review them and submit recommendations to Congress. If the Judicial Conference's recommendations are different from the rules, the effective date is delayed an additional 150 days, during which time Congress can reconsider the rules. If Congress does not act on the Judicial Conference's recommendations, the Rules included in the law become effective 150 days after the transmittal of the Judicial Conference's recommendations.

In October, 1994, the American Bar Association submitted comments to the Rules of Practice and Procedure Committee of the Judicial Conference concerning the issues posed by Rules 413, 414 and 415 of the Federal Rules of Evidence. Those comments were based on the Association's Rules Enabling Act policy related to the manner in which rules should be promulgated for the federal courts.<sup>2</sup>

The comments criticized the bypassing of the Rules Enabling Act process. By evading the longstanding process designed to promulgate rules only after extensive thoughtful review by the entire legal community, Congress challenged the entire rulemaking structure. In particular, the comments pointed out that the careful review inherent in the public comment process was designed to eliminate unwarranted changes or changes which have unintended \*345 consequences. In light of the number of serious ambiguities in the rules, the abbreviated public comment period is particularly disturbing. In addition, requiring affirmative Congressional action to modify Rules 413 - 415 effectively precludes the likelihood of any revision, despite the real possibility that substantial and substantive comments would be generated when the rules were briefly distributed for public

review. Ultimately, if the rulemaking structure is ignored any time that a rule is likely to generate controversy, the entire integrity of the Rules Enabling Act is subverted.

The comments also noted the absence of any ABA policy directed at the use of propensity evidence cases concerning sexual abuse due, no doubt, in part to the fact that these rules are in direct conflict with the existing federal rules. The only related ABA policy concerned the use of prior bad acts evidence pursuant to Rule 404(b). In *United States v. Huddleston*,<sup>3</sup> the Supreme Court viewed the preliminary fact question of whether a defendant had committed the prior bad act as a Rule 104(b) issue. This holding overturned the longstanding requirement of most courts that clear and convincing evidence was required for the admission of such acts due to their inherent prejudice. The ABA resolution urges that Rule 404(b) be amended to provide that the court shall determine the preliminary fact question by a clear and convincing evidence standard. Thus, the ABA had previously viewed with suspicion evidence which legitimately fit within Rule 404(b) in order to ensure that courts carefully exercise their gatekeeping responsibilities. The ABA policy report supporting the Rule 404(b) resolution assumed that propensity evidence was inadmissible and simply spoke to the prejudice which may occur by jurors who use the evidence incorrectly for its propensity purposes.

Ensuing events have validated a number of the concerns expressed in the ABA comments. The Summary of Comments on New Evidence Rules 413 - 415 prepared by the Rules Committee Support Office of the Administrative Office of the United States Courts, indicates that 100 individuals and organizations opposed the rules, 10 supported them and 18 recommended modifications or were neutral. Opponents included 11 lawyers, 56 evidence professors, 19 judges, and 12 organizations, among others. The reasons for opposition to the rules were as follows:

Circumvents Rules Enabling Act	7
Constitutional Concerns	19
Insufficient Data on Propensity	33
Unfair	58
Unnecessary	16
Impact on Native Americans	4
Drafting Problems	47

**\*346** In October, 1994, these rules were considered by two Advisory Committees of the Judicial Conference. The Advisory Committee on the Criminal Rules of Procedure sent a memorandum to the Evidence Advisory Committee noting its concern over the last minute addition of the rules without prior input from the Judicial Conference. The Committee specified its previous rejection of such rules by an 8 to 1 vote, and again voted 8 to 1 to oppose the adoption of rules permitting propensity evidence in sex cases and expressed its view that Rule of Evidence 404(b) was an “adequate vehicle” to introduce other crimes evidence. In addition the “Committee seriously questioned whether Rules 413 - 415 are worth the danger of convicting a defendant for his past, as opposed to charged behavior.” Concerning the content of the rules, the Committee suggested several drafting changes, including combining the three rules into one and requiring that the prosecution be required to prove by clear and convincing evidence that the alleged act had occurred.<sup>4</sup>

