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# UNDERTAKING THE TASK OF REFORMING THE AMERICAN CHARACTER EVIDENCE PROHIBITION: THE IMPORTANCE OF GETTING THE EXPERIMENT OFF ON THE RIGHT FOOT

Edward J. Imwinkelried\*

“It is one of the happy incidents of the federal system that a single . . . State may . . . serve as a laboratory; and try novel social . . . experiments without risk to the rest of the country.”

—Justice Louis Brandeis, dissenting in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 281, 311 (1932).

The Roman poet Horace wrote that if properly begun, a task is already half done.<sup>1</sup> The task at hand is the reform of the American character evidence prohibition. The prohibition has long been hornbook law in the United States.<sup>2</sup> The initial sentence of Federal Rule of Evidence 404(b) codifies the prohibition: “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show in conformity therewith.”<sup>3</sup> The prohibition precludes a litigant from relying on a character theory of logical relevance—the theory depicted in Figure 1.<sup>4</sup> By way of example, suppose that an accused is charged with a murder. The prohibition forbids the prosecutor from introducing evidence of the accused’s other uncharged killings, on the theory that the uncharged acts show the accused’s violent character and that, in turn, that character increases the probability that the accused committed the charged homicide.

Although this prohibition is one of the oldest fixtures in American Evidence law,<sup>5</sup> recently there have been calls for its relaxation

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1. “He has half the deed done, who has made a beginning.” *Epistles* (tr. Christopher Smart) Book I. II, TO LOLIUS, Line 40.

2. See generally 1 CHARLES McCORMICK, EVIDENCE §§ 188-93 (4th ed. 1992).

3. FED. R. EVID. 404(b), 28 U.S.C.

4. See *infra* p. 304.

5. Edward J. Imwinkelried & Miguel A. Mendez, *Resurrecting California’s Old Law on Character Evidence*, 23 PACIFIC L.J. 1005, 1041 n. 242 (1992)(collecting cases dating back to the mid-1800s).

or abolition.<sup>6</sup> These calls reflect, *inter alia*, two developments. First, there is a growing realization in the United States that other common-law jurisdictions have already abandoned a rigid character prohibition.<sup>7</sup> The leading precedent is the House of Lords' 1975 decision in *R. v. Boardman*.<sup>8</sup> In *Boardman*, the Lords stressed that the admissibility of evidence of an accused's uncharged misconduct should turn on its cogency rather than its category;<sup>9</sup> if evidence has great probative value on a character theory of logical relevance, the evidence should not be reflexively excluded "by categorization."<sup>10</sup> *Boardman* purported to relax the prohibition across the board in all types of cases. Under this view, whatever the charged offense against the accused, the degree of probative value should be dispositive of the question of the admissibility of uncharged misconduct.<sup>11</sup>

Second, although at one time it was assumed that a person's character traits are weak predictors of the person's conduct,<sup>12</sup> that assumption is being reassessed.<sup>13</sup> At the time the Federal Rules of Evidence were being drafted, the dominant personality theory was situationism.<sup>14</sup> Situationists believed that environmental factors largely determine a person's conduct.<sup>15</sup> In contrast, the person's supposed character traits or disposition had little predictive value.<sup>16</sup> However, a new theory—interactionism—has emerged.<sup>17</sup> According to that theory, when there is a sufficiently large sample

6. Office of Legal Policy, *Report to the Attorney General on the Admission of Criminal Histories at Trial*, 22 J. LAW REFORM 707 (1989).

7. P. B. Carter, *Forbidden Reasoning Permissible: Similar Fact Evidence a Decade After Boardman*, 48 MODERN L. REV. 29 (1985); Rupert Cross, *Fourth Time Lucky—Similar Fact Evidence in the House of Lords*, CRIM. L. REV. 62 (1975); L. H. Hoffman, *Similar Facts Evidence After Boardman*, 91 LAW QUARTERLY REV. 193 (1975).

8. [1975] A.C. 421.

9. P.B. CARTER, CASES AND STATUTES ON EVIDENCE 536 (1981).

10. *R. v. Boardman* [1975] A.C. 421, 452 (Lord Hailsham).

11. *Id.* at 457 (Lord Cross).

12. Miguel A. Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 U.C.L.A. L. REV. 1003 (1984).

13. David P. Bryden and Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 MINN. L. REV. 529, 561-65 (1994).

14. Susan M. Davis, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 514-15 (1991).

15. *Id.* at 515.

16. *Id.*

17. *Id.* at 518.

of the person's conduct in similar situations, on the average, the person's behavior in analogous settings can be forecast.<sup>18</sup>

These two developments have fueled the drive to revise the American character evidence doctrine. To be sure, no American jurisdiction has gone as far as the United Kingdom; neither Congress nor any state has overturned the character evidence prohibition in all types of cases. Several jurisdictions, however, have already begun to experiment with partial repeals of the prohibition. At the state level in 1994, the Missouri legislature adopted a statute providing that in certain prosecutions of adults for offenses against victims under 14 years of age, "evidence that the defendant has committed other . . . uncharged crimes involving victims under fourteen years of age shall be admissible for the purpose of showing the propensity of the defendant to commit the crime . . . with which he is charged . . ." <sup>19</sup> The Indiana legislature has also approved a statute permitting the admission of uncharged acts of child molestation on a character theory of logical relevance.<sup>20</sup> At the federal level in late 1994, Congress gave tentative approval<sup>21</sup> to three new Federal Rule of Evidence provisions, Rules 413-15, abolishing the character evidence prohibition in certain types of criminal and civil cases. Rule 413(a) reads:

In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses is admissible, and may be considered for its bearing on any matter to which it is relevant.

Rule 414(a) contains a parallel provision for child molestation prosecutions, and for its part, Rule 415(a) would sweep away the prohibition "[i]n a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation." In short, the task of "reforming" the American character evidence prohibition is under way.

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18. *Id.* at 517-20.

19. MO. REV. STAT. § 566.025 (effective January 1, 1995).

20. IND. STAT. ANN. § 35-37-4-15 (1994).

21. The legislation provides that although Congress has voted to approve the Federal Rule of Evidence amendments in question, the United States Judicial Conference will have 150 days to comment on the amendments. If the conference recommends that the amendments as worded by Congress go into effect, they take effect 30 days after the transmittal of the conference's recommendation. If the conference recommends otherwise, the amendments nevertheless take effect within 150 days after the transmittal of the conference's recommendation unless Congress revisits the issue and rejects or revises the amendments.

If Horace was right, however, the question is whether the task has begun properly. Have Congress and the Indiana and Missouri legislatures chosen the right starting point for revising the prohibition? In the short term, if they have selected the wrong starting point, we may see extensive litigation attacking the legislation. As Section III of this Essay explains, the starting points codified in the federal and Missouri legislation will enable accused disadvantaged by the legislation to raise a serious equal protection challenge—a claim that they are being treated differently than other accused simply because of the charge filed against them. In the long term, the chosen starting point could result in miscarriages of justice. As Justice Cardozo once remarked, the indiscriminate admission of an accused's past misdeeds can pose a "peril to the innocent."<sup>22</sup> The contemporary abhorrence of sexual misconduct and offenses against children is as intense as it is widespread. Repulsed by evidence of such uncharged crimes by an accused, a juror might be tempted to look past weaknesses in the prosecution's proof of the accused's guilt of the charged crime. If it becomes evident that the legislation leads to that consequence in a significant number of cases, the experiment with the revision of the character prohibition may end in failure.

The thesis of this brief Essay is that Congress and the Missouri legislature have chosen the wrong starting point for this experiment. The relevant policy questions are how probative the uncharged offense is of a person's charged conduct and how great is the risk of unfair prejudice,<sup>23</sup> namely, that the testimony of the uncharged offense will incline the jury to overlook gaps in the showing of guilt of the charged offense. Unfortunately, as the starting points, Congress and the Missouri legislature have chosen offenses which possess little probative value but acute potential for prejudice.

Even if the three tentatively approved Federal Rules provisions ultimately go into effect in federal practice, the questions raised in this Essay are of far more than academic interest. There are 48 other states to be heard from. While the federal legislation might have great symbolic value, the vast majority of sexual assault and child molestation prosecutions occur in state court. Those 48 jurisdictions have yet to decide whether and, if so, how to begin their process of reforming the character evidence prohibition. This Es-

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22. *People v. Zackowitz*, 172 N.E. 466, 468 (N.Y. 1930).

23. See Advisory Committee Note, FED. R. EVID. 403 (explaining the technical concept of "prejudice" within the meaning of that term in Rule 403).

say urges those jurisdictions not to follow Congress's lead; rather, this Essay urges those states to begin their experiments by following the lead of the empirical research discussed below in Section III and choosing as their starting points offenses with demonstrably higher probative value and less capacity to prejudice an accused unfairly.

The first section of this Essay describes the status quo codified in Federal Rule 404(b). This section identifies the twin rationales for the prohibition set out in 404(b). The next section turns to the arguments comprising the case for reforming the prohibition. This section evaluates the arguments in terms of the rationales for the prohibition. The third and final section advances the thesis that the starting points chosen by Congress and the Indiana and Missouri legislatures are unsound. This section explains that there are preferable starting points which legislatures and courts in the other 48 states should seriously consider if they are inclined to make inroads on the character evidence prohibition.

### **The Status Quo: The First Sentence of Federal Rule of Evidence 404(b)**

Outside the courtroom, laypersons routinely rely on character reasoning.<sup>24</sup> "It is perfectly logical to take past performance into account in making all kinds of important personal decisions."<sup>25</sup> The character evidence prohibition cannot be defended on the ground that evidence of an accused's other crimes is logically irrelevant to the question of whether the accused committed the charged offense; the logical relevance of uncharged misconduct on that question is undeniable. However, both at common law and under the Federal Rules of Evidence, evidence that is technically logically relevant may be excluded when realistically, the evidence poses probative dangers that outweigh its probative worth.

### **The Risk of Misdecision.**

One probative danger is misdecision or prejudice. Codifying the common law, Federal Rule of Evidence 403 authorizes a trial judge to bar relevant, otherwise admissible evidence when the admission

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24. See generally Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777 (1981); H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845 (1982).

