

THE EVIDENTIARY ISSUE CRYSTALIZED BY THE COSBY AND WEINSTEIN SCANDALS: THE PROPRIETY OF ADMITTING TESTIMONY ABOUT AN ACCUSED'S UNCHARGED MISCONDUCT UNDER THE DOCTRINE OF OBJECTIVE CHANCES TO PROVE IDENTITY

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The numbers in the scandals are staggering. By one count, eighty-seven different women have accused former movie mogul Harvey Weinstein of sexual misconduct.¹ In the case of Bill Cosby, the number stands at more than fifty.² The accusations against Mr. Cosby have already led to criminal charges in Pennsylvania.³ Although the charge against Mr. Cosby names only one victim, Ms. Andrea Constad, the prosecution sought to introduce testimony about uncharged incidents involving nineteen other accusers.⁴

The prosecution's effort in the Cosby case is not an isolated incident. The Federal Rules of Evidence contain a provision governing the admissibility of uncharged misconduct. In pertinent part, Rule 404(b) reads:

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1. Sara M. Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87 Accusers*, USA TODAY (Oct. 27, 2017, 11:27 AM), <https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001/>.

2. Chris Franciscani & Linsey Davis, *Bill Cosby's Fate Could Turn on a Pivotal Court Decision Expected Next Week*, ABC NEWS (Mar. 2, 2018, 1:08 AM), <https://abcnews.go.com/US/bill-cosbys-fate-turn-pivotal-court-decision-expected/story?id=53450806> [hereinafter Franciscani]; see also Lizzy McLellan, *Second Time Around: As Bill Cosby's Retrial Looms, Lawyers Consider Whether He Can Get a Fair Trial Amidst the Growing #MeToo Movement*, NAT'L L.J., Feb. 1, 2018, at 19.

3. Franciscani, *supra* note 2.

4. *Id.*

(b) Crimes, Wrongs, or Other Acts

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.⁵

Forty-four states have adopted evidence codes patterned after the Federal Rules,⁶ and most of those codes contain a provision identical or equivalent to Rule 404(b).⁷ The numbers about the cases applying Rule 404(b) are as impressive as the numbers about the accusations against Messrs. Cosby and Weinstein. Rule 404(b) generates more published opinions than any other provision of the Federal Rules of Evidence.⁸ In many jurisdictions, alleged errors in the admission of uncharged misconduct evidence are the most common ground for appeal in criminal cases.⁹

In some jurisdictions, errors in the introduction of uncharged misconduct evidence are the most frequent basis for reversal in criminal cases.¹⁰ These numbers reflect the realization by both prosecutors and defense counsel that uncharged misconduct evidence can be extraordinarily prejudicial at trial.

As Rules 404(b)(1)-(2) indicate, when a prosecutor attempts to introduce testimony about uncharged crimes, the challenge is convincing the trial judge that the testimony is logically relevant on a non-character theory. Rule 404(b)(1) forbids the prosecution from introducing the uncharged misconduct evidence to show the accused's bad character and then arguing that that character increases the probability that the accused is guilty of the charged crime—the simplistic argument, “He did it once, therefore he did it again.”¹¹ The prosecutor must convince the judge that the evidence is logically relevant to an element of the charged crime without positing a

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

6. See 6 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE, T-43 to -49 (Mark S. Brodin ed., 2d ed. 2016).

7. See *id.*

8. 1 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 1:4, at 1-32 (rev. ed. 2015) [hereinafter 1 UNCHARGED MISCONDUCT EVIDENCE].

9. See 22B CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5239, at 427 (1978).

10. Patrick Wallendorf, *Evidence—The Emotional Propensity Exception: State v. Treadway*, 116 ARIZ. ST. L.J. 153, 156 n. 29 (1978).

11. *State v. Newton*, 743 P.2d 254, 256 (Wash. 1987) (“[T]he notion that a person who has once committed a crime is more likely to do so again”); Victor Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59, 68, 80 (1984) (“[O]nce a thief, always a thief.”).

forbidden inference as to the accused's personal, subjective bad character.¹² It is true that as amended in 1995, the Federal Rules contain so-called rape sword statutes, Federal Rules of Evidence 413-14, that carve out exceptions to the character evidence prohibition in sexual assault and child molestation cases.¹³ However, to date, most states have not followed suit,¹⁴ and consequently, in most states the prosecution still faces the challenge of identifying and substantiating a non-character theory of logical relevance.

There are several non-character ways in which evidence of an accused's uncharged misconduct can be relevant to establish the accused's identity as the perpetrator of the charged crime. Suppose that the prosecution can prove that on January 10th of a given year, the accused stole a pistol from a gun store. The pistol's serial number makes the pistol a one-of-a-kind item. Now assume that the accused is standing trial for an attempted rape perpetrated on February 10th of the same year. The testimony about the charged crime establishes that during the rape the perpetrator brandished a pistol and further that when the perpetrator heard someone approaching, the perpetrator panicked and dropped the pistol. The pistol found at the scene of the attempted rape has the same serial number as the pistol that the accused stole on January 10th. On these facts, without violating the character evidence prohibition, the prosecution could introduce evidence of the uncharged January 10th theft in order to prove the accused's identity as the perpetrator of the charged crime.¹⁵ The prior theft placed the accused in possession of a unique instrumentality found at the scene of the charged crime. The evidence is thus relevant to show the accused's identity as the perpetrator of the attempted rape without necessitating any assumption about the accused's general bad character or a disposition to commit rape.

By the same token, there is legitimate non-character relevance when the prosecution can show that the charged and uncharged crimes share a unique, one-of-a-kind *modus operandi*. When the prosecution can link the accused to an uncharged crime committed with the identical, unique *modus operandi* as the charged crime, the trier of fact may infer the accused's guilt of the charged crime without positing any assumption about the accused's bad character. Both the British¹⁶ and American cases recognize this non-character theory. The American cases use such expressions as "distinctive," "earmark," "fingerprint," "handiwork," "identifying," "signature,"

12. See 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 8, § 2:19, at 2-146.

13. FED. R. EVID. 413(a), 414(a).

14. See 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 8, § 2:25, at 2-179 to -182.

15. *People v. Carter*, 232 N.E.2d 692, 697 (Ill. 1967).

16. See, e.g., *R v. Boardman* [1975] AC 421 (HL) 440, 454, 462 (appeal taken from Eng.) (using "signature" to describe *modus operandi*).

“singular,” “trademark,” and “unique” to describe the type of *modus operandi* that the charged and uncharged crimes must share.¹⁷ The courts demand that the method of committing the crimes be highly similar.¹⁸ In particular, the British cases reason that when both the charged and uncharged crimes are perpetrated in a distinctive, strikingly similar fashion, it would be an extraordinary coincidence if two different criminals employed that *modus operandi*.¹⁹

Another theory – a theory that the prosecution has invoked in the *Cosby* case²⁰ – is the doctrine of objective chances. The doctrine rests on informal or intuitive²¹ probability reasoning.²² If the frequency of a type of event in a given case exceeds the normal incidence of such events, the extraordinary coincidence renders it implausible that random, innocent chance explains the higher frequency.²³

Initially, the British courts invoked the doctrine of chances theory as a justification for introducing evidence of an accused’s uncharged misconduct to negate a claim of accident and conversely prove the occurrence of an *actus reus*. One of the most famous British cases—excerpted or at least cited in virtually every American Evidence course book—is *R. v. Smith*,²⁴ the infamous “Brides in the Bath” prosecution. Smith had gone through a marriage ceremony with a Ms. Mundy. She was later found drowned in her own bathtub. The prosecution offered testimony that two other women whom the accused had purportedly married “were . . . found drowned in their baths in houses where they were living with” the accused.²⁵ Even more curiously, all the deaths occurred after the women had purchased insurance policies naming the accused as the beneficiary.²⁶ The court ruled that the uncharged misconduct evidence was admissible to shed light on the question

17. 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 8, § 3:12, at 3-71 to -75 (collecting cases); see also DAVID P. LEONARD, *THE NEW WIGMORE: EVIDENCE OF OTHER MISCONDUCT AND SIMILAR EVENTS* §13.7.3, at 746 (Richard D. Friedman ed., 2009).

18. 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 8, § 3:12, at 3-76 to -77.

19. *Boardman*, [1975] AC 421 (HL) 457; *R v. Tricoglus* [1977] 65 Crim. App. 16, at 20 (Eng.) (“The similarity would have to be so unique or striking that common sense makes it inexplicable on the basis of coincidence.”).

20. *Francescani*, *supra* note 2.

21. LEONARD, *supra* note 17, § 7.3.2, at 437; David P. Leonard, *The Use of Uncharged Misconduct Evidence to Prove Knowledge*, 81 NEB. L. REV. 115, 161-62 (2002) (“informal probability reasoning”).

22. LEONARD, *supra* note 17, § 7.3.2, at 440-41; see also RICHARD EGGLESTON, *EVIDENCE, PROOF AND PROBABILITY* 96 (2d ed. 1983); Stephen E. Fienberg & D. H. Kaye, *Legal and Statistical Aspects of Some Mysterious Clusters*, 154 J. ROYAL STAT. SOC’Y 61, 61 (1991).

23. 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 8, § 4:3, at 4-46.

24. *R v. Smith* [1916] 11 Crim. App. 229 (Eng.).

25. *Id.*

26. *Id.* at 233.

of whether Mundy's death was "accidental."²⁷ The court reasoned that 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.²⁸ The American courts have followed *Smith* and approved the use of uncharged misconduct evidence to rebut defense claims that there was no actus reus.²⁹

The next step in the evolution of the doctrine of chances was its invocation by the British courts to justify the admission of an accused's uncharged misconduct evidence to show intent.³⁰ More specifically, in prosecutions for knowing receipt of stolen goods under the doctrine the courts often admitted evidence of an accused's prior possession of stolen property.³¹ The courts reasoned that although an innocent person might occasionally come into possession of stolen property, the repetition of such an occurrence is so unusual that it strongly suggests that on one or some of the occasions the accused had the mens rea of knowledge.³² In his landmark American treatise, Dean Wigmore proposed a famous hypothetical illustrating the legitimate use of uncharged misconduct to prove intent.³³ In the hypothetical, accused B is charged with shooting at A, whom B was hunting with. On two prior occasions on which bullets from B's gun "whistl[ed] past [A]'s head," B assured A that he had not shot at A "deliberately." Wigmore elaborates:

[T]he chances of an inadvertent shooting on three successive similar occasions are extremely small; or (or to put it another way) . . . inadvertence . . . is only an abnormal or occasional explanation for the discharge of a gun at a given object, and therefore the recurrence of a similar result (i.e., discharge towards the same object, A) excludes the fair possibility of such an abnormal cause and points out the cause as probably a more natural and usual one, i.e., a deliberate discharge at A. In short, similar results do not usually occur through abnormal causes; and the

27. *Id.* at 237.

