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SOME COMMENTS ABOUT MR. DAVID KARP'S REMARKS ON PROPENSITY EVIDENCE

EDWARD J. IMWINKELRIED*

INTRODUCTION

One of the most interesting events in the recent history of the American character evidence doctrine was the Bush Administration's proposal of Federal Rules of Evidence 413-15.1 Today we are privileged to have with us Mr. David Karp, one of the Justice Department officials instrumental in drafting that proposal. As his remarks indicate, the proposed rules would significantly change the character evidence doctrine.2

On the one hand, I agree with Mr. Karp that it is appropriate to consider changing the doctrine. The character evidence prohibition has long been a target of criticism by thoughtful commentators.3 More recent developments, however, make this an especially apropos time to consider this topic. To begin with, there is a growing realization that the rigid American character evidence prohibition is out of step with the more liberal doctrines in effect in other progressive common-law jurisdictions such as England.4 Moreover, the latest psychological research suggests that character evidence may be more probative than we have traditionally assumed it to be.5 For both of these reasons, we should rethink the policy underlying the firm

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1. For a discussion of the content of the proposed rules, see David J. Karp, Evidence of Propensity and Probability in Sex Offense Cases and Other Cases, 70 CHI.-KENT L. REV. 15 (1994).
2. See id.
prohibitions on character evidence codified in Federal Rules of Evidence 404-05.

On the other hand, after some thought, I believe that at this juncture, it would be unwise to adopt the proposed Federal Rules. The proposed rules would relax the character evidence doctrine beyond the point to which it has been liberalized in other common-law systems. Further, it would be premature to premis any major alterations of the doctrine on the new line of psychological research. To be sure, we should carefully monitor that ongoing research and be more open-minded about the possibility of revising the character evidence prohibition. However, the case has not yet been made for the type of fundamental change embodied in the proposed rules.

I. THE STATUS QUO AS A COMPROMISE POSITION

At first blush, the choice appears to be between two polar extreme positions. At one extreme is the status quo, the character evidence prohibition in Rules 404-05. With few exceptions, those statutes firmly forbid litigants from using a person's character as circumstantial proof of conduct. Under Rule 404(b), if the litigant proposes introducing evidence of a person's uncharged misconduct, the litigant must ordinarily identify a noncharacter theory of logical relevance. Seemingly at the other extreme is the Bush Administration's proposal to abolish the prohibition at least in certain categories of cases. As Mr. Karp tells us: "the proposed rules of admissibility mean what they say. Evidence admitted under the rules could be considered for its bearing on any matter to which it is relevant. This includes questions of the defendant's propensity or disposition to commit sex crimes."

However, it is a mistake to conceive the choice in these terms. In truth, the current doctrine is a compromise position occupying the middle of the spectrum of possibilities. Professor Lewis made that point emphatically in his noted 1989 article. Like Mr. Karp, Professor Lewis points out that the courts frequently admit uncharged misconduct. He asserts that as administered by the courts, the rule is strongly biased in favor of admitting evidence impugning the ac-

7. See Fed. R. Evid. 404(b).
8. Karp, supra note 1, at 18.
10. See generally id.
cused's character.\textsuperscript{11} He urges revising the evidentiary standard to make admission the exception rather than the rule.\textsuperscript{12} His proposal—rather than Rules 404-05—is the polar extreme to the Bush Administration's proposal.

In contrast, Rules 404-05 represent a compromise position. As Mr. Karp twice acknowledges, there is an underlying "tension" in this doctrinal area—a tension generated by the competing interests in effectively enforcing penal laws and ensuring the accused a fair trial.\textsuperscript{13} The current rules give both interests substantial protection. The rules certainly do not ignore the former interest. As Mr. Karp and Professor Lewis have both noted, in many cases the test set out in Rule 404(b) proves flexible enough to permit the jury to be informed of the accused's past misdeeds;\textsuperscript{14} and that information substantially increases the probability of the accused's conviction. I suspect that Mr. Karp would also agree that the current rules are more protective of the accused's interests than the proposed rules. Mr. Karp may believe that, in large measure, that protection is undeserved; but that measure of protection exists under Rules 404-05.

Most prosecutors would contend that Professor Lewis' position depreciates the interest in vigorous law enforcement. In the same vein, many defense counsel would undoubtedly argue that proposed Rules 413-15 slight the accused's interest in a fair trial. Both sides charge that the current Rules 404-05 are unduly solicitous of the other side's interest. I lecture on Rule 404(b) for both the National College of District Attorneys and the National Association of Criminal Defense Lawyers, and I frequently hear these charges. Both sides complain about the current rules precisely because those rules embody a compromise position which balances and respects both interests. Adopting the proposed rules or Professor Lewis' position would not simply shift us from one polar extreme view to another; instead, it would move us from a centrist compromise to one of the extremes.

Adopting proposed Rules 413-15 would not only shift us to an extreme position; the proposed rules would also push us well beyond

\textsuperscript{11} Id. at 348.
\textsuperscript{12} Id. at 352.
\textsuperscript{13} Karp, supra note 1, at 30-31.
\textsuperscript{14} Id. at 32; Lewis, supra note 9, at 293 n.12, 323-24, 341-42, 356. See Lynn A. Helland et al., An Asymmetrical Approach to the Problem of Peremptories: A Rebuttal, 30 CRIM. L. BULL. 242 (1994) (an article coauthored by three federal prosecutors). The authors state that the impact of the character evidence prohibition codified in Rule 404(a) is "minor." Id. at 250 n.13. They explain that "the practical effects" of the prohibition are "minor" precisely "because the many legitimate uses of prior bad acts evidence authorized under Rule 404(b) mean that the most relevant evidence of a person's bad character is still presented to the jury." Id.
the extent to which other common-law jurisdictions have been willing to liberalize the character evidence prohibition. It is true that the current rules embody a more categorical prohibition than other jurisdictions such as England recognize. In 1975 in *R. v. Boardman*, the House of Lords rejected a rigid distinction between character and noncharacter reasoning. However, in their speeches in *Boardman*, the Lords made it clear that they were sanctioning character reasoning only when disposition has exceptional probative value in the case—fact situations in which, for instance, the accused has committed a number of strikingly similar uncharged acts. *Boardman* did not signal the routine admission of character evidence. As one English commentator puts it, "[l]ike Banquo's ghost," the character-noncharacter distinction reappears in the English cases. Even after *Boardman*, in the great majority of cases, the English courts have rejected character theories of admissibility. Character theories are accepted only occasionally when they possess the highest cogency. In addition, the English courts have gone farther than the American courts in developing the doctrine of chances as a noncharacter theory of admissibility—using not only the version of the theory based on the objective improbability of so many accidents but also employing the variation of the theory based on the improbability of so many similar, false accusations against the same accused.

To understand the role of the character evidence doctrine in other common-law systems, it is critical to view the doctrine in context—specifically, in the context of balancing probative value against probative danger. In its most recent pronouncement on the subject, the House of Lords in *R. v. P.* reiterated that the proponent has the burden of convincing the trial judge that the probative value of the

20. Id. at 43.
evidence outstrips any attendant probative dangers. Federal Rule 403 allocates the burden quite differently. The Advisory Committee Note to the 1990 amendment of Rule 609 purports to clarify Rule 403. That note makes it clear that Rule 403 assigns the risk of non-persuasion to the opponent and that the opponent must convince the trial judge that the incidental probative dangers "substantially" outweigh the probative value. As Professor Lewis notes, many courts had adopted that construction of Rule 403 even earlier. The net result is that while the English courts usually reject character reasoning even after *Boardman*, that reasoning would generally be acceptable under the proposed Rules 413-15. Mr. Karp's remarks confirm that. He quotes the analysis statement for the proposed Sexual Assault Prevention Act which declares: "It is not expected . . . that evidence admissible pursuant to proposed Rules 413-15 would often be excluded on the basis of Rule 403. . . . The presumption is in favor of admission."

It just so happened that when Professor Nance asked me to speak at this program, I was in the midst of preparing an article on character evidence for the *Anglo-American Law Review* at the University of Bristol. I discussed and quoted proposed Rules 413-15 in the draft article. I received comments from the editor, Professor Partington, and the reviewer to the effect that I did not understand how significantly the proposed rules differ from the contemporary character evidence doctrine in England. Their comments were that the wording of the proposed rules goes "well beyond *Boardman*" and purportedly allows the introduction of "a whole range of prejudicial . . . evidence" which English courts would exclude. Those comments should give us pause. In light of those comments and the compromise nature of the current rules, we should embrace the proposed rules only if the case for their adoption is compelling. It is not.

24. See id.
25. *FED. R. EVID.* 609 (advisory committee's note to the 1990 Amendment).
26. Id.
27. Lewis, *supra* note 9, at 293.
II. THE WEAKNESS OF THE CASE FOR OVERTHROWING THE STATUS QUO

Mr. Karp correctly points out that the underlying assumption of the American character evidence prohibition is that lay triers of fact will misuse character testimony in the technical sense that they will be inclined to overestimate its probative value. He questions that assumption and points to two types of evidence that factfinders can accurately assess and properly utilize character testimony: judicial experience and empirical research.

*Judicial experience.* Mr. Karp suggests that we can look to judicial “experience” as some evidence that triers of fact will not overvalue character testimony. He states that there is a widespread judicial tendency to be “inclined to admit evidence of other sex crimes by the defendant in sex offense prosecutions.” He regards this tendency as proof of judicial experience which is more trustworthy than an “a priori” presumption that “particular categories of evidence are . . . prejudicial.” There are several flaws in that suggestion.

First, although at one time there may well have been a judicial consensus that one way or another uncharged misconduct evidence should be admitted in sex offense prosecutions, that consensus is eroding. In several jurisdictions in which there was decisional authority allowing the admission of uncharged misconduct to establish an accused’s lustful disposition, courts have held that the authority is no longer good law after the passage of an evidence code patterned after the Federal Rules. Other jurisdictions have decided as a matter of common law to overrule that authority. One decision, *Lannan v. State,* was rendered by the Indiana Supreme Court in October 1992. The court noted that in the past, many courts had carved out a special lustful disposition theory for admitting uncharged misconduct evi-

31. Karp, supra note 1, at 22.
32. See id. at 23.
33. Id.
34. Id.
35. Id.
36. See Reed, supra note 5.
Indeed, the court referenced some of the cases cited by Mr. Karp. However, even after considering those cases and evidence of recidivism rates among sex offenders, the court opted to abandon the lustful disposition exception.

Second, even if the consensus were still intact, it would be questionable to treat the existence of the consensus as persuasive evidence that triers of fact can accurately value character evidence. There are obvious explanations for the existence of the old consensus other than a widespread judicial belief that triers of fact are competent to gauge the probative worth of character testimony. There are other factors at work. The Lannan court points out that many of the old decisions were driven by a felt need to admit evidence to corroborate the complainant's testimony about a secretive crime. Mr. Karp himself states that the need for uncharged misconduct evidence "appeared [to many courts] to be particularly exigent" in sex offense prosecutions. In the final analysis, many of the reasons advanced for expanding the admissibility of character evidence are anti-crime arguments resting on social policy—arguments having little or nothing to do with theories about the probative worth of character testimony. It is one thing to demonstrate that there are many cases straining to justify the admission of uncharged misconduct in sex offense cases, but it is another matter to infer a widespread judicial perception that character is highly predictive of conduct.

**Empirical research.** In addition to asking us to eschew reliance on "a priori" assumptions about jurors' ability to evaluate character evidence, Mr. Karp invites us to consider the empirical studies of jurors' ability. Although there is little discussion of those studies in the text of Mr. Karp's remarks, in footnote 32 he cites the earlier Justice Department report entitled *The Admission of Criminal Histories at Trial.* That report discusses the studies at some length and challenges the assumption that psychological data supports the finding

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40. Id. at 1335.
42. Lannan, 600 N.E.2d at 1337.
43. Id.
44. Karp, supra note 1, at 30.
46. Karp, supra note 1, at 27.
47. Id. at 20 n.32 (citing Office of Legal Policy, U.S. Dep't of Justice, *The Admission of Criminal Histories at Trial,* 22 U. MICH. J.L. REV. 707 (1989) [hereinafter Histories].
that laypersons routinely overestimate the value of character evidence.\textsuperscript{48}

Since the release of that report, another article has been published which presses the same argument, Ms. Davies' 1991 article.\textsuperscript{49} Her article is highly relevant to our topic today. At the outset of her article, Ms. Davies mentions the previous articles reviewing the psychological literature.\textsuperscript{50} By and large, those articles concluded that the research data indicates that character is a poor predictor of conduct.\textsuperscript{51} However, Ms. Davies contends that psychologists are now reassessing the earlier research.\textsuperscript{52}

After mentioning the earlier legal articles, she describes the evolution of the psychological research on this issue.\textsuperscript{53} As she points out, in the 1950s the trait or generality theory was dominant.\textsuperscript{54} The gist of the theory is that each person has stable character traits which produce "consistent behavior in widely divergent situations."\textsuperscript{55} According to this theory, even when there is only a "miniscule sample[ ] of [the person's] prior behavior," it is possible to draw a trustworthy inference as to character and then to use that inference as the basis for a further, reliable inference as to the person's conduct on a particular occasion.\textsuperscript{56}

Ms. Davies then notes that the trait theory came under sharp attack in the 1960s and 1970s—when the Federal Rules of Evidence were being drafted.\textsuperscript{57} Mischel led the assault on the trait theory and championed the competing theory of situationism.\textsuperscript{58} Mischel argued that there was little empirical support for assuming cross-situational consistency.\textsuperscript{59} The situationist theory posits that environmental factors or external stimuli largely determine conduct.\textsuperscript{60} Situationist theorists denied that persons possess relatively permanent character

\textsuperscript{48} Histories, supra note 47, at 732-33.

\textsuperscript{49} Davies, supra note 5, at 504. See also Bryden & Park, supra note 5, at 561-65; Reed, supra note 5, at 146-56.

\textsuperscript{50} Davies, supra note 5, at 505.


\textsuperscript{52} Davies, supra note 5, at 506.

\textsuperscript{53} Id. at 511-23.

\textsuperscript{54} Id. at 504.

\textsuperscript{55} Id. at 513.

\textsuperscript{56} Id.

\textsuperscript{57} Id. at 514-15.

\textsuperscript{58} Id. at 514.

\textsuperscript{59} Id.

\textsuperscript{60} Id. at 515.
traits which are predictive of conduct even in highly similar situations.61 Based on situationism, some legal commentators urged that character evidence has absolutely “no probative value” on the question of a person’s conduct on a specific occasion.62

However, Ms. Davies adds that just as trait theory gave way to situationism, situationism has waned.63 Today the prevailing theory is interactionism.64 The interactionist theory is that a person’s conduct is a function of both the person’s disposition and the situation or environment.65 Interactionists believe that if there is a sufficient sample of the person’s behavior in similar situations, the person’s conduct in an analogous situation can be accurately forecast on the average.66 As Ms. Davies explains, interactionist theory is not only inconsistent with the situationist theory dominant when the Federal Rules were drafted; the theory also cuts in favor of liberalizing the character evidence prohibition67 and moving in the general direction which Mr. Karp has advocated.

However, there are two important caveats. Even if we take contemporary interactionist theory at face value, the proposed rules go much farther than that theory warrants. First, interactionists emphasize that you need a large sample of instances of the person’s conduct in similar situations to draw a reliable inference as to the person’s character trait. Most are of the view that a trustworthy inference cannot be drawn “on the basis of one or two observations of behavior ....”68 However, the proposed rules would permit a trier of fact to do precisely that. Mr. Karp tells us that the rules mean what they say;69 and if they do, they mean that a prosecutor would be permitted to introduce a single other instance of the accused’s behavior and urge the jury to draw a character inference and make a prediction of conduct based on that inference. A scrupulous interactionist would balk at drawing that inference and making that prediction.

Second, we should perhaps be hesitant to legislate on the basis of the current popularity of the interactionist theory. As Ms. Davies states, trait theory had a large number of adherents until the mid-

61. Id.
63. Davies, supra note 5, at 515.
64. See id. at 518.
65. Id.
66. Id. at 517-20.
67. Id. at 519.
68. Id.
69. Karp, supra note 1, at 18.
In a relatively short time—a little more than a decade—situationism both came into and went out of vogue. Interactionism is now the most widely followed theory; but it is hardly as well established a psychological theory as, for example, some of the propositions about the frailties of human memory. Given the rather quick rise and fall of the trait and situationist theories, we would be well advised to wait until there is further research data solidifying interactionism.

CONCLUSION

The Bush Administration’s advocacy of proposed Rules 413-15 has done a real service to both the bar and evidence scholars. The mere proposal serves to remind us that just as the United States enforces a more rigid version of the hearsay rule than most common-law jurisdictions apply, we have a more categorical character evidence prohibition than is currently in effect in other common-law systems. Federal Rules 404-05 erect a virtually “absolute bar” against character reasoning; unless the defense overreaches and the prosecution can invoke curative admissibility, the prosecution is “never” permitted to introduce uncharged misconduct evidence on a character theory of logical relevance. In Boardman, the Lords rejected that view. They argued that the admissibility question should turn on the degree of probative value rather than simply the kind of probative value.

It is therefore time to rethink the American jurisprudence of character evidence. However, it probably is not yet time to enact proposed Rules 413-15. The growing recognition of the doctrine of chances as a noncharacter theory acceptable under the current Rule 404(b) certainly reduces the need to adopt the proposed rules. If enacted, those rules would commit us to an extreme view; those rules would relax the character evidence prohibition beyond the point permitted by other common-law systems. The advocates of the proposed rules certainly have not yet constructed a compelling case based on the available empirical data. Concededly, the interactionist theory

70. Davies, supra note 5, at 513.
71. Id. at 514-15.
73. United States v. Arias-Montoya, 967 F.2d 708, 709 (1st Cir. 1992) (referring to Rule 404(b)).
75. See Boardman, 1975 App. Cas. 421.
76. Id. at 427-28.
77. See Imwinkelried, supra note 22.
lends impetus to the movement to relax the prohibition. However, it is questionable whether that theory has crystallized to the point that it can serve as a firm basis for legislative change. Moreover, just as the proposed rules sweep beyond the reforms effected in other common-law jurisdictions, the rules exceed interactionist theory; interactionists demand a substantial sample of behavior before inferring a character trait, and the proposed rules would allow a prosecutor to invite that inference based even on a single, isolated act.

Long ago Professor Kenneth Culp Davis urged evidence reformers to adopt a "full-bodied" empirical approach. Evidence scholars have slowly moved in that direction. The interactionist theory is promising; and if it fulfills its promise—if future research gives a better sense of the size of the sample of behavior needed to draw a reliable character inference and the degree of similarity needed to assure cross-situational consistency—it will be time to adopt legislation such as proposed Rules 413-15. That time has not yet arrived.

78. See supra notes 64-68 and accompanying text.