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# ARTICLES

## AN EVIDENTIARY PARADOX: DEFENDING THE CHARACTER EVIDENCE PROHIBITION BY UPHOLDING A NON-CHARACTER THEORY OF LOGICAL RELEVANCE, THE DOCTRINE OF CHANCES

*Edward J. Imwinkelried* \*

*“Once is happenstance. Twice is coincidence. The third time it’s enemy action.”*

— *Ian Fleming*, *GOLDFINGER*<sup>1</sup>

The case became curiouser and curiouser.<sup>2</sup> Paul Woods was barely eight months old at the time of his death.<sup>3</sup> The death of any child is a tragedy; but, to say the least, the facts surrounding Paul’s death were suspicious. Paul died of a cyanotic episode.<sup>4</sup> The Woods household was his second foster placement.<sup>5</sup> During his initial placement, he never suffered any breathing problems.<sup>6</sup> Moreover, when he began experiencing such problems after his

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1. IAN FLEMING, *GOLDFINGER* (Berkley Publ’g Group 1982) (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).

2. *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973).

3. *See id.* at 128.

4. *Id.* at 129.

5. *See id.*

6. *Id.*

placement with the Woods family, he was treated at several different hospitals.<sup>7</sup> He had never had an episode during any of those periods of hospitalizations.<sup>8</sup> When Paul died, the physicians were unable to identify a cause of death.<sup>9</sup> Yet, a forensic pathologist, Dr. Vincent DiMaio, suspected foul play.<sup>10</sup> He would eventually testify at Martha's trial that he thought that Paul's death was homicidal.<sup>11</sup> In his expert opinion, someone had smothered Paul to death.<sup>12</sup> However, Dr. DiMaio was candid. On the witness stand, he testified that although he believed there was a seventy-five percent chance that someone had murdered Paul, there was a remaining twenty-five percent chance that the cause of death was some unknown disease.<sup>13</sup> Dr. DiMaio even went to length of conceding that the forensic evidence did not prove a murder beyond a reasonable doubt.<sup>14</sup>

Given Dr. DiMaio's concessions, his testimony standing alone probably would not have produced a conviction. Indeed, the prosecution's case might never have reached a jury; a trial judge might have been forced to find the case legally insufficient and grant a defense motion for a directed verdict.<sup>15</sup> However, the prosecution had additional, potent evidence. During the preceding twenty-five years, in one way or another, Martha had taken care of many children, both her own and those of relatives and friends. During that period, nine children had suffered at least twenty cyanotic episodes while in Martha's custody.<sup>16</sup> Seven of those children had died.<sup>17</sup> As in Paul's case, none of those children had experienced breathing difficulties while they were in a hospital away from Martha; and, again as in Paul's case, the treating phy-

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7. See *id.* at 130 n.5.

8. See *id.* at 129-30.

9. See *id.* at 130.

10. See *id.*

11. *Id.* at 130.

12. *Id.*

13. *Id.*

14. *Id.*

15. See, e.g., *Jackson v. Virginia*, 443 U.S. 307, 316, 324 (1979) (announcing that, in deciding whether the prosecution has sustained its initial burden of production, the trial judge must inquire whether a rational trier of fact could find guilt beyond a reasonable doubt); see also 2 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 9:88 (rev. ed. 2005) [hereinafter 2 UNCHARGED MISCONDUCT EVIDENCE] (discussing *Woods*); Nickolas J. Kyser, Comment, *Developments in Evidence of Other Crimes*, 7 U. MICH. J.L. REFORM 535, 541-42 (1974).

16. *Woods*, 484 F.2d at 130.

17. *Id.*

sicians had been unable to identify a definitive medical cause for the fatal episodes.<sup>18</sup> The presentation of the testimony about the other twenty incidents sealed Martha's fate. The jury convicted, and the appellate court affirmed.<sup>19</sup>

On the civil side, plaintiffs' attorneys in civil rights actions often encounter evidentiary challenges similar to the problem faced by the prosecutor in *United States v. Woods*. For example, the plaintiff's attorney representing a discharged employee may need to establish that the employer was motivated by a discriminatory animus.<sup>20</sup> Unless the employer is stupid as well as biased, the plaintiff's attorney may have no "smoking gun"—no documentary evidence establishing the discriminatory motivation for the plaintiff's discharge.<sup>21</sup> Just as the prosecution might well have suffered a directed verdict in *Woods* without the benefit of the testimony about the other twenty cyanotic episodes, the dearth of evidence of discriminatory animus in a civil rights action may doom the plaintiff's case.<sup>22</sup> The parallel continues, though. The plaintiff may be able to survive a nonsuit motion and gain a favorable verdict if he or she can find evidence of other instances in which the same employer took adverse personnel actions against similarly situated employees, that is, employees of the same race, gender, or age.<sup>23</sup>

In these cases, when the other incidents are sufficiently numerous and similar to the alleged misconduct, any reasonably intelligent lay juror would find evidence of the other incidents convincing. Indeed, it would be "an affront to common sense" to exclude such evidence.<sup>24</sup> The rub is that, at first blush, there is a plausible objection to the introduction of such evidence. The objection is that the testimony amounts to inadmissible evidence of the defendant's bad character. In the United States, it is a venerable, common-law principle that the proponent may not treat an

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18. See *id.* at 130–32.

19. *Id.* at 129.

20. See Lisa Marshall, Note, *The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits*, 114 YALE L.J. 1063, 1064 (2005).

21. See *id.* at 1069–70, 1086–87.

22. See *id.* at 1088.

23. See *id.* at 1065 (describing the evidence as "the employer's prior acts of animus").

24. *R. v. Boardman*, [1975] A.C. 421, 456 (H.L.) (appeal taken from Eng.) (U.K.); see Edward J. Imwinkelried, *The Evolution of the Use of the Doctrine of Chances as Theory of Admissibility for Similar Fact Evidence*, 22 ANGLO-AM. L. REV. 73, 95–96 (1993) [hereinafter *Similar Fact Evidence*].

opposing litigant's other misconduct as circumstantial proof of the misconduct alleged in the pleadings.<sup>25</sup> Today, that principle is expressly codified in the Federal Rules of Evidence. The first sentence of Rule 404(b) reads: "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."<sup>26</sup> The proponent may not argue that: (1) the other incidents demonstrate the person's bad character; and (2) in turn, that character increases the probability that the person committed the misdeed alleged in the pleadings<sup>27</sup>—in other words, the person acted "characteristically" or "true to character" on that alleged occasion.<sup>28</sup>

Fortunately for both prosecutors and plaintiffs, however, most courts have prevented an affront to common sense by recognizing a theory for rationalizing the admission of this critical type of evidence. Immediately after announcing the character evidence prohibition, Rule 404(b) continues: Evidence of other misconduct "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."<sup>29</sup> As at common law, the statute permits the proponent to introduce the evidence so long as there is a tenable non-character theory of logical relevance.<sup>30</sup> Indeed, every federal circuit has construed Rule 404(b) to mean that the proponent may rely on *any* alternative theory—that is, any theory other than the character theory forbidden in the first sentence of the statute.<sup>31</sup>

In cases such as *Woods* and the hypothetical civil rights action described above, the courts often invoke the doctrine of objective chances as the non-character theory to legitimate the introduction of the evidence. In the criminal arena, the doctrine has become a mainstay of child abuse and drug prosecutions. If, as in *Woods*, the defendant claims that the child's death was an accident, the government may introduce evidence of other injuries in-

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25. See MCCORMICK ON EVIDENCE § 190 (John W. Strong ed., 5th ed. 1999).

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

27. 1 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:19 (rev. ed. 2005) [hereinafter 1 UNCHARGED MISCONDUCT EVIDENCE].

28. *Riggins v. Alaska*, 101 P.3d 1060, 1062 (Alaska Ct. App. 2004) (quoting *Bingaman v. Alaska*, 76 P.3d 398, 408 (Alaska Ct. App. 2003)).

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

30. 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 27, §§ 2:20-:23.

31. See *id.* §§ 2:30-:31 (collecting cases from all the circuits).

flicted on the child to prove the commission of an actus reus.<sup>32</sup> Or in a drug prosecution in which the defendant claims that he was “merely present” at or an “innocent bystander” to a drug transaction, the government may present evidence of the defendant’s involvement in other drug trafficking to show mens rea.<sup>33</sup> Innocent persons sometimes accidentally become enmeshed in suspicious circumstances, but it is objectively unlikely that will happen over and over again by random chance. By the same token, evidence of a defendant’s other discriminatory acts serves as the backbone of the plaintiff’s case in many civil rights actions.<sup>34</sup>

When the doctrine of chances initially made its advent in American case law in the 1970s, its advocates were attorneys representing the prosecution and plaintiffs. The character evidence prohibition was firmly entrenched at common law and in evidence statutes; and in order to satisfy the prohibition, those attorneys seized on the doctrine of chances and urged the courts to accept it as a non-character theory. In child abuse cases such as *Woods*, prosecutors pressed the doctrine on the courts to persuade them to receive evidence of other injuries to a deceased child or to other children in the defendant’s custody. Likewise, since bigoted defendants rarely left a paper trail documenting their bias, civil rights plaintiffs’ counsel appealed to the doctrine to justify introducing evidence that was vital to proving the defendants’ discriminatory intent.<sup>35</sup> At this early point in the evolution of the doctrine, it was the defense bar, both criminal and civil, which attacked the doctrine and contended that it did not qualify as a legitimate non-character theory of relevance.

Paradoxically, in the past decade, the tables have turned. The character evidence prohibition is no longer considered sacrosanct. New psychological studies suggest that a person’s highly particularized character traits are more predictive of conduct than was originally thought.<sup>36</sup> At the federal level, over the objection of the

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32. See John E.B. Myers, *Uncharged Misconduct Evidence in Child Abuse Litigation*, 1988 UTAH L. REV. 479, 535–38 (1998).

33. See 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 27, § 5:28, at 5–80 n.1 (collecting cases in which defendant claims he was “merely present” or an “innocent bystander”).

34. See Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 194–95 (1998); Marshall, *supra* note 20, at 1065–66.

35. Marshall, *supra* note 20, at 1067–70, 1082–83.

36. See Susan Marlene Davies, *Evidence of Character to Prove Conduct: A Reassess-*

United States Judicial Conference,<sup>37</sup> Congress enacted Federal Rules of Evidence 413–15 to selectively abolish the character evidence prohibition in criminal and civil actions involving allegations of sexual assault or child molestation.<sup>38</sup> The legislation took effect in July 1995.<sup>39</sup> Two handfuls of state legislatures have followed suit,<sup>40</sup> and similar legislation is pending in other jurisdictions.<sup>41</sup> Now the prosecutors and plaintiffs' attorneys who once championed the doctrine of chances as a non-character theory are attacking the theory. Although the legislation enacted to date repeals the prohibition in only selected types of cases, there is a sense that support for the prohibition has waned to the point that it is time to think the formerly unthinkable and propose abolishing the prohibition in its entirety. The argument runs that character evidence is indeed probative.<sup>42</sup> The abolitionists add that even the premier doctrine of chances does not qualify as a genuinely non-character theory.<sup>43</sup> They contend that, on close scrutiny, even that doctrine rests on implicit, forbidden assumptions about the defendant's bad character.<sup>44</sup> If the doctrine of chances is a spurious non-character theory but excluding such vital evidence offends common sense, then perhaps the character evidence pro-

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*ment of Relevancy*, 27 CRIM. L. BULL. 504, 515–17 (1991).

37. See JUD. CONFERENCE OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (1995), reprinted in 159 F.R.D. 51, 51–53 (1995).

