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David J. Karp

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RESPONSE TO PROFESSOR IMWINKELRIED'S COMMENTS

DAVID J. KARP*

I would like to thank Professor Imwinkelried for his perceptive remarks, which reflect agreement with my suggestions on a basic point: The current approach to evidence of uncharged acts is unsatisfactory, and alternatives should be considered. Our area of possible disagreement is whether the desirable alternatives include the pending legislative proposal for sex offense cases. Professor Imwinkelried's remarks raise five major points:

The first point is characterizing Rule 404(b) as a "compromise" measure.¹ However, what's an intermediate approach depends on what positions one chooses to characterize as the extremes. You might say that Rule 404 is a compromise in that prosecutors and defense attorneys dislike it for opposite reasons, but splitting the difference between rival groups of lawyers is not a sound criterion for formulating rules of evidence.

I think the pending legislative proposal can fairly be characterized as a moderate reform measure. It amounts to a kind of codification of a tendency that has substantial support in both traditional and contemporary judicial precedent. It does not repeal Rule 404(b) across the board; it does not admit evidence of offenses which are dissimilar in character from the charged offense; and it does not impose a mandatory rule of admission that supersedes the general standards of the rules of evidence. It also does not have any effect on cases other than sexual assault and child molestation cases.

On the other hand, Rule 404(b) cannot be characterized as a "compromise" position on the admission of evidence of the defendant's criminal propensities, because it takes the most extreme possible

* Senior Counsel, Office of Policy Development, United States Department of Justice; B.A. 1972, Columbia College; Ph.D. 1975, Massachusetts Institute of Technology; J.D. 1979, Columbia University School of Law. This statement, which is a companion piece to *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15 (1994), was presented as part of an address to the Evidence Section of the Association of American Law Schools ("AALS") on January 9, 1993. The statement as printed here is unchanged from the text presented to the AALS Evidence Section, except for editing to conform to the *Chicago-Kent Law Review*'s conventions regarding citation form and footnote documentation. The bracketed footnotes in this publication were added in the editing process and were not included in the original text of the address.

[1. Edward J. Imwinkelried, *Some Comments about Mr. David Karp's Remarks on Propensity Evidence*, 70 CHI.-KENT L. REV. 37, 38.]

position on that issue. It categorically bars the admission of evidence for that purpose, no matter how probative it is.

The second point raised by Professor Imwinkelried's comments is the comparison to the rules of other common law countries, and particularly England.² If we make comparisons to foreign legal systems, limiting the scope to common law jurisdictions is a skewed approach. Other foreign systems may be more willing to explore the defendant's character in criminal trials, and to admit information concerning his earlier offenses. For example, it is stated that in France, "the history of the accused, including his criminal record, is read out at the beginning of the trial."³ This information is provided to the judges and the jurors⁴ as a matter of course. In seeking to learn from other countries, the ones we look at shouldn't be limited to a selected class whose rules fall near one end of the spectrum.

Getting back to England, the conditions for admitting this type of evidence are not that restrictive. The recent English decision cited by Professor Imwinkelried (*R. v. P.*)⁵ was a sex offense case involving a defendant who had been molesting his two daughters. The admission of the evidence was found to be proper, although the facts were not unusual for that type of offense. The House of Lords expressly held that "striking similarity" among the offenses is not required, and disapproved lower court decisions which held that "similarity beyond . . . the pederast's or the incestuous father's stock-in-trade" is a condition of admissibility.⁶ The English rule also does not limit admission to cases involving any particular number of victims or incidents.⁷

The third point concerns the tendency of courts in the United States to adopt a broad approach to admission in sex offense cases.⁸ I have a different impression of the contemporary decisions in this area. For every recent decision that rejects a principle of broad admission in

[2. *Id.* at 39-41.]

3. Criminal Law Revision Committee, Eleventh Report—Evidence (General), 1972, Cmnd. 4991, at 49.

4. See generally Edward A. Tomlinson, *Nonadversarial Justice: The French Experience*, 42 M.D. L. REV. 131, 143-44 (1983) (tribunal in serious criminal cases in France includes three judges and nine lay jurors); Office of Legal Policy, U.S. Dep't of Justice, *The Admission of Criminal Histories at Trial*, 22 U. MICH. J.L. REF. 707, 751-53 (1989) [hereinafter *Histories*] (use of jurors and juries in criminal trials in European systems generally, including decision of European Commission on Human Rights upholding admission of previous convictions "even in cases where a jury is to decide on the guilt of an accused.").

5. [1991] 3 All E.R. 337.

[6. *Id.* at 337, 339, 346-48.]

7. See DPP v. Boardman, [1975] A.C. 421, 428, 460 (rejecting defense argument that more than two instances are required).

[8. Imwinkelried, *supra* note 1, at 42-43.]

sex offense cases, there is another one that adopts the principle, though achieving that result may require contortionist's tricks with Rule 404(b). I have given a few examples in my remarks, and many others can be cited. The obstacles to admission are now greater for the courts, but the inclination to admit the evidence is still there.