28. *Id.* at 233.

29. 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 8, § 4:3, at 4-46 to -47; *see also* United States v. Woods, 484 F.2d 127, 133-34, 136 (4th Cir. 1973) (in an infanticide prosecution, the accused claimed that the child's death was accidental; the prosecution was permitted to introduce evidence that nine other children who had been in the accused's custody suffered at least 20 cases of cyanosis) (citing *Smith*, 11 Crim. App. 229); Edward J. Imwinkelried, *United States v. Woods: A Story of the Triumph of Tradition (FRE 404(b): Character Evidence, Exception: Similar Circumstances)*, in EVIDENCE STORIES 59, 61-62 (Richard Lempert ed., 2006).

30. LEONARD, *supra* note 17, § 3.3.4, at 131.

31. *Id.*

32. *Id.* at 133.

33. 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 302, at 241 (James H. Chadbourne ed., 1979).

recurrence of a similar result . . . tends (increasingly with each instance) . . . to negate . . . innocent mental state³⁴

In part, due to Wigmore's influential treatise, the American courts have joined the British courts in treating the doctrine of objective chances as a basis for admitting uncharged misconduct to prove mens rea.³⁵

The final step in the evolution of the doctrine has been its adaptation to permit the introduction of uncharged misconduct evidence to prove identity. This is the variation of the doctrine that the prosecution has resorted to in the *Cosby* case.³⁶ Although there are far fewer British and American cases applying this variation of the doctrine, there is respectable case authority on both sides of the Atlantic. The leading British case is the House of Lords' celebrated 1975 decision in *R. v. Boardman*.³⁷ Boardman was a headmaster of a school, and several students accused him of sexual improprieties.³⁸ The speeches by all five Lords invoked the doctrine to justify the admission of one student's accusation to prove the truth of another boy's accusation.³⁹ In his speech, Lord Morris stated that "it [is] unlikely that two people would tell the same untruth" "having considerable features of similarity."⁴⁰ For his part, Lord Hailsham asserted that the strikingly similar, unusual features "common to the two stories" amounted to "a coincidence which is against all the probabilities"⁴¹ Lord Cross emphasized that "[t]he likelihood of such a coincidence obviously becomes less and less the more people there are who make the similar allegations and the more striking are the similarities in the various stories."⁴²

There are a handful of American cases approving this use of the doctrine of chances.⁴³ In its official analysis of then proposed Federal Rules of

34. *Id.*

35. LEONARD, *supra* note 17, § 3.3.4, at 131.

36. Francescani, *supra* note 2.

37. [1975] AC 421 (HL) (appeal taken from Eng.); see also COLIN TAPPER, CROSS AND TAPPER ON EVIDENCE 373 n.20 (12th ed. 2010) ("This decision was accepted elsewhere by the highest courts in the Commonwealth . . .") (citing *Sutton v The Queen* (1984) 152 CLR 528 (Austl.), *R v. Hsi En Feng* [1985] 1 NZLR 222 (N.Z.), and *R v. Robertson* [1987] 1 SCR 918 (Can.)).

38. See *Boardman*, [1975] AC 421 (HL) 421.

39. *Id.* at 427-38, 439-40, 443-44, 446-47, 449-50, 543-55, 460.

40. *Id.* at 441-42.

41. *Id.* at 446, 453.

42. *Id.* at 459.

43. E.g., *People v. Vandervliet*, 508 N.W.2d 114 n.35 (Mich. 1993) ("[W]e can intuitively conclude that it is objectively improbable that three out of thirty clients would coincidentally [falsely] accuse defendant of sexual misconduct."); *State v. Lopez*, 2018 UT 5, ¶ 54, 417 P.3d 116. In his concurring opinion in *People v. Balcom*, 867 P.2d 777 (Cal. 1994), Justice Arabian declared:

If . . . two people claim rape, and if their stories are sufficiently similar, the chance that both are lying, or that one is truthful and the other invented a false story that just happens to be similar, is greatly diminished.

Evidence 413-14, the Office of Policy Development (OPD) of the Department of Justice squarely endorsed reliance on the doctrine to prove identity:

It is inherently improbable that a person whose prior acts show that he is in fact a rapist or child molester would have the bad luck to be later hit with a false accusation of committing the same type of crime, or that a person would fortuitously be subject to multiple false accusations by a number of different victims.⁴⁴

The principal drafter of the legislation, Mr. David Karp, OPD Senior Counsel, argued that it is legitimate to admit uncharged misconduct for this purpose because of “the improbability that multiple victims would independently fabricate similar stories.”⁴⁵ Given the extensive publicity for the Cosby and Weinstein scandals, going forward we are likely to see more frequent citations of the doctrine of chances as a justification for admitting uncharged misconduct evidence to prove identity. As previously stated, in the pending Cosby case, the prosecution pointed to the doctrine of chances for precisely that reason.⁴⁶

However, a significant danger lies ahead. There is a grave risk of confusing the *modus operandi* and doctrine of chances theories. To begin with, they both serve as rationales for admitting uncharged misconduct evidence to prove identity.⁴⁷ Furthermore, they employ common terminology—both impose a “similarity” requirement.⁴⁸ Finally, both rely on a form of probability reasoning.⁴⁹ One asserts that it would be an extraordinary coincidence for two perpetrators to use the same strikingly similar *modus* while the other claims that it would be an extraordinary coincidence for two complainants to fabricate the same strikingly similar accusations.⁵⁰ Thus, there is an acute danger that the courts will blur the distinctions between the two theories.

Confusing the two theories can easily lead to miscarriages of justice. As we shall see, the theories require different foundational elements and proof.⁵¹ Suppose that a court confused the theories. If the court mistakenly failed to

44. 137 CONG. RECORD S3240 (daily ed. Mar. 13, 1991), *quoted in* 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 8, § 2:25, at 2-161.

45. David Karp, *Response to Professor Imwinkelried's Comments*, 70 CHI.-KENT L. REV. 49, 53 (1994).

46. Francescani, *supra* note 2.

47. *See* 1 MCCORMICK ON EVIDENCE § 190, at 1035-36, 1040 (Kenneth S. Broun ed., 7th ed. 2013) [hereinafter MCCORMICK].

48. *Id.* at 1035, 1037-39.

49. *Id.* at 1039.

50. *Id.* at 1035; Francescani, *supra* note 2.

51. *See infra* Section II.B.2.

insist on proof of a foundational element needed for the applicable theory but unnecessary for the other theory, the result could be the erroneous admission of uncharged misconduct evidence and a wrongful conviction. Or the court might demand proof of a foundational element unnecessary for the applicable theory but required for the other theory. Here the result could be the erroneous exclusion of the uncharged misconduct evidence and a wrongful acquittal.

The thesis of this article is that there are fundamental differences between the *modus operandi* theory for proving identity and the doctrine of objective chances theory. The first part of this article is descriptive. Part I reviews the traditional uses of the doctrine of chances to prove *actus reus* and *mens rea*. Part II turns to the much more controversial use of the doctrine to rationalize the admission of uncharged misconduct evidence to prove identity, as in the *Cosby* case. Initially, Part II addresses the threshold policy question of whether the prosecution should be permitted to resort to this variation of the doctrine to prove identity. Part II concludes that that question should be answered in the affirmative. Part II then turns to the task of specifying the required foundation for a proper invocation of the doctrine. In doing so, Part II distinguishes this variation of the doctrine from the use of the *modus operandi* for the same purpose, namely, to justify the admission of an accused's uncharged misconduct to prove identity. The article concludes that although in principle this adaptation of the doctrine can serve as a legitimate basis for admitting uncharged misconduct evidence, in practice the courts should proceed with circumspection. In general, uncharged misconduct is highly prejudicial.⁵² As Justice Cardozo remarked, uncharged misconduct evidence can be a "peril to the innocent."⁵³ Caution is especially warranted here; there is not only a fine line⁵⁴ between verboten character reasoning and non-character theories of logical relevance but also an even thinner line between the applications of the *modus operandi* and doctrine of chances theories for proving identity.

I. THE TRADITIONAL USES OF THE DOCTRINE OF OBJECTIVE CHANCES
TO JUSTIFY THE ADMISSION OF UNCHARGED MISCONDUCT EVIDENCE
TO PROVE ACTUS REUS AND MENS REA

A. *The Doctrine of Objective Chances as a Non-Character Theory of*

52. 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 8, §§ 1:2-3 (collecting the relevant psychological studies).

53. *People v. Zachowitz*, 172 N.E. 466, 468 (N.Y. 1930).

54. *United States v. Derington*, 229 F.3d 1243, 1247 (9th Cir. 2000); *State v. Brown*, 900 A.2d 1155, 1160 (R.I. 2006).

Logical Relevance

As the introduction noted, Rule 404(b)(1) generally⁵⁵ prohibits the prosecution from introducing testimony about an accused's uncharged misconduct on a character theory of logical relevance. The prosecution cannot rely on the theory depicted in the following figure:

FIGURE 1

THE ITEM OF EVIDENCE	INTERMEDIATE INFERENCE	ULTIMATE INFERENCE
The accused's uncharged misdeeds	The accused's personal, subjective bad character	On the charged occasion, the accused acted "in character," committing the charged offense

The common law and Rule 404(b) ban this theory because the theory poses two substantial probative dangers. The first inference from the item of evidence to the intermediate inference poses the risk that the jury will be tempted to decide the case on an improper basis—the danger that the great utilitarian philosopher Jeremy Bentham termed the risk of “misdecision.”⁵⁶ This risk is the sort of “prejudice” mentioned in Federal Rule of Evidence 403. The Advisory Committee Note accompanying Rule 403 explains that although an item of evidence is technically logically relevant, realistically it can tempt the jury to decide the case on an impermissible basis.⁵⁷ In order to decide whether to draw this inference, the jury must ask: Is the accused a law-abiding, moral person or a law-breaking, immoral individual? It is

55. However, under Rule 404(a)(2)(A), the prosecution may rebut if under the so-called “mercy rule” the accused elects to present good character evidence as circumstantial proof of his or her innocence of the charge. In addition, Rules 413-14 represent exceptions to the general rule. In federal sexual assault and child molestation prosecutions, the government is permitted to introduce an accused's uncharged misconduct to show his or her disposition toward criminal conduct and then argue that that disposition increases the probability that the accused committed the charged offense. 1 EDWARD J. IMWINKELRIED, PAUL C. GIANNELLI, FRANCIS A. GILLIGAN, FREDRIC I. LEDERER & LIESA RICHTER, *COURTROOM CRIMINAL EVIDENCE* § 803 (6th ed. 2016) [hereinafter *COURTROOM EVIDENCE*].

56. 6 JEREMY BENTHAM, *An Introductory View of the Rationale of Evidence: For the Use of Non-Lawyers as Well as Lawyers*, in *THE WORKS OF JEREMY BENTHAM* 1, 105 (John Bowring ed., Russell & Russell Inc. 1962); see also I. H. DENNIS, *THE LAW OF EVIDENCE* 582-83 (1999) (moral prejudice).

57. FED. R. EVID. 403 advisory committee's notes on proposed rules.

hazardous to compel the jury to consciously advert to that question.⁵⁸ When the prosecution parades the accused's other misconduct before the jury and the jury must concentrate on the accused's personal character, at a subconscious level the jurors may be tempted to punish the accused even if they would otherwise have found reasonable doubt about his or her guilt; the jurors might conclude that the accused is so dangerous that society must be protected by imprisoning the accused even if he or she is not guilty of the crime charged.⁵⁹ This risk is an especially significant concern in the United States because the Supreme Court has construed the Eighth Amendment ban on Cruel and Unusual Punishment as forbidding punishing a person for his or her status.⁶⁰ Hence, while the risk is a major policy concern in the United Kingdom, the risk assumes constitutional dimension in the United States.

To make matters worse, another significant probative danger arises because, at the second step in Figure 1, the jury must decide whether to use the accused's general disposition or character trait as a basis for predicting the accused's behavior on the charged occasion. In the words of Rule 404(b)(1), the prosecution would be inviting the jurors to treat the accused's disposition as a basis for concluding that "on a particular [charged] occasion the [accused] acted in accordance with the character."⁶¹ The probative danger is overvaluation, the risk that the jury will ascribe too much weight to general character as a predictor of conduct on a specific occasion.⁶² Like the temptation to decide the case on an improper basis, overvaluation of the weight of the item of evidence can mislead the jury into inferential error.⁶³ Although laypersons often rely on this type of character reasoning in everyday life, the available psychological studies show that the general construct of character is usually a poor predictor of conduct.⁶⁴ Situational factors tend to be more influential.⁶⁵

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

59. *Id.* at 61-65.

60. *Cf.* Robinson v. California, 370 U.S. 660, 666-67 (1962). See also Romer v. Evans, 517 U.S. 620, 635 (1996).

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

62. 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).

63. *Thigpen*, 925 F.2d at 1014; Blinka, *supra* note 62.

64. Miguel Angel Mendez, *California's New Law on Character Evidence: Having Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1044-53 (1984); see also Edward J. Imwinkelried, *Reshaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U.L. REV. 723, 741-42 (2008) [hereinafter *Reshaping*].

65. See *supra* text accompanying note 64.

What is the basic theory underlying the doctrine of chances, and how does it differ from character reasoning? Consider the most traditional use of the doctrine to rebut an accused's claim that there was no *actus reus*—the social loss in question was caused by an accident rather than human intervention. That was the use involved in *R. v. Smith*, the “Brides in the Bath” case. The following figure depicts the underlying theory:

FIGURE 2

THE ITEM OF EVIDENCE	INTERMEDIATE INFERENCE	ULTIMATE INFERENCE
The accused's involvement in similar losses in other, uncharged incidents (the drowning of two other wives)	The combination of the charged and uncharged incident(s) constitutes an extraordinary coincidence, exceeding the ordinary incidence of such events	One or some of losses were the product of an <i>actus reus</i> rather than random accident

This theory of logical relevance is not only superficially different than the theory depicted in Figure 1. More importantly, it is distinguishable from the first theory in terms of the probative dangers that inspire the character prohibition codified in Rule 404(b)(1). As previously stated, in Figure 1, to decide whether to draw the first inference, the jury must consciously address the question of the accused's personal, subjective character. The doctrine of chances does not require the jurors to do so. Rather than focusing on the accused's subjective character, the jurors must consider the objective probability or plausibility of so many accidents befalling the accused. The jury considers the cluster,⁶⁶ concatenation,⁶⁷ or string⁶⁸ of events, including both the charged and uncharged incidents. It is true that individually, the events may appear innocent.⁶⁹ However, the jury must decide whether in aggregate or collectively,⁷⁰ the events constitute an implausible, extraordinary coincidence⁷¹—simply stated, “an affront to common sense.”⁷²

66. Fienberg & Kaye, *supra* note 22.

67. MCCORMICK, *supra* note 47, § 190, at 1040.

68. LEONARD, *supra* note 17, § 9.4.2, at 611.

69. MCCORMICK, *supra* note 47, § 190, at 1040.

70. *Id.*

71. PHIPSON ON EVIDENCE 548-49 (Hodge M. Malek ed., 19th ed. 2018).

72. *R. v. Boardman* [1975] AC 421 (HL) 459 (appeal taken from Eng.).

In the words of the Court of Appeals for the Seventh Circuit, the theory is “purely objective, and has nothing to do with a subjective assessment of [the accused’s] character.”⁷³ Of course, there is always a danger that on its own motion the jurors will engage in forbidden character reasoning. However, that danger is present whenever the jury hears uncharged misconduct evidence. Further, under this theory, neither the prosecution in argument nor the judge in instructions may refer to the accused’s character or disposition; the argument and instructions must be strictly confined to the objective likelihood of the coincidence.

This theory is distinguishable from character reasoning in another respect. At the second step in Figure 1, the trier of fact employs character as a predictor of conduct on the charged occasion. The doctrine of chances theory depicted in Figure 2 does not entail that inference. Rather, the prosecutor urges the jurors to do precisely what the pattern instructions in most jurisdictions direct the jurors to do, that is, draw on their common sense⁷⁴ and experience⁷⁵ in order to decide which inference is more plausible. Is it more plausible to infer that all the events represent innocent happenstance,⁷⁶ or does it seem more probable that one or some of the events involve an *actus reus* and criminal agency?

Admittedly, some critics have contended that the doctrine of chances is nothing more than character reasoning in disguise.⁷⁷ However, those

73. *United States v. York*, 933 F.2d 1343, 1350 (7th Cir. 1991), *overruled on other grounds* by *Wilson v. Williams*, 182 F.3d 562 (7th Cir. 1999); *see also* *United States v. Aguilar-Aranceta*, 58 F.3d 796, 799 (1st Cir. 1995) (“The justification . . . is that no inference as to the defendant’s character is required.”); Nancy Bauer, Casenote, *People v. Spoto: Teasing the Defense on Prior Bad Acts Evidence*, 63 U. COLO. L. REV. 783, 803 (1992) (“In theory, the doctrine has no bearing at all on the defendant’s character . . .”).

74. EGGLESTON, *supra* note 22, at 88-89; *Boardman*, [1975] AC 421 (HL) 439, 445.

75. *Boardman*, [1975] AC 421 (HL) 445; EGGLESTON, *supra* note 22, at 89. *See* *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.’ . . . [I]n assessing credibility or the reasonableness of a position, people inherently apply conclusions about human behavior based on *common experiences of daily living* . . . [J]urors may use ‘common sense,’ derived from the repetitive pattern of human behavior and experiences common to all of us . . .”) (citation omitted); *United States v. Flores-Chapa*, 48 F.3d 156, 161 (5th Cir. 1995) (“Juries are free to use their common sense and apply common knowledge, observation, and experience gained in the ordinary affairs of life . . .”); *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 from the circumstantial evidence.”); *Zada v. Scully*, 847 F. Supp. 325, 328 (S.D.N.Y. 1994) (“Jurors can and are expected to apply common sense in evaluating evidence . . .”).

76. Feinberg & Kaye, *supra* note 22, at 61.

77. Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 199-204 (1998); Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259, 1260-64 (1995); Lisa

contentions have been largely rebutted.⁷⁸ Despite the criticisms, the courts certainly continue to classify the doctrine of chances as a genuine non-character theory;⁷⁹ and the better view is that uncharged misconduct evidence may be admitted by virtue of the doctrine without offending the character evidence prohibition.⁸⁰

B. *The Well-Settled Uses of the Doctrine of Chances*

1. To Prove the Occurrence of an Actus Reus

As subpart I.A noted, initially the courts employed the doctrine of chances as a basis for introducing uncharged misconduct evidence to prove the occurrence of an actus reus and negate a claim of accident. In the words of one of the seminal British cases, *Bond*,⁸¹ “That the same accident should repeatedly occur to the same person is unusual, especially so when it confers a benefit on him.” Many American courts have adopted the same reasoning.⁸² As the introduction noted, in the British *Smith* case, the prosecution was allowed to present testimony about the bathtub drowning deaths of the accused’s two prior wives to rebut the accused’s claim that the drowning of his third wife was accidental. In an eerily similar bathtub drowning case,⁸³ *People v. Lisenba*,⁸⁴ a California court reached the same result.

There are two kinds of cases in which both the British and American courts have regularly invoked the doctrine of chances for this purpose. One

Marshall, Note, *The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits*, 114 YALE L.J. 1063, 1064-65 (2005).

78. Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, the Doctrine of Chances*, 40 U. RICH. L. REV. 419, 448-58 (2006) (the critics argue that the doctrine is character in disguise because, in their view, the doctrines must assume that the accused has a constant, unvarying character trait connecting all the incidents; however, if that were the case, the ultimate inference from the applicability of the doctrine would be that all the incidents represented crimes; however, the only necessary inference from an application of the doctrine is that together the charged and uncharged incidents amount to an extraordinary coincidence and that therefore one or some of the incidents were criminal; in short, the critics err in positing that the doctrine assumes a simplistic, thoroughgoing determinism).

79. See, e.g., *State v. Lopez*, 2018 UT 5, ¶¶ 50, 59 n.12, 417 P.3d 116.

80. 1 CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, *FEDERAL EVIDENCE* § 4:34, at 829-30 (3d ed. 2007) [hereinafter MUELLER & KIRKPATRICK].

81. *R v. Bond* [1906] 2 KB 389 at 420-21 (Eng.).

82. 1 MICHAEL H. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* § 404:5, at 406 n.15 (“Other crimes, wrongs, or acts offered to rebut an assertion of . . . accident are frequently stated to bring into play the ‘doctrine of chances’”); LEONARD, *supra* note 17, § 9.4.2, at 609-10.

83. LEONARD, *supra* note 17, § 9.4.2, at 611.

84. 94 P.2d 569 (Cal. 1939), *aff’d*, 314 U.S. 219 (1941).

is arson prosecutions. When there have been numerous fires at properties owned or occupied by the accused in an arson or insurance fraud case, American⁸⁵ as well as British⁸⁶ precedents approve of the admission of testimony about the prior fires as uncharged misconduct evidence. Objectively, it is highly unlikely that a single person will be victimized by multiple fires in a short period of time.⁸⁷

Infanticide prosecutions are the second type of case in which both British and American courts routinely invoke the doctrine of objective chances to prove actus reus. In *R. v. Smith*⁸⁸ and *People v. Lisenba*,⁸⁹ the victims were adult women. However, more commonly the accused claims accident when a child in his or her custody dies. When the courts have relied on the doctrine to justify admitting uncharged misconduct evidence to rebut such claims, the numbers have frequently been startling. In the leading British case, *Makin*,⁹⁰ the accused husband and wife were evidently professional foster parents. They were charged with the murder of an infant entrusted to their custody.⁹¹ They claimed that the infant's death was an accident. The Privy Council ruled that to rebut that claim, the prosecution was permitted to introduce testimony that the remains of 13 infants had been found in the gardens of three houses that had been occupied by the accused.⁹² The council accepted the prosecution's argument that "the recurrence of the unusual phenomenon of babies having been buried in an unexplained manner in a similar part of

85. See, e.g., *People v. Mardlin*, 790 N.W.2d 607, 612-14, 619, 623-24 (Mich. 2010) (the frequency of fires closely associated with the accused); C.J. Williams & Dasha Ternavska, *A Series of Unfortunate Events: The Admissibility of "Other Fires" Evidence in Arson Cases*, 48 CONN. L. REV. 685, 711 (2016).

86. See, e.g., ARCHBOLD: PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES §13-9, at 990 (Stephen Mitchell, et al. eds., 42d ed.1985) ("Where the defendant was indicted for arson with intent to defraud an insurance company, for the purpose of . . . proving that the fire was the result of design and not of accident, evidence was admitted that the defendant had previously occupied two houses in succession, both of which had been insured, that fires had broken out in both, and that the defendant had made claims upon and been paid by the insurance companies in respect of the loss caused by each fire.") (citing *R. v. Gray* (1866) 176 Eng. Rep. 924, cited with approval in *Makin v. A-G* [1894] AC 57 (PC) (appeal taken from N.S.W.)).

87. 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 8, § 4:1, at 4-9; see also Williams & Ternavska, *supra* note 85, at 710.

88. [1916] 11 Crim. App. 229 (Eng.).

89. 94 P.2d at 570.

90. AC 57 (PC) 59. See EGGLESTON, *supra* note 22, at 91-92; Fienberg & Kaye, *supra* note 22, at 62; LEONARD, *supra* note 17, § 9.4.2, at 610; see also TAPPER, *supra* note 37, at 372, 377-78 (in *Makin*, "the number of such cases . . . made coincidence implausible . . . [I]t was argued that the accuseds' commission of the crime charged stemmed from the statistical incidence of the deaths of children in houses the accused had occupied, and that their disposition to commit such crimes played no part in the argument to show that they had done so in any one case").

91. See Fienberg & Kaye, *supra* note 22, at 12.

92. *Id.*

the premises previously occupied” by the accused implied that one or some of the deaths were not accidental.⁹³

The sheer numbers were even more unsettling in the corresponding leading American case, *United States v. Woods*.⁹⁴ There the accused was charged with the murder of an infant named Paul whom she was in the process of adopting.⁹⁵ The apparent cause of death was cyanosis (oxygen deprivation).⁹⁶ As in *Makin*, the accused contended that the death was accidental. The parallel continues because, as in *Makin*, the prosecution proffered uncharged misconduct evidence to rebut the contention.⁹⁷ In a 25-year period, nine children whom the accused had custody of or access to suffered at least 20 cyanotic episodes, and seven had died.⁹⁸ Like the Privy Council, the Court of Appeals for the Fourth Circuit upheld the admission of the testimony for that purpose.⁹⁹ Writing for the court, Judge Winters declared:

[W]ith regard to no single child was there any legally sufficient proof that defendant had done any act which the law forbids. Only when all of the evidence concerning the nine other children and Paul is considered collectively is the conclusion impelled that the probability that some or all of the other deaths, cyanotic seizures, and respiratory deficiencies were accidental or attributable to natural causes was . . . remote¹⁰⁰

In these cases, the prosecution need not prove that the other, uncharged incidents were crimes. It is sufficient if the prosecution demonstrates that the accused has a significant connection to¹⁰¹ or link with¹⁰² the other incidents—having occupied the other premises where the fires occurred or having had custody of the other children who died. Once that nexus is established, the doctrine of chances comes into play.¹⁰³ At that point, an objective probability assessment of the extraordinary incidence of fires or

93. *Id.*

94. 484 F.2d 127, 130-31 (4th Cir. 1973); *see also* Imwinkelried, *supra* note 29, at 59, 60-61.

95. *Woods*, 484 F.2d at 128.

96. *Id.* at 129-30.

97. *Id.* at 130-31.

98. LEONARD, *supra* note 17, § 9.4.2, at 609.

99. *Woods*, 484 F.2d at 135-36.

100. *Id.* at 133; *see also* LEONARD, *supra* note 17, § 9.4.2, at 609-10. In *Woods*, one of the most respected forensic pathologists, Dr. Vincent DiMaio, testified that there was a 75% probability that the manner of Paul’s death was homicidal. Without Dr. DiMaio’s testimony, the prosecution’s case might not have been legally sufficient to sustain a conviction. *Jackson v. Virginia*, 443 U.S. 307 (1979); *see also* Nickolas J. Kyser, Comment, *Developments in Evidence of Other Crimes*, 7 U. MICH. J.L. REFORM 535, 542 (1974).

101. *See* EGGLESTON, *supra* note 22, at 102.

102. *See* Fienberg & Kaye, *supra* note 22, at 72.

103. *See* LEONARD, *supra* note 17, § 9.4.2, at 608;

deaths drives the conclusion that one or some of the fires or deaths were the result of an actus reus, not random accident.

2. To Prove that the Perpetrator Possessed the Requisite Mens Rea

On both sides of the Atlantic, courts have invoked the doctrine of objective chances to uphold the admission of uncharged misconduct evidence proffered to show mens rea.¹⁰⁴ The following figure depicts the underlying theory of logical relevance:

FIGURE 3¹⁰⁵

FIRST ITEM OF EVIDENCE	INTERMEDIATE INFERENCE	ULTIMATE INFERENCE
The accused's involvement in uncharged, similar events surrounded by suspicious circumstances	The objective improbability of innocent involvement in so many suspicious events	On one or some of the occasions the accused possessed a mens rea

This is the variation of the doctrine that Dean Wigmore had in mind when he formulated his famous hypothetical about the three shots. In the past British courts have often admitted uncharged misconduct to rebut an accused's claims of ignorance or mistake¹⁰⁶ or a contention of innocent, unknowing possession.¹⁰⁷

The American cases fall into the same mold. In knowing receipt of stolen goods cases, the American courts frequently allow the prosecution to introduce evidence that on uncharged occasions the accused was found in possession of stolen property.¹⁰⁸ An innocent person might occasionally come into possession of stolen goods, but objectively the recurrence of that event is a suspicious coincidence. Similarly, in drug prosecutions American cases routinely sustain the admission of uncharged misconduct to rebut an accused's claim that he or she did not know that contraband drugs were

104. See LEONARD, *supra* note 17, § 7.3.2, at 439-41; MUELLER & KIRKPATRICK, *supra* note 80, § 4:34, at 829-31.

105. 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, 1133 (1993).

106. RUPERT CROSS, EVIDENCE 311-12 (3d ed. 1967).

107. *Id.* at 312-15.

108. See LEONARD, *supra* note 17, § 3.3.4, at 132.

secreted in the automobile he or she was driving.¹⁰⁹ Again, it is plausible that an innocent person will sometimes find himself or herself behind the wheel of an automobile in which someone else had hidden illicit drugs. However, when that event recurs multiple times, common sense points to the conclusion that on one or some of the occasions the accused's possession was knowing and criminal rather than ignorant and innocent.¹¹⁰

II. THE CONTROVERSY OVER THE USE OF THE DOCTRINE OF OBJECTIVE CHANCES TO PROVE IDENTITY

Although the Anglo-American cases approving the use of the doctrine of chances to prove an actus reus or mens rea are veritably legion, far fewer decisions explicitly endorse the use of the doctrine to prove identity. The American authority is especially sparse. However, the widespread publicity for the scandals involving Messrs. Cosby and Weinstein may encourage more prosecutors to attempt to utilize the doctrine for this purpose in the future. As previously stated, in the pending Cosby case, the prosecution did precisely that in order to persuade the trial judge to admit testimony by 19 other women who have accused Mr. Cosby of sexual misconduct.¹¹¹ This is still another variation of the doctrine of chances, depicted below:

FIGURE 4

FIRST ITEM OF EVIDENCE	INTERMEDIATE INFERENCE	ULTIMATE INFERENCE
Other complaints of similar misconduct allegedly committed by the accused	The objective improbability of so many complainants making similar false accusations	The truth of one or some of the complaints

109. Edward J. Imwinkelried, *Criminal Minds: The Need to Refine the Application of the Doctrine of Objective Chances as a Justification for Introducing Uncharged Misconduct Evidence to Prove Intent*, 45 HOFSTRA L. REV. 851, 871 (2017) (the article acknowledges that the courts often at least implicitly apply the doctrine of chances to justify admitting uncharged misconduct evidence to prove intent; however, the article criticizes the trend in the case law to loosely apply the foundational requirements for invoking the doctrine of chances).

110. The inference of criminal intent is especially strong when the conduct is a complex act requiring several steps. LEONARD, *supra* note 17, § 7.3.2, at 439-40 (citing *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978)).

111. Francescani, *supra* note 2.

As the introduction noted, there are both British and American cases explicitly approving the use of uncharged misconduct under this theory to prove identity.¹¹² In addition, the Justice Department's Office of Policy Development has argued forcefully in favor of this theory.¹¹³ However, only a small number of decisions actually rely on the theory—far fewer than the cases endorsing the *modus operandi* theory and even fewer than the decisions approving the use of the doctrine to prove *actus reus* or *mens rea*. Hence, the soundness of this theory should not be taken for granted. Consequently, the first subpart of Part II addresses the policy question of whether it is legitimate to use the doctrine of objective chances for this purpose. In particular, subpart A considers the potential objections that testimony about mere accusations is too flimsy to be probative and that the approval of this use of the doctrine will virtually swallow the character evidence prohibition.

After evaluating those objections, subpart A concludes that it is permissible to utilize the doctrine of chances for the specific purpose of proving identity. Subpart B then attempts to specify the foundational elements that the prosecution should be obliged to establish before introducing uncharged misconduct evidence under the doctrine. Subpart B differentiates the foundation for invoking the doctrine from the predicate needed to apply the closely related *modus operandi* theory. As the introduction noted, there is a grave risk of confusion between the two theories. For that reason, subpart B endeavors to sharply distinguish the two foundations.

A. Should the Courts Allow the Introduction of Uncharged Misconduct Evidence Under the Doctrine to Prove Identity?

1. The Insubstantiality of the Evidence of Mere Complaints or Accusations

In the case of the use of the doctrine to prove *actus reus* or *mens rea*, the prosecution must present admissible evidence that the uncharged incidents occurred. At first blush this use of the doctrine appears to authorize the receipt of testimony about mere complaints or accusations. Since any reference to an accused's uncharged misconduct can be highly prejudicial, it

112. See *supra* notes 37-43 and accompanying text.

113. See *supra* notes 44-45 and accompanying text.

might be objected that without more, testimony about a mere accusation or complaint is too flimsy to warrant running the risk of prejudice.

There are several responses to this potential objection. One is that it is well-settled that in some instances, Rule 404(b) permits the admission of testimony about mere complaints. Rule 404(b) applies to civil actions as well as prosecutions.¹¹⁴ 404(b) frequently comes into play in product liability actions when the plaintiff offers testimony about other accidents involving the same product as the product that allegedly injured the plaintiff.¹¹⁵ A prior complaint about the product can trigger a manufacturer's duty to investigate the product's safety and effect appropriate repairs.¹¹⁶ The complaint puts the manufacturer on notice of the existence of the defect. There is a substantial body of case law allowing plaintiffs to introduce testimony about "mere" complaints for this purpose.¹¹⁷ By analogy, when the mens rea for a charged crime includes the essential element of recklessness, a prosecutor could argue that prior complaints to the accused are admissible to establish the mens rea. After all, the essence of recklessness is a conscious disregard of a known risk.¹¹⁸

Of course, an objector could argue that although mere complaints can be sufficiently probative when a civil defendant's or accused's state of mind is in issue, in the current setting the prosecution proposes putting the evidence to a very different use, that is, proving conduct—the accused committed the charged offense. However, the objection assumes that under the doctrine, the prosecutor need present only testimony about the complaints—without evidence of the incidents that are the subject of the complaints. The objection confuses the evidence to be admitted with the theory justifying the admission of the evidence. The underlying theory may turn on the number of complaints, but in every case applying the theory the prosecution has presented evidence showing the occurrence of the acts complained of. Two of the leading British cases are illustrative. As previously stated, in *Boardman* the speeches of all the Lords endorsed the application of the doctrine of chances to prove identity.¹¹⁹ Yet, in *Boardman* the prosecution was not content to show that there had been other accusations. Rather, in

114. Unlike Federal Rule 804(b)(3), by its terms Rule 404(b) is not limited to criminal cases. Furthermore, the wording of Rule 404(b) refers to "crime, wrong, or other act" in the alternative.

115. 2 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, § 7:24, at 7-98 (rev. ed. 2015) [hereinafter 2 UNCHARGED MISCONDUCT EVIDENCE].

116. *Id.* § 7:18, at 7-71.

117. *See id.*; R v. *Boardman* [1975] AC 421 (HL) 439-42 (Lord Morris of Borth-y-Gest), 444-45 (Lord Wilberforce), 446-54 (Lord Hailsham of St. Marylebone), 457-61 (Lord Cross of Chelsea), 462-63 (Lord Salmon) (appeal taken from Eng.).

118. WAYNE LAFAVE, CRIMINAL LAW § 5.4(f) (6th ed. 2017).

119. *See supra* notes 39-42 and accompanying text.

Lord Morris's words, "Each boy gave evidence."¹²⁰ Similarly, *Scarrott*¹²¹ recognized the propriety of using the doctrine of chances to prove identity. In that case, Lord Justice Scarman commented that "the boys gave their evidence."¹²² In short, when the doctrine is invoked to prove identity, the evidence admitted is every bit as substantial as the evidence received when the doctrine is used to establish an *actus reus* or *mens rea*.

2. The Risk of the Effective Nullification of the Character Evidence Prohibition

Alternatively, a critic of the use of the doctrine to prove identity might object that if the courts approve this use of the theory, as a practical matter they will nullify the character evidence prohibition codified in Rule 404(b)(1).¹²³ The thrust of the objection is that uncharged misconduct will be so liberally admissible under this theory that in effect the prosecution will almost always be able to introduce uncharged misconduct evidence showing the accused's bad character.

This objection misconceives both the foundation for relying on the doctrine to prove identity and the sort of argument that the doctrine will permit the prosecution to make to the trier of fact. To begin with, the objection understates how difficult it will be for the prosecution to lay an adequate foundation to invoke the doctrine. In fact, it will sometimes be more difficult for the prosecution to do so than it would be to resort to either the *modus operandi* theory or a rape sword statute such as Rule 413 or 414.

As we shall see in subpart B.2, the prosecution can employ the *modus operandi* theory even when it has evidence of only one uncharged incident. So long as the other evidence convinces the judge that the charged and uncharged crimes share a distinctive *modus operandi*, all that the prosecution needs is evidence of a single uncharged incident. If the prosecution can link the accused to the uncharged crime and demonstrate that the uncharged and charged crimes exhibit the same distinctive *modus operandi*, the trier can infer the accused's guilt of the charged crime without indulging any assumption about the accused's subjective character.

Furthermore, it is fallacious to assume that the number of incidents needed to trigger the doctrine will generally be less than or even the same as the number required to allow the trier of fact to infer bad character. As previously stated, Rules 413-14 are rape sword laws, allowing the

120. *Boardman*, [1975] AC 421 (HL) 435.

121. *R v. Scarrott* [1978] QB 1016 (CA) 1016 (Eng.).

122. *Id.* at 1019.

123. *See Imwinkelried*, *supra* note 109, at 855-56.

prosecution to introduce evidence of uncharged sexual assaults and child molestations to show an accused's bad character.¹²⁴ Admittedly, some critics of these rules have urged that the courts should not apply the rules when the prosecution presents testimony about only one other incident; the critics point to psychological research that a fairly large number of similar incidents is necessary in order to draw a trustworthy inference as to a person's character.¹²⁵ However, in a statement inserted into the Congressional Record by one of the statutes' sponsors as part of the rules' legislative history,¹²⁶ Mr. David Karp, the principal draftsman of the statutes, explicitly stated that under the statutes even a single uncharged incident ought to suffice.¹²⁷ On several occasions the courts have held the rules applicable even when the prosecution proffered testimony about only a single uncharged incident.¹²⁸

As we shall see, in contrast a single other complaint may not be enough to trigger the doctrine of objective chances.¹²⁹ Subpart B.2 explains that the doctrine comes into play only when the number of accusations lodged against the accused exceeds the number that are generally filed against persons in the accused's position.¹³⁰ If the accused is a teacher with tens of students every year or a nurse working for a long period in a large hospital ward,¹³¹ that number could easily be greater than one. The upshot is that there will be cases in which the doctrine would not apply even though the number satisfied the threshold for the *modus operandi* theory or a rape sword statute.

In addition, the objection rests on a misunderstanding of the argument that the doctrine will allow the prosecutor to make to the trier of fact during summation. When a rape sword statute applies or when the accused has

124. FED. R. EVID. 413, FED. R. EVID. 414.

125. *Reshaping*, *supra* note 64, at 759-61 ("In a 2001 survey of the literature, one psychologist points out that in the prior published studies attempting to predict behavior on the basis of inferences drawn from a single prior instance of conduct, the level of predictability was 'at best .30' – worse than flipping a coin."); *see also* Edward J. Imwinkelried, *Some Comments About Mr. David Karp's Remarks on Propensity Evidence*, 70 CHI.-KENT L. REV. 37, 45 (1994).

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

127. David J. Karp, *Response to Professor Imwinkelried's Comments*, 70 CHI.-KENT L. REV. 49, 52 (1994) ("a few incidents or a single incident").

128. *United State v. Dillon*, 532 F.3d 379, 387-91 (5th Cir. 2008) (Rule 413); *United States v. Crawford*, 413 F.3d 873 (8th Cir. 2005) (Rule 413); *United States v. Sioux*, 362 F.3d 1241, 1243 (9th Cir. 2004) (Rule 413); *United States v. Withorn*, 204 F.3d 790, 794-96 (8th Cir. 2000) (Rule 413); *United States v. Cree*, 400 F. Supp. 2d 1192, 1193-94 (D.N.D. 2005) (Rule 414); *United States v. Walker*, 261 F. Supp. 2d 1154, 1156 (D.N.D. 2003) (Rule 414), *aff'd*, No. 03-3114, 2004 WL 439891 (8th Cir. March 11, 2004).

129. *See infra* notes 167-76 and accompanying text.

130. *See infra* notes 167-76 and accompanying text.

131. Fienberg & Kaye, *supra* note 22, at 65-67.

elected to place his or her character in issue,¹³² in summation the prosecutor may talk about the “kind” or “type” of person the accused is – whether the accused possesses a character trait increasing the probability that the accused committed the charged crime. However, even when the doctrine of chances applies, the prosecution is forbidden from pressing that argument. Rather than discussing the accused’s “personal” or “subjective” character, the prosecutor may use only such terms as “objective,” “probability,” “plausibility,” and “likelihood.” For that matter, the prosecutor’s argument must be quite limited. There is nothing inherent in the logic of the doctrine that singles out the charged incident as a product of an *actus reus*, having been perpetrated by a person possessing the required *mens rea*, or the subject of a true complaint.¹³³ Instead, the judge should confine the prosecutor to arguing that “one or some”¹³⁴ of the incidents were the product of human intervention, committed by someone with the necessary *mens rea*, or the subjects of valid accusations. At most the prosecution may point to the objective improbability as “some evidence” of an *actus reus*, *mens rea*, or identity. The probabilistic theory underlying the doctrine does not entitle the prosecutor to single out the charged incident and definitely assert that the testimony about the other events establishes that that incident was a complete crime committed by the accused.

In short, the approval of the use of the doctrine to prove identity would not result in the formal or practical nullification of the character evidence prohibition. There are fact patterns in which the number of other incidents will fall short of meeting the threshold for invoking the doctrine. Even when the doctrine applies, in summation the prosecutor may not make a frontal verbal assault on the prohibition against using the accused’s personal, subjective bad character as circumstantial proof of the accused’s commission of the charged offense. The doctrine may permit the prosecution to submit the testimony about the uncharged incident to the jury. However, during summation Rules 404-05 will preclude the prosecution from making the sort of brutal attack on the accused’s character permitted by Rules 413-14.

132. See *COURTROOM EVIDENCE*, *supra* note 55, § 803.

133. See Kyser, *supra* note 100, at 542; 2 *UNCHARGED MISCONDUCT EVIDENCE*, *supra* note 115, § 9:90, at 9-296.

134. In *United States v. Woods*, 484 F.2d 127, 142-43 (4th Cir. 1973), in addition to submitting the uncharged misconduct evidence under the doctrine of chances, the prosecution presented the testimony of a leading forensic pathologist, Dr. Vincent DiMaio, who stated that there was a 75% probability that the death involved in the charge was homicidal. Without Dr. DiMaio’s testimony, the prosecution’s evidence well might have been legally insufficient to sustain a conviction. See *supra* note 100 and accompanying text.

B. If So, What Foundational Requirements Should the Courts Impose?

If the courts ought to extend the doctrine of chances to the proof of identity, the next question that arises is what foundational requirements should the prosecution have to satisfy in order to use the doctrine for that purpose. Even the most ardent advocates of this use of the doctrine counsel that the courts apply the doctrine with “great caution.”¹³⁵ The courts should clearly specify the foundational requirements to minimize the risk of confusing the doctrine with either verboten character reasoning or the modus operandi theory.

The tendency in the published opinions is to list several distinct requirements for invoking the doctrine. A 2018 Utah Supreme Court decision, *State v. Lopez*,¹³⁶ is a case in point. There the court listed several considerations, including the independence of the accusations, the similarity of the accusations, and the frequency of the accusations. The court separately enumerated the considerations and described them as “foundational requirements.”¹³⁷ As we shall now see, rather than viewing these considerations as separate foundational requirements, it is best to conceive them as factors in the court’s multi-step inquiry into the bottom line question: Has the prosecution established that the accused has been the subject of such complaints more frequently than the typical, similarly situated person?

1. The Independence of the Accusations

In *Boardman*, all five Lords stressed that the accusations must be independent. Lord Morris stated:

The learned [trial] judge left the matter fairly to the jury. He mentioned the possibility of two people conspiring together and he examined the question whether there were . . . any indications that S and H had conspired together. That was important because one question which the jury may have wished to consider was whether it was against all the probabilities, if the appellant was innocent, that two boys, unless they had collaborated, would tell stories with considerable features of similarity.¹³⁸

Citing an earlier decision, *R. v. Sims*,¹³⁹ Lord Wilberforce pointed to the risks of “collaboration or concoction.”¹⁴⁰ He noted not only “the possibility that the witnesses may have invented a story in concert but also the possibility

135. *R v. Boardman* [1975] AC 421 (HL) 452 (Lord Hailsham) (appeal taken from Eng.).

136. 2018 UT 5, ¶ 54, 417 P.3d 116.

137. *Id.*

138. *Boardman*, [1975] AC 421 (HL) 441-42.

139. [1946] 1 KB 531 (Eng.).

140. *Boardman*, [1975] AC 421 (HL) 444.

that a similar story may have arisen by a process of infection from media of publicity”¹⁴¹—a potential taint that is undeniably lively in situations such as the notorious Cosby and Weinstein scandals. Like Lord Wilberforce, Lord Hailsham indicated that it is improper to apply the doctrine if the various complainants have conspired to “concoct” the accusation.¹⁴² Similarly, Lord Cross emphasized that the key to invoking the doctrine is a showing that it is objectively improbable that multiple complainants would “independently . . . hit upon” the same details in their accusations.¹⁴³ For that reason, the doctrine should not be applied when the complainants are “in league”¹⁴⁴ and have collaborated, “put[ting] their heads together to concoct false evidence.”¹⁴⁵ Lord Salmon echoed Lord Cross’s view.¹⁴⁶

In their speeches in *Boardman*, several Lords suggested that the trial judge ought to consider the risk of a conspiracy tainting the multiple accusations but that the matter is ultimately for the jury rather than the judge.¹⁴⁷ A 1994 decision, *R. v. Ananthanarayanan*,¹⁴⁸ is certainly correct in stating that without more, the defense’s speculation about the possibility of taint does not warrant excluding the evidence; the defense must present “some credible evidence of concoction.”¹⁴⁹ Another 1994 decision, *R. v. H*,¹⁵⁰ generalized that the risk of a conspiracy is ordinarily a question for the jury but added that in extreme cases of strong evidence of concoction, the trial judge could bar the evidence. The Australian courts treat the risk as cutting to admissibility and not merely the weight of the evidence; the Australian High Court has adopted the view that “if the judge sees a [genuine] possibility of collaboration, the evidence is to be excluded.”¹⁵¹ American

141. *Id.*

142. *Id.* at 448.

143. *Id.* at 461.

144. *Id.* at 460.

145. *Id.* at 459.

146. *Id.* at 463; *see also* *R. v. Scarrott* [1978] QB 1016 (CA) 1027 (Eng.) (the complainants may have “gang[ed] up;” “Clearly there was a suggestion that some, or perhaps all, of these boys might have been a party to a ganging up organized by the older brother of Peter B.”).

147. *Boardman*, [1975] AC 421 (HL) 441 (Lord Morris).

148. [1994] 1 WLR 788 at 798 (Eng.).

149. *R. v. W* [1994] 1 WLR 800 at 806 (Eng.).

150. [1994] 1 WLR 809 at 814 (Eng.); *see also* *Scarrott*, [1978] QB 1016 (CA) 1028 (if there is a “very real possibility that the evidence is tainted by conspiracy or ganging up,” that possibility may so reduce the probative value so low that the trial judge should exclude the evidence).

151. Lee Stuesser, *Similar Fact Evidence in Sexual Offence Cases*, 39 CRIM. L.Q. 160,175 (1996) (citing the Australian High Court’s 1988 decision in *Hoch v The Queen* (1988) 165 CLR 292).

decisions such as *Lopez* are in accord and classify a showing of independence as a full-fledged foundational requirement for admissibility.¹⁵²

In the typical case it makes sense to impose a requirement for proof of the independence of the accusations. In the final analysis, the rationale for the doctrine of chances rests on probability theory.¹⁵³ When events are truly independent, one can use the multiplication or product rule to determine the probability that by random coincidence, both events will occur.¹⁵⁴ One independent probability is multiplied by the other independent probability. As we shall soon see in B.2, even assuming independence, it will sometimes be extremely difficult to determine the probability of multiple complaints or accusations against the accused. However, the risk of collaboration between the complainants compounds the difficulty. If the accusations are not independent, it is improper to apply the multiplication or product rule. If there is a taint such as the risk posed by widespread publicity for one of the accusations, the probabilities are conditional rather than independent.¹⁵⁵ In that event, it will be even harder to estimate the probability of multiple accusations. Suppose that a woman interacted with Mr. Cosby a decade ago. Realistically how can one quantify the risk that the massive publicity for the Cosby scandal will subconsciously influence her, prompt her to misrecollect the nature of the interaction, and therefore lodge a false complaint against him? In this situation, it can be frightfully difficult, if not impossible, for a judge or juror to intelligently resolve the bottom line question. They will be unable to determine with any degree of confidence whether the number of complaints against the accused exceeds the number of accusations that could be expected against a similarly situated, innocent person.

2. The Similarity and Relative Frequency of the Accusations

Distinguishing Between the Doctrine of Chances and the Modus Operandi Theory

Just as similarity of complaints is a factor in deciding whether to apply the doctrine of chances to prove identity, similarity of the modus operandi is a factor in deciding whether to invoke that theory to justify admitting

152. *State v. Lopez*, 2018 UT 5, ¶ 54, 417 P.3d 116.

153. EGGLESTON, *supra* note 22, ch. 7; Fienberg & Kaye, *supra* note 22.

154. 1 PAUL C. GIANNELLI ET AL., SCIENTIFIC EVIDENCE § 15.07[a], at 915-16 (5th ed. 2012).

155. *Id.* § 15.07[a], at 915.

uncharged misconduct to prove identity. However, similarity plays a very different role under the two theories.

The Modus Operandi Theory. The following figure depicts the non-character modus operandi theory:

FIGURE 5

FIRST ITEM OF EVIDENCE	SECOND ITEM OF EVIDENCE	ULTIMATE INFERENCE
The accused's commission of the uncharged crime with a unique modus operandi	The charged crime was committed with the same modus operandi	The accused's identity as the perpetrator of the charged crime.

In the modus operandi theory, the judge begins his or her analysis by identifying all the points of similarity between the manner in which the charged and uncharged crimes are committed.¹⁵⁶ However, that is only the beginning of the inquiry. Having identified all the points of similarity in the modus operandi of the crimes, the judge must then reach the question of whether that modus operandi is so distinctive that it is likely used by only one criminal.¹⁵⁷ If the uncharged and uncharged crimes were probably committed by “one and the same [person]”¹⁵⁸ and the prosecution can establish that the accused committed the uncharged crime, testimony about the uncharged crime is relevant on a non-character theory to prove the accused's identity as the perpetrator of the charged crime. The British courts exclude the evidence if the points of similarity are merely “the . . . stock-in-trade of the typical criminal committing that type of offense.”¹⁵⁹ The modus operandi of the charged and uncharged offenses must share “a signature or other special feature.”¹⁶⁰ In his speech in *Boardman*, Lord Hailsham proposed two classic—and colorful—examples:

[W]hilst it would certainly not be enough to identify the culprit in a series of burglaries that he climbed in through a ground floor window, the fact that he left the same humorous limerick on the walls of the sitting room, or an esoteric symbol written in lipstick on the mirror, might well be enough. In a sex case, . . . the fact that it was alleged to have been performed wearing

156. 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 8, § 3:11.

157. *Id.* § 3:12.

158. R v. Morris [1970] 54 Crim. App. 69 at 80 (Eng.).

159. DPP v. P [1991] 2 AC 447 (HL) (appeal taken from Eng.).

160. *Id.* at 462.

the ceremonial head-dress of a Red Indian chief or other eccentric garb might well in appropriate circumstances suffice.¹⁶¹

Lord Salmon put it differently: If the accused is foolish enough to use the same, one-of-a-kind method of perpetrating the charged and uncharged crimes, the accused “might just as well have published a written confession”¹⁶²

The American cases agree that standing alone, the fact that the charged and uncharged crimes display a similar modus is not enough. The prosecution must prove a both/and proposition: The modus operandi is very similar, and more importantly it is likely that only one criminal employs that modus.¹⁶³ As the introduction noted, the American courts have used a long list of adjectives and nouns to capture the notion: The modus operandi must be “distinguishing,” “distinctive,” an “earmark,” “a fingerprint,” “identifying,” “idiosyncratic,” “peculiar,” a “signature,” “singular,” “a veritable trademark,” and “unique.”¹⁶⁴ An American prosecutor might attempt to satisfy this foundational requirement by calling a police officer who had queried a national or state database of crimes, including information about the elements of the modus operandi of each crime in the database. The officer’s query asked for a list of crimes that included all the elements of the modus operandi of the offense the accused was charged with. The prosecutor could elicit the officer’s testimony that the database identified only one other crime including all those elements—a crime linked to the accused.

The Doctrine of Objective Chances. Just as the judge begins his or her modus operandi analysis by identifying the similarities in the method of committing the charged and uncharged crimes, the judge starts the doctrine of chances analysis by identifying the points of similarity between the charged and uncharged accusations against the accused.¹⁶⁵ However, the ultimate point of the analysis under the doctrine is not to decide whether all the accusations describe crimes committed with a unique, one-of-a-kind modus operandi.¹⁶⁶ Rather, under the doctrine, the point of the bottom line is to determine whether there have been more complaints against the accused than would be expected to be lodged against a similarly situated person in the same time period. The question is not the absolute number of complaints

161. *R v. Boardman* [1975] AC 421 (HL) 454 (appeal taken from Eng.).

162. *Id.* at 462.

163. 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 8, § 3:12.

164. *Id.* § 3:12, at 3-71 to -75 (collecting cases using these various terms).

165. LEONARD, *supra* note 17, § 9.4.2, at 608-09.

166. MCCORMICK, *supra* note 47, § 190, at 1039-40 (under the doctrine of chances, “the similarities between the act charged and the extrinsic acts need not be as extensive and striking . . .”).

or accusations; rather, the key is the relative frequency.¹⁶⁷ Has the defendant been accused of such misconduct more frequently than the average, similarly situated, innocent person would be the object of such accusations? Although courts sometimes list similarity and frequency as separate foundational requirements for invoking the doctrine of chances,¹⁶⁸ in truth those factors represent different steps in a process of reasoning to the bottom line: (1) initially identifying all the points of coincidence between the complainants' accusations; (2) next estimating the frequency with which similarly situated, innocent persons could normally expect to face such accusations; and (3) lastly determining whether, considering both the charged and uncharged accusations, the accused has been an object of such accusations more often than the expected frequency.¹⁶⁹

When the judge applies the doctrine rather than the *modus operandi* theory, after identifying all the points of similarity in the initial step, the judge asks two other questions that do not arise under the *modus operandi* theory.¹⁷⁰ The question at the second step is how frequently a similarly situated, innocent person could expect to become the subject of accusations similar to the accusation embodied in the pending charge.¹⁷¹ This step in the inquiry is critical because, as a general proposition, the greater the number of points of similarity between the accusations, the lower the frequency will be; and, consequently, the easier it will be for the prosecution to establish that in the instant case, the number of accusations against the accused is so high that it represents an extraordinary coincidence.¹⁷²

Consider this hypothetical. In a given case, a nurse is accused of committing a certain type of offense against the patients in the hospital ward she is assigned to.¹⁷³ Including the accusation underlying the charge, in a three-year period there have been three similar complaints against the nurse. After studying the evidence about the charged and uncharged accusations, the judge determines that there are four "points of coincidence"¹⁷⁴ in "common,"¹⁷⁵ namely, features A, B, C, and D. Further, assume that other

167. 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, 590-91, 597 (1990) [hereinafter *The Doctrines*].

168. *E.g.*, State v. Lopez, 2018 UT 5, ¶ 54, 417 P.3d 116.

169. *Id.* ¶ 57.

170. *See Id.* ¶¶ 40, 50.

171. *Id.* ¶¶ 50, 57.

172. Imwinkelried, *supra* note 78, at 437.

173. *E.g.*, Fienberg & Kaye, *supra* note 22, at 65-67 (describing *Rachals v. State*, 361 S.E.2d 671 (Ga. App. 1987) and *Jones v. State*, 751 S.W.2d 682 (Tex. App. 1988)).

174. *R v. Boardman* [1975] AC 421 (HL) 447 (Lord Hailsham) (appeal taken from Eng.).

175. *Id.* at 460 (Lord Cross).

foundational testimony convinces the judge that during a similar period, an innocent nurse performing similar duties in a similarly sized ward could expect to be the subject of two such complaints. In another case, the accusations might share a fifth point of coincidence, E as well as A, B, C, and D. How might the frequencies of the two complaints compare? What are the logical possibilities? Of course, the frequencies could be the same. If all the points of coincidence are very commonplace, the frequency of A-B-C-D accusations might be identical to the frequency for A-B-C-D-E accusations. However, if E is a somewhat unusual feature, the probability is that the frequency of A-B-C-D-E accusations will be lower than the frequency of A-B-C-D accusations. But the frequency of A-B-C-D-E accusations cannot be higher than the frequency of A-B-C-D accusations. The class large enough to include all A-B-C-D-E accusations necessarily contains all A-B-C-D accusations. The upshot is that more often than not the frequency of accusations containing more points of similarity is likely to be lower than the frequency of accusations containing fewer points of similarity.

At the second stage in analysis, the prosecution will try to convince the judge that the pertinent frequency in the case is as low as possible.¹⁷⁶ After estimating the normal frequency at that stage, in the third and final step the judge computes the incidence in this case, the total number representing both the charged and uncharged accusations against the accused.¹⁷⁷ The doctrine of chances is triggered only when, considered together, the charged and uncharged accusations against the accused amount to an extraordinary coincidence, exceeding the normal incidence for such accusations. If the normal incidence is one accusation or complaint, cumulatively the accusation underlying the charge and one other accusation will satisfy the threshold for the doctrine. However, if the normal incidence is two complaints, the combination of the charge and an accusation about an uncharged incident does not exceed the threshold. If even a similarly situated, innocent person could be expected to be the subject of as many complaints as have been leveled against the accused, the number of complaints is consistent with the hypothesis that in each incident complained of, the accused was guilty of no wrongdoing.

Estimating the Relative Frequency of Similar Accusations

In many, if not most, instances, when the prosecution attempts to invoke the doctrine of chances to justify admitting uncharged misconduct to prove

176. *The Doctrines*, *supra* note 167, at 590-92.

177. *Id.*

identity, the real problem of proof is developing a reliable estimate of the frequency of similar accusations at the second step in the analysis.¹⁷⁸

Actus Reus. Consider the challenge of developing the frequency estimate when the prosecution is using the doctrine to establish the occurrence of an actus reus. In extreme fact situations such as the “Brides in the Bath” case,¹⁷⁹ the judge may be willing to estimate the frequency as one. Drawing on common experience, the judge may be confident that for most persons, having a spouse drown in their own bathtub is a “once in a lifetime” experience.

Alternatively, the number representing the combination of the charged and uncharged incidents might be so large that it shocks the judge and, without more, persuades the judge that their random concurrence would be an extraordinary coincidence.¹⁸⁰ The extreme facts in *Makin* (13 other infants)¹⁸¹ and *Woods* (20 other cyanotic episodes)¹⁸² are classic examples. The judge’s natural reaction to the sheer number in those cases would be that they are the stuff of front page headlines.

Failing proof of a “once in a lifetime” experience or startlingly high numbers, the prosecution might present expert epidemiological testimony about the frequency of the type of occurrence involved in the case: the death of an infant of a certain age due to cyanosis¹⁸³ or cardiac arrest incidents among hospital patients.¹⁸⁴ In short, in many cases involving the use of the doctrine to negate accident claims, there will be a reliable basis for generating a frequency estimate.

Mens Rea. Initially, it might seem more difficult to develop a reliable estimate when the prosecution uses the doctrine to establish mens rea. After all, we are now dealing with invisible states of mind rather than observable events such as deaths. However, even in this setting it will often be possible for the prosecution to convince the judge that the frequency can be reliably estimated. As in the case of the use of the doctrine to prove actus reus, the judge may be willing to conclude that the accused’s claim is a “once in a lifetime” experience. Suppose, for instance, that the accused is charged with attempting to smuggle into the United States a highly toxic, banned biological agent that was found in his or her luggage. It is plausible that on

178. *Contra The Doctrines*, *supra* note 167, at 590 (explaining when the “improbability threshold” is met in a frequency analysis).

179. *R v. Smith* [1916] 11 Crim. App. 229 at 235-36 (Eng.).

180. *Contra The Doctrines*, *supra* note 167, at 590 (explaining when the “improbability threshold” is met in a frequency analysis).

181. *Makin v. A-G* [1894] AC 57 (PC) (appeal taken from N.S.W.).

182. *United States v. Woods*, 484 F.2d 127, 134 n.7, 135 (4th Cir. 1973).

183. *Id.* at 135.

184. *Fienberg & Kaye*, *supra* note 22, at 65-67.

one occasion a friend of the accused could plant the agent in the accused's luggage and dupe the accused into unwittingly bringing such material into the United States. However, if the charge represents the second occasion on which the accused was discovered at Customs with the same toxin in his or her luggage, the accused's claim that he or she was duped twice is likely to fall on deaf judicial ears.

In this context as well, the combination of the charged and uncharged incidents might yield such a large number that the judge concludes that the frequency in the instant case obviously exceeds the normal incidence for such events. Assume that in the past few years the police have found stolen property in the accused's possession on six occasions. In all likelihood, the judge will not demand a criminologist's testimony before finding that the accused has been personally involved in that type of event far more frequently than would typically be expected.

Even when the facts are not as extreme as in the above hypothetical, the prosecution may be able to muster hard data that could serve as the basis for a rough frequency estimate. When the prosecution employs the doctrine to establish *mens rea*, the frequency relates to the question of how often the accused has been personally involved in the same type of suspicious event such as possession of stolen goods.¹⁸⁵ Law enforcement authorities should at least have data indicating how often persons within their jurisdiction have been arrested for possession of stolen goods and how many persons have been arrested for that offense. If within the last five years the typical person arrested for knowing receipt has suffered only one arrest but police have found this accused in possession of stolen property on four occasions during the same period, there is a solid basis for concluding that the accused has been involved in such incidents with extraordinary frequency. Admittedly, in this hypothetical, the accused is being compared to other arrestees rather than the typical innocent citizen. However, it stands to reason that using this standard of comparison makes the number of complaints against the accused even more suspicious and incriminating.

Identity. Of course, the frequency estimate of greatest interest for our purposes relates to the frequency of similar accusations against similarly situated innocent persons. At one time or another in his or her life, everyone has been wrongfully accused of something—sometimes of very serious misconduct.¹⁸⁶ That is why the first step in the judge's analysis, specifying all the common elements of the accusations and narrowing the type of accusation, is essential. Once the judge has completed that initial stage of

185. 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 8, § 5:28, at 5-78 to -79.

186. *Id.* at 5-78.

analysis, the prosecution will sometimes be able to persuade the judge to accept an estimate of the frequency.¹⁸⁷ As in the case of the use of the doctrine to prove *actus reus* or *mens rea*, the prosecution can occasionally rely on common sense and argue that the accusation underlying the charge is a “once in a lifetime” experience.¹⁸⁸

In other instances, the judge might simply find the total number so shockingly large that she intuitively feels that the number would represent an extraordinary coincidence.¹⁸⁹ Suppose that the accused is charged with the evening theft of a Harley-Davidson motorcycle from the driveway where it was parked. Although the nighttime hour made the observation conditions less than ideal, the owner testifies that when she heard a noise on the driveway, she looked out and saw the thief. At a later lineup, she identifies the accused.¹⁹⁰ In the same two-month period, four other Harley-Davidson motorcycles were stolen from owners’ driveways during the evening in the same locale. As in the charged incident, the owners pick out the accused at subsequent lineups. The theft of a motorcycle from a driveway at night hardly qualifies as a distinctive *modus operandi*. It is a hackneyed method of committing the crime. However, it is likely to strike the judge as an implausible coincidence that such a large number of motorcycle owners would independently make such similar false complaints against the accused in such a small window of time.

In still other instances, the prosecution might have empirical data that the judge could rely on to conclude that the combination of the charged and uncharged accusations amounts to an exceptional coincidence. In *Boardman*, the accused was the headmaster of a school.¹⁹¹ Given its potential civil liability for misconduct of its employee teachers, any major school district is likely to maintain data about the number of reports filed against each teacher and the nature of such complaints, e.g., whether they relate to racial discrimination or sexual misconduct.¹⁹² Assume that the district’s records demonstrated that within the past five years, the average teacher was accused of sexual misconduct at most once. If there have been five such complaints against a particular teacher in the same time period, the number of complaints against this teacher far exceeds the normal frequency.

187. *The Doctrines*, *supra* note 167, at 597-98.

188. *Id.*

189. Imwinkelried, *supra* note 78, at 435-36 (analyzing *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973)).

190. FED. R. EVID. 801(d)(1)(C) (a prior identification).

191. *R v. Boardman*, [1975] AC 421 (HL) 423 (appeal taken from Eng.).

192. See generally *The Doctrines*, *supra* note 167, at 591 (asserting that government agencies and private research companies compile data).

Yet, in many cases it will prove to be very difficult for the prosecution to establish a reliable basis for a frequency estimate.¹⁹³ Numerous factors can impact the frequency. One factor is the size of the potential class of accusers. If the accused is a teacher in regular contact with a large number of students or a nurse assigned to a huge ward at a major urban hospital, the number of potential accusers increases; and the frequency is likely to increase accordingly. Another pertinent factor is the attractiveness of the accused as a target. For obvious reasons, wealthy, “deep pocket” persons are more attractive targets than destitute individuals. Similarly, by virtue of their profession or line of work certain individuals are more attractive targets because they are more vulnerable to accusations. A politician involved in a re-election campaign could be an especially vulnerable target.

These factors certainly do not exhaust the considerations that could affect the number of complaints that might be lodged against a similarly situated, innocent person. We have seen that there are numerous bases on which the judge could develop a trustworthy estimate of the frequency. However, what if in a given case, at the second step in analysis the judge concludes that the prosecution has failed to present any relevant information about a salient factor affecting the frequency? If the judge reached that conclusion, the judge should refuse to admit evidence of the other accusations and the related incidents under the doctrine.¹⁹⁴ If a judge admits evidence too liberally under the doctrine, the uncharged misconduct evidence can easily lead to a wrongful verdict.¹⁹⁵ The core notion of the doctrine of chances is proof of an extraordinary coincidence.¹⁹⁶ When the judge finds that there is no sensible basis—neither common sense nor empirical data—for estimating the frequency of accusations, there is no principled basis for admitting the evidence. If the judge were to admit the evidence even though it did not satisfy the foundational requirements for any non-character theory such as the doctrine of chances or *modus operandi*, there would be an intolerable risk that the jury will default to forbidden character reasoning.

193. Distinguish the question of the independence of the accusations. As Lord Wilberforce cautioned in *Boardman*, it may be inappropriate to use doctrine of chances reasoning when the accusations are not independent. *Boardman*, [1975] AC 421 (HL) 444. More specifically, he pointed out that the “publicity” for one or more of the accusations may taint other accusations. For that matter, the publicity may also increase the number of complaints; for a variety of reasons, the publicity may prompt some persons to make accusations that they otherwise would not have leveled. In such a situation, the judge could well bar the evidence for a lack of independence rather than a failure to establish an extraordinary coincidence exceeding the normal incidence.

194. *The Doctrines*, *supra* note 167, at 588, 592.

195. *See, e.g., id.* at 593.

196. *Id.* at 595-96.

III. CONCLUSION

In the past, there have been occasional references in the American legal literature to the use of the doctrine of objective chances to justify the admission of uncharged misconduct evidence to prove identity.¹⁹⁷ There have also been a handful of American precedents invoking the doctrine.¹⁹⁸ However, that may change in the near future. The sheer number of accusations in the Cosby and Weinstein scandals has crystalized the issue of the propriety of employing the doctrine of chances for that purpose. As previously stated, in the Cosby case the prosecution made that very argument in support of its motion to admit the testimony of 19 accusers other than the named victim.¹⁹⁹

Although most of the prior precedents applying the doctrine have limited its use to proving actus reus and mens rea, there is a powerful argument for extending the doctrine to allow the admission of uncharged misconduct evidence to establish identity. As we have seen, this extension would not violate the character evidence prohibition; rather than relying on an assumption about the accused's subjective character, the doctrine rests on probability notions and the objective improbability of extraordinary coincidences. In the words of two of the Lords in *Boardman*, excluding the evidence would be "an affront to common sense."²⁰⁰ The thrust of the argument is that the evidence supports a compelling, common-sense inference that only "an ultra-cautious jury"²⁰¹ would reject.

Yet, the same Lords recommended that trial judges exercise "great caution"²⁰² in relying on this extension of the doctrine. That recommendation is sound. Not only is uncharged misconduct evidence prejudicial. Moreover, there is a huge potential for confusion in this setting. A trial judge employing this extension must be cognizant of three distinctions: the first between character and non-character theories of logical relevance; the second between two non-character theories, namely, modus operandi and the doctrine of objective chances; and a third among the three different uses of the doctrine of chances, that is, proof of actus reus as opposed to mens rea as opposed to identity. These varying theories have very different foundational requirements. It can be a challenge to draw those lines not only during the judge's own admissibility analysis but also in the wording of the limiting

197. See *supra* text accompanying notes 44-45.

198. See *supra* text accompanying note 43.

199. Francescani, *supra* note 2.

200. R v. Boardman [1975] AC 421 (HL) 453 (Lord Hailsham) (appeal taken from Eng.).

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

202. *Id.* at 452, 456 (Lord Hailsham).

instruction that the judge must give the jury about the proper use of the evidence.²⁰³

It is imperative that the courts not only clearly articulate the differences among the theories but also that they enforce the limitations on each theory “with some rigor.”²⁰⁴ In *Boardman*, Lord Hailsham was correct in asserting that given a convincing show of an exceptional coincidence, the exclusion of the evidence could be “an affront to common sense.”²⁰⁵ However, if the courts apply the extension loosely and fail to painstakingly observe the distinctions among character evidence, the modus theory, and the various uses of the doctrine of objective chances, the admission of the evidence could result in an affront to justice.

203. FED. R. EVID. 105.

204. MUELLER & KIRKPATRICK, *supra* note 80, § 434, at 830.

205. *Boardman*, [1975] AC 421 (HL) 453.