38. See FED. R. EVID. 413–15.

39. *Id.*

40. See 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 27, § 2:23 (including Alaska, Arizona, California, Colorado, Illinois, Indiana, Louisiana, Missouri, Oregon, Rhode Island, Texas, and Utah); Joyce R. Lombardi, Comment, *Because Sex Crimes Are Different: Why Maryland Should (Carefully) Adopt the Contested Federal Rules of Evidence 413 and 414 That Permit Propensity Evidence of a Criminal Defendant's Other Sex Offenses*, 34 U. BALT. L. REV. 103, 106 (2004) (“[T]en states . . . have adopted some version of the rules.”).

41. Lombardi, *supra* note 40, at 105.

Maryland Delegate Pauline Menes of Prince George's County and Maryland Senator Jennie Forehand of Montgomery County sponsored a bill in January 2004 that would facilitate admissibility of other sex offenses as propensity evidence in trials of child molesters. The proposed statute, which effectively creates a “propensity evidence” exception in Maryland Rule of Evidence 5-404(b), is modeled after Federal Rule of Evidence 414 . . . .

*Id.*

42. See H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 883–84 (1982).

43. See Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259, 1262–65 (1995).

44. See Morris, *supra* note 34, at 200–01; Marshall, *supra* note 20, at 1070–73.

hibition itself must go. Character evidence should be presumptively admissible, subject to the trial judge's discretion to exclude otherwise admissible evidence as being unduly prejudicial.<sup>45</sup> The upshot is that if they are to uphold the character evidence prohibition, then the former opponents of the doctrine of chances must now come to its defense.

The thesis of this article is that the attacks on the doctrine of chances are mistaken. The article develops that thesis in four steps. The first part of this article describes both the character prohibition and the general permissibility of non-character theories. The second part of the article focuses specifically on the doctrine of chances and explains why at least superficially the doctrine appears to qualify as a legitimate non-character theory. The third part reviews the attacks that have been mounted on the doctrine of chances. The fourth and final part evaluates those attacks and demonstrates that they are erroneous. The attacks rest on a misunderstanding of both the doctrine itself and the statistical inferences underpinning the doctrine. The article concludes that evidence qualifying for admission under the doctrine possesses genuine non-character logical relevance. There may be a case for abolishing or generally relaxing the character evidence prohibition, but that case cannot be premised on the asserted incoherence of the doctrine of chances as a non-character theory.

## I. THE CHARACTER EVIDENCE PROHIBITION AND THE GENERAL PERMISSIBILITY OF NON-CHARACTER THEORIES OF LOGICAL RELEVANCE

### A. *The Nature of the Distinction Between Character and Non-Character Theories of Logical Relevance*

In everyday life, we commonly rely on character reasoning. We treat a person's past behavior as predictive of behavior on other occasions.<sup>46</sup> Suppose that the parent of two children comes home to find children's DVDs strewn all over the floor of the family room. The parent knows that one child tends to be messy and has

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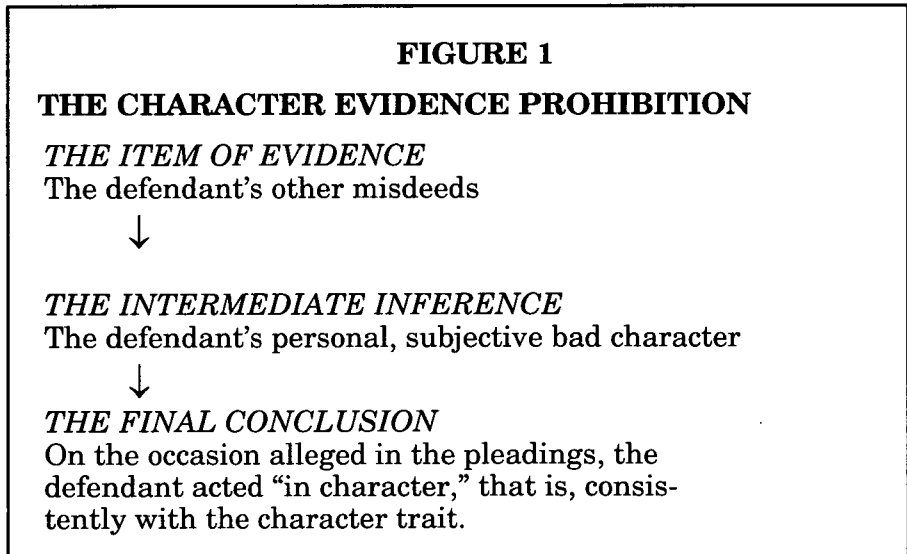
45. See Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 803-10 (1981); Marshall, *supra* note 20, at 1096-98.

46. See, e.g., Uviller, *supra* note 42, at 848.



repeatedly left DVDs on the family room floor. The parent also knows that, in contrast, the other child tends to be neat and, to her knowledge, has never left DVDs out of place. When the parent confronts them, both children deny leaving the DVDs on the floor; and the demeanor of the two children seems equally sincere. It is to be expected that the parent will punish the child who has frequently been messy in the past. It may be a bit simplistic to reason, "he did it once, therefore he did it again,"<sup>47</sup> but on a daily basis, we all resort to such reasoning.

Why then generally bar such reasoning in the courtroom? To appreciate the rationale for the general character evidence prohibition, we must understand the nature of the forbidden theory, notably the inferences it entails and the probative dangers posed by those inferences. Figure 1 depicts the *verboden* theory:<sup>48</sup>



As Figure 1 indicates, the first step in a character theory is inferring the defendant's personal, subjective bad character from

47. See *State v. Newton*, 743 P.2d 254, 256-57 (Wash. 1987) (referencing "the notion that a person who has once committed a crime is more likely to do so again") (quotations and citation omitted); Victor J. Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59, 68-69, 80 (1984) (presenting the simplistic view that "once a thief, always a thief"); 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).

48. See 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 27, § 2:19, at 2-114 fig. 2-2.

the defendant's prior misdeeds. Rule 404(b) refers to this step as offering the uncharged acts for the immediate purpose "to prove the character of a person."<sup>49</sup> This step poses the probative danger of prejudice, recognized in Rule 403.<sup>50</sup> Here, "prejudice" denotes a danger of misdecision.<sup>51</sup> The Advisory Committee Note accompanying Rule 403 explains that, in this context, "prejudice" means that although an item of evidence is technically logically relevant, realistically it will tempt the jury to decide the case on an improper basis.<sup>52</sup> The initial step in character reasoning forces the jury to focus on the question of the type or kind of person the defendant is. The jury must ask itself: Is the defendant a law-abiding, moral person or a law-breaking, immoral individual? It is hazardous to compel the jury to consciously advert to that question.<sup>53</sup> There is a grave risk that the jury may decide to punish the defendant for being a criminal rather than because the jurors are convinced beyond a reasonable doubt that the defendant committed the charged crime.<sup>54</sup> If the defendant's uncharged misconduct is heinous or repulsive, then, at a conscious level, a juror might decide to nullify the rule that they may convict only if they find the defendant guilty beyond a reasonable doubt. The juror might conclude that the defendant is simply so dangerous that society must be protected by imprisoning the defendant. Alternatively, the uncharged misconduct evidence could easily bias the jurors at a subconscious level.

Assume that at the conclusion of their initial stage in reasoning, the jury concludes that the defendant has a subjective disposition or propensity toward illegal or immoral conduct. As Figure 1 illustrates, next the jurors must decide whether to treat that propensity as proof that, on the alleged occasion, the defendant acted consistently with his or her bad character trait. In the words of Rule 404(b), the proponent urges the jury to conclude

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

50. See *id.* R. 403.

51. The philosopher Jeremy Bentham coined the expression, "misdecision." See JEREMY BENTHAM, *An Introductory View of the Rationale of Evidence; For the Use of Non-Lawyers as Well as Lawyers*, in 6 THE WORKS OF JEREMY BENTHAM, 1, 105 (John Bowring ed., Russell & Russell Inc. 1962).

52. See FED. R. EVID. 403 advisory committee's note.

53. See Mark E. Turcott, *Similar Fact Evidence: The Boardman Legacy*, 21 CRIM. L.Q. 43, 46, 48, 54, 56-57 (1979).

54. See I.H. DENNIS, THE LAW OF EVIDENCE 582-83 (1999) (illustrating moral prejudice); John T. Johnson, Comment, *The Admissibility of Evidence of Extraneous Offenses in Texas Criminal Cases*, 14 S. TEX. L.J. 69, 78 (1973).

that, at the time and place alleged in the pleadings, the defendant engaged in "action in conformity" with the bad character trait.<sup>55</sup> This inferential step poses a further probative danger. The danger is the risk that the jury will overestimate the probative worth of the evidence.<sup>56</sup>

Admittedly, within the past fifteen years, some psychological researchers have reported that relatively confident predictions of a person's behavior can be made when there is a large sample of the person's conduct in very similar situations.<sup>57</sup> However, there is a good deal of research indicating that more generalized character traits are relatively poor predictors of conduct on a specific occasion.<sup>58</sup> As one British commentator remarked:

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. . . . [There is a] tendency to exaggerate the representativeness of particular conduct. . . . [The] monolithic view of

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

56. See *Thigpen v. Thigpen*, 926 F.2d 1003, 1014 (11th Cir. 1991); Daniel D. Blinka, *Evidence of Character, Habit, and "Similar Acts" in Wisconsin Civil Litigation*, 73 MARQ. L. REV. 283, 295 (1989); Randolph N. Jonakait, *Biased Evidence Rules: A Framework for Judicial Analysis and Reform*, 1992 UTAH L. REV. 67, 68, 77 ("[T]he jury will be overly influenced by the negative character evidence . . ."); James W. McElhaney, *Character and Conduct*, LITIG., Winter 1991, at 45-46 ("[T]he jury may give the defendant's past too much weight. While a past obviously has probative value, the jury may plug the holes of a weak case with the assumption that cats and firebugs do not change their stripes.").

57. See David Crump, *How Should We Treat Character Evidence Offered to Prove Conduct?*, 58 U. COLO. L. REV. 279, 283 (1987); Davies, *supra* note 36, at 518; David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15, 20, 24-25 (1994); Miguel A. Méndez, *The Law of Evidence and the Search for a Stable Personality*, 45 EMORY L.J. 221, 230-34 (1996) (reporting on research by Mischel and Shoda). Mischel and Shoda's

new work challenges the prevailing scientific and legal conclusions about the value of predisposition evidence. If they are right about the relative stability and invariance of the basic personality structure and about the stable patterns of variability flowing from that structure, then consciously cheating clients might indeed tell us something about whether the defendant consciously evaded his tax obligations.

Méndez, *supra*, at 234.

58. See Miguel Angel Méndez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1052-55 (1984); Robert G. Spector, *Rule 609: A Last Plea for Its Withdrawal*, 32 OKLA. L. REV. 334, 351-54 (1979).

traits of human personality does not enjoy the support of the psychological literature of the past half-century.<sup>59</sup>

Situational, ad hoc factors can be far more influential than character traits in shaping a person's conduct on a specific occasion. Like the danger of misdecision, a risk of overvaluation of evidence is a recognized probative danger that can countervail against admissibility.<sup>60</sup>

It is the concurrence of the probative dangers of misdecision and overvaluation which accounts for the general rule excluding character evidence. Although the evidence is logically relevant, reliance on a character theory poses these two significant risks. The combination of those risks is the rationale for the common-law prohibition and the first sentence of Rule 404(b).

However, as previously stated, like the common law, the second sentence of Rule 404(b) permits the proponent to rely on non-character theories of logical relevance. To determine whether the asserted theory qualifies, the trial judge must trace the entire chain of inferences underlying the theory.<sup>61</sup> The theory passes muster if the inferential path between the item of evidence and a fact of consequence in the case does not require any inferences as to the defendant's personal, subjective character.<sup>62</sup>

In a given case, the question is whether the item of evidence is relevant not only on a forbidden character theory but also on a legitimate non-character theory. Rule 401 states such a liberal test for logical relevance that any testimony about a defendant's prior

59. Roderick Munday, *Stepping Beyond the Bounds of Credibility: The Application of Section 1(f)(ii) of the Criminal Evidence Act 1898*, 1986 CRIM. L. REV. 511, 513-14; see also Campbell v. Greer, 831 F.2d 700, 707 (7th Cir. 1987) ("[P]sychological studies . . . show that moral conduct in one situation is not highly correlated with moral conduct in another."); David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 28 (1986-87) (stating that the "assumption that global, highly generalized traits . . . determine just about everything" is now largely discredited).

60. See Richard O. Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1027-28 (1977).

61. See, e.g., *United States v. Mastrangelo*, 172 F.3d 288, 295 (3d Cir. 1999) ("[T]he government must 'clearly articulate how that evidence fits into a chain of logical inferences' without adverting to a mere propensity to commit crime now based on the commission of crime then." (quoting *United States v. Sampson*, 980 F.2d 883, 887 (3d Cir. 1992))).

62. See David P. Leonard, *The Use of Uncharged Misconduct Evidence to Prove Knowledge*, 81 NEB. L. REV. 115, 117, 123 (2002) ("[O]ther crimes, wrongs, or acts are only inadmissible if the way the proponent is using the evidence requires an inference of character at any point in the chain of inferences. . . ."); William Roth, *Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach*, 9 PEPP. L. REV. 297, 303 (1982).

misconduct will be relevant on a character theory.<sup>63</sup> The prior act is some evidence of the defendant's propensity for misconduct; and if allowed to, the proponent would argue that that propensity at least slightly increases the probability that the defendant committed the alleged misdeed. The issue is not an either-or problem; rather, the issue is both-and. Does the item also possess relevance on a legitimate non-character theory? If it does, the typical solution is to admit the evidence but to give the jury a limiting instruction under Rule 105. In the limiting instruction, the trial judge: (1) negatively forbids the jury from treating the item as character evidence; but (2) affirmatively specifies the acceptable, non-character use of the item.<sup>64</sup>

Over the centuries, the courts have developed myriad non-character theories.<sup>65</sup> Consider a simple example. Suppose that the defendant is charged with burglarizing a bank on March 1, 2005. Rather than forcing his way into the bank, the burglar used a key to enter a side door. At the trial, the prosecutor offers evidence of the defendant's uncharged misconduct. More specifically, the prosecutor calls the bank president as a witness. The bank president testifies along the following lines: On February 1, 2005, he came home to find a burglar in his residence; he recognizes the defendant as the burglar; one of the items missing after the residential burglary was the president's key to the side door of the bank; and he has accounted for all the other keys to the side door.

The bank president's testimony is certainly logically relevant on a character theory. The prosecutor could advance two different character arguments. One would be that the February 1 burglary shows the defendant's general criminal propensity and that that propensity increases the probability that the defendant committed the charged crime. The prosecutor could also present the more

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63. FED. R. EVID. 401. ("Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); *see also* *United States v. Casares-Cardenas*, 14 F.3d 1283, 1287 (8th Cir. 1999) ("Relevance is established by any showing, however slight, that makes it more or less likely . . . .") *United States v. Nason*, 9 F.3d 155, 162 (1st Cir. 1993) ("The threshold for relevance is very low under Federal Rule of Evidence 401.").

64. *See* 2 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 15, §§ 9:72-73.

65. *See* Uviller, *supra* note 42, at 877. Chapters 3-6 of *Uncharged Misconduct Evidence* list and discuss the most popular theories employed in criminal cases. *See* 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 27. Chapter 7 of *Uncharged Misconduct Evidence* reviews the theories most commonly utilized in civil actions. *See* 2 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 15.

compelling argument that the uncharged misconduct demonstrates the defendant's propensity to commit burglary and that propensity enhances the probability that the defendant perpetrated the charged burglary. Of course, both of those theories run afoul of the character evidence prohibition codified in the first sentence of Rule 404(b). If the prosecutor relied on either of those theories, the judge would summarily sustain a defense objection raising the prohibition.

However, on the facts of this case, the prosecutor can also articulate a non-character theory. The February 1 offense put its perpetrator in possession of the only missing key to the side door of the bank burgled on March 1. The uncharged misconduct is therefore logically relevant on a non-character theory to prove the defendant's identity as the perpetrator of the charged March 1 offense. The inferential path between the testimony about the February 1 incident and the fact of consequence—the defendant's identity as the perpetrator of the charged March 1 crime—does not entail any inference as to the defendant's general tendency to commit crimes or even a more specific tendency to perpetrate burglaries. It is true that, in a given case, the trial judge can exercise his or her discretion under Rule 403 to bar otherwise admissible 404(b) evidence if the evidence raised significant probative dangers.<sup>66</sup> If the prosecution had ample other evidence of the defendant's identity<sup>67</sup> and there would be a time-consuming dispute over the uncharged misconduct,<sup>68</sup> the judge might invoke Rule 403. However, in many cases, the judge admits the evidence but administers a limiting instruction to the jury to maximize the probability that the jury uses the evidence only for its legitimate, non-character purpose.

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66. See FED. R. EVID. 403.

67. The bank might be equipped with surveillance cameras that captured clear images of the defendant entering the bank by the side door.

68. The defense might sharply contest whether the defendant perpetrated the uncharged act. Under Federal Rule of Evidence 104(b), as construed in *Huddleston v. United States*, 485 U.S. 681, 689–91 (1988), even if the judge rules the evidence admissible, the defense may present contrary testimony to the jury. Assume that the bank president did not view the defendant during the February 1 burglary. In that event, the prosecution might have to rely on circumstantial forensic evidence to prove that the defendant committed the February 1 crime. The defense counsel might represent to the judge that if the judge admits the evidence, the defense will be forced to call both experts disputing the prosecution's forensic evidence and alibi witnesses establishing the defendant's whereabouts on February 1. That testimony could easily consume several days of court time.

## B. *The Importance of the Distinction Between Character and Non-Character Theories of Logical Relevance*

The distinction between character and non-character theories is of great symbolic, constitutional, and practical significance.

The rule distinguishes our criminal justice system from both Continental and totalitarian legal systems. It is a "feature[], of vast moment, that distinguishes the [American] from the Continental system of evidence."<sup>69</sup> In a traditional inquisitorial criminal trial on the Continent, "evidence of the character of the accused (including specific prior acts) is . . . freely used."<sup>70</sup> The trier of fact essentially receives a dossier on the defendant's background. In totalitarian systems, the defendant can sometimes be charged with the offense of being an enemy of the state or of having an anti-social personality. The American legal system repudiates that view. In the words of the Michigan Supreme Court, "[I]n our system of jurisprudence, we try cases, rather than persons."<sup>71</sup> At trial, the defendant is held to answer only for the charged offense, not his or her entire past.<sup>72</sup>

In criminal cases in the United States, this policy has constitutional dimensions. In *Robinson v. California*,<sup>73</sup> the Supreme Court of the United States announced that the Eighth Amendment ban on cruel and unusual punishment forbids a state from criminalizing a person's status.<sup>74</sup> After a defendant has been found guilty beyond a reasonable doubt of the charged offense, the trier of fact may consider uncharged misconduct during sentencing.<sup>75</sup> How-

69. Morris, *supra* note 34, at 182 (quoting 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 58.2, at 1213 (Peter Tillers ed., 1983)).

70. 1A WIGMORE, *supra* note 69, § 58.1, at 1212; *see also id.* § 58.1, at 1212 n.3 (referencing a Danish rape trial, in which "the prior criminal record of the accused—a quite lengthy record—was introduced in evidence before the determination of guilt," because "[i]n France the history of the accused, including his criminal record, is read out at the beginning of the trial."); Lester B. Orfield, *Relevancy in Federal Criminal Evidence*, 43 NEB. L. REV. 485, 519 (1963).

71. *People v. Allen*, 420 N.W.2d 499, 504 (Mich. 1988).

72. *See* Thomas J. Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidenced in Federal Criminal Trials*, 50 U. CIN. L. REV. 713, 731 (1981); *see also* Louis H. Natali, Jr. & R. Stephen Stigall, "Are You Going to Arraign His Whole Life?": *How Sexual Propensity Evidence Violates the Due Process Clause*, 28 LOY. U. CHI. L.J. 1, 9–12 (1996).

73. 370 U.S. 660 (1962).

74. *See id.* at 666; *see also* *Romer v. Evans*, 517 U.S. 620, 635 (1996) (recognizing the impropriety of penalizing a person for his or her status).

75. *See* 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 27, § 1:06.

ever, prior to the finding of guilt, the focus is on the question of whether the defendant committed the specific act alleged in the accusatory pleading.

Finally, the distinction between character and non-character theories is of tremendous practical importance. On the criminal side, Rule 404(b) is the most litigated provision in the Federal Rules of Evidence.<sup>76</sup> It generates more published opinions than any other provision of the Rules.<sup>77</sup> In many states, errors in admitting this species of evidence are the most common cause for reversal on appeal.<sup>78</sup> Further, the issue is of growing importance in civil litigation. As we have already seen, the issue looms large in civil rights actions in which the plaintiff must demonstrate discriminatory intent.<sup>79</sup> The distinction can not only determine a plaintiff's ability to prove an intent necessary to establish liability; the distinction has also become crucial when a plaintiff offers evidence of a defendant's other misconduct as a predicate for imposing punitive damages.<sup>80</sup> In all these cases, the key evidentiary ruling by the judge may be the decision whether testimony about a defendant's other misdeeds possesses genuine non-character relevance. If the judge rules the evidence admissible, the prosecutor or plaintiff often prevails.<sup>81</sup> If the judge excludes the evidence, the government or plaintiff may not even have enough evidence to make out a submissible case and reach the jury. In *Woods*, if the prosecution had had only Dr. DiMaio's testimony, it is doubtful whether the government would have even taken the case to trial.

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76. See Morris, *supra* note 34, at 182 & n.6.

77. See 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 27, § 1:04, at 6 (citing 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 404(08) (Joseph M. McLaughlin ed., 1996)).

78. *Id.* (citing Patrick Wallendorf, Note, *Evidence—The Emotional Propensity Exception*, 1978 ARIZ. ST. L.J. 153, 156)).

79. Morris, *supra* note 34, at 194–95. See generally Marshall, *supra* note 20.

80. See generally Jim Gash, *Punitive Damages, Other Acts Evidence, and the Constitution*, 2004 UTAH L. REV. 1191, 1211–24 (discussing how the Federal Rules of Evidence deal with the question of admissibility of prior misconduct).

81. See 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 27, § 1:02 (discussing the empirical studies of the impact of uncharged misconduct evidence on jury decision making in criminal and civil cases).



## II. THE DOCTRINE OF OBJECTIVE CHANCES AS A NON-CHARACTER THEORY OF LOGICAL RELEVANCE

Part I discusses non-character theories in broad brush fashion. This part hones in on a specific non-character theory—the doctrine of objective chances.

### A. *The Landmark English and American Decisions Recognizing the Doctrine of Chances*

One of the seminal English decisions on the doctrine is the celebrated case of *Rex v. Smith*.<sup>82</sup> The accused, George Smith, had gone through a marriage ceremony with a woman named Bessie Mundy.<sup>83</sup> She had inherited a large sum of money from her father.<sup>84</sup> Bessie was later discovered drowned in her own bathtub.<sup>85</sup> The defendant claimed that the death was accidental; he stated that he had no involvement in the death.<sup>86</sup> The prosecution offered uncharged misconduct evidence to rebut the defendant's claim.<sup>87</sup> The testimony was to the effect that two other women the accused had purportedly married "were . . . found drowned in their baths in houses where they were living with" the accused.<sup>88</sup> The defense contended that the testimony constituted blatantly inadmissible bad character evidence. Nevertheless, the trial judge admitted the testimony.<sup>89</sup>

On appeal, Smith challenged the trial judge's ruling. The appellate court affirmed the trial judge's decision.<sup>90</sup> The court agreed with Smith that the prosecution could not introduce the evidence to show the defendant's personal bad character and to then invite the jury to treat that character as proof that he had perpetrated the charged murder.<sup>91</sup> However, the court held that

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82. 84 L.J.K.B. 2153 (Crim. App. 1915); see *Similar Fact Evidence*, *supra* note 24, at 77-78; Rothstein, *supra* note 43, at 1260-61.

83. *Rex*, 84 L.J.K.B. at 2153.

84. *Id.*

85. *Id.* at 2154.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 2157.

91. *Id.* at 2156.

the evidence was properly admissible to shed light “upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental.”<sup>92</sup> The court’s reasoning focused on the objective improbability of so many similar accidents befalling Smith.<sup>93</sup> Either Smith was one of the unluckiest persons alive, or one or some of the deaths in question were the product of an *actus reus*.<sup>94</sup>

The Introduction to this article discussed the *Woods* decision by the United States Court of Appeals for the Fourth Circuit. That decision essentially imported the *Smith* doctrine into the United States. In its brief in *Woods*, the government explicitly cited *Smith* as authority.<sup>95</sup> Although the defense brief characterized *Smith* as “divergent”<sup>96</sup> and “mischie[vous],”<sup>97</sup> the Court of Appeals accepted *Smith* as persuasive authority.<sup>98</sup> In the majority opinion, Judge Winter echoed *Smith*. As in *Smith*, Judge Winter reaffirmed the character evidence prohibition.<sup>99</sup> He noted that “[t]he government and the defendant agree that evidence of other crimes is not admissible to prove that an accused is a bad person and therefore likely to have committed the crime in question.”<sup>100</sup> Although *Woods* antedated the adoption of the Federal Rules of Evidence,<sup>101</sup> Judge Winter embraced the inclusionary conception of the distinction between character and non-character theories, stating that “evidence of other offenses may be received, if relevant, for any purpose other than to show a mere propensity or disposition on the part of the defendant to commit the crime.”<sup>102</sup>

92. *Id.*

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

94. See D.W. Elliott, *The Young Person’s Guide to Similar Fact Evidence—I*, 1983 CRIM. L. REV. 284, 289.

95. See Appellee’s Brief at 51, *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973) (No. 72-2217).

96. Reply Brief of Appellant at 133 n.8, *Woods*, 484 F.2d 127 (No. 72-2217).

97. *Id.*

98. *Woods*, 484 F.2d at 127, 133 n.8.

99. *Id.* at 133.

100. *Id.*

101. See *id.* at 134 n.9 (referring to “[t]he proposed Federal Rules of Evidence”). The Rules would take effect two years later. RONALD L. CARLSON ET AL., *EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE & STATUTES* 16 (5th ed. 2002).

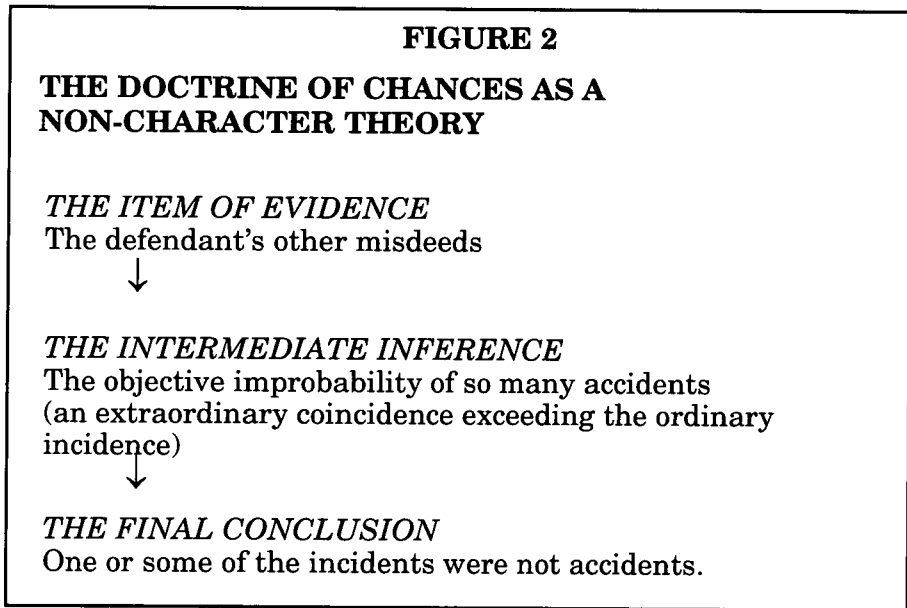
102. *Woods*, 484 F.2d at 134.

The prosecution did not have to “fit[]”<sup>103</sup> its evidence into a recognized “pigeonhol[e].”<sup>104</sup>

In the body of his opinion, Judge Winter characterized the doctrine of chances as a non-character theory. In his view, without positing any assumption about Martha’s personal, subjective bad character, the evidence shed light on “the unlikelihood” that so many children in Martha’s custody would “accidental[ly]” suffer cyanotic episodes.<sup>105</sup> It struck Judge Winter as an extraordinary coincidence that “so many children at defendant’s mercy experienced this condition.”<sup>106</sup>

### B. *The Theory of Logical Relevance Underlying the Doctrine of Objective Chances*

Figure 1 in Part I of this article diagrammed the forbidden character theory of logical relevance. Figure 2 depicts the doctrine of chances:<sup>107</sup>



103. *Id.* at 133.

104. *Id.* at 134.

105. *Id.*

106. *Id.*

107. See 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 27, § 4:01 fig. 4-2; see also *People v. VanderVliet*, 508 N.W.2d 114, 128 n.35 (Mich. 1993), *opinion amended*, 520 N.W.2d 338 (Mich. 1994) (citing with approval the discussion in UNCHARGED MISCONDUCT EVIDENCE).

As Figure 2 demonstrates, the doctrine of chances differs at least superficially from a character theory of logical relevance. Initially, under the doctrine the proponent does not offer the evidence of the uncharged misconduct to establish an intermediate inference as to the defendant's personal, subjective bad character.<sup>108</sup> Rather, the proponent offers the evidence to establish the objective improbability of so many accidents befalling the defendant or the defendant becoming innocently enmeshed in suspicious circumstances so frequently.<sup>109</sup> The proponent must establish that, together with the uncharged incident, the charged incident would represent an extraordinary coincidence.<sup>110</sup> In some cases, that will be obvious. *Smith* is a case in point. In a fact situation such as *Smith*, the jury hardly needs an expert's testimony to appreciate that, on average, finding one's spouse drowned in the family bathtub is at most a "once in a lifetime" experience.<sup>111</sup> In other cases, though, the proponent may need to introduce independent evidence to establish the ordinary incidence of the type of event in which the defendant was involved.<sup>112</sup>

Like the intermediate inference, the final conclusion under the doctrine of chances differs from the ultimate conclusion in character reasoning. If the jury finds the requisite extraordinary coincidence under the doctrine of chances, the proponent may invite the jury to finally conclude that, as a matter of common sense, the coincidence is evidence that one or some of the incidents were not accidents. 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.<sup>113</sup> 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 an actus reus or mens

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108. See 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 27, § 4:01.

109. See *VanderVliet*, 508 N.W.2d at 128–29, 129 n.38.

110. 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, 590–92 (1990) [hereinafter *The Doctrines*].

111. Cf. *id.* at 598 (“[T]he inadvertent possession of illicit drugs or stolen property is probably a ‘once in a lifetime’ experience for an innocent person.”).

112. See *id.* at 590–92.

113. See *Kyser*, *supra* note 15, at 541–42.

rea.<sup>114</sup> 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*.

The doctrine of chances not only comes to a different final conclusion than a character theory; the doctrine also takes a different route to its final conclusion. Under a character theory, the second inference entails using the defendant's subjective character as a predictor of conduct.<sup>115</sup> The second inference under the doctrine of chances is quite different. At trial, the litigants present the jury with at least two competing hypotheses: one that all the incidents are accidents, and the other that one or some of the incidents were not accidents. When a jury is presented with competing versions of the events, the jury is expected to use its common sense to gauge the relative plausibility of the versions.<sup>116</sup> In many jurisdictions, the pattern jury instructions both authorize and encourage the petit jurors to use their common sense in choosing among the competing hypotheses advanced by the litigants.<sup>117</sup>

In this light, it becomes clear that the doctrine is not merely superficially different than a character theory. Far more impor-

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114. See *id.*; see also 2 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 15, § 9:88.

115. See Kyser, *supra* note 15, at 537.

116. See, e.g., *United States v. Starks*, 309 F.3d 1017, 1021–22 (7th Cir. 2002) (“[T]he trier of fact is entitled to employ common sense in making reasonable inferences . . . .”); *United States v. Hamie*, 165 F.3d 80, 84 (1st Cir. 1999) (“[I]n . . . choosing from among competing inferences, jurors are entitled to take full advantage of their collective experience and common sense.” (alteration in original) (quoting *United States v. O’Brien*, 14 F.3d 703, 708 (1st Cir. 1994))); *United States v. Gainey*, 111 F.3d 834, 836 (11th Cir. 1997) (“In evaluating the facts of a case, the law permits jurors to ‘apply their common knowledge, observations and experiences in the affairs of life.’ . . . [J]urors may use ‘common sense,’ derived from the repetitive pattern of human behavior and experiences common to all of us . . . .” (quoting *United States v. Cruz-Valdez*, 773 F.3d 1541, 1546 (11th Cir. 1985) (en banc))); *United States v. Saccoccia*, 58 F.3d 754, 782 (1st Cir. 1995) (stating that jurors “are not expected to resist common sense inferences based on the realities of human experience”); *United States v. Donovan*, 24 F.3d 908, 913 (7th Cir. 1994) (“[W]e expect jurors to draw on their experience as well as their common sense to draw reasonable inferences. . . .”), *aff’d*, No. 95-2720, 104 F.3d 362 (7th Cir. 1994) (unpublished table decision); *United States v. McAfee*, 8 F.3d 1010, 1014 (5th Cir. 1993) (commenting that “[j]uries are free to use their common sense and apply common knowledge, observation, and experience gained in the ordinary affairs of life” to choose among competing potential inferences from the circumstantial evidence).

117. See, e.g., 1A KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS: CRIMINAL § 12.02, at 130 (5th ed. 2000) (“You are expected to use your good sense in considering and evaluating the evidence in the case. . . . [G]ive the evidence a reasonable . . . construction in the light of your common knowledge of the natural tendencies and inclinations of human beings.”).

tantly, the doctrine is distinguishable from a character theory in terms of the policies which inspire the character prohibition.<sup>118</sup>

First, while a true character theory forces the jurors to consciously address the question of the type or kind of person the defendant is, there is no such necessity under the doctrine. Thus, the doctrine reduces the risk that the jurors will in effect penalize the defendant because of his or her status. The judge's instruction on the doctrine should expressly direct the jurors that they may not treat the uncharged evidence as proof of the defendant's personal bad character.<sup>119</sup> It is true that it might occur to an individual juror that the evidence is also logically relevant on a character theory and to vote against the defendant for that reason. However, under the doctrine there is much less risk that that probative danger will materialize. The instruction on the doctrine not only does not compel the jurors to focus on the defendant's character or disposition; the instruction ought to bluntly tell them not to do so. Thus, the doctrine creates a markedly lower danger of misdecision.

Second, the doctrine presents less risk of overvaluation of the evidence. As Part I explained, that risk can be acute when the jury must use the defendant's character as a predictor of conduct on a specific occasion. However, under the doctrine the final inferential step is different. The doctrine does not ask the jurors to utilize the defendant's propensity as the basis for a prediction of conduct on the alleged occasion. Instead, the doctrine asks the jurors to consider the objective improbability of a coincidence in assessing the plausibility of a defendant's claim that a loss was the product of an accident or that he or she was accidentally enmeshed in suspicious circumstances. This common sense mode of reasoning is not only legitimate; indeed, the pattern jury charges in many jurisdictions urge the jurors to resort to precisely that type of reasoning.

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118. See generally 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 27, § 4:01.

119. See 2 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 15, §§ 9:71-:73.

### III. THE RECENT ATTACKS ON THE LEGITIMACY OF THE DOCTRINE OF CHANCES AS A NON-CHARACTER THEORY

#### A. *The Early General Attacks on the Character Evidence Prohibition*

In the early 1980s, two highly respected Evidence commentators, Professor Richard Kuhns and the late Professor H. Richard Uviller, released thoughtful, general critiques of the character evidence prohibition.

Professor Kuhns published his critique in 1981.<sup>120</sup> Professor Kuhns did not contend that all of the recognized, purportedly non-character theories in fact rely on propensity inferences. He wrote:

In a relatively small number of cases in which specific acts evidence is offered, the relevance of the evidence arguably is not dependent on a propensity inference. Consider, for example, a murder prosecution in which the state's theory is that the victim was killed with a .38-caliber pistol, and the prosecutor offers to prove that two days prior to the murder the defendant stole such a pistol. . . .

The evidence . . . is admittedly relevant in a propensity sense. The factfinder might infer that people who steal guns have a propensity to murder. . . . The relevance of the evidence, however, is not dependent upon the[] propensity inference. Mere possession of the weapon shows the ability of the murder defendant to commit the homicide. . . .

If [the] evidence . . . is offered solely to show that the defendant had the ability to commit the crime, . . . [the] evidence . . . fall[s] outside the propensity prohibition.<sup>121</sup>

However, Professor Kuhns argued that on close scrutiny, in many instances in which the courts admitted evidence on purportedly non-character theories, there are implicit propensity inferences.<sup>122</sup> In some cases, the logical relevance of the evidence depends on a generalized inference about the propensities of a category of persons.<sup>123</sup> For example, courts routinely admit "consciousness of guilt"<sup>124</sup> evidence that a defendant attempted to ob-

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120. Kuhns, *supra* note 45.

121. *Id.* at 792.

122. *See id.* at 803.

123. *See id.* at 785-89.

124. *See* 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 27, § 3:04.

struct justice by threatening or bribing a witness.<sup>125</sup> The logical relevance of the evidence turns on the validity of the assumption that, as a class, guilty persons have a propensity to obstruct justice to avoid the consequences of their guilt.<sup>126</sup> However, if the essential propensity inference relates to a class of persons rather than the individual defendant, then there may be somewhat less risk of misdecision, since the theory does not compel the jury to focus on the type or sort of person the individual defendant is. According to Professor Kuhns, in other cases, the logical relevance of the evidence depends on a propensity inference, but the propensity concerns morally neutral conduct.<sup>127</sup> Professor Kuhns pointed out that when knowledge is at issue in drug prosecutions, the courts frequently accept evidence of the defendant's involvement in prior drug trafficking.<sup>128</sup> There is a propensity inference, but the inference is merely that "[a] person who has obtained knowledge of some fact has a propensity to retain that knowledge."<sup>129</sup> Here too, the nature of the propensity inference reduces the risk of misdecision. There is less danger that the propensity inference itself will cause the jury to find the defendant repulsive and convict despite the existence of reasonable doubt as to the defendant's guilt of the charged offense. In Professor Kuhns's view, in still other cases, the logical relevance of the evidence depends on an individualized propensity to engage in morally blameworthy conduct.<sup>130</sup> These cases pose the gravest probative dangers. The theory of relevance compels the jury to advert to the defendant's personal, subjective character traits; and worse still, the character trait concerns immoral, potentially repugnant conduct.

Although Professor Kuhns surveyed many of the leading non-character theories, he did not comment about the doctrine of chances. He twice cited *Woods*, but he neither singled out the doctrine nor ventured an opinion as to whether it is a legitimate non-character theory.<sup>131</sup> That oversight was understandable, though, since at the time of Professor Kuhns's article the doctrine was just emerging in American case law as a non-character theory.

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125. See Kuhns, *supra* note 45, at 787.

126. See *id.*

127. See *id.* at 779.

128. See *id.* at 790.

129. *Id.*

130. See *id.* at 779, 790, 794.

131. See *id.* at 780 n.11, 800 n.100.



His bottom line, though, was a call for the abolition of the distinction between character and non-character theories.<sup>132</sup> He concluded that propensity evidence ought to be acceptable, subject to discretionary exclusion under Rule 403.<sup>133</sup>

In 1982, Professor H. Richard Uviller published his general critique of the character prohibition.<sup>134</sup> The principal thrust of his critique differed from that of Professor Kuhns' attack on the prohibition. The starting point for Professor Uviller's main line of his argument was the contention that the common understanding is that character is probative of conduct.<sup>135</sup> Professor Uviller then asserted that intellectual honesty demands recognizing that the limiting instructions, attempting to confine the jury's consideration of evidence of bad acts to non-character uses, are largely ineffective.<sup>136</sup> As he colorfully put it, such a limiting instruction "does more to satisfy legal scholasticism than to direct the minds of real jurors."<sup>137</sup> "To the ordinary human mind, . . . the division between the prescribed and the proscribed uses [of the uncharged misconduct evidence] may be a bit difficult to perceive."<sup>138</sup> The limiting instruction is "arcane legalistic wordplay."<sup>139</sup>

Although Professor Uviller's article had a different central focus than Professor Kuhns's, Professor Uviller did touch in passing upon the question of whether all the evidence purportedly admitted for "special purposes" possesses genuine non-character relevance.<sup>140</sup> Professor Uviller cited Professor Kuhns's earlier article.<sup>141</sup> Like Professor Kuhns, Professor Uviller asserted that the courts often admit evidence of disposition or propensity under a different name.<sup>142</sup> He stated that the distinction between character and non-character theories is "illusory . . . at its core."<sup>143</sup> His analysis of that issue was not as extended as Professor Kuhns's,

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132. *See id.* at 803-04.

133. *See id.* at 805, 810.

134. *See Uviller, supra* note 42.

135. *See id.* at 848, 883-84.

136. *See id.* at 877 (discussing the "special purpose" exception).

137. *Id.* at 869; *see also id.* at 880.

138. *Id.* at 879.

139. *Id.* at 890.

140. *Id.* at 877.

141. *See id.* at 850 n.13.

142. *See id.* at 885.

143. *See id.* at 869.

but Professor Uviller appeared to largely concur with Professor Kuhns.

There is a further parallel to Professor Kuhns's article. Like Professor Kuhns, Professor Uviller stopped short of explicitly challenging the doctrine of chances. Even in footnotes, he did not mention *Woods*. He did, however, comment on one fact situation where the doctrine of chances comes into play modernly.<sup>144</sup> The courts frequently rely on the doctrine in prosecutions for the knowing receipt of stolen goods.<sup>145</sup> The doctrine of chances argument is that, although an innocent person might accidentally come into the possession of stolen property, it is objectively unlikely that the same innocent person will unwittingly do so on multiple occasions.<sup>146</sup> In his article, Professor Uviller mentions such a fact situation.<sup>147</sup> On the one hand, he does not expressly argue that in such cases the logical relevance of the evidence depends on a propensity inference. On the other hand, he argues that in such cases, there is a substantial risk that the jurors will be unable or unwilling to observe a limiting instruction confining the evidence to a non-character use.<sup>148</sup>

#### B. *The More Specific Attacks on the Doctrine of Chances within the Past Decade*

Although the attacks by Professors Kuhns and Uviller on the character prohibition were both cogent and forceful, they had little immediate impact. However, they set the stage for later attacks specifically targeting the doctrine of chances. The subsequent attacks took the form of three articles. These articles were all published within the past decade—coinciding with the legislative efforts to selectively abolish the character evidence prohibition in prosecutions and civil actions involving allegations of sexual assault and child molestation.<sup>149</sup>

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144. *Id.* at 879. For a more recent statement of many of Professor Uviller's arguments, see Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 *TEMPLE L. REV.* 201 (2005).

145. 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 27, §§ 5:28–29.

146. *Id.* § 5:28.

147. *See* Uviller, *supra* note 42, at 879.

148. *Id.* at 882.

149. *See* FED. R. EVID. 413–15. The statutes took effect on July 9, 1995. *See id.*

The first article was released by Professor Paul Rothstein, the former chair of the American Bar Association Criminal Justice Section's Committee on Rules of Evidence and Criminal Procedure.<sup>150</sup> Like Professors Kuhns and Uviller, Professor Rothstein states that a theory lacks legitimate non-character relevance if the theory depends on a propensity inference.<sup>151</sup> He acknowledges that Dean Wigmore had championed the doctrine of chances as a non-character theory.<sup>152</sup> Wigmore believed that "the doctrine provides a way to infer guilt from the multiplicity of offenses . . . without relying on . . . propensity reasoning."<sup>153</sup> However, Professor Rothstein parts company with Wigmore over the doctrine. To critique the doctrine, Professor Rothstein turns to the *Smith* prosecution—the "Brides of the Bath" case.<sup>154</sup> He flatly asserts that, in reality, the *Smith* court admitted the uncharged evidence on a propensity theory.<sup>155</sup> He declares that "[i]t is inescapable" that the theory rests on a propensity inference.<sup>156</sup> In Professor Rothstein's view, the evidence lacks logical relevance unless one at least implicitly assumes that the defendant has a propensity to repeat the crime.<sup>157</sup>

The second attack was mounted in 1998 by a practitioner, Mr. Andrew Morris, writing in *The Review of Litigation*.<sup>158</sup> Mr. Morris specifically cites the preceding articles by Professors Kuhns<sup>159</sup> and Rothstein.<sup>160</sup> Drawing on those articles, he analyzes the doctrine of chances in depth. He notes that the doctrine has a certain common sense appeal:

Consider repeated flips of a coin. On any given flip (or "trial") there is a 50/50 chance that a coin will land heads. The probability of two consecutive flips *both* turning up heads is 50% x 50%, which equals 25%, or 1 in 4. For four flips, the probability that the result will be

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150. Rothstein, *supra* note 43, at 1259.

151. *See id.* at 1260.

152. *See id.* at 1262 & n.19.

153. *Id.*

154. *See id.* at 1260–61.

155. *Id.* at 1261.

156. *Id.*

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

158. *See Morris, supra* note 34.

159. *Id.* at 189 n.33.

