

10-1-2001

The Gate(way)s Of Hell And Pathways To Purgatory: Eradicating Common Law Protections In The Newly Sculpted Character Evidence Rules Of The United Kingdom's 2003 Criminal Justice Act

Chris Chambers Goodman

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Common Law Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Chris Chambers Goodman, *The Gate(way)s Of Hell And Pathways To Purgatory: Eradicating Common Law Protections In The Newly Sculpted Character Evidence Rules Of The United Kingdom's 2003 Criminal Justice Act*, 66 U. Miami L. Rev. 79 (2011)

Available at: <https://repository.law.miami.edu/umlr/vol66/iss1/4>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

The Gate(way)s of Hell and Pathways to Purgatory: Eradicating Common Law Protections in the Newly Sculpted Character Evidence Rules of the United Kingdom's 2003 Criminal Justice Act

CHRIS CHAMBERS GOODMAN*

INTRODUCTION	80
I. PART ONE: A BRIEF REVIEW OF THE CHARACTER EVIDENCE RULE AND ITS DEVELOPMENTS	82
A. <i>Relaxing the Rule</i>	83
B. <i>Obviating the Rule in Certain Types of Federal Cases</i>	85
C. <i>Reversing the Rule from Exclusion to Inclusion in the United Kingdom</i> ...	86
II. PART TWO: RULES GOVERNING ADMISSIBILITY OF THE BAD CHARACTER OF CRIMINAL DEFENDANTS UNDER THE 2003 CJA	87
A. <i>Gateway (a): Mutual Agreement</i>	89
B. <i>Gateway (b): When the Defendant Brings in His Own Bad Character</i>	89
C. <i>Gateway (c): Important Explanatory Evidence for the Jury</i>	90
D. <i>Gateway (d): Important Matter at Issue Between the Prosecution and Defense</i>	91
1. USING PRIOR BAD ACTS TO SHOW PROPENSITY TO COMMIT THE CHARGED CRIME	91
2. DEMONSTRATING A PROPENSITY FOR UNTRUTHFULNESS	94
E. <i>Gateway (e): Substantial Probative Value for an Important Matter at Issue Between Co-defendants</i>	95
F. <i>Gateway (f): To Correct a False Impression Given by the Defendant</i>	97
G. <i>Gateway (g): Defendant Attacks Another Person's Character</i>	100
III. PART THREE: CONTRASTING OUTCOMES UNDER THE 2003 CRIMINAL JUSTICE ACT WITH THE FEDERAL RULES OF EVIDENCE	102
A. <i>Gateway (a) Does Not Have a Corresponding Federal Rule</i>	102
B. <i>Gateway (b) is More Restrictive than FRE 404</i>	103
C. <i>Gateway (c) is Noticeably Broader than FRE 404(b)</i>	104
D. <i>Gateway (d) Exceeds the Scope of the FRE by Disregarding the General Rule of FRE 404 that Propensity Evidence Generally is Prohibited</i>	106
E. <i>Gateway (e) Opens Avenues Not Available Under the FRE</i>	108
F. <i>Gateway (f) is Substantially Broader than FRE 404 and FRE 608</i>	110
G. <i>Gateway (g) Broadens the Time Frame for Opening the Door to Character Evidence</i>	111

* Chris Chambers Goodman, Professor of Law, Pepperdine University School of Law, A.B. Harvard *cum laude*, J.D., Stanford Law School. The author wishes to thank the Dean's Summer Research Fund, Senior Research and Student Services Librarian Don Buffaloe, and research assistant Diana Fields, whose diligent research and editing work on both sides of the Atlantic Ocean made this work possible. In addition, the author expresses her gratitude for the careful editing performed by the staff of the University of Miami Law Review. This article is dedicated to all the students, faculty, and staff from Pepperdine's 2010 Summer London Study Abroad Program, for inspiring me to look beyond the boundaries of my own legal training and explore pathways through the United Kingdom's legal system.

IV. PART FOUR: EVALUATING THE MAJOR DISTINCTIONS AND RECOMMENDATIONS FOR REFORM	112
A. <i>Four Important Distinctions Between the 2003 CJA and the FRE</i>	112
1. TESTIMONY IS NOT NEEDED TO TRIGGER THE DEFENDANT'S CHARACTER FOR UNTRUTHFULNESS	113
2. EVIDENCE ADMITTED FOR ONE PURPOSE CAN BE USED FOR ANOTHER PURPOSE	115
3. PRETRIAL STATEMENTS OPEN A GATEWAY TO BAD CHARACTER EVIDENCE AT TRIAL	118
4. WIDER ADMISSIBILITY OF SPECIFIC INSTANCE EVIDENCE	119
B. <i>Conclusions and Recommendations</i>	120

INTRODUCTION

Character evidence has long been a subject of hearty debate. How a person has behaved in the past, and others' opinions about that person, are bits of information we use to make everyday decisions. When interviewing a job applicant for a law firm, for instance, would you want to know whether the applicant has committed sexual harassment while in a previous job? When checking references, would you want to find out whether the applicant is a team player and gets along with co-workers? Of course you would. We all want this information to help us decide whether to offer the applicant a position at our firm.

It is common sense to seek information about a person's past behavior and about others' impressions of a person about whom we are trying to make a decision. Jurors in criminal cases feel the same way. When they are faced with whether to find someone guilty or not guilty, and the case is a close one, common sense tells them to consider the defendant's prior behavior, and the opinions and impressions of those who know the defendant outside of court.

Despite our common-sense desire to use character evidence to decide whether to trust or believe someone, the English Common Law and the codification of evidence law into United Kingdom and United States statutes long sought to protect us from ourselves by prohibiting jurors from hearing character evidence to prove conduct in conformity with that character.¹ Legislators recognize that while past conduct and impressions are useful information for decision-makers, presenting the evidence can be unfair to those on trial because the jurors may convict a person based on his past behavior, rather than on his current conduct. For this reason, the rules of evidence in many jurisdictions prevent

1. See ADRIAN KEANE, *THE MODERN LAW OF EVIDENCE* 467 (7th ed. 2008) (noting that "bad character evidence of the accused was admissible only exceptionally."). See also 1 MCCORMICK ON EVIDENCE 281 (John W. Strong ed., 5th ed. 1999) (explaining that the Federal Rules of Evidence "basically codify common law doctrine.").

jurors from using this information to help them decide the crucial issue of guilt or innocence.