25. James McElhaney, *Character and Conduct*, 17 LITIGATION 45, 46 (Winter 1991).

of the evidence would give rise to a substantial danger of "unfair prejudice."<sup>26</sup> The accompanying Advisory Committee Note states that the judge may exclude marginally relevant evidence which "suggest[s] decision on an improper basis."<sup>27</sup> By way of example, this danger accounts for the general rule, set out in Federal Rule of Evidence 411, precluding the admission of testimony about a civil defendant's liability insurance.<sup>28</sup> The Advisory Committee Note to Rule 411 states that the policy justification for the exclusionary rule is a "feeling that knowledge of the presence . . . of liability insurance would induce juries to decide cases on improper grounds."<sup>29</sup>

### The Risk of Overvaluation.

Another recognized danger is the risk that lay jurors will overvalue the testimony.<sup>30</sup> This danger helps explain the existence of many of the special restrictions on the introduction of scientific evidence. The courts prescribing the restrictions often assert that many jurors give inordinate weight to scientific testimony.<sup>31</sup> These courts fear that even flawed scientific evidence will "assume a posture of mystic infallibility in the eyes of a jury."<sup>32</sup>

A character theory of logical relevance presents both of these classic probative dangers. As Figure 1<sup>33</sup> indicates, a character theory of logical relevance entails two inferences. If prosecutors were permitted to rely on the theory as a basis for introducing evidence of an accused's uncharged crimes, the initial question facing the jury would be to decide whether the accused possesses a certain bad character trait. The jury would consciously have to address the question of what kind or type of person the accused is. At a subconscious level, the jurors might be tempted to punish the accused for his or her past misdeeds<sup>34</sup>—especially when the testimony indi-

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26. FED. R. EVID. 403.

27. *Id.* at Adv. Comm. Note, FED. R. EVID. 403.

28. *Id.* at FED. R. EVID. 411.

29. *Id.* at Adv. Comm. Note, FED. R. EVID. 411.

30. Victor Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C.DAVIS L.REV. 59, 83 (1984); Richard Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1030-31 (1977).

31. *People v. Kelly*, 549 P.2d 1240 (Cal. 1976).

32. *Id.*

33. *See infra* p. 304.

34. Recent Case, *Criminal Law—Admissibility of Evidence of Other Crimes*, 24 TEMP. L.Q. 245, 246 (1950).

cates that to date, the accused has escaped unpunished for those misdeeds.<sup>35</sup> Former Justice William Brennan once remarked,

One of the dangers inherent in the admission of extrinsic offense evidence is that the jury may convict the defendant not for the offense charged but for the extrinsic offense. This danger is particularly great where . . . the extrinsic activity was not the subject of a conviction; the jury may feel that the defendant should be punished for that activity even if he is not guilty of the offense charged.<sup>36</sup>

In the United States, a misdecision on this basis is of special concern, for it would amount to a violation of the accused's constitutional rights.<sup>37</sup> In 1962, in *Robinson v. California*,<sup>38</sup> the Supreme Court announced that the Eighth Amendment ban on cruel and unusual punishment forbids a state from criminalizing a person's status. Of course, once the jury has found the accused guilty of a discrete, criminal act, the accused's recidivism may be considered during sentencing.<sup>39</sup> However, unlike a totalitarian country, the United States does not countenance "trial by dossier;"<sup>40</sup> the government may not charge an accused with being an enemy of the State and place the accused's entire life on trial. "In our system of jurisprudence, we try cases, rather than persons."<sup>41</sup> Requiring the jurors to focus on the type of person the accused is poses a danger that some jurors will vote to convict because of their negative perception of the accused as a dangerous, anti-social person.

That probative danger is compounded by the further risk presented by the second inferential step in a character theory of logical relevance. Under this theory, after the jury decides what inference to draw as to the type of person the accused is, the jury must employ that inference in a particular manner; they must util-

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35. Calvin Sharpe, *Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof*, 59 NOTRE DAME L. REV. 556, 561 (1984); C.R. Williams, *The Problem of Similar Fact Evidence*, 5 DALHOUSIE L.J. 281, 289 (1979); Comment, *Of Propensity, Prejudice, and Plain Meaning: The Accused's Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404(b)*, 87 NW. U. L. REV. 651, 669 (1993); *United States v. Erickson*, 797 F. Supp. 1387, 1391 (N.D.Ill. 1992); *Brown v. Commonwealth*, 763 S.W.2d 128 (Ky. 1989).

36. *Dowling v. United States*, 493 U.S. 342, 361-62 (1990) (Brennan, J., dissenting).

37. See generally D. Craig Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Trials*, 64 WASH. L. REV. 289 (1989).

38. 370 U.S. 660 (1962).

39. *Rummel v. Estelle*, 445 U.S. 263 (1980).

40. *Bernyk v. State*, 355 S.E.2d 753 (Ga. App. 1987).

41. *People v. Allen*, 420 N.W.2d 499, 503-04 (Mich. 1988).



ize the inference as the basis for a further inference as to conduct on the charged occasion. In other words, they must use the inference as a predictor of conduct and inquire whether they believe that on the charged occasion, the accused acted "in character"—that is, consistently with his or her bad character trait. While the first inferential step creates the risk of misdecision and unfair prejudice, this step triggers a risk of overvaluation.

The fear is that jurors might overestimate the probative worth of the accused's bad character, demonstrated by uncharged crimes, in resolving the question of whether the accused perpetrated the charged offense. There is general agreement among psychologists that when laypersons learn of an individual's acts, they tend to form a "unified, integrated" impression<sup>42</sup> of the individual's personality.<sup>43</sup> There is, however, sharp disagreement over the question of whether it is warranted to give such impressions significant weight in predicting the individual's conduct in a specific situation.<sup>44</sup> If the initial inference as to the accused's character "overly influence[s]" the jury, they "will, therefore, less likely reach an accurate verdict."<sup>45</sup>

Rule 404(b) currently imposes an absolute prohibition<sup>46</sup> on the use of a character theory of logical relevance as a predicate for introducing evidence of specific, uncharged acts. Although such acts possess logical relevance on that theory, the prohibition exists to shield the accused from the two probative dangers discussed above. Those dangers furnish the *raison d'être* for the status quo prohibition of character reasoning; and as we shall now see, they also supply a convenient framework for reviewing the arguments for overturning the prohibition.

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42. Robert G. Lawson, *Credibility and Character: A Different Look at an Intermittent Problem*, 50 NOTRE DAME L. REV. 758, 767, 776-77 (1975).

43. Roderick Munday, *Stepping Beyond the Bounds of Credibility: The Application of Section 1(f)(ii) of the Criminal Evidence Act of 1898*, CRIM. L. REV. 511, 513-14 (1986).

44. Miguel A. Mendez, *California's New Law on Character Evidence: Evidence Code § 352 and the Impact of Recent Psychological Studies*, 31 U.C.L.A. L. REV. 1003 (1984). See also *Campbell v. Greer*, 831 F.2d 700, 707 (7th Cir. 1987); *David Crump, How Should We Treat Character Offered to Prove Conduct*, 58 U. COLO. L. REV. 279, 283 (1987); *David Leonard, The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1 (1986-87).

45. Randolph N. Jonakait, *Biased Evidence Rules: A Framework for Judicial Analysis and Reform*, 1992 UTAH L. REV. 67, 68.

46. *United States v. Hahn*, 17 F.3d 502, 509 (1st Cir. 1994); *United States v. Arias-Montoya*, 967 F.2d 708, 709 (1st Cir. 1992); *People v. Honey*, 596 P.2d 751 (Colo. 1979).

### The General Case For Reforming The Status Quo

The United States Justice Department has attempted to construct a case for jettisoning the character evidence prohibition. To do so, the Department has presented several arguments;<sup>47</sup> some of the Department's primary arguments relate directly to the policy rationales for the prohibition codified in Rule 404(b).

#### The Risk of Misdecision.

As previously stated, one rationale is the fear that if character reasoning were legitimated, lay jurors might succumb to the temptation to convict the accused on the basis of his or her criminal past—even when there is a reasonable doubt about the accused's guilt of the charged crime. However, as the Department's Office of Legal Policy has noted, the United States is not the only country which forbids punishing the accused on the basis of their status.<sup>48</sup> Many other democratic countries such as the United Kingdom do so. Yet, most of these countries have nevertheless abandoned a rigid prohibition of character evidence. Those countries evidently do not believe that the potential misuse of the evidence necessitates a categorical ban on the admission of character evidence.

An advocate of the status quo might argue that the risk of misuse should be of greater concern in the United States because we rely on lay jurors rather than professional jurists as decision-makers. "More than ninety percent of the world's criminal jury trials, and nearly all of its civil jury trials, take place in the United States."<sup>49</sup> However, there are not only criminal jury trials in other countries such as the United Kingdom,<sup>50</sup> there are also many civil-law democratic countries where laity still participate as decision-makers to an extent.<sup>51</sup>

Moreover, an opponent of the status quo can plausibly contend that American society is now more willing to run the risk in ques-

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47. See Edward J. Imwinkelried, *A Small Contribution to the Debate Over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions*, 44 SYRACUSE L. REV. 1125 (1993).

48. Office of Legal Policy, *Report to the Attorney General on the Admission of Criminal Histories at Trial*, 22 U. MICH. J.L. REF. 707, 750-752 (1989).

49. Gerhard Casper & Hans Zeisel, *Lay judges in the German civil courts*, in J. H. MERRYMAN, *COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS* 720-25 (1978).

50. Edward J. Imwinkelried, *A Comparative Law Analysis of the Standard for Admitting Scientific Evidence: The United States Stands Alone*, 42 FORENSIC SCI. INT'L 15, 20 (1989).

51. *Id.* at 18.

tion. Poll after poll documents the belief that curbing crime is the most pressing problem facing the United States. A September 1994 Roper poll found that 62% of the over 1,000 respondents personally knew a crime victim.<sup>52</sup> In a Yankelovich Partners poll released October 19, 1994, 86% of the 800 adults responding answered that the crime problem has "become worse in the past few years."<sup>53</sup> In a similar September 1994 poll conducted by the Wirthlin Group, 61% of the respondents stated that crime is a "serious problem" in the United States.<sup>54</sup> The abolition of the character evidence prohibition would give recidivists pause; they would know that if tried, they would be more likely to be convicted because of the freer admissibility of their prior misconduct. If the prevention of crime is viewed as a societal priority and other democratic countries are apparently willing to run the risk of misuse of bad character evidence to pursue that priority, it is certainly not unthinkable for the United States to do likewise.

### The Risk of Overvaluation.

The other rationale supporting the status quo is the belief that the typical lay jurors will attach too much weight to the accused's bad character in assessing the probability that the accused committed the charged offense. However, there is no *a priori* answer to the question of the extent of lay jurors' ability to evaluate critically character as a predictor of conduct. That question lends itself to empirical investigation, but unfortunately the state of the empirical research is in flux.<sup>55</sup>

At one time, situationism was the most popular theory among psychologists.<sup>56</sup> Situationists denied that persons possess permanent character traits which are highly predictive of conduct.<sup>57</sup> They found little empirical support for any hypothesis of cross-situational consistency,<sup>58</sup> and they consequently concluded that situation-specific, environmental factors were far more influential.<sup>59</sup>

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52. Copy on file with the author.

53. *Id.*

54. *Id.* See also Gail Diane Cox, *Voters Tough on Criminals: Law and Order Initiatives Sweep the Polls, While Tort Reform and Others Lose*, NAT'L. L.J., Nov. 21, 1994, at A6.

55. Bryden and Park, *supra* note 13, at 559-64.

56. Susan M. Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 515 (1991).

57. *Id.*

58. *Id.*

59. *Id.* at 514.

More recent commentators, however, assert that the support for situationism is no longer "monolithic."<sup>60</sup> More recent empirical studies indicate that recidivism rates might be higher than previously supposed.<sup>61</sup> These studies lend support to the emergent interactionist theory that a person's conduct is a product of his or her character traits as well as situation-specific external stimuli.<sup>62</sup> Interactionists believe that at least when there is an adequate sample of the person's conduct in highly analogous situations, it is possible to draw reliable character inferences and legitimate to employ those inferences as a basis for predictions of behavior.<sup>63</sup> Hence, just as the proponents of the character evidence prohibition may be guilty of overstating the risk of misdecision, they may have understated the probative value of character proffered as circumstantial evidence of conduct. If both of the rationales for the prohibition are suspect, it is arguably time to consider reforming the character evidence doctrine.

### **The Specific Starting Points For Reform Chosen By Congress and The Missouri Legislature**

As the preceding section pointed out, many democratic countries admit character evidence in all types of criminal cases. In contrast, no American jurisdiction has decided to go that far and attempt a wholesale repeal of the character prohibition. Even the most daring jurisdictions, Congress and the Indiana and Missouri legislatures, have been content to experiment with selective repeal in prosecutions for specified types of offenses. The problem is that in terms of the fundamental policy concerns of misdecision and overvaluation, the specified prosecutions are the cases in which the character evidence prohibition is most defensible. The available empirical studies, including some conducted by the Justice Department itself, indicate that those crimes carry great potential for unfair prejudice and have little probative value.

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60. David Crump, *How Should We Treat Character Evidence Offered to Prove Conduct?*, 58 U. COLO. L. REV. 279, 283 (1987).

61. Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct in Sex Offender Cases*, 21 AM. J. CRIM. L. 127, 149 (1993).

62. Davis, *supra* note 56, at 517-20.

63. *Id.*

### The Risk of Misdecision.

The risk of misdecision is greatest when the jury is likely to find the character of the accused's uncharged misconduct repugnant<sup>64</sup> or revolting.<sup>65</sup> The admission of testimony about that type of misconduct can poison the jurors' minds<sup>66</sup> and generate an overmastering hostility against the accused.<sup>67</sup>

Evidence of sexual misconduct or child molestation by an accused has an extraordinary tendency to create such hostility. Certain categories of sex offenders, notably those who prey on young children, are considered veritable monsters. One federal court stated that the possibility of hostility is "somewhat heightened" in such cases.<sup>68</sup> For its part, the Washington Supreme Court has observed that "the potential for prejudice is at its highest" "in sex cases."<sup>69</sup>

The available empirical studies confirm that observation. The most famous study of the behavioral patterns of American jurors is the Chicago Jury Project, described in the classic text, *THE AMERICAN JURY* by Kalven and Zeisel.<sup>70</sup> One of the questions that the Chicago researchers investigated was the jurors' reaction to various types of offenses. The researchers specifically commented on the potential for prejudice in sex offense prosecutions. According to the researchers, many jurors found such conduct "reprehensible"<sup>71</sup> and became "outraged."<sup>72</sup> Jurors were especially likely to find the conduct offensive when the victim was a young child.<sup>73</sup> The researchers described the danger that jurors will have "no patience with . . . [legal] technicality" and will "override[ ] distinctions of the law" to find the accused guilty.<sup>74</sup>

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64. William Roth, *Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach*, 9 PEPP. L. REV. 297, 300 n.9 (1982).

65. ZELMAN COWEN & P.B. CARTER, *ESSAYS ON THE LAW OF EVIDENCE* 146 (1956).

66. HARRY CLAY UNDERHILL, *CRIMINAL EVIDENCE* § 182 (4th ed. 1935).

67. 2 JACK WEINSTEIN & MARGARET BERGER, *WEINSTEIN'S EVIDENCE*, § 404[18] (1994).

68. *United States v. Buhl*, 712 F. Supp. 53, 57 (E.D.Pa. 1989), *aff'd without op.*, 899 F.2d 1219 (3d Cir. 1990).

69. *State v. Coe*, 684 P.2d 668, 673 (Wash. 1984).

70. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966).

71. *Id.* at 397.

72. *Id.* at 396.

73. *Id.* at 396-97.

74. *Id.* at 396.

Subsequent studies corroborate these early findings. In a 1986 poll, 1,000 adults were surveyed.<sup>75</sup> The adults were asked to rank various crimes according to their heinousness. While murder was the crime rated most serious, rape, incest and child abuse were the next three highest rated crimes.

A 1989 study conducted by the Bureau of Justice Statistics, the Department of Justice's research arm, points to the same conclusion.<sup>76</sup> This survey canvassed 60,000 adults.<sup>77</sup> The researchers attempted to determine how the public perceives the relative seriousness of a wide range of crimes. As in the 1986 poll, homicide received the highest rating. However, the next two highest ratings went to the offenses of rape and child abuse. Non-violent theft offenses consistently received much lower ratings.

In short, as their starting points for revising the character evidence prohibition, Congress and the Indiana and Missouri legislatures have chosen offenses which are most likely to trigger the risk of misdecision—one of the probative dangers that inspires prohibition. It may be true that as a general proposition, American Evidence law has exaggerated the danger of misdecision that would be created by the admission of proof of the accused's bad character. However, that danger is anything but fanciful in the case of the offenses specified in the statutes approved by Congress and the Missouri legislature.

### **The Risk of Overvaluation.**

To make matters worse, the chosen starting points can also be faulted on the ground that the specified offenses do not appear to be particularly probative as predictors of conduct. Citing an article by a former chair of the Federal Parole Board, one commentator characterized the supposed high rate of recidivism among sex offenders as a downright myth.<sup>78</sup> In 1993, Dean Thomas Reed published a comprehensive review of the empirical studies of recidivism rates.<sup>79</sup> In the main, those studies report that the recidivism rate for sexual offenses is lower than the rate for other

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75. *Sin*, PEOPLE, Feb. 10, 1986, at 106, 108.

76. *The Severity of Crime*, BUREAU OF JUSTICE STATISTICS BULLETIN (Jan. 1984).

77. *How Do Americans Rank the Severity of Crime?*, INSIDE DRUG LAW, Sept. 1984, at 9.

78. James M. H. Gregg, *Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses*, 6 ARIZ. L. REV. 212, 223 (1965).

79. Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct in Sex Offender Cases*, 21 AMER. J. CRIM. L. 127 (1993).

serious crime.<sup>80</sup> Similarly, the recidivism rate for pedophilia appears to be below the national average for all crimes.<sup>81</sup> Among sex offenses, the crime with the highest recidivism rate is exhibitionism.<sup>82</sup> In Dean Reed's words, the recidivism studies reveal "nothing particularly unique about sex offenses" which would justify singling them out for "a special rule" admitting "uncharged criminal conduct more leniently than in drug sales or possession of stolen property prosecutions."

As in the case of the risk of misdecision, the Justice Department's own empirical studies are corroborative. In a 1989 study, the Bureau of Justice Statistics tracked 100,000 prisoners for three years to determine the extent of their recidivism.<sup>83</sup> The researchers used rearrest rates as a measure of recidivism. The rate for rapists was 7.7%. "Of the offenses studied, only homicide had a lower recidivism rate . . . ."<sup>84</sup> The rate for the theft offense of burglary was 31.9%—more than four times higher.<sup>85</sup> It may be true that in the past, we have underestimated the probative value of an accused's character as circumstantial proof of the accused's conduct on the charged occasion and, conversely, overestimated the risk of jury overvaluation. Like the risk of misdecision, however, that risk appears acute in the case of the crimes specified in the statutes passed by Congress and the Missouri legislature. Those crimes seemingly have very little probative worth as circumstantial proof of contrast. In sharp contrast, the recidivism rates for other types of crimes such as theft offenses are demonstrably—and markedly—higher.

#### **Other Potential Rationales for Singling Out Sex Offenses and Child Molestation as the Initial Inroads on the Character Evidence Prohibition.**

Of course, the arguments critiqued above do not exhaust the case for the choices made by Congress and the Indiana and Missouri legislatures. For example, it might be urged that sexual assault and child molestation deserve special treatment, since they are such grave crimes. No one in their right mind would dispute that both offenses are serious crimes. It is doubtful, however, that

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80. *Id.* at 149-50.

81. *Id.* at 151.

82. *Id.* at 154.

83. Bryden and Park, *supra* note 13 at 572.

84. *Id.*

85. *Id.*

standing alone, that argument can sustain a special character evidence rule for prosecutions of those crimes. The crime of murder is arguably at least as serious. As previously stated, murder received the highest rating in the 1986 and the 1989 studies. Furthermore, murder typically carries more serious sentences, notably the death penalty. Yet neither Rule 413 nor Rule 414 has any application to murder prosecutions.

Alternatively, it might be contended that there is a greater need for the evidence in these types of cases. Prosecutions for these kinds of crimes often degenerate into "swearing contests," and the admission of evidence of an accused's similar misdeeds on a character theory might help tip the balance in favor of a guilty verdict. Although there is a large element of truth in the assertion that the verdict in trials for these crimes often turns on the jury's assessment of the relative credibility of the complainant and the accused,<sup>86</sup> a court would be hard pressed to treat that contention as an adequate justification for differential treatment of sexual assault and child molestation. There is a greater need for evidence to tip in the balance in prosecutions for many other types of crimes.

To begin with, at least in prosecutions for sexual misconduct or child molestation, there is usually a victim capable of testifying at trial. In contrast, many theft offenses are committed clandestinely in the absence of the victimized property owner; there is no eyewitness victim capable of coming forward to identify the accused as the perpetrator. Moreover, in many jurisdictions, there are special evidentiary doctrines which can be used to enhance the credibility of the victim of a sexual assault or child molestation. Even before any attempted impeachment, the prosecutor in such a case may prove a fresh complaint to bolster the alleged victim's credibility.<sup>87</sup> After impeachment, the prosecutor can introduce expert testimony as to rape trauma syndrome<sup>88</sup> or child sexual abuse accommodation syndrome<sup>89</sup> to rehabilitate the victim's credibility. Moreover, given the nature of sexual assault and child molestation, it is far more likely that the perpetrator will leave trace evidence such as

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86. Richard A. Hibey, *The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent, and Character*, 11 AMER. CRIM. L. REV. 309 (1973); Judith Rowland, *Rape Experts Dispell Jurors' Preconceptions*, THE PROSECUTOR'S BRIEF 21 (Sept.-Oct. 1979).

87. EDWARD IMWINKELRIED, PAUL GIANNELLI, FRANCIS GILLIGAN & FREDERIC LEDERER, *COURTROOM CRIMINAL EVIDENCE* § 702 (2d ed. 1993).

88. 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELREID, *SCIENTIFIC EVIDENCE* § 9-4 (2d ed. 1993).

89. *Id.* at § 9-5.



blood, semen or saliva at the crime scene—material which lends itself to the analysis of genetic markers such as DNA.<sup>90</sup> Thus, quite apart from character evidence, the prosecutor in these cases will often have a wide array of evidentiary tools to use to persuade the trier of fact—a wider array than the prosecutor has in prosecutions for many other types of crimes.

### Conclusion

When a researcher begins an experiment, he or she typically starts with an experimental design which has a decent prospect for success and which creates little danger to human safety. The researcher is interested in determining whether the hypothesis warrants intensive empirical investigation; the researcher wants to find out whether the hypothesis holds true under even relaxed test conditions. If the hypothesis fails that lax test, it has been falsified,<sup>91</sup> and the hypothesis obviously does not warrant the time and expense entailed in further testing. However, if the hypothesis passes that test, it can be provisionally accepted.<sup>92</sup> The researcher then conducts experiments under more severe test conditions.<sup>93</sup> Subsequently, more stringent tests “push[ ] a hypothesis to its limits rather than [merely] reexamining the paradigmatic case around which it was formulated.”<sup>94</sup> The later experiments provide incremental verification<sup>95</sup> for the hypothesis and enable the researcher to refine the hypothesis.

Furthermore, the researcher usually designs the early experiments to minimize the safety risks. If the researcher is testing an hypothesis about the release of energy from a certain chemical reaction, the initial experiment might be conducted in an underground chamber to reduce the danger of releasing uncontrolled contaminants into the atmosphere. Likewise, when the researcher is investigating an unproven medication, the researcher often begins with animal tests. The researcher conducts tests involving human subjects only if the hypothesis survives the earlier animal experiments. Since the later tests might create a significant health

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90. *Id.* at Ch. 17; 2 PAUL C. GIANNELLI & EDWARD J. IMWINKELREID, *SCIENTIFIC EVIDENCE* Ch. 18 (2d ed. 1993).

91. Bert Black, Francisco J. Ayala and Carol Saffran-Brinks, *Science and the Law in the Wake of Daubert: A New Search for Scientific Knowledge*, 72 *TEX. L. REV.* 715, 762-63 (1994).

92. *Id.* at 762.

93. *Id.* at 762-63, 783-84.

94. *Id.* at 763.

95. *Id.* at 762.

risk, it would be socially irresponsible for the researcher to forego the earlier, less hazardous variations of the experiment.

Although scientists appreciate the logic of designing experiments in this fashion, that logic has been lost on Congress and the Indiana and Missouri legislatures. As we have seen, as the starting points for the experiment with the reform of the character evidence prohibition, they have chosen crimes with minimal probative value as predictors of the accused's conduct. It would make far more sense to initiate the experiment by selecting crimes with higher recidivism rates. Again, in the 1989 Bureau of Justice Statistics study, the researchers found that the rearrest rate for burglary was more than four times higher than the rearrest rate for sexual offenses.<sup>96</sup>

The choices by Congress and the Indiana and Missouri legislatures seem even more debatable if we turn to the risk factor. A scientific researcher customarily defers the most hazardous experimental designs to the very end of the series of tests. Congress and the Missouri legislature have done just the opposite. Here, the risk is that the jurors will find the evidence of the accused's uncharged misconduct so inflammatory<sup>97</sup> that they will be blinded to the weakness of the proof of the guilt of the charged crime. As Justice Cardozo cautioned,<sup>98</sup> the introduction of sordid,<sup>99</sup> uncharged misconduct evidence can result in the conviction of accused who in fact are innocent of the charged offense. The 1984 Bureau of Justice Statistics study<sup>100</sup> demonstrates that the average citizen regards sexual misconduct and child molestation with special disdain. The available research indicates that the admission of testimony about an accused's uncharged theft offenses would be much less likely to trigger a wrongful conviction.

An intelligently designed experiment for the reform of the American evidence doctrine ought to begin with much different starting points than those chosen by Congress and the Indiana and Missouri legislatures. Theft offenses would be an exceptionally good candidate for the initial inroad on the character evidence prohibition; the recidivism rate for theft offenses is quite high, the average juror is likely to find evidence of uncharged theft offenses much less repulsive than evidence of uncharged sexual misconduct,

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96. Bryden and Park, *supra* note 13 at 572.

97. *People v. Cardenas*, 647 P.2d 569, 576 (Cal. 1982).

98. *People v. Zackowitz*, 254 N.E. 192, 200 (N.Y. 1930).

99. Michael Patrick May, *Evidence of Other Crimes as Substantive Proof of Guilt in Maryland*, 9 U. BALT. L. REV. 245, 254 (1980).

100. *The Severity of Crime*, BUREAU OF JUSTICE STATISTICS BULLETIN (Jan. 1984).

and prosecutors have fewer evidentiary tools at their disposal in theft offense trials.

The starting points specified in the federal, Indiana and Missouri legislation not only raise the spectre of the conviction of the innocent; they also virtually guarantee years of litigation of equal protection challenges to the legislation. Although the legislation certainly classifies accused on the basis of the nature of the offense they are charged with, in the long run the legislation may survive the challenges. The courts ultimately may decide that the appropriate tier of equal protection scrutiny is the minimal,<sup>101</sup> rational basis<sup>102</sup> test. Under this test, the issue is whether the legislative classification bears a rational relation to a legitimate state policy; and the courts will sustain the classification so long as the legislature could conceive<sup>103</sup> or hypothesize<sup>104</sup> a set of facts establishing a nexus between the policy and the classification. If the courts invoke the minimal scrutiny test, the legislation is likely to be upheld. For example, rape is one of the most underreported crimes against the person.<sup>105</sup> Rape victims are understandably reluctant to come forward and air such horrific experiences in a public courtroom. The legislatures could conceive that the enactment of statutes such as Federal Rules 413-14 would give rape victims further incentive to report the offense. The victim might engage in a type of cost/benefit analysis in deciding whether to come forward. When there is little likelihood that the victim's testimony will result in a conviction, the victim could conclude that that small likelihood does not justify the personal costs to him or her. However, if the victim perceived that statutes such as Rules 413-14 increased that likelihood, they might be more willing to report the offense; and their willingness to do so would strengthen the enforcement of the laws criminalizing sexual misconduct.<sup>106</sup>

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101. *Crane v. Schneider*, 635 F. Supp. 1430, 1432 (E.D.N.Y. 1986).

102. *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

103. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

104. *Bunyan v. Camacho*, 770 F.2d 773, 774 (9th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986).

105. Lisa van Amburg & Suzanne Rehtin, *Rape Evidence Reform in Missouri: A Remedy for the Adverse Impact of Evidentiary Rules on Rape Victims*, 22 ST. LOUIS L.J. 367 (1978); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977); Elizabeth M. Davis, *Rape Shield Statutes: Legislative Responses to Probative Dangers*, 27 J. URBAN & CONTEMP. L. 271 (1984).

106. *But see* Joel Schrag & Suzanne Scotchmer, *Crime and Prejudice: The Use of Character Evidence in Criminal Trials*, 10 J.L. & ECON. ORG. 319 (1994) (arguing that in some cases, the abolition of the character evidence prohibition will encourage rather than deter their perpetration).

The real battle in the equal protection litigation challenging this legislation will be over the appropriate tier of equal protection scrutiny. The defense bar will argue that the statutes in question do not codify "run-of-the-mill" evidentiary rules, subject to minimal scrutiny. The defense bar has a plausible contention that the classifications embodied in these statutes must be subjected to the intermediate level of scrutiny.<sup>107</sup> Under this test, to pass muster, the classification must be substantially related to an important state interest.<sup>108</sup> The courts have sometimes invoked middle level scrutiny when the classification in question affected socially important, albeit nonconstitutional, interests.<sup>109</sup> Again, the Supreme Court has declared that it offends the Eighth Amendment to criminalize status.<sup>110</sup> Although the abolition of the character evidence prohibition does not directly criminalize an accused's status, the routine admission of bad character evidence heightens the risk that the jury will convict on account the accused's status as a recidivist rather than the strength of the evidence of the charged crime. If the courts opt to apply the intermediate tier of equal protection scrutiny, the doubts about the aptness of the starting points chosen by Congress and the Indiana and Missouri legislatures could prove fatal to the legislation. Given the minimal probative value of the specified offenses as predictors of conduct and their repulsive nature, a court might find it difficult to conclude that the classification satisfies middle tier scrutiny.

In sum, although the nascent experiment with the American character evidence doctrine may succeed, it certainly will not do so because of the starting points chosen by Congress and the Missouri legislature. Quite to the contrary, the experiment might succeed despite the inaptness of the chosen starting points. Importantly, though, while Congress and Missouri proceed to implement their questionable legislation, the remaining states can undertake their own different, sounder experiments. They could formulate their own rules selectively repealing the character prohibition in prose-

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107. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

108. *Equality Foundation of Cincinnati v. Cincinnati*, 860 F. Supp. 417 (S.D. Ohio 1994); *Ridgeway v. Montana High School Ass'n*, 633 F. Supp. 1564, 1579 (D.Mont. 1986), *aff'd*, 858 F.2d 579 (9th Cir. 1988); *Baker v. Vanderbilt University*, 616 F. Supp. 330, 331 (M.D.Tenn. 1985).

109. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-33 (2d ed. 1988).

110. *Robinson v. California*, 370 U.S. 660, 666 (1962); *See also Provident Mut. Life Ins. Co. v. City of Atlanta*, 864 F. Supp. 1274, 1291 (N.D. Ga. 1994) ("The fundamental rights . . . identified by the . . . Supreme Court" as triggering "strict judicial scrutiny" include "the right to fairness in the criminal process.").

cutions for other offenses—offenses with appreciably higher recidivism rates and less potential for unfair prejudice. In his dissenting opinion in *New State Ice Co.*,<sup>111</sup> Justice Brandeis lauded the potential for experimentation inherent in the federal system. That potential may prove to be the salvation of the new experiment with evidence of an accused's bad character.

FIGURE 1

0 ————> 0 ————> 0

an accused's  
uncharged  
acts of  
misconduct

the accused's  
personal,  
subjective  
bad character

the accused's  
conduct "in  
character"—  
consistent  
with his or  
her bad  
character—  
on a specific  
occasion

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111. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).