160. *Id.* at 189 n.33, 200 n.73, 201 n.75. Mr. Morris states that "Professor Rothstein appears to agree with my conclusion, although he does not spell out his rationale." *Id.* at 200 n.73.

heads every time is 50% x 50% x 50% x 50%, which equals 6.25%, or 1 in 16. The upshot is that solid mathematical ground exists for our intuition that, at some point, we suspect that someone who repeatedly flips a coin that turns up heads is not merely relying on chance; she has a trick coin.<sup>161</sup>

Yet, Mr. Morris believes that the doctrine of chances is flawed as a non-character theory. Mr. Morris states that the published opinions relying on the doctrine fail to explain why the evidence possesses non-character relevance.<sup>162</sup> He asserts that, in truth, the evidence lacks any logical relevance unless one assumes that the defendant has a “constant,”<sup>163</sup> “continuing,”<sup>164</sup> and “unchanging”<sup>165</sup> character “across time.”<sup>166</sup> The only possible conclusions open to the jury are that all the incidents were accidents or intentional misdeeds.<sup>167</sup> In Mr. Morris’s view, a “mixed set[]”—the assumption that some incidents were accidents but others were crimes—is not relevant to reduce the “chance of accident.”<sup>168</sup> The uncharged misconduct is relevant to “decrease[] the probability of accident *only* if we assume that . . . every event is intentional.”<sup>169</sup> For the uncharged incidents to be relevant, “we assume that *all* of the outcomes are alike. This requires the assumption of continuity of character, or classic propensity reasoning.”<sup>170</sup> “In the end,” “we cannot dislodge propensity from [the] center” of the logic of the doctrine of chances.<sup>171</sup>

Although Mr. Morris does not cite Professor Uviller’s article, near the end of his article Mr. Morris makes an alternative argument reminiscent of Professor Uviller’s thesis. In a footnote, Mr. Morris declares:

Even if . . . the use of the doctrine of chances to eliminate the odds of an accident did not involve propensity reasoning, it bears such close similarity to propensity reasoning that we could not seriously have faith that limiting instructions could prevent a jury from cross-

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161. *Id.* at 193.

162. *See id.* at 191.

163. *Id.* at 194, 201.

164. *Id.* at 195, 201; *see also id.* at 199 (“continuity of character”).

165. *Id.* at 201.

166. *Id.* at 194.

167. *See id.* at 203.

168. *See id.*

169. *Id.* at 201.

170. *Id.* at 203.

171. *Id.* at 192, 203.

ing over the thin line between eliminating the probability of accident and directly reasoning about propensity. As a result, evidence used on this theory would often fall to the Rule 403 balancing test.<sup>172</sup>

The articles by Professor Rothstein and Mr. Morris concentrate on the use of the doctrine of chances in the criminal setting. In contrast, the most recent article attacking the doctrine discusses the use of the doctrine in civil rights discrimination cases. The article is a 2005 student note by Ms. Lisa Marshall.<sup>173</sup> The note reflects a comprehensive review of the prior literature, replete with citations to the articles by Professors Kuhns<sup>174</sup> and Uviller<sup>175</sup> and Mr. Morris.<sup>176</sup> Ms. Marshall's concern is that the rigorous enforcement of the character evidence prohibition in civil rights actions will frustrate the enforcement of those laws.<sup>177</sup> She points out that given the dearth of other evidence of discriminatory intent, civil rights plaintiffs often desperately need to introduce testimony about a defendant's other discriminatory acts.<sup>178</sup> She adds that in many cases, the civil rights plaintiff's only hope of rationalizing the introduction of the testimony is an invocation of the doctrine of chances.<sup>179</sup>

Like Mr. Morris, Ms. Marshall concedes that, at first blush, the doctrine of chances is an attractive option.<sup>180</sup> It appears to have a sound statistical basis.<sup>181</sup> Indeed, courts routinely permit plaintiffs to introduce statistical evidence to lay a foundation for invoking the doctrine:

[C]ourts encourage plaintiffs alleging discrimination to introduce statistics demonstrating the "degree of disparity between the expected and actual . . . composition of the [workforce] necessary to support an inference of discrimination." . . . Any "degree of disparity" is . . . probative of the ultimate issue in a disparate treatment case—the intention of the employer at the time she made the relevant employment decision. . . .<sup>182</sup>

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172. *Id.* at 200 n.74.

173. *See* Marshall, *supra* note 20.

174. *Id.* at 1097 n.131.

175. *Id.* at 1083 n.64.

176. *Id.* at 1072 n.30.

177. *Id.* at 1065–66.

178. *See id.* at 1066, 1083.

179. *See id.* at 1080–82.

180. *See id.* at 1081.

181. *See id.*

182. *Id.* at 1080–81 (alteration in original) (quoting *Berger v. Iron Workers Reinforced*

However, Ms. Marshall believes that the courts' reliance on the doctrine of chances in these cases is misplaced because ultimately the doctrine fails as a non-character theory.<sup>183</sup> The critical question is "how the evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit" the alleged misdeed.<sup>184</sup> Like Professor Rothstein and Mr. Morris, Ms. Marshall professes that she cannot discern any relevance in doctrine of chances cases unless one posits the defendant's character.<sup>185</sup> The "logic that underlies" even statistical evidence is "propensity-based."<sup>186</sup> The evidence is utterly irrelevant unless one assumes that the defendant employer has "some enduring propensity to act in a given way" across time.<sup>187</sup>

These attacks on the doctrine of chances come at a critical point in the history of the character evidence prohibition. As previously stated, in a number of jurisdictions, the opponents of the prohibition have already persuaded the legislatures to selectively repeal the prohibition in certain types of prosecutions and civil cases.<sup>188</sup> The next step, of course, would be a wholesale abolition of the doctrine. The attacks on the doctrine of chances pave the way for that step. As we have seen, the testimony admitted under the doctrine has become vital in child abuse cases, drug prosecutions, and civil rights actions.<sup>189</sup> Many laypersons would regard it as an "affront to common sense" to bar such evidence.<sup>190</sup> However, if the doctrine of chances runs afoul of the character evidence prohibition, intellectual honesty demands that the courts discontinue invoking the doctrine to justify the introduction of the evidence. Of course, that outcome could well result in the exclusion of this vital evidence, miscarriages of justice, and the consequent frustration of the compelling public policies underlying the child abuse, drug trafficking, and civil rights laws. The ultimate denouement could easily be a legislative decision that the character evidence prohibition itself must yield. Like Dickens's Mr. Bumble,

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Rodmen Local 201, 843 F.2d 1395, 1412 (D.C. Cir. 1988)).

183. See *id.* at 1081.

184. See *id.*

185. *Id.* at 1071-72.

186. *Id.* at 1081.

187. *Id.* at 1080-81.

188. See *supra* notes 37-41 and accompanying text.

189. See *supra* notes 32-34 and accompanying text.

190. R. v. Boardman, [1975] A.C. 421, 456 (H.L.) (appeal taken from Eng.) (U.K.).

legislators might react that “[i]f the [character evidence] law supposes that, . . . the law is a[n] ass” and must be jettisoned.<sup>191</sup> In short, at this juncture in the history of the character evidence rule, it is critical to decide whether the attacks on the doctrine of chances have merit.

#### IV. THE FALLACIES IN THE ATTACKS ON THE DOCTRINE OF CHANCES

To make that decision, we must painstakingly dissect the chain of inferences underlying the doctrine of chances.

##### A. *The Theoretical Distinction Between the Doctrine and a Character Theory of Logical Relevance*

Whether we work forward from the starting point of the chain of reasoning or backward from the final conclusion under the doctrine, we reach the same conclusion: The doctrine of chances is a legitimate non-character theory.

##### 1. Working Forward Toward the Final Conclusion in the Doctrine

In his article, Mr. Morris points out that proponents frequently offer statistical evidence to prove up doctrine of chances claims.<sup>192</sup> In her note, Ms. Marshall states that, more fundamentally, the claim is statistical in nature.<sup>193</sup> The claim is based on the disparity between the expected and actual values.<sup>194</sup> How many incidents would we expect the average person to be involved in, and how many incidents was the defendant involved in? Ms. Marshall observes that these claims are often made in civil rights cases alleging discrimination.<sup>195</sup>

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191. CHARLES DICKENS, *OLIVER TWIST* 520 (Dodd, Mead & Co. 1941) (1838) (internal quotes omitted).

192. See Morris, *supra* note 34, at 194–95.

193. See Marshall, *supra* note 20, at 1080–81; see also Leonard, *supra* note 50, at 161 (stating that the doctrine of chances “is based on informal probability reasoning”).

194. See Marshall, *supra* note 20, at 1080–81.

195. See *id.* at 1080 (“[S]tatistical analyses . . . are common in discrimination suits. . .”).

The popularity of such claims in discrimination suits is understandable. In one of the leading Supreme Court decisions on jury discrimination, *Castaneda v. Partida*,<sup>196</sup> the Court approved the use of this mode of reasoning to establish discriminatory animus.<sup>197</sup> A foremost American authority on statistical evidence, Professor David Barnes, has reconstructed the *Castaneda* Court's reasoning.<sup>198</sup> As he describes the reasoning process, the *Castaneda* analysis includes the following steps, *inter alia*:

- Find the number of the allegedly discriminated-against group you would expect to find on the jury panel if there were no discrimination.
- Find the number of the allegedly discriminated-against group who were actually included on the jury panel.
- Compute the disparity between the two numbers.
- Determine the probability that random chance could account for the disparity.<sup>199</sup>

This process is a species of hypothesis testing. The hypothesis is that there was no discrimination in selecting the panel and that innocent random chance accounts for the panel's composition. The statistician next determines the number of minority panelists that would be expected if the hypothesis were true. The statistician then ascertains the actual number of minority panelists and compares that number to the expected value. If that disparity is significant enough,<sup>200</sup> it leads to the rejection of the hypothesis of random chance.<sup>201</sup>

196. 430 U.S. 482 (1977).

197. See *id.* at 496; DAVID W. BARNES, STATISTICS AS PROOF: FUNDAMENTALS OF QUANTITATIVE EVIDENCE 91-92 (1983).

198. See BARNES, *supra* note 197, at 91-92; 1 PAUL C. GIANELLI & EDWARD J. IMWINKELREID, SCIENTIFIC EVIDENCE § 15-5(A), at 689-90, Matthew Bender & Co. (3d ed., 1999).

199. BARNES, *supra* note 197, at 91-92; 1 GIANELLI & IMWINKELRIED, *supra* note 198, § 15-5(A), at 689-90.

200. The question is not simply the absolute size of the disparity. In a jury discrimination case, its significance also depends upon the total size of the jury pool. BARNES, *supra* note 197, at 92.

201. See *Castaneda v. Partida*, 430 U.S. 482, 496-97 n.17 (1977) ("[I]f the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist.").



The critics of the doctrine of chances assert that this type of statistical reasoning is “propensity-based.”<sup>202</sup> They agree that the test of whether a chain of logical inferences is propensity-based is whether it necessarily entails an inference as to the defendant’s personal, subjective bad character.<sup>203</sup> They must therefore mean that if we eliminate the possibility of random chance, the only remaining logical route to the conclusion of fault requires an inference that the defendant’s propensity prompted the defendant to form the wrongful intent.<sup>204</sup> If that were not the case and there were an alternative route, the theory would not be “propensity-based.”<sup>205</sup>

Thus, the question arises: If innocent, random chance does not account for the disparity between the expected and actual values, is the only alternative explanation the assumption that the person’s character traits prompted the person to engage in criminal or discriminatory conduct causing the disparity? On reflection, the answer is “No.” The critics of the doctrine assume that if we eliminate random chance as an explanation, the only logical way to connect the outcome (so many deaths, involvements, or adverse actions against minorities) to the conclusion of wrongful conduct or intent is to posit the explanation that the person has a propensity for that conduct or intent. That assumption is false.

The assumption rests on a simplistic determinist view of human behavior. To be sure, a person’s genetic background, environment, and characteristics influence a person’s behavior.<sup>206</sup> However, consistent with Western philosophic tradition, for the

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202. *E.g.*, Marshall, *supra* note 20, at 1081.

203. *See, e.g., id.* at 1071–72 (citing *Becker v. ARCO Chem. Co.*, 207 F.3d 176, 191 (3d Cir. 2000)).