In criminal cases, the prosecution generally is not allowed to present character evidence about a criminal defendant in order to prove that the defendant acted in conformity with that character trait during a particular situation. Over the centuries, there has been some movement away from a strict application of the general character evidence ban. For instance, the ban has been applied less strictly on issues of witness credibility, and, more recently in the United States, for those charged with sexual assaults and child molestations.² In 2003, the United Kingdom took the bold step of abolishing the common law rules on bad character evidence and started anew with sections 98 through 111 of the 2003 Criminal Justice Act.³ The 2003 CJA makes the 180-degree shift from a general exclusion of character evidence to prove propensity to a more inclusionary alternative—one that provides numerous paths for admitting bad character evidence. These paths are called “gateways,”⁴ and the gateways are quite wide.

The gateways provide prosecutors the opportunity to offer bad character evidence about the defendant in criminal trials and permit broad latitude in the jurors’ consideration of bad character evidence. Under the 2003 CJA, character evidence that is admissible for one purpose can be used for other purposes, and a defendant’s character can be attacked for credibility purposes regardless of whether he testifies at trial. In addition, pretrial disclosures made during pre- or post-arrest questioning can open the door to bad character evidence at trial, and specific instance character evidence is more broadly available.

Has the United Kingdom gone too far? Or has the United States not gone far enough? Would the criminal justice system be better served by a more relaxed approach to the admissibility of bad character evidence? Or would the rights of the accused be more severely prejudiced if character evidence was more widely used for propensity purposes? In short, what lessons can be learned from the expansive approach of our brothers and sisters in law across the pond as they apply the 2003 CJA?

This article begins with a brief historical primer on the character evidence rules that apply to criminal defendants in the United States and the United Kingdom. Part One summarizes the evolution of the rules limiting the use of bad character evidence about criminal defendants at trial. Part Two of this article explains the specific requirements of each gateway of the 2003 CJA and uses recent case authorities to illustrate the

2. See FED. R. EVID. 608, 413, 414.

3. Criminal Justice Act, 2003, c. 44, §§ 98–111 (Eng.).

4. See Criminal Justice Act § 101.

application of each gateway. Next, Part Three compares and contrasts the admissibility of character evidence through each gateway with its admissibility under the corresponding Federal Rule(s) of Evidence. Part Four analyzes and evaluates four major distinctions between the 2003 CJA in the United Kingdom and the FRE in the United States and makes recommendations for reform.

I. PART ONE: A BRIEF REVIEW OF THE CHARACTER EVIDENCE RULE AND ITS DEVELOPMENTS

This section provides a general overview of the character evidence rules pertinent to this article for those readers familiar with the FRE. It provides some detail on the background of the United Kingdom character evidence law and then quickly traces how those rules have evolved over the centuries.⁵

The long-standing general rule is that character evidence is not admissible to prove that a person behaved in conformity with that character trait on a particular occasion.⁶ Character evidence is evidence about the person's past conduct and not the conduct at issue in the current litigation. The three basic types of character evidence are specific instance, opinion, and reputation,⁷ which are illustrated in the paragraphs below using the job applicant example in the Introduction above.

Assume that the interviewer offered the applicant a job, and then months later, that new employee was accused of sexual harassment. There are no witnesses to the alleged harassment, so the case involves a typical "she said, he said" situation. When the harassment victim sues the employee and the company, he would like to call as witnesses other co-workers from the defendant's previous employers to provide evidence that this employee is the type of person who sexually harasses co-workers. The argument is a propensity argument, stating that because the employee has harassed co-workers in the past, she is the kind of person who harasses co-workers; therefore, she likely harassed this co-worker in her current job. This is an illustration of specific instance character evidence.

Opinion testimony is another form of character evidence. In the example above, a witness who is familiar with the employee testifies

5. For a more detailed review of the complicated character evidence rules under the Federal Rules of Evidence, see MCCORMICK ON EVIDENCE, *supra* note 1. For more information on the United Kingdom law prior to the 2003 CJA, see KEANE, *supra* note 1, at 448–58.

6. There are exceptions to this general rule, and those pertinent to this article's analysis will be discussed *infra* notes 18–21, 153–57, 172–73, and accompanying text.

7. FED. R. EVID. 405.

about her opinion of the employee's gender sensitivity (e.g., "In my opinion, she is too friendly with co-workers and makes inappropriate sexual suggestions in the workplace."). That testimony is in the form of an opinion on the character of the defendant in the case.

Similarly, character evidence can take the form of reputation testimony, which is basically an amalgamation of multiple opinions. When a witness testifies, "I used to work with the defendant at my previous job, and for the entire time that I have known her, her reputation has been that she sexually harasses male co-workers. All the men warn each other not to get in a situation to be alone with her," she is offering character evidence of the reputational variety.

All three types of character evidence were generally inadmissible at trial unless an exception applied.⁸ Focusing on the character of criminal defendants, the United Kingdom law generally excluded evidence of the bad character of a criminal defendant at trial.⁹ Even evidence of prior convictions and prior bad acts can be excluded on the grounds that the evidence is unduly prejudicial.¹⁰ There were two primary exceptions to this general rule of exclusion: (1) where the accused brought up his own character; and (2) where similar fact evidence was sufficiently probative to outweigh the prejudicial impact.¹¹

A. *Relaxing the Rule*

As the doctrine developed in the United Kingdom, the accused maintained a "shield" against cross-examination of his bad character. The prosecution could penetrate that shield only in three situations: (1) where the defendant "asserted his good character"; (2) where "the nature and conduct of the defence was such as to involve imputations on the character of witnesses for the prosecution or the deceased victim of a crime"; or (3) where "the accused gave evidence against" a co-defendant charged in the same proceeding.¹² If the accused did not offer evidence of his own good character, nor challenge the character of a witness, victim or co-defendant, then the door to bad character evidence remained tightly shut. Where the defendant testified on his own behalf, his credibility became an issue. The long-standing rule, however, prevented

8. See FED. R. EVID. 404, 405.

9. See KEANE, *supra* note 1, at 455 (stating that "[t]he general rule was exclusionary. The prosecution were not permitted either to adduce evidence of the accused's bad character, other than that relating directly to the offence charged, or to cross-examine witnesses for the defence with a view to eliciting such evidence.").