In contrast, when the Evidence Advisory Committee met in November, 1994 to consider the Congressionally passed rules, while the Committee remained opposed to the content of the rules, it viewed the policy decision to permit propensity evidence as a Congressional fait accompli. As a result, the Evidence Advisory Committee is “urging Congress to reconsider its decision on the policy questions. If Congress does not do so, the committee is recommending that its alternative language be adopted.”<sup>5</sup> In other words, the Committee limited its redrafting of the three rules to “correct ambiguities and possible constitutional infirmities identified in Rules 413 - 415 and remain consistent with Congressional intent.”<sup>6</sup> **\*347** Therefore, it did not attempt to dilute the content of the rules. In fact, both during and after the Committee meeting, input from the original drafters of the rules was incorporated. While it is fair to say that the end result of this process is a more coherent, better written version of the earlier rules, it is disturbing that the only support for propensity rules within either of the two Advisory Committees of the Judicial Conference came from the Department of Justice representative. Such support was not unexpected, since the rules were

originally drafted by the Department of Justice during the administration of President Bush. In other words, none of the judges, academics or other lawyers on either Committee would have adopted these rules.

Rules 413 - 415 were included in the final version of the Violent Crime Control and Law Enforcement Act of 1994 in order to obtain a key vote in favor of the legislation. Even assuming that the Judicial Conference recommends to Congress that the Evidence Advisory Committee's redraft of the propensity rules should be substituted for the present rules, Rules 413 - 415 will go into effect as presently worded unless Congress takes affirmative action. If the rules become effective due to Congressional inaction, extensive litigation can be expected concerning their scope. Significant questions unanswered by the text of Rules 413 - 415 include whether the judge has any discretion to exclude prejudicial prior bad acts, whether expert testimony of sexual deviancy is permitted, and whether hearsay evidence of prior bad acts can be introduced. Moreover, while due process issues may be raised concerning any evidence introduced solely for propensity,<sup>7</sup> such questions would be magnified if Rules 413 - 415 were interpreted as completely prohibiting the exclusion of propensity evidence.

Given this background, the American Bar Association House of Delegates resolution appended to this report opposes Federal Rules of Evidence 413 - 415. First, it should be clear what this resolution does not do. Evidence which is legitimately within F.R.E. Rule 404(b) is not affected by this resolution. Lawyers and judges recognize the difficulties associated with proving sexual abuse in cases involving adults as well as children. Problems in proof frequently stem from the absence of other witnesses or corroboration. When the defendant claims consent, the trial often becomes a credibility \*348 contest. Where young children are involved, their discomfort about testifying or inability to communicate may intertwine with competency questions.

Society is currently struggling with ways to ensure that the guilty do not escape punishment without the wholesale abandonment of the evidentiary and constitutional protections of criminal defendants. The federal constitution has been interpreted to permit children to testify out of the presence of the defendant when an individualized showing can be made that the child would be traumatized by face to face confrontation.<sup>8</sup> Child hearsay is now admitted under traditional hearsay exceptions as well as by hearsay catchalls and in some states by specific child hearsay exceptions. Expert testimony is used extensively in all types of sexual abuse cases. The Rape Shield rule protects against the complainant being put on trial for her own consensual sexual conduct.

Moreover, existing caselaw in state and federal courts generously interprets Rule 404(b) to permit evidence of the defendant's prior bad acts in sex crimes cases so long as any nexus exists to a purpose other than propensity. Therefore, to the extent that the prior acts indicate motive, intent, opportunity, identity, or common scheme or plan, those acts are legitimately admitted under current law. Similarly, as Professor Imwinkelried has argued, the doctrine of chances may provide an alternative noncharacter route for the most egregious evidence of bad acts.<sup>9</sup> In other words, in determining whether an act was criminal, the doctrine of chances permits the use of reasoning which asks “[h]ow statistically likely is it that an innocent individual would be accused of the same type of crime on several different occasions[ ]?”. The inference is not that the person is bad, and therefore more likely to commit the current crime, but rather that the possibility of repeated unfounded accusals is remote, unless there is another explanation which could account for the previous complaints. The most obvious use of this reasoning is in cases of multiple unexplained deaths happening in a similar manner, when the evidence that any one death was a homicide. However, this rationale has been extended to sexual misconduct cases on the theory that it is unlikely that one individual would be falsely accused of several completely separate similar incidents.<sup>10</sup> \*349 Obviously, when the doctrine of chances is used, a proper foundation must be established and the evidence carefully evaluated to exclude acts that have no other purpose than propensity.

Undoubtedly, a few cases will always exist in which the only relevancy link for admission is propensity and exclusion may result in what some believe to be an unwarranted retrial or acquittal. However, to catch that relatively small number of cases, the proponents of Rules 413 - 415 would drastically alter one of the fundamental premises underlying the Federal Rules of Evidence. Currently, we do not round up the regular suspects and try them based on evidence of who they are rather than what they did in the particular case. Wigmore characterized the prejudice associated with character evidence as “the overstrong tendency to

believe the accused guilty of the charge merely because he is a likely person to do such acts [and] the tendency to condemn not because the accused is believed guilty of the present charge but because he escaped unpunished from other offenses.”<sup>11</sup>

Prejudice can result from overestimating the probative value of character evidence, or punishing the accused for past conduct or other crimes the defendant may have committed or will commit. Obviously, the prejudice of such acts is great. Jurors may be overwhelmed by an emotional response to the evidence which interferes with their ability to hold the prosecution to its burden of proof beyond a reasonable doubt. They may not care if sufficient evidence of guilt exists because they feel less responsibility for convicting an individual who they know has committed previous bad acts. Ultimately, the jury may reach its verdict without deciding the defendant's guilt in the present case.

Rules permitting propensity evidence are particularly inadvisable in light of developing scientific evidence which has consistently demonstrated the high percentage of mistaken identifications in cases where the assailant's identity is at issue. Approximately 30% of cases submitted to the FBI laboratory for DNA analysis result in the known suspect's DNA not matching the specimen taken from the scene.<sup>12</sup> If police work and identifications are mistaken in so \*350 many cases involving violent crimes, one must wonder why the judicial system would want to encourage convictions in such cases based on propensity evidence. In other words, the admission of character evidence allows the jury to convict the defendant by inferring that if he has committed a previous sexual crime, he committed the current one. However, the reason that many sex offenders are originally identified is because of their inclusion in mug books of sexual offenders. Thus, it is predictable that in many cases where a victim has been raped by a stranger, the defendant will have been charged with prior sexual crimes. If the prior conviction has a relevance other than propensity, it will be admitted without the need for any change in the rules.

The driving force behind the proposed rules appear to be directed at two types of cases: 1) those in which the defense to rape is consent, and 2) those in which a pedophile preys on numerous young children. However, the rules are not so limited. One would assume that such a dramatic change in the philosophy underlying the rules would have called for some empirical justification. Had the rules gone through the Rules Enabling Act process, such proof would likely have been demanded. It is unclear that such evidence does exist. The early belief was that sexual offenders had very low recidivism rates. Recent recidivism rates for sexual offenders also appear to be lower than for most other categories.<sup>13</sup> Exhibitionists appear to have the highest recidivism rates of other sex offenders.<sup>14</sup> But even these are described as less than the national average of all recidivists.<sup>15</sup> Other commentators question the methodology of studies of recidivism of sexual offenders.<sup>16</sup> Yet none of the commentators appear to posit that recidivism in sexual offenses is higher than rates for other types of crime.

Indeed, the relevant question is not simply whether sexual offenders have high recidivism rates, but is character evidence of sexual crimes more predictive than character evidence of other crimes? Unfortunately, recidivism rates are unacceptably high for all crimes. Therefore, if propensity is allowed for sex crimes, how is this to be distinguished from using propensity in other cases, except \*351 for the outrage which is understandably directed at the commission of sexual crimes?<sup>17</sup> 3 While sexual offenses are often hard to prove, so are drug conspiracies and other categories of crimes.

To the extent that some will argue that sexual propensity evidence has previously been permitted under the guise of evidence showing a “lustful disposition,” several points should be made. First, when this exception first became popular, deviant sexual offenders were assumed to be highly recidivistic and rare.<sup>18</sup> Second, the predominant use of such evidence was limited to child abuse cases.<sup>19</sup> Third, the pure propensity use of such evidence was often masked because of instructions which focused on whether the prior acts showed a sexual deviation of the same nature as revealed by the present crime. In other words, prosecutors were not permitted to argue that the defendant should be convicted because he is a sexual offender. While Rules 413 - 415 may prompt this type of closing argument, convictions based on status are constitutionally prohibited.<sup>20</sup> Fourth, propensity evidence has been rejected by the Federal Rules and states adopting Rule 404. Fifth, while one commentator argued that a number of states still permit such evidence in sexual abuse cases,<sup>21</sup> some of those decisions predate the adoption of Federal and State

versions of Rule 404. Newer opinions often stretch to permit sexual crimes evidence, but they do so by enlarging the concepts of common plan or scheme, or modus operandi, not by relying on character evidence.<sup>22</sup>

If Rules 413 - 415 are promulgated, they may become the first volley in a larger attempt to reject the ban against character evidence. For example, Ms. Davies, a commentator widely quoted as favoring a more generous approach to the admissibility of relevant character evidence, makes no distinction between sexual crimes \*352 and other crimes.<sup>23</sup> However, unlike the balance struck by the drafters of Rules 413 - 415, she is quite concerned about prejudice and suggests a balancing approach which favors the exclusion of character evidence unless the proponent demonstrates that its probative value outweighs the danger of unfair prejudice.<sup>24</sup> Moreover, she would require a foundation of clear and convincing evidence for admission of prior acts.<sup>25</sup>

Even if one were comfortable with a policy shift allowing propensity evidence in sexual cases, and empirical evidence appeared to support a propensity rule for certain types of sexual offenders, Rules 413 - 415 cast their net much more widely, treating all sexual offenses and offenders as fungible. As previously mentioned, the scientific evidence concerning stranger rapes indicate that these are the very types of crimes which are often subject to mistaken identifications. Nor are all child abusers pedophiles.

In addition, it is clear that Rules 413 - 415 only apply to a small number of cases, those which are within federal jurisdiction. Ironically, even the proponents of the rules recognize this fact and view their enactment as a symbolic victory which will serve as a model for state rules. As a practical matter, in federal criminal cases, the effect will be felt in Indian territory where what would otherwise be state crimes are prosecuted in federal court. Other questions of fairness aside, should such a significant and controversial rule change be adopted which will primarily impact Native Americans? To the extent that the Military Rules of Evidence are required to follow the federal rules, a built-in delay of 180 days exists from the effective date of any new federal rule, during which time Rules 413 - 415 can be reviewed and modifications suggested which can be enacted by Presidential order.

Given the numerous troubling features of Rules 413 - 415, it is disquieting that an unintended result of their enactment may be to produce a backlash against the strict interpretation of the federal Rape Shield Rule 412. For example, judges may be more likely to admit evidence of the complainant's sexual history when the defendant's prior sexual acts are offered for propensity and credibility is key. There are obvious distinctions between the prior consensual acts of a complainant and prior unconsented acts of the \*353 defendant. However, when judges are faced with the admission of character evidence, some may feel constrained to admit otherwise excluded evidence of the complainant's sexual history on the theory that it is constitutionally required. The only way to challenge such results would be by the unsatisfactory route of petitioning for mandamus. It would be unfortunate if complainants hesitated to bring sexual charges because Rules 413 - 415 resulted in less predictability about whether their own backgrounds would become ammunition for impeachment at trial.

Moreover, to date no one has focused on how these rules might work in civil cases. The rape shield has recently been extended to cover sexual harassment. However, given the broader discretion of the judge in civil cases, Rule 412's protection may be illusory if judges routinely admit the complainant's sexual history when they admit propensity acts of the defendant. Similarly, defendants may claim prior touching by the plaintiff to open the question of the complainant's sexual activity. Conversely, defendants accused of sexual harassment will face the likelihood of their entire sexual history being admitted without any direct link to the case. Where an employer is also sued, and the evidence is not work-related, additional questions of prejudice may arise.

While the public sentiment against sexual offenders is shared by everyone, Rules 413 - 415 are ill designed and raise troubling policy issues. The legal community should not sit silent while Congress imposes these rules in an effort to appear tough on crime, but without a full consideration of the numerous issues raised by their enactment.

#### Footnotes

a1 Editor's Note: The American Bar Association House of Delegates adopted this resolution at its midyear meeting on February 13, 1995.

- aa1 This report was written by Professor Myrna S. Raeder, who is a Professor of Law at Southwestern University School of Law and the former chairperson of the Criminal Justice Section's Committee on Federal Rules of Evidence and Criminal Procedure. The Report was prepared in support of the attached American Bar Association House of Delegates resolution.
- 1 Pub. L. No. 103-322, 108 Stat. 1796.
- 2 See ABA House of Delegates Report No. 118B (January, 1982).
- 3 485 U.S. 681 (1988).
- 4 See Memo to Hon. D. Lowell Jensen, From Professor Dave Schlueter, Reporter, October 11, 1994, Re: Advisory Committee's Discussion of Federal Rules of Evidence 413 - 415.
- 5 Letter from Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Re: Proposed New Rules 413 - 415 of the Federal Rules of Evidence (Dec. 2, 1994).
- 6 Id.
- 7 See, e.g., *McKinney v. Rees*, 993 F.2d 1378, 1385 (9th Cir.), cert. denied, 114 S. Ct. 622 (1993) (erroneous admission of propensity evidence rendered trial fundamentally unfair in violation of due process).
- 8 See *Maryland v. Craig*, 497 U.S. 836 (1990).
- 9 Edward J. Imwinkelried, *The Dispute Over the Doctrine of Chances*, 7 *Crim. Just.* 16 (1992).
- 10 See *People v. VanderVliet*, 80 - 81, 508 N.W.2d 114, 129 (1993), amended on other grounds, 520 N.W.2d 338 (1994); see also *People v. Balcom*, 867 P.2d 777, 785 (1994), *Arabian, J.* (concurring) (if two people claim rape and their stories are sufficiently similar, the chances that both are lying or one truthful and the other invented a false story that just happens to be similar, is greatly diminished).
- 11 1A John H. Wigmore, *Evidence in Trials at Common Law* s 58.2 (Peter Tillers ed., 1983).
- 12 See, e.g., National Research Council, *DNA Technology in Forensic Science* 88 (1992); Begley, et. al., *Blood, Hair and Heredity*, *Newsweek*, July 11, 1994, at 24.
- 13 David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 *Minn. L. Rev.* 529 (1994); Allen J. Beck, Bureau of Justice Statistics, U.S. Dept. of Justice, *Recidivism of Prisoners Released in 1983* 6 (1989).
- 14 Thomas J. Reed, *Reading Goal Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 *Am. J. Crim. L.* 127, 154 (1992).
- 15 Id. at 149, 155.
- 16 Lita Furbey et al., *Sex Offender Recidivism: A Review*, 105 *Psychol. Bull.* 3, 4 (1989).
- 17 See Bryden & Park, *supra* n.13, at 572.
- 18 See generally Edward J. Imwinkelried, *Uncharged Misconduct* s 4.14.
- 19 See, e.g., Bryden & Park, *supra* n. 14, at 558.
- 20 See *Robinson v. California* 370 U.S. 660 (1992); Edward J. Imwinkelried, *A Small Contribution to the Debate Over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions* (forthcoming *Cornell L. Rev.* 1995) (arguing that even if Rules 413 - 415 are enacted, the defendant would be entitled to an instruction limiting the use of character evidence).
- 21 See Thomas J. Reed, *supra* n.13, at 159.
- 22 See, e.g., *People v. Balcom*, 7 Cal. 4th 414, 867 P.2d 777 (1994) (uncharged rapes not admissible to prove intent, but admissible to prove manifestations of common design or plan); see also Paul F. Rothstein, *Evidence in a Nut Shell* 355 -56 (1981) (arguing that on occasion a specific propensity may rise to the level of a common plan).

23 See Susan Marlene Davies, Evidence of Character to Prove Conduct: A Reassessment of Relevancy, 27 *Crim. L. Bull.* 504, 534 (1991); see also Reed, *supra* n.14, at 145.

24 *Id.*

25 *Id.* at 536.

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