204. *See, e.g., id.* Of course, that inference is one possible route to the ultimate conclusion of fault. However, as previously stated, admissible uncharged misconduct is almost always logically relevant on two theories: (1) a forbidden character theory; and (2) a permissible non-character theory. *See supra* note 63 and accompanying text. The existence of the first potential theory does not require the exclusion of the evidence. *See supra* notes 63–64 and accompanying text. Rather, the typical solution is to admit the evidence on theory (2) but give the jury a limiting instruction under Federal Rule of Evidence 105 to forbid the jury from relying on theory (1). *See supra* note 64 and accompanying text.

205. *See* Marshall, *supra* note 20, at 1081.

206. *See generally* D.H. Kaye, Behavioral Genetics Research & Criminal DNA Databases (2005) (a study funded by the U.S. Department of Energy) (on file in Professor Imwinkelried’s office), available at <http://homepages.law.asu.edu/~kayed/pubs/genlaw/05-LCP-behav.pdf> (last visited Nov. 14, 2005); Lisa Schriener Lewis, Note, *The Role Genetic Information Plays in the Criminal Justice System*, 47 ARIZ. L. REV. 519 (2005) (examining behavioral genetics and exhibiting its potential application in the criminal justice process).

most part American law assumes that persons are autonomous<sup>207</sup> human beings possessed of volitional capacity.<sup>208</sup> That is, they possess free will.<sup>209</sup> 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.<sup>210</sup> 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.

Consider Mr. Morris's example of the four consecutive coin flips, all yielding heads.<sup>211</sup> He seems to think that the only logically possible explanations for the outcome are: (1) random chance was at work; and (2) the person flipping has a propensity to cheat.<sup>212</sup> He asserts that if we discount random chance, the evidence is logically relevant "only by assuming that the defendant's character remains constant across time."<sup>213</sup> That assertion is plainly wrong. There are at least four logically possible explanations for the outcome: (1) random chance was 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; and (4) in Mr. Morris's terminology, a "mixed set[]"<sup>214</sup>—random chance accounts for some of the flips that resulted in heads, and on the remaining flips the person made a free, situational choice to cheat.

Explanations (3) and (4) are potential explanations for the person's conduct. Consider explanation (3). Prior to the occasion when the person flipped the coin, the person may have lived a

207. See generally GERALD DWORIN, *THE THEORY AND PRACTICE OF AUTONOMY* (1988) (taking an in-depth look at the concept of autonomy, the values behind it, and the various roles it plays in different spheres of life).

208. See MORTIMER J. ADLER, *SIX GREAT IDEAS* 141–42, 152, 164 (1981).

209. See *id.*

210. See WAYNE R. LAFAVE, *CRIMINAL LAW* § 1.5(a), at 28–29 (4th ed. 2003).

211. See Morris, *supra* note 34, at 193.

212. See *id.*

213. *Id.* at 194.

214. *Id.* at 203.

saintly life, displaying no propensity at all toward criminal or immoral conduct. However, just before the occasion, her child was diagnosed with a serious illness, she learned that the cost of her child's medical care would be astronomical, and her insurance company informed her that it would not cover the expenses. Even if she had no disposition or character trait to cheat, the person might make a situational choice to cheat on the occasion in question. In addition, consider possibility (4). A friend bets the person that she cannot attain heads on five consecutive flips. The person realizes that she has little chance to win the bet. The odds against her are so long that she makes the bet almost as a lark. Surprisingly, when she fairly flips the coin the first three times, by random chance each flip yields a head. Before the fourth flip, she is shocked to realize that she has a realistic chance of winning the bet. At that point, she decides to cheat and does so on the fourth and fifth flips. Significantly, neither explanation (3) nor explanation (4) necessarily entails an inference that the person has a pre-existing character trait or disposition to cheat. Explanation (3) involves entirely situational choices, and (4) is a mix of random chance and situational choice.

If there are potential explanations that do not rest on propensity inferences, then the remaining question is this: Does disproof of the hypothesis of random chance increase the probability of those explanations? If it does, uncharged misconduct discrediting the chance hypothesis is logically relevant without positing a propensity inference.

The doctrine of chances theory is an example of reasoning by process of elimination. The proponent uses the theory to eliminate random chance as an explanation for the set of outcomes. Process-of-elimination is a valid mode of logical reasoning. It was a favorite of Sherlock Holmes, that most logical of investigators, that "when you have eliminated the [other possibilities], whatever remains, *however improbable*, must be the truth."<sup>215</sup> More to the point, the courts permit lay jurors to utilize process-of-elimination reasoning.<sup>216</sup> In many jurisdictions, in proceedings such as toxic tort cases, the plaintiff may introduce testimony

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215. ARTHUR CONAN DOYLE, *SHERLOCK HOLMES: THE SIGN OF FOUR* 60 (Broadview Press 2001) (1890).

216. See Wendy Michelle Ertmer, Note, *Just What the Doctor Ordered: The Admissibility of Differential Diagnosis in Pharmaceutical Product Litigation*, 56 VAND. L. REV. 1227, 1228 (2003).

about differential diagnosis or etiology to establish the nature of the plaintiff's illness or its causation.<sup>217</sup> This type of expert testimony is reducible to process-of-elimination reasoning.<sup>218</sup>

However, what exactly does the process-of-elimination reasoning prove? Negatively, it serves as a basis for discounting or eliminating one explanation for the outcomes, but that is not enough. To satisfy the logical relevance standard codified in Rule 401,<sup>219</sup> the evidence must do more. To wit, it must affirmatively increase the probability of at least one of the remaining possibilities. In a doctrine of chances case, if the evidence is to be admitted on a non-character theory, the negative elimination of the random chance hypothesis must affirmatively increase the probability of one of the alternative explanations which do not entail a propensity inference. In Mr. Morris's coin flipping hypothetical, the elimination of explanation (1) (entirely random chance) would have to increase the probability of explanation (3) (all situational choices) or explanation (4) (a mix of random chance and situational choices).

It is submitted that in the typical case, the negative disproof of the random chance hypothesis will have that affirmative effect. Assume that there are four logically possible explanations. At the outset of the investigation, there is no data rendering one explanation more probable than another. In that event, the only non-arbitrary choice would be to assign the same probability to each explanation and treat each hypothesis as equally probable. If there were four possibilities, as in the coin flipping hypothetical, each hypothesis would be assigned a twenty-five percent probability. What happens, though, when process-of-elimination reasoning enables the statistician to eliminate one of the four hypotheses? For instance, what 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

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217. See *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255, 262 (6th Cir. 2001); *Smith v. Wyeth-Ayerst Labs. Co.*, 278 F. Supp. 2d 684, 695-97 (W.D.N.C. 2003); Jean Macchiaroli Eggen, *Clinical Medical Evidence of Causation in Toxic Tort Cases: Into the Crucible of Daubert*, 38 HOUS. L. REV. 369, 402-03 (2001). See generally Edward J. Imwinkelried, *The Admissibility and Legal Sufficiency of Testimony About Differential Diagnosis (Etiology): Of Under- and Over-Estimations*, 56 BAYLOR L. REV. 391 (2004).

218. See Gary Sloboda, *Differential Diagnosis or Distortion?*, 35 U.S.F. L. REV. 301, 303 (2001).

219. FED. R. EVID. 401.

hypotheses, each of those probabilities must be reassigned. More 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.

A caveat is necessary. Atypical cases are conceivable. Suppose, for example, that empirical epidemiological research establishes that the risk of a certain illness is a constant. On that supposition, the disproof of a competing explanation or diagnosis would not increase the probability of the constant risk. However, such cases will undoubtedly be rare. Indeed, research has revealed no doctrine of chances case in which the record of trial included anything approaching empirical proof of a fixed risk. Absent such data, the negative disproof of the random chance hypothesis affirmatively increases the probability of the alternative explanations which do not rest on a propensity inference. As Figure 3 indicates, the doctrine of chances evidence is hence logically relevant on a non-character theory, satisfying both Rule 401 and the second sentence of Rule 404(b).

**FIGURE 3****THE REASONING PROCESS UNDERLYING THE DOCTRINE OF CHANCES***THE STARTING POINT*

An identification of all the explanatory hypotheses for the outcomes, including the explanation that random chance accounts for all the outcomes and any hypotheses that the person's situational choice accounts for one or some of the outcomes

*THE ELIMINATION OF THE RANDOM CHANCE HYPOTHESIS*

By demonstrating an extraordinary coincidence, the doctrine of chance leads negatively to the rejection of the hypothesis that random chance accounts for all the outcomes

*INCREASING THE PROBABILITY OF THE REMAINING HYPOTHESES INVOLVING SITUATIONAL CHOICES*

In the typical case, the elimination of the random chance hypothesis has the affirmative effect of increasing the probability of the remaining explanatory hypotheses, including those hypothesizing situational choice rather than choice prompted by the person's character trait.

## 2. Working Backward from the Ultimate Conclusion under the Doctrine

In discrimination cases such as *Castaneda*,<sup>220</sup> the defense asks the jury to accept the hypothesis that innocent random chance accounts for all the outcomes—there was no discrimination.<sup>221</sup> Assume, though, that the disparity between the expected and actual values is so significant that it leads to the rejection of that hy-

220. *Castaneda v. Partida*, 430 U.S. 482 (1977).

221. *See id.* at 498–99.

pothesis. What is the significance of that rejection? Even if we reject that hypothesis, it is a logical fallacy to leap to the conclusion that all the outcomes represent intentional misdeeds (intentional misconduct). As framed, the hypothesis must be rejected whenever even one of the outcomes is an accident.

Properly construed, the doctrine of chances recognizes the limited probative value of the disproof of the random chance hypothesis. Revisit *Woods*.<sup>222</sup> Cumulatively, there were twenty-one cyanotic episodes, including Paul's death.<sup>223</sup> However, nothing inherent in the logic of the doctrine singled out the charged incident, Paul's death, as a homicide.<sup>224</sup> The only direct inference from the doctrine of chances is that one or some of the incidents were not accidents. The doctrine does not prove that the charged incident was a crime, much less that all the incidents were crimes.<sup>225</sup> On the one hand, the doctrine of chances evidence is logically relevant and presumptively admissible; to a degree, the negative disproof of the random chance hypothesis affirmatively increases the probability of the competing explanations for the outcomes, including the explanations which do not entail propensity inferences. On the other hand, the doctrine of chances standing alone might be legally insufficient to sustain the prosecution's or plaintiff's burden of production.<sup>226</sup> Again, in *Woods*, it was critical that the prosecution also had the benefit of Dr. DiMaio's testimony pointing to the suspicious circumstances surrounding Paul's death.

It is significant that the only conclusion flowing directly from doctrine of chances reasoning is that one or some of the incidents

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222. *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973).

223. *See id.* at 130.

224. 2 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 15, § 9:88; Kyser, *supra* note 15, at 542.

225. *See* 2 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 15, § 9:88, at 257-58.

226. *See id.* In an extreme fact situation, though, even without the benefit of other evidence, the doctrine of chances evidence could arguably suffice. By way of example, suppose that the normal person suffers a particular type of loss only once during his or her lifetime, but the defendant has suffered the loss one thousand times. However, even this fact situation would raise the question of whether a "purely" statistical case is ever legally sufficient. Compare Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1380 (1985) (stating that in such a case, "the evidence would never reach the jury"), with Ronald J. Allen, *A Reconceptualization of Civil Trials*, 66 B.U. L. REV. 401, 429 n.67 (1986) ("Support for the proposition that courts are reluctant to allow these cases to be decided on the basis of 'statistical evidence' is greatly exaggerated in the literature.").

were not accidents. Again, the critics of the doctrine assert that the doctrine implicitly requires an assumption that the defendant has a “consistent[],”<sup>227</sup> “constant,”<sup>228</sup> “continuing,”<sup>229</sup> or “unchanging”<sup>230</sup> character trait “across time.”<sup>231</sup> If this were true, as Mr. Morris quite correctly points out, then the jury would be required to infer that “all”<sup>232</sup> the outcomes are non-accidental and that “every”<sup>233</sup> act was intentional. Without more, however, doctrine of chances evidence neither requires nor even permits the jurors to reach that final conclusion. If the doctrine does not yield that final conclusion, it cannot posit an antecedent intermediate inference of “constant”<sup>234</sup> character.

### B. *The Practical Safeguards Reinforcing the Distinction at Trial*

It is a question of logic whether the doctrine of chances theory embodies an implicit, forbidden character inference. The preceding analysis has hopefully demonstrated that the doctrine does not suffer from that flaw. However, it is an empirical question whether lay jurors are competent to comply with a limiting instruction, permitting them to engage in doctrine of chances reasoning but forbidding them from relying on character reasoning.

There is good reason for concern. The distinction between character and non-character theories can be a “thin” one.<sup>235</sup> In one case, *Estelle v. McGuire*,<sup>236</sup> the Supreme Court of the United States came close to granting habeas corpus relief because the judge’s instruction on the doctrine of chances was so confusingly worded that there was a danger that lay jurors might have misinterpreted it as authorizing them to engage in character reasoning.<sup>237</sup> Further, there is a considerable body of psychological re-

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227. Morris, *supra* note 34, at 195.

228. *Id.* at 194.

229. *Id.* at 195, 201.

230. *Id.* at 191, 201.

231. *Id.* at 194.

232. *Id.* at 203.

233. *Id.* at 201.

234. *Id.* at 194.

235. *United States v. Bass*, 794 F.2d 1305, 1313 (8th Cir. 1986); Morris, *supra* note 34, at 200 n.74.

236. 502 U.S. 62 (1991).

237. *See id.* at 71–75.



search calling into question lay jurors' ability to comply with limiting instructions.<sup>238</sup>

However, the findings in the psychological studies are by no means uniform. For example, a Canadian study discovered that the jurors took the instruction quite seriously and resisted the temptation to misuse uncharged misconduct evidence.<sup>239</sup> In that light, it may be premature to dismiss limiting instructions as worthless.

At trial, there are numerous precautions that the trial judge and the opponent can take to reduce the risk that the jury will overstep its boundaries and treat the doctrine of chances evidence as proof of the defendant's bad character. To begin with, both the judge and the opponent should insist that the proponent lay a proper foundation. In some cases, that will necessitate an affirmative showing of the ordinary incidence of the type of loss that befell the defendant or the type of event that the defendant became involved in.<sup>240</sup> When the record contains that evidence, the jury is more likely to deliberate about the critical disparity between the actual and expected values and less likely to focus mistakenly on the defendant's personal, subjective character.

Next, the judge should be willing to give, and the opponent should emphasize, the limiting instruction. The instruction ought to highlight the difference between legitimate doctrine of chances reasoning and forbidden character reasoning.<sup>241</sup> In particular, the instruction should condemn the latter in no uncertain terms.<sup>242</sup> Given the difficulty that the jury may have understanding the distinction, the judge can repeat the instruction, giving it once when the evidence is admitted and again in the final jury charge.<sup>243</sup> For his or her part, in closing argument the opponent

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238. See 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 27, § 1:03.

239. Evelyn Goldstein Schaefer & Kristine L. Hansen, *Similar Fact Evidence and Limited Use Instructions: An Empirical Investigation*, 14 CRIM. L.J. 157, 173-75 (1990); see also Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401, 419 (1990).

240. 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, 597-98 (1990).

241. See, e.g., 2 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 15, § 9:72 (Cum. Supp. 2004).

242. See, e.g., *id.* §§ 9:71-72.

243. See *id.* at § 9:74.

should dwell on the instruction to ensure that the jury both understands the distinction and appreciates its obligation to follow the instruction.<sup>244</sup>

Lastly, the trial judge and opponent must be prepared to police the proponent's closing argument. Even if the proponent initially offers the evidence for a limited non-character purpose, in closing, the proponent may slip and invite the jury to misuse the testimony as character evidence.<sup>245</sup> When the proponent does so, the opponent should immediately move to strike and, in an extreme case, consider moving for a mistrial. Cumulatively, these procedural safeguards afford the defendant a measure of protection against misuse of the evidence.

## V. CONCLUSION

When the defense submitted its brief in the *Woods* case thirty-two years ago, the defense counsel could accurately represent to the Court of Appeals that, as of that date, there were no published American decisions explicitly endorsing the doctrine of objective chances.<sup>246</sup> There were only a few, isolated opinions containing "loose language" that appeared to approve "the divergent English rule."<sup>247</sup>

In the relatively short span of three decades, the state of the American case law has changed dramatically. The doctrine of chances is now a fixture in the American jurisprudence on uncharged misconduct evidence. The doctrine looms large: If a plaintiff wants to prove discriminatory animus in a civil rights action or the government desires to establish actus reus in a child abuse prosecution or knowledge in a drug case, they frequently invoke the doctrine to justify the introduction of the uncharged misconduct evidence needed to supply the proof. When they do so, in the courtroom they will insist that the doctrine qualifies as a non-character theory. If the trial judge accepts that characteriza-

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244. See 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, 26 (suggesting that the prosecution benefits from limiting instructions).

245. See 2 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 15, § 9:78.

246. Reply Brief of Appellant at 11-12, *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973) (No. 72-2217).

247. *Id.* at 12.

tion of the doctrine, then the character evidence prohibition will not stand in the way of the proponent's introduction of the necessary evidence.

The paradox today is that upholding the doctrine as a non-character theory may be the best line of defense for the character evidence prohibition itself. As previously stated, it is often imperative for prosecutors to introduce testimony about the defendant's uncharged misconduct in child abuse and drug prosecutions, and for plaintiffs to do likewise in civil rights cases. These types of cases not only implicate pressing public interests; in addition, they often attract media and public attention.<sup>248</sup> If the judiciary embraced the arguments of the critics of the doctrine of chances and routinely excluded that type of testimony as inadmissible character evidence, then the exclusion would have a negative impact on the enforcement of the laws against child abuse, drug trafficking, and discrimination. The public might well become aware of that impact. The public awareness could easily trigger a political and legislative backlash,<sup>249</sup> which might claim the character evidence prohibition as a victim. Ms. Marshall's note augurs that possibility. In her view, the rigorous enforcement of the character evidence prohibition will deprive civil rights plaintiffs of evidence they desperately need to prove discriminatory intent.<sup>250</sup> She fears that an uncompromising application of the prohibition will "drastically undermine" civil rights law "in contravention of congressional intent."<sup>251</sup> Given a stark choice between upholding the prohibition and enforcing the social

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248. For example, witness the intense media attention given to the 2004–2005 prosecution of Michael Jackson, including the media discussion of the extensive uncharged misconduct evidence proffered against the defendant. See, e.g., *Prosecutors Seek Prior Claims in Jackson Trial*, CNN.COM, Dec. 15, 2004, <http://www.cnn.com/2004/LAW/12/15/jackson.case/index.html> (last visited Nov. 14, 2005).

249. The political backlash against the acquittal of John Hinckley, Jr., who attempted to assassinate President Reagan in 1981 contributed the Congressional decision to amend Federal Rule of Evidence 704(b) to restrict testimony about the defendant's insanity. See Anne Lawson Braswell, Note, *Resurrection of the Ultimate Issue Rule: Federal Rule of Evidence 704(b) and the Insanity Defense*, 72 CORNELL L. REV. 620, 623–24 (1987). Similarly, there is a sense that the acquittal of William Kennedy Smith, Jr., on sexual assault charges in Florida has been in the back of mind of some of the state legislatures which have selectively abolished the character evidence prohibition in prosecutions for such charges. See generally Mark Hansen, *Experts Expected Smith Verdict*, A.B.A. J., Feb. 1992, at 18. One of the key evidentiary rulings in the *Smith* case was the trial judge's decision to preclude the prosecution from introducing testimony about other sexual offenses that the defendant had allegedly committed. *Id.*

250. Marshall, *supra* note 20, at 1068–71, 1097–98.

251. *Id.* at 1098.

policies inspiring civil rights laws, she would opt for the latter.<sup>252</sup> If the courts reject the doctrine of chances as a non-character theory and exclude uncharged misconduct evidence as a matter of course in civil rights, child abuse, and drug cases, then Congress and many state legislatures may very well make the same choice.

The case against the doctrine of chances rests on the argument that the doctrine relies on implicit, forbidden propensity inferences. The critics of the doctrine contend that the uncharged misconduct evidence proffered under the doctrine is logically relevant only if one assumes that the person has a constant character trait across time. Part IV demonstrated that that contention is unsound. There are explanatory hypotheses for the outcomes other than the two obvious possibilities that chance accounts for all the outcomes and that all the outcomes are intentional acts, prompted by the person's character traits. Those other possibilities consist of hypotheses in which the person's situational choices account for one, some, or all of the outcomes. By negatively discrediting the random chance hypothesis, the doctrine affirmatively increases the probability assigned to those hypotheses. Moreover, since the only final conclusion necessarily yielded by the doctrine is that one or some of the incidents are not accidents, logically an assumption of the person's unchanging character cannot be embedded in the doctrine. If that were such an assumption, the final conclusion under the doctrine would have to be that all the events are intentional acts. Rather, the logic of the doctrine yields a more limited final conclusion. Indeed, the nature of the conclusion is so limited that in some cases, without additional evidence the proponent will win the battle but lose the war. The proponent may succeed in introducing the uncharged misconduct evidence; but without additional proof such as Dr. DiMaio's testimony in *Woods*, the judge will be forced to rule that the proponent has not sustained his or her initial burden of production to reach the jury. The evidence will be admissible but legally insufficient to make out a submissible case.

There is more at stake here than the courts' continued willingness to introduce uncharged misconduct evidence under the doctrine of chances. This controversy implicates the very future of the character evidence prohibition. In truth, the critics of the general prohibition and the doctrine of chances have rendered a

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252. *Id.*

huge service to the jurisprudence of uncharged misconduct evidence in the United States. When Professors Kuhns and Uviller released their articles in the early 1980s, there was undeniable merit in their claim that the courts' treatment of purportedly non-character theories was usually conclusory and that the courts often accepted illicit bad character evidence in disguise. Sadly, in the past some courts have indiscriminately<sup>253</sup> treated non-character theories such as plan as "talisman[s], the mere utterance of which" surmounts a character evidence objection.<sup>254</sup> Professor Rothstein was the first commentator to perceptively raise this question specifically in connection with the doctrine of chances, and Ms. Marshall has persuasively demonstrated that the question is lively in civil actions as well as prosecutions. For his part, Mr. Morris has made the most detailed attempt to identify the propensity inferences supposedly implicit in the doctrine of chances theory.

Part IV of this article argued that the attacks on the doctrine's status as a non-character theory are mistaken. The uncharged misconduct accepted under the doctrine is logically relevant without positing any assumption about the defendant's personal, subjective bad character. Nevertheless, the critics' attacks on the doctrine have been quite helpful. Thanks to their efforts—through an analysis of their attacks—we can arrive at a better, more refined understanding of the utility and limitations of the doctrine. That understanding should enable the courts to avoid any affront to common sense by admitting vital, probative evidence while respecting the significant policies promoted by the character evidence prohibition.

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253. *State v. Yager*, 461 N.W.2d 741, 751–52 (Neb. 1990) (Shanahan, J., dissenting).

254. *United States v. Sneezzer*, 983 F.2d 920, 927 (9th Cir. 1992) (O'Scannlain, J., dissenting in part).