The fourth point is inferences from the practices of American courts in this area.⁹ Courts in the United States have never been compelled to admit evidence of similar crimes on a broad basis in sex offense cases. If they did not believe that this type of evidence was more probative than prejudicial, they would not have admitted it. When one examines the decisions that have adopted special rules for sex offense cases, they do not say that the protection of possibly innocent defendants must be sacrificed in order to nail sex offenders by any possible means. Rather, the decisions tend to focus on the probative value of this type of evidence, and the need to admit it in order to achieve accurate verdicts.

For example, in *State v. Charles L.*,¹⁰ the Supreme Court of West Virginia adopted an overt "lustful disposition" exception for child molestation cases, despite state evidence rule 404(b), and despite earlier precedent to the contrary.¹¹ Following a review of the issues of proof in child molestation cases, the court concluded that "[i]n consideration of all these factors, the probative value of such testimony far outweighs the potential for unfair prejudice."¹²

The fifth point is the import of empirical studies of character.¹³ However, the case for the proposed rules does not depend on controversial theories about the nature of human character.

Is past criminal conduct predictive of subsequent criminal conduct? The point is taken for granted in other contexts. For example, the defendant's criminal history weighs heavily in pre-trial release determinations and in sentencing decisions, both as a statutory matter and as a matter of judicial discretion. It often determines whether a defendant is locked up or set free before trial, and whether he is imprisoned for 20 years rather than 5 after conviction. This is primarily because what a defendant has done in the past is taken as a good indication of what he's likely to do in the future if not adequately restrained or deterred.

[9. *Id.* at 43.]

[10. 398 S.E.2d 123 (W. Va. 1990).]

[11. *Id.* at 131-33.]

[12. *Id.* at 133.]

[13. Imwinkelried, *supra* note 1, at 43-46.]

Susan Davies' article,¹⁴ cited by Professor Imwinkelried, differs with his view of the import of the psychological theories described in that article. The author rejects the argument that psychological theory entails the unreliability of character evidence in the form of a few incidents or a single incident.¹⁵ She notes that some legal commentators have fallaciously argued that such evidence is not probative of conduct because one or two observations do not support an inference of behavioral consistency in varying situations.¹⁶ However, she rebuts this argument by observing that "where situations are similar, past behavior is an excellent indicator of a person's likely future behavior."¹⁷ Davies' article also concludes that contemporary psychological findings do not substantiate the view that character evidence is likely to be prejudicial.¹⁸

A more basic response to the alleged uncertainty of predicting later conduct from earlier conduct is that the objection simply misconceives the issue. The question is not one of predicting in the abstract that a person will commit crimes, or of predicting that he will do so in certain situations. Rather, the question of admission arises where there is specific non-character evidence that a crime has been committed, and that the defendant is the one who did it. In sex offense cases, this normally includes the victim's accusation. The hypothesis of the defendant's innocence then depends on the possibility that the victim is lying or mistaken, and that the other evidence of guilt is also false or misleading.

Presenting the charged incident in isolation from the defendant's broader course of conduct does not provide the basis for a fair assessment of this possibility. For all the jurors know, they are being asked to credit charges of heinous conduct against a person who is not criminally disposed in general, and who has otherwise led a blameless life.

This misleading portrayal of the case can be corrected through the admission of evidence of similar conduct of the defendant on other occasions, which tends to show that he is capable of committing such crimes, and disposed to do so. A defendant's history of sexually assaultive conduct evidences a willingness to engage in violence to co-

[14. Susan Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504 (1991).]

[15. *Id.* at 519-20.]

[16. *Id.* at 519.]

[17. See *id.* at 519-20.]

[18. *Id.* at 523-33; see also *Histories*, *supra* note 4, at 732-33 (finding that juries are more likely to acquit than judges though aware of the defendant's criminal record in a large proportion of all cases).]

erce sexual acts. A defendant's history of child molestation provides evidence that children are within his zone of sexual interest. The value of this type of evidence in assessing the plausibility of the charge is not limited to cases involving a strikingly similar series of crimes or numerous uncharged incidents. How great that value is under the facts of particular cases is properly a question for the jury.

Finally, I would emphasize the importance of taking account of considerations of probability in rethinking the rules in this area, as well as considerations relating to character or propensity. For example, the *Boardman* case in England¹⁹ involved a headmaster who was soliciting sex from students in his school. The case is often described as establishing the admissibility of evidence of character in certain circumstances, but the debate in the case shows reliance on a different rationale—the improbability that multiple victims would independently fabricate similar stories. Inferences relating to probability are a distinct and equally important rationale supporting the admission of evidence of similar crimes. Analyses that fail to take account of this point are overlooking half of the issue.

19. DPP v. *Boardman*, [1975] A.C. 421.

