

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

*Edward J. Imwinkelried**

[T]here is nothing either good or bad but thinking makes it so.
– William Shakespeare¹

I. INTRODUCTION

Dean Wigmore once wrote that the hearsay doctrine is the “most characteristic rule of the Anglo-American law of Evidence.”² 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.³ Modernly, most legal systems in the common law world have significantly relaxed that prohibition.⁴ However, with few exceptions,⁵ the evidentiary codes in

* 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. See 1 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

the United States firmly maintain the prohibition.⁶ 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.”⁷ 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.”⁸ This provision generates more appellate litigation and published opinions than any other section in the Rules.⁹ 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.¹⁰ Prosecutors frequently offer uncharged misconduct under Rule 404(b)(2) because they appreciate that its introduction can have a

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).

devastating impact on the defense.¹¹ 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 105.¹² 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."¹³ Today, the introduction of uncharged misconduct to prove intent is the most common use of Rule 404(b) evidence.¹⁴ It is understandable why prosecutors resort to this use of uncharged misconduct so frequently. In

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).

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,¹⁵ especially in prosecutions for white-collar crimes.¹⁶ Unless the accused has made a confession directly admitting mens rea, the prosecution must almost always rely on circumstantial evidence.¹⁷

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.¹⁸ Most courts take a lenient attitude toward the admission of such evidence to prove intent.¹⁹ 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;²⁰ 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.²¹

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:

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).

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 small²²

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."²³

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, subjective²⁴ disposition or propensity for illegal or immoral conduct.²⁵ In theory, the doctrine of chances has nothing to do with the accused's character.²⁶ Instead, to apply the doctrine, the trier of fact focuses on the objective improbability of so many accidental, inadvertent occurrences.²⁷ 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,

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.

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.²⁸ The line between proper non-character reasoning and improper character reasoning is a fine one.²⁹ It can be a very thin distinction for the lay jurors to draw during deliberations.³⁰ Again, to trigger the doctrine, the prosecutor must demonstrate that the charged and uncharged crimes are similar.³¹ The very similarity of the crimes can sorely tempt the jury to succumb to the character-reasoning syndrome.³² 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 blur³³ 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.³⁴

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.³⁵ 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.³⁶ 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.³⁷

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.

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.³⁸ 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.³⁹ 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.⁴⁰ 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.⁴¹ In particular, the appellate courts have not mandated that trial judges read the jury limiting instructions specifically tailored to the doctrine of chances.⁴²

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.⁴³ 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.⁴⁴ 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.

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.

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.⁴⁵ When the federal drafters prepared the original Rule 404, they used section 1101 from the California Evidence Code as a model.⁴⁶ 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.”⁴⁷ 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.”⁴⁸ 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.”⁴⁹

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.

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

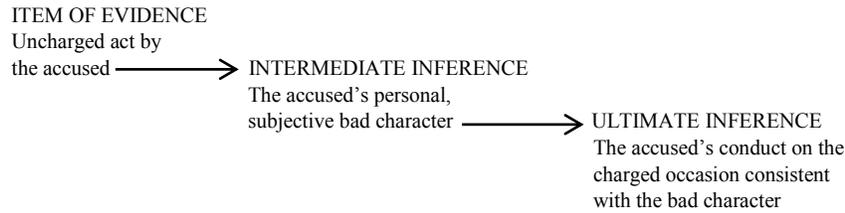
46. See FED. R. EVID. 404 advisory committee’s note. The note expressly cites the California Law Revision Commission report discussing California’s codification of the doctrine. *Id.*; see also CAL. EVID. CODE § 1101 law revision commission cmt. (West 2009); CAL. LAW REVISION COMM’N, TENTATIVE RECOMMENDATION 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.*

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.⁵⁰ 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.⁵¹ The Eighth Amendment cruel and unusual punishment provision bars criminalizing a person's status.⁵² 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).⁵³ This step creates the danger that the jury will overvalue the evidence.⁵⁴ 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.⁵⁵ 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.⁵⁶

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*:

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 immoral⁵⁷ 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.”⁵⁸ 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”⁵⁹

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

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).

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.⁶⁰ 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.⁶¹

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).⁶²

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.⁶³ Hence, to justify the admission of uncharged misconduct evidence, the prosecution must

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.

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.⁶⁴ To begin with, the charged and uncharged incidents must be generally similar.⁶⁵ There is no across-the-board requirement that to be admissible under Rule 404(b), an uncharged incident be similar to the charged offense.⁶⁶ The text of Rule 404(b) does not include the adjective, "similar." Under Rule 404(b), the courts often admit "consciousness of guilt" evidence.⁶⁷ Thus, in a murder prosecution, Rule 404(b) would allow the prosecution to show that the accused had attempted to bribe a prosecution witness;⁶⁸ 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.⁶⁹ The cases recognizing that necessity are legion.⁷⁰ 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.⁷¹ 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.⁷² In

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.

contrast, when the evidence is offered to prove intent, the two crimes need merely fall into the same general category.⁷³ As Dean Wigmore stated, the charged and uncharged offenses need be similar only “in [their] gross features.”⁷⁴ 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*.⁷⁵ 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.⁷⁶

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.”⁷⁷ The question is not the absolute number of incidents.⁷⁸ 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.⁷⁹ 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.⁸⁰ 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.⁸¹ In some cases, the judge can rely on common sense and experience to conclude that a particular type of

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.*

event is a once-in-a-lifetime experience.⁸² In other cases, though, the judge should demand that the prosecution produce evidence of the baseline frequency of such events.⁸³

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).⁸⁴ 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.⁸⁵ This inference poses the danger that the jury will convict the accused on an improper basis, that is, his or her criminal past.⁸⁶ 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).⁸⁷ This step creates the danger that the jury will overvalue the evidence.⁸⁸ 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.⁸⁹ 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."⁹⁰

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.

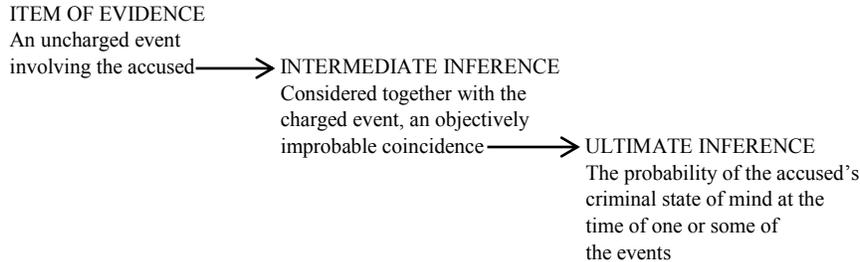
88. *See* IMWINKELRIED, *supra* note 11, § 2:19.

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).

Contrast the theory of logical relevance underlying the doctrine of chances, using Figure 2, below.⁹¹

FIGURE 2



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.⁹² 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.⁹³

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.⁹⁴ The courts have permitted prosecutors

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

to use the doctrine for several purposes. One of the leading American cases is *United States v. Woods*.⁹⁵ In that case, the accused was charged with infanticide.⁹⁶ The victim had died of cyanosis.⁹⁷ The accused claimed that the child's suffocation was accidental.⁹⁸ 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.⁹⁹ The trial judge admitted the testimony, and the appellate court upheld the ruling.¹⁰⁰ 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.¹⁰¹ 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.¹⁰² 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.¹⁰³

Of greater interest for our present purpose, the courts accepting the doctrine also allow prosecutors to employ the doctrine to establish mens rea.¹⁰⁴ Sometimes, criminals plant drugs on an innocent person or in an

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).

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."¹⁰⁵ 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.¹⁰⁶ These critics begin their line of argument by noting that the doctrine of chances rests on a species of statistical reasoning.¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹ The critics of the doctrine of chances contend that the probability reasoning underlying the doctrine is propensity-based.¹¹⁰ 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

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.

bad character.¹¹¹ The critics assert that without positing the accused has a character that is “continuing,”¹¹² “constant,”¹¹³ and “unchanging”¹¹⁴ “across time,”¹¹⁵ there is no logical nexus between the accused’s uncharged act and the charged offense.¹¹⁶

However, these criticisms are flawed. First, in Figure 2, work forward from left to right toward the final conclusion.¹¹⁷ 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 autonomous¹¹⁸ human beings with volitional capacity.¹¹⁹ Simply stated, they possess free will.¹²⁰ 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.¹²¹

Now, in Figure 2, work from right to left—that is, backward from the ultimate inference.¹²² The critics misconceive the doctrine of chances. If it were true that the accused had a continuing, constant,

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.

unchanging character, the ultimate inference would be that “all”¹²³ the outcomes were the same. “[E]very” act would be either innocent or criminal.¹²⁴ 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.¹²⁵ 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.¹²⁶ 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).¹²⁷

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.

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).

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"¹²⁸ and admit it under Rule 404(b) as some evidence that the accused possessed a criminal intent.¹²⁹

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.¹³⁰ *United States v. Evans*, a prosecution for knowing receipt of stolen goods, is a case in point.¹³¹ The court sustained the admission of uncharged misconduct evidence of the accused's receipt of other stolen goods,¹³² 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."¹³³ *United States v. Campbell*, a 2015 prosecution for the knowing preparation of false tax returns, fits the same mold.¹³⁴

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).

Moreover, even when the courts purport to apply the doctrine in so many words, in many instances their analysis is shallow.¹³⁵ 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.¹³⁶ 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.¹³⁷ 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.¹³⁸ The opinions are replete with sweeping assertions that "virtually any prior drug offense" is admissible to prove intent in a drug prosecution.¹³⁹

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

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 Pendant 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)).

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.¹⁴⁰ 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.¹⁴¹ When a single item of evidence is relevant for two purposes, one permissible and the other impermissible, the judge ordinarily¹⁴² admits the evidence but gives the jury a limiting instruction.

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. LAFAVE, *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.

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.”¹⁴³ A complete, properly worded limiting instruction has two prongs.¹⁴⁴ 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.¹⁴⁵ 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.¹⁴⁶ If the uncharged misconduct is relevant on only one non-character theory, to a degree, the instruction must identify and specify that purpose.¹⁴⁷ 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

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.*

affirmative prong the judge may give the jury only the guidance that they may use the evidence for the purpose of proving “intent.”¹⁴⁸

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.¹⁴⁹ 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.¹⁵⁰ In this context, blurring the line is an acute danger; given a choice between “intuitive”¹⁵¹ character reasoning and more “attenuated”¹⁵² 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.¹⁵³

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

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.¹⁵⁴ To remedy that problem, appellate courts

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; 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; 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; 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; 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=OUJI-CR%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.

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.¹⁵⁵ 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.

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.

*(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.)*¹⁵⁶ 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

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.*

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.¹⁵⁷ 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."¹⁵⁸ 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).

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.

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.¹⁵⁹ 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,¹⁶⁰ and prosecutors offer Rule 404(b) evidence to prove intent more often than for any other purpose.¹⁶¹ If the judicial application of Rule 404(b) is to be more than an intellectually dishonest “exercise in evasion,”¹⁶² 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.¹⁶³ 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

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).

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.¹⁶⁴ 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.¹⁶⁵ The current lax administration of the doctrine of objective chances seriously imperils that tradition.

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).