10. See FED. R. EVID. 609 (requiring balancing probative value against prejudice). See also FED. R. EVID. 404(b).

11. KEANE, *supra* note 1, at 456.

12. *Id.*

many challenges to that credibility, because they were considered to be unduly prejudicial.¹³

As one would expect, the character evidence rules across the Atlantic Ocean paralleled those of the United Kingdom.¹⁴ Under the common law, the general rule provided that character evidence was not admissible to prove conduct in conformity on a particular occasion.¹⁵ That rule was codified into the FRE.¹⁶ In addressing the character trait of credibility, where a person sought to be a witness at trial, certain convictions could be used for impeaching the credibility of the witness after the witness had given his testimony.¹⁷

The modern rule in the United States has an exception to the general character evidence ban that permits the use of felony convictions (subject to a probative value-prejudicial effect balancing test) to impeach any witness, including when the criminal defendant testifies on his own behalf at trial.¹⁸ The balancing test has been relaxed where the convictions are for crimes involving false statement or dishonesty (1990 Amendments) or where either is necessary to establish an element of the crime (2006 Amendments).¹⁹ In addition, another exception notes that reputation and opinion evidence about the defendant's character for untruthfulness is admissible if the defendant testifies.²⁰ On cross-examination, the prosecution may inquire about specific instances for the purposes of impeaching the defendant's character for truthfulness, but those specific instances may not be proven extrinsically.²¹

Like the laws of the United Kingdom, the FRE permit evidence of prior bad acts when used to prove something other than conduct in conformity.²² Those non-conduct in conformity purposes include motive, identity, common plan, preparation, and absence of mistake or accident.²³

13. See *id.* at 455 ("The rule prevented the prosecution from introductory evidence of previous convictions, previous misconduct, and disposition towards wrongdoing or misconduct, the principle rationale of the rule being that the prejudice created by such evidence outweighed any probative value it might have.").

14. See David Culberg, Note, *The Accused's Bad Character: Theory and Practice*, 84 NOTRE DAME L. REV. 1343, 1343 (2009).

15. Calvin W. Sharpe, *Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof*, 59 NOTRE DAME L. REV. 556, 559-60 (1984).

16. See FED. R. EVID. 404. See also MCCORMICK ON EVIDENCE, *supra* note 1, at 281.

17. See MCCORMICK ON EVIDENCE, *supra* note 1, at 62-63.

18. FED. R. EVID. 609(a).

19. FED. R. EVID. 609(a) advisory committee's notes.

20. FED. R. EVID. 608(a).

21. FED. R. EVID. 608(b).

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

23. *Id.* This also includes intent, opportunity, and knowledge on its non-exhaustive list of non-character purposes. *Id.* Some would argue that these are backdoor ways to admit character

B. *Obviating the Rule in Certain Types of Federal Cases*

While the general prohibition against the use of character evidence remains in force in the United States, in the mid-1990s three relatively new additions to the FRE broadened the admissibility of certain kinds of character evidence in specific types of cases. In 1995, Congress modified the FRE in sexual assault and child molestation cases to address public policy concerns over the recidivism rates of those charged with such offenses.²⁴

This modification for sexual assault and child molestation cases consists of several rules²⁵ that overturn the general prohibition against the use of character evidence to prove conduct in conformity on a particular occasion. FRE 413 provides that in sexual assault trials, evidence of the defendant's prior acts of sexual assault can be used "for its bearing on any matter to which it is relevant."²⁶ FRE 414 similarly overturns the character evidence ban in cases charging child molestation.²⁷ In addition, FRE 415 applies the terms of FRE 413 and FRE 414 to civil cases alleging sexual assault or child molestation.²⁸

Thus, in federal criminal prosecutions where the accused is charged with a sexual assault or a child molestation offense, the general prohibition against using character evidence to prove conduct in conformity evaporates. Specific instances of past sexual assaults or child molestations are admissible to help prove that the defendant committed the currently charged sexual assault or child molestation. This substantial departure from the common law character evidence rules was deemed justified by social science research about recidivism among these types of perpetrators.²⁹

evidence for a conduct-in-conformity purpose, but that discussion is beyond the scope of this article. For more information, see generally Chris Chambers Goodman, *The Color of Our Character: Confronting the Racial Character of Rule 404(b) Evidence*, 25 LAW & INEQ. 1 (2007).

24. See generally Michelle Harper Lawson, Note, *Federal Rules of Evidence 413 and 414: A Guide for Massachusetts Evidentiary Law*, 37 SUFFOLK U. L. REV. 1175 (2004) ("Studies also estimate that '1 in 4 imprisoned rape and sexual assault offenders has a prior history of convictions for violent crimes, and 1 in 7 has been previously convicted of a violent sex crime.' In 1994, in an attempt to reduce similar staggering statistics, Congress passed Federal Rules of Evidence 413 and 414 pursuant to the Violent Crime Control Act." (citations omitted)).

25. See DAVID W. MILLER & THOMAS J. LEACH, *FEDERAL & CALIFORNIA EVIDENCE RULES* 195 (2009) (explaining that FRE 413 through FRE 415 were part of the Violent Crime Control and Law Enforcement Act of 1994 and went into effect in July 1995).

26. FED. R. EVID. 413(a).

27. FED. R. EVID. 414(a).

28. FED. R. EVID. 415(a).

29. See Lawson, *supra* note 24, at 1179 n.29.

C. *Reversing the Rule from Exclusion to Inclusion in the United Kingdom*

After some criticism of the narrowness of the character evidence laws in the United Kingdom, there were discussions about modifying the laws to ameliorate the strict prohibition on bad character evidence.³⁰ Reformers suggested that the focus shift to provide more discretion to the judge and jurors to consider what weight to give relevant bad character evidence.³¹ The result of the reform efforts was a substantial relaxation of the character evidence prohibitions—in fact, the United Kingdom's response was to *abolish* the common law on bad character evidence and create the gateways of the 2003 CJA.

The focus of the 2003 CJA is on inclusion, rather than exclusion,³² that substantially expands the scope of bad character evidence admissible at trial.³³ Adrian Keane, author of *The Modern Law of Evidence*,³⁴ notes that the 2003 CJA provisions “allow evidence of the accused's bad character to be admitted more readily than in the past.”³⁵ The 2003 CJA was intended to expand the use and admissibility of bad character evidence in criminal trials.³⁶ Once admitted, the bad character evidence is more broadly available to prove relevant matters in the case.³⁷

Instead of the former barricade to character evidence, with only a few breach points, the 2003 CJA provides an open field with many paths and few obstacles to offering bad character evidence. These paths are in the form of seven “gateways” through which bad character evidence may be admitted under the 2003 CJA.³⁸ If the evidence is admissible through any one of the gateways, it may be used for other purposes as well.³⁹

30. See KEANE, *supra* note 1, at 455.

31. *Id.* at 456 (citation omitted).

32. See *id.* at 467 (“The approach under section 101 of the 2003 [CJA] is radically different. It is not one of inadmissibility subject to exceptions, but of admissibility if certain criteria are met.” (citing *R v. Weir*, [2005] EWCA (Crim) 2866, [35], [2006] 1 W.L.R. 1885 [1899] (Eng.)).

33. See *id.*

34. KEANE, *supra* note 1.

35. *Id.* at 467–68.

36. See *R v. Edwards*, [2005] EWCA (Crim) 3244, [2006] 1 W.L.R. 1524 [1526] (Eng.) (“Under the new regime, it is apparent that Parliament intended that evidence of bad character would be put before juries more frequently than had hitherto been the case.”). As was said in *Weir*, “[T]he 2003 Act completely reverses the pre-existing general rule. Evidence of bad character is now admissible if it satisfies certain criteria (see section 101(1)), and the approach is no longer one of inadmissibility subject to exceptions.” *Weir*, [2005] EWCA (Crim) 2866 at [35].

37. See *Edwards*, [2005] EWCA (Crim) 3244 at [100]. The *Edwards* court also quotes the trial judge's instruction to the jury that admitted bad character evidence can be used for a credibility assessment, as well as in deciding whether the defendant committed the offenses. *Id.* at [101].

38. Criminal Justice Act, 2003, c. 44, §§ 101–106 (Eng.).

39. See *infra* Part II.

The gateways are open when: (a) the parties mutually agree to admissibility; (b) the defendant raises his own character evidence; (c) the jury needs the information as important explanatory evidence; (d) an important matter at issue between the prosecution and the defense is involved; (e) the evidence has substantial probative value for an important matter between co-defendants; (f) the evidence is necessary to correct a misimpression given by the defendant; or (g) the defendant has attacked the character of another person.⁴⁰

II. PART TWO: RULES GOVERNING ADMISSIBILITY OF THE BAD CHARACTER OF CRIMINAL DEFENDANTS UNDER THE 2003 CJA

As noted in Part One, the 2003 CJA made substantial changes to the character evidence rules in criminal cases. These changes mainly apply to evidence of bad character. Good character evidence is still governed by the common law rules, as explicitly noted in the statute.⁴¹ The common law rules permit evidence of good character in the form of reputation, but prohibit the use of specific instances to prove good character.⁴² The judge provides a “good character direction” to the jury to explain that the jury can use that good character evidence towards proving credibility if the accused testifies,⁴³ as well as towards proving innocence regardless of whether the accused testifies.⁴⁴ The 2003 CJA addresses the character of defendants and non-defendants in separate sections; this article will focus on the criminal defendant’s character.⁴⁵

Bad character evidence now enjoys greater admissibility in the United Kingdom. The categories of admissible bad character evidence under the 2003 CJA include not only convictions, but also prior bad acts, allegations, and even crimes for which the defendant was acquit-

40. Criminal Justice Act § 101(1).

41. *See id.* § 99(1).

42. *See R v. Rowton*, (1865) 169 Eng. Rep. 1497.

43. *See R v. Shepherd*, [1995] EWCA (Crim) 153 (Eng.). *See also* KEANE, *supra* note 1, at 454 n.38.

44. *See R v. Alkaitis*, [2004] EWCA (Crim) 1072 (Eng.). In *Alkaitis*, the accused was charged with importing drugs, and while she had no previous drug convictions, she had used drugs recreationally in excess. *Id.* at [6]. The trial judge gave a modified good character direction emphasizing the accused’s past drug abuse, and the accused was convicted. *Id.* at [1], [8]. The appellate judge, however, quashed the direction on the grounds that it was unduly prejudicial and the conviction was unsafe. *Id.* at [21].

45. The character of non-defendants is addressed in section 100 of the CJA, while the character of defendants is addressed in section 101. The common law is preserved for other character issues not addressed by the CJA. Section 118(1)(2) reads, “Any rule of law under which in criminal proceedings evidence of a person’s reputation is admissible for the purpose of proving his good or bad character.” Criminal Justice Act § 118(1). The provision goes on to note that the rule is preserved for the purpose of the evidence being used to prove the “matter concerned.” *Id.*

ted.⁴⁶ Evidence that a person drinks excessively or is a poor co-worker could constitute bad character evidence and be admissible under these rules.⁴⁷ Under some gateways, however, judges retain the discretion to limit the use of these sorts of character assertions to avoid wasting the court's time and confusing the jury with a multitude of minor infractions that do not bear directly on the charge at issue.⁴⁸

Each gateway of the 2003 CJA has its own requirements for admitting bad character evidence; the sub-sections below discuss these requirements.

46. See Mark George & Mary McKeone, Garden Ct. N. Barristers Chambers, Presentation on "The Bad Character Provisions of the CJA 2003" for the Crime Team Spring Seminar Series 3 (May 22, 2005), transcript available at <http://www.gcncchambers.co.uk/index.php/gcn/content/download/1238/7945/file/CJA-Bad%20Character-MG-updated%20220905.pdf> (updated Sept. 22, 2005). George & McKeone note that:

Evidence capable of coming within the definition of misconduct in [section] 112 includes previous allegations in respect of which the defendant has been tried and acquitted, allegations which were never tried at all for one reason or another or other complaints which never reached the police (e.g. a complaint by a pupil against a teacher which was considered by the head teacher but never reported to the police) Depending on the use to be made by the prosecution of the previous allegations (about which more later) it would seem that such evidence would now be admissible under [section] 101.).

Id. In particular situations, evidence of previous acquittals is admissible. See *id.* See also *R v. Z*, [2000] 2 A.C. 483 (H.L.) (appeal taken from Eng.) (reasoning that using evidence of the occurrence of a criminal act, even where the accused was acquitted in a prosecution for that act, does not violate double jeopardy because the evidence is being used to help prove the later crime, not as an attempt to re-prove the former crime).

47. See George and McKeone, *supra* note 46, at 3. Parties are permitted to admit bad character evidence that extends beyond prior acquittals and convictions. *Id.* The CJA provides:

The definition of misconduct in [section] 112 includes "other reprehensible behaviour". How far this extends will no doubt be the subject of much litigation in the next few months and years. Nevertheless it is possible to indicate the likely parameters. It has been suggested by some academic commentators that "other reprehensible behaviour" could encompass telling lies, drinking to excess, failing to pay one's debts, disobedience, absenteeism and other serious misconduct at work, promiscuity, cheating on a spouse or partner and any other conduct of which "right thinking" people would disapprove. If this is right, then it would appear that the scope for this sort of conduct being admitted in evidence is potentially very wide.

Id.

48. See George and McKeone, *supra* note 46, at 3. While the language in the CJA appears to allow bad character evidence outside of previous convictions, it seems *offensive* to adduce evidence of unproven accusations for the purpose of proving propensity to commit an offense. See *id.* Despite the broad scope of the CJA's bad character provisions, which has been expanded upon hypothetically by numerous academic commentators, many courts prefer to take a stricter approach to admitting bad character evidence. See *id.* In *R. v. Bovell*, [2005] EWCA (Crim) 1091, [2005] Crim. App. 27 (Eng.), the court questioned the admissibility of an allegation that eventually ended in a withdrawn criminal charge. See George & McKeone, *supra* note 46, at 2. *Bovell* implies that the court of appeal will not tolerate the admittance of evidence that "amounts to little more than idle gossip and tittle-tattle." See *id.* at 4.

A. Gateway (a): Mutual Agreement

Under gateway (a), evidence of the defendant's bad character is admissible by mutual agreement.⁴⁹ If the parties agree that certain evidence of the defendant's bad character should be used at trial, then that bad character evidence will be admissible. Even a tacit agreement is enough.⁵⁰

One might expect that the prosecution would always agree to admit evidence of the defendant's bad character, but it is less conceivable that defendants would agree to admit evidence of their own bad character. If the defendant thinks that the bad character evidence was useful to his case, he will admit it under gateway (b), discussed below. Thus, this exception generally applies to the prosecution's attempt to offer bad character evidence of the defendant where the defendant does not object to such an offer.

B. Gateway (b): When the Defendant Brings in His Own Bad Character

The criminal defendant can access gateway (b) to offer evidence of his own bad character.⁵¹ He can present evidence through his own testimony or that of his own witnesses, as well as upon cross-examination of other witnesses.⁵² The defendant is deemed responsible for offering the bad character evidence unless he does so inadvertently, such as in

49. Criminal Justice Act § 101(1)(a).

50. *See* R v. Marsh, [2009] EWCA (Crim) 2696, [46] (Eng.). In *Marsh*, the defendant's lover, who confessed to killing his wife, testified that the defendant was aroused by cutting during sexual gratification and that he had arranged an alibi for his wife's killing. *Id.* at [5], [10], [44]. Evidence that the defendant had arranged a false alibi before, when he planned to attack someone who had wronged him, was also admitted. *Id.* at [44]. The defendant appealed the admission of this evidence as "not relevant to any issue concerning the appellant's part in the murder of [his wife]." *Id.* at [45]. All the parties, however, had already agreed that the evidence was relevant and should be admitted, so the court found that it was admissible. *Id.* at [46]. The court still questioned whether the conviction would stand had the evidence not been admitted, and found that it was both relevant and necessary in showing the defendant's control over the witness and whether he had acted by plan or spontaneity. *Id.* at [47].

51. Criminal Justice Act § 101(1)(b).

52. *See id.* The Crown Prosecution Service notes that:

The [defendant's] bad character is admissible if it is adduced by himself, or is given in answer to a question asked by him in cross-examination and intended to elicit it. This allows a defendant to adduce his own bad character if it is felt that it would be helpful to do so. There may be circumstances where a defendant chooses to do this. Examples may include—where a defendant raises an alibi that he was in prison at the time; where his bad character is relatively innocuous in the context of the trial, that he might prefer to put it in evidence rather than leave it to the jury to speculate about it; or if he considers that his own character while bad, is less likely to indicate guilt than that of a person alleges was criminal.

Bad Character Evidence, CROWN PROSECUTION SERVICE (Feb. 25, 2008), http://www.cps.gov.uk/legal/a_to_c/bad_character_evidence.

response to a poorly drafted question on direct or cross-examination, or when a witness simply “goes rogue.”⁵³

While the notion of bringing in bad character evidence of one’s own accord is counter intuitive, there are situations where doing so is an appropriate strategy. For instance, where the defendant has an alibi that requires disclosure of misconduct (e.g., he was committing adultery during the time the crime occurred), or when his character is less bad than that of a co-defendant, it may make sense for him to introduce evidence of his bad character.⁵⁴

C. Gateway (c): Important Explanatory Evidence for the Jury

Character evidence is admissible through gateway (c) when the jury needs that evidence to understand the case.⁵⁵ The evidence must have “substantial value” or be evidence without which the jury would find it “impossible or difficult” to understand the case.⁵⁶ Evidence that helps the jury understand the background, history, or context of the case fits in this category as well.⁵⁷ For instance, evidence of a defendant’s prior instances of drug dealing could be admissible under this gateway to explain why the victim recognized the defendant⁵⁸ or to explain the defendant’s irrational behavior.⁵⁹ As noted above, evidence about what happened in the case itself is not character evidence and therefore does not need a gateway to be admissible.⁶⁰

Evidence is admissible through this gateway regardless of whether

53. See *id.* The CPS goes on to note that “evidence is inadmissible if the defendant did not intend to elicit the evidence, such as an unsolicited disclosure by a witness of a defendant’s bad character or evidence of bad character elicited in cross-examination due to a carelessly framed question.” *Id.*

54. *Id.*

55. Criminal Justice Act § 101(1)(c).

56. *Id.* § 102(a)–(b). This provision specifically states that:

For the purposes of section 101(1)(c) evidence is important explanatory evidence if

(a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and

(b) its value for understanding the case as a whole is substantial.

Id.

57. See, e.g., *R v. Edwards*, [2005] EWCA (Crim) 3244, [101], [2006] 1 W.L.R. 1524 (Eng.).

58. See *id.* The witness recognized the defendant because she had bought drugs from him four times previously, and her testimony was strengthened by the frequency of their encounters. The judge found that it would “be difficult properly to understand other evidence in the case without knowing the background of the heroin dealings,” concluding that this evidence was admissible because it “went to the heart of matters.”

59. See *R v. Chapman*, [2006] EWCA (Crim) 2545, [32] (Eng.) (finding evidence of drug addiction and prior conviction for drug possession in a murder and possession of firearms case admissible under gateway (c) to explain “otherwise inexplicable and irrational behaviour”).

60. See Criminal Justice Act § 98(a)–(b). This section excludes from the character definition the facts of the offense or of “misconduct in connection with the investigation or prosecution of that [charged] offence.” *Id.*

the accused has offered any evidence in the case.⁶¹ In order for the evidence to be admitted through gateway (c), it must clear up a missing part of the surrounding context and be necessary to understanding the situation as a whole.⁶² Gateway (c) is not a significant departure from the common law because “so-called ‘background evidence’” was admissible at common law.⁶³

D. Gateway (d): Important Matter at Issue Between the Prosecution and Defense

Gateway (d) admits evidence that involves “important matters at issue between the defense and the prosecution.”⁶⁴ These “important matters at issue” include credibility and any other matters that must be established to support the charge, or that are needed to support a defense.⁶⁵ One commentator notes that the only evidence that does not fit within this gateway is evidence “of relatively minor or marginal significance.”⁶⁶ Therefore, this provision greatly expands the admissibility of character evidence over the prior law. It is important to note that this gateway provides a mechanism for admitting prosecution evidence only, not evidence by or on behalf of the criminal defendant.⁶⁷

1. USING PRIOR BAD ACTS TO SHOW PROPENSITY TO COMMIT THE CHARGED CRIME

These “important matters at issue” also include situations where the defendant has a propensity to commit the kind of offense with which he is charged.⁶⁸ There is a much greater scope of character evidence admissible under this gateway than under prior law.⁶⁹ While propensity evidence was generally inadmissible under prior law, it is generally admissible under the 2003 CJA.⁷⁰ Prior bad acts are admissible to show propensity, regardless of whether or not they resulted in convictions. For instance, this gateway permits the prosecution to offer evidence of

61. See Criminal Justice Act § 101(1)(c).

62. See *id.*

63. KEANE, *supra* note 1, at 369.

64. Criminal Justice Act § 101(d).

65. See CROWN PROSECUTION SERVICE, *supra* note 52.

66. KEANE, *supra* note 1, at 378.

67. Criminal Justice Act § 103(6). If the defendant wishes to admit his own bad character evidence, he may do so under gateway (b) or gateway (a) as discussed above.

68. See Criminal Justice Act § 103(1)(a).

69. See KEANE, *supra* note 1, at 478 (“The test is one of simple relevance or probative value. There is no requirement of enhanced relevance or ‘substantial probative value’ as there is under section 101(1)(e)” (citation omitted)).

70. See *id.* at 481 (citing *R v. Chopra*, [2006] EWCA (Crim) 2133, [12], [2007] 1 Cr. App. 16 (Eng.)).

sequencing, such as where the same person committed multiple offenses as part of a larger plan.⁷¹

There is no set number of offenses, bad acts, or convictions necessary to establish a propensity.⁷² One court did find, however, that “a single previous conviction for an offence of the same description or category . . . may [show propensity] where it shows a tendency to unusual behavior, or where the circumstances demonstrate probative force in relation to the offence charged.”⁷³ The court cited abusing children and setting fires as examples.⁷⁴ The court then found that a prior conviction for waving an imitation gun was sufficiently unusual and probative to show propensity in the current case, where the defendant was charged with possessing an imitation firearm with an attempt to cause fear of violence.⁷⁵ The propensity here was based on the similarity of conduct.⁷⁶ Needless to say that courts have found evidence of this kind of propensity to be lacking in other cases.⁷⁷

Another situation where a prior bad act may be admissible is where the defendant has been convicted of a similar offense in the same category as the charged offense.⁷⁸ Only two categories have been specifically identified: theft offenses and sexual offenses.⁷⁹ When the prosecution relies upon the specific facts of the underlying prior conviction, then the courts will permit evidence of those underlying facts.⁸⁰ Convictions will be excluded if admitting them would result in injustice or unfairness to the criminal defendant.⁸¹ One factor courts consider in evaluating unfairness is the length of time since the prior conviction.⁸²

The 2003 CJA specifically excludes prior bad acts to show propensity when the character evidence of “propensity makes it no more likely”

71. See, e.g., *R v. Wallace*, [2007] EWCA (Crim) 1760, [14], [17], [2008] 1 W.L.R. 572 (Eng.) (admitting evidence of prior armed robberies of small businesses in a particular area with common features that suggest defendant was a part of all of them).

72. See *DPP v. P*, [1991] 2 A.C. 447 (H.L.) (appeal taken from Eng.).

73. *R v. Bernasconi*, [2006] EWCA (Crim) 1052, [16] (Eng.).

74. *Id.*

75. *Id.* at [18]. See also *R v. Long*, [2006] EWCA (Crim) 578, [13] (Eng.) (“[This Court] doubts that [R v. Hanson, [2005] EWCA Crim 824, [2005] 1 W.L.R. 3169 (Eng.)] is authority for the proposition that one conviction is inadequate to show propensity.”).

76. *Id.*

77. See *R v. Ainscough*, [2006] EWCA (Crim) 694, [13], [2006] J.P. 517 (Eng.) (evidence from the Police National Computer was admitted through gateway (d) but later denied on appeal as not enough to rely on); *R v. B*, [2004] EWCA (Crim) 1254, [20] [2004] 2 Crim. App. 34 (Eng.) (Crown attempted to admit propensity evidence for sexual offenses but was denied because it was not factually relevant).

78. See KEANE, *supra* note 1, at 481.

79. *Id.*

80. See *id.* at 480–81.

81. Criminal Justice Act, 2003, c. 44 § 101(3) (Eng.).

82. *Id.* § 101(4).

that the defendant committed the charged offense.⁸³ There is some debate about when this exception applies. For instance, some commentators state that the “[2003] CJA is less interested in ‘tendency’ than the previous law.”⁸⁴ Others explain that the ultimate question is: “Does the evidence of propensity add nothing more than prejudice to the prosecution?”⁸⁵ Another notes that a “propensity in a defendant that makes guilt no more likely is an oxymoron waiting to happen.”⁸⁶ What is clear is that the 2003 CJA “meant to exclude from the bad character provisions cases where there is no dispute between prosecution and defence concerning the facts, only over the legal significance of what occurred.”⁸⁷

The easiest cases are those where the facts are undisputed, and the only issue is whether the charged offense can be proven based on those facts. A common illustration of this situation is a homicide case where the question is whether the defendant’s actions caused the death of the victim,⁸⁸ or whether the defendant had the requisite specific intent for a murder conviction.⁸⁹

Even when there is no dispute about the facts (e.g., defendant struck victim over the head and victim died), however, there can be legal significance as to whether the crime was manslaughter based on a heat-of-passion or mutual combat theory, or murder based on premeditation and deliberation or extreme recklessness. Past violent acts of a similar

83. *Id.* § 103(1)(a).

84. *Criminal Justice Act*, L. ESSAYS U.K., <http://www.law-essays-uk.com/resources/free-essays/criminal-justice-act.php> (last visited Aug. 11, 2011).

85. Robert Hall, *Criminal Justice Act 2003 Bad Character Provisions*, ONE KING’S BENCH WALK, 5–6 (Mar. 16, 2005), http://www.lkbw.co.uk/_data/assets/pdf_file/0004/9544/bad-character_provisions_lecture_notes_160305.pdf.

86. Roderick Munday, *Bad Character Rules and Riddles: “Explanatory Notes” and the True Meanings of S.103(1) of the Criminal Justice Act 2003*, 2005 CRIM. L. REV. 337, 338. Munday explains that when the prosecution seeks to offer evidence of propensity:

it is open to that defendant to introduce evidence showing that, statistically or logically speaking, these previous convictions—say by reason of their nature, by reason of their different modes of commission, or by reason of their infrequency—do not demonstrate that the defendant has a “propensity to commit offences of the kind with which he is charged.”

Id. at 338.

87. See Munday, *supra* note 86, at 339 (citing Criminal Justice Act (explanatory note [371])).

88. See Criminal Justice Act (explanatory note [371]) (because causation is not related to a tendency to behave in a particular way, propensity would not help with this issue).

89. See Bullen v. R., [2008] EWCA (Crim) 4, [30], [2008] 2 Crim. App. 25 (Eng.) (“We can see that causation generally lies wholly in the facts of a particular case, and does not depend on a propensity.”). But see R v. Rees, [2007] EWCA (Crim) 1837, [17]–[28] (Eng.). In *Rees*, a defendant with a history of partner abuse was facing a murder or manslaughter conviction for allegedly beating his girlfriend to death. *Id.* at [1]. Though the trial judge declined to admit the defendant’s entire record of partner abuse out of concern that such evidence would be unduly prejudicial, the judge still permitted one of the defendant’s battered ex-girlfriends to testify. *Id.* at [17]–[18]. The appellate court affirmed the trial judge’s decision. *Id.* at [27]–[28].

nature would tend to be helpful explanatory evidence in determining the legal significance of the facts surrounding the fatal blow.

2. DEMONSTRATING A PROPENSITY FOR UNTRUTHFULNESS

Important matters at issue under gateway (d) also include the defendant's propensity to be untruthful.⁹⁰ Under prior law, all crimes were potentially relevant to credibility.⁹¹ The 2003 CJA has a more circumspect approach. The explanatory notes indicate that only a "limited range" of convictions are admissible under this gateway.⁹² For instance, stealing from a store is dishonest, but not untruthful. Conversely, defrauding someone generally involves untruthfulness.⁹³

Examples of previous convictions that establish propensity towards untruthfulness include where the defendant testified in the prior case and the jury must have disbelieved his testimony in order to convict him, where the elements of the prior crime involve untruthfulness, and where the defendant "exhibited lies or deception" in committing the prior offense.⁹⁴ When the prior conviction shows a propensity towards vio-

90. Criminal Justice Act § 103(1)(b).

91. See Munday, *supra* note 86, at 340. Munday states:

Under the old law, when it came to credibility, all manner of offences were treated as relevant to someone's credibility. Moreover, there was a complex case law, and learning besides, debating whether similar previous offending was relevant to credibility or whether it was just too close to issue for comfort; whether offences of dishonesty were especially relevant to someone's credibility; whether antecedent not guilty pleas or similar defences, run unsuccessfully, were relevant to credit; and whether details of previous offences were admissible, too. Initially, in view of the otherwise highly repressive character of this statute, one might have assumed that a goodly proportion of the evidence admitted previously, once credibility became an issue, would fall within this generously expressed provision. But once more, turning to the Explanatory Notes, one discovers that appearances may deceive.

Id. (citations omitted).

92. Munday, *supra* note 86, at 340. The explanatory notes provide that:

[s]ection 103(1)(b) makes it clear that evidence relating to whether the defendant has a propensity to be untruthful (in other words, is not to be regarded as a credible witness) can be admitted. This is intended to enable the admission of a *limited range of evidence* such as convictions for perjury or other offences involving deception (for example, obtaining property by deception), as opposed to the wider range of evidence that will be admissible where the defendant puts his character in issue by for example, attacking the character of another person.

Id.

93. See KEANE, *supra* note 1, at 499 (distinguishing untruthfulness from dishonesty); R v. Lawson, [2006] EWCA (Crim) 2572, [33], [2007] 1 Crim. App. 11 (Eng.) ("[A] previous conviction for an offence of dishonesty will not necessarily be capable of establishing a propensity for untruthfulness." (citing R v. Hanson, [2005] EWCA (Crim) 824, [13], [2005] 1 W.L.R. 3169 (Eng.))).

94. See Peter Mirfield, *Character and Credibility*, 2009 CRIM. L. REV. 135, 138. Mirfield sets forth three corresponding scenarios where previous convictions may establish propensity towards untruthfulness: first, where the previous crime involved lying, such as "perjury or obtaining by deception," where by definition they entail the "telling of lies;" second, where the parties actually

lence, it will not be admissible to prove untruthfulness under gateway (d), but it may be admissible to prove a propensity towards violence.⁹⁵

For example, where a defendant was on trial for a burglary committed in 2007 and was subsequently arrested for a burglary in 2008 to which he pleaded guilty, it was error for the judge to admit evidence of the 2008 burglary under gateway (d) in the trial for the 2007 burglary.⁹⁶ Because the defendant had pled guilty, the 2008 burglary conviction did not relate to untruthfulness (although one could say that it related to his truthfulness).⁹⁷

The defendant's character for untruthfulness is relevant in every case except in the unusual circumstance where there is no suggestion that he has been untruthful in any respect.⁹⁸ This situation arises when the issue is a pure question of law. For instance, where the facts are undisputed about a death resulting from blows to the stomach during a fistfight, the prosecution may have no quibble with the defendant's recitation of the facts. Instead, the case is about the meaning of those facts in determining whether the facts prove homicide or self-defense. In that situation, the prosecution cannot submit evidence of the defendant's character for untruthfulness though this gateway.

E. Gateway (e): Substantial Probative Value for an Important Matter at Issue Between Co-defendants

Co-defendants can use gateway (e) to offer bad character evidence about their fellow defendant.⁹⁹ This gateway is not open to the prosecution.¹⁰⁰ In addition, the trial judge has "no discretionary power to exclude" this evidence.¹⁰¹ Co-defendants frequently use this gateway

lied or deceived in their actions; third, when a party pleads not guilty but is still convicted, it seems an obvious assumption the jury found that the party was lying. *Id.*

95. *Mirfield*, *supra* note 94, at 139–40. *See, e.g.*, *R v. McDonald*, [2007] EWCA (Crim) 1194, [26] (Eng.) (where the jury was incorrectly informed that previous convictions were relevant to credibility, convictions were deemed unsafe and were overturned); *R v. Meyer*, [2006] EWCA (Crim) 1126, [18]–[29] (Eng.); *R v. Awaritefe*, [2007] EWCA (Crim) 706, [24]–[26] (Eng.). *R v. Culhane*, [2006] EWCA (Crim) 1053, [29] (Eng.).

96. *See R v. Laurusevicius*, [2008] EWCA (Crim) 3020, [21] (Eng.).

97. *Id.* at [20]–[21] (explaining that "[the 2008 burglary arrest] showed that on that occasion he was a burglar but not that he was an untruthful burglar"). For this reason, the court held that the evidence of the 2008 burglary should not have been admitted. *Id.*

98. *See Criminal Justice Act*, 2003, c. 44, § 103(1)(b) (Eng.).

99. *Id.* § 101(1)(e). For purposes of brevity and clarity, the remainder of this section will refer to the party opposing the admissibility of that evidence as the defendant. The party proffering the character evidence will be referred to as the co-defendant.

100. *Id.* § 104(2)(a)–(b).

101. *KEANE*, *supra* note 1, at 500; *R v. Lawson*, [2006] EWCA (Crim) 2572, [31], [2007] 1 Crim. App. 11 (Eng.) ("Once gateway (e) is passed, there is no discretion in the judge to exclude bad character evidence as there is where application is made by the Crown under gateway (d) or (g).").

when they rely upon what is known as a “cut-throat [defense]” where each defendant claims the other is solely responsible for the crime.¹⁰² This often involves denying ownership of drugs or weapons.¹⁰³

This gateway significantly expanded the prior law.¹⁰⁴ Formerly, when a defendant took the stand and gave evidence against another co-defendant, the testifying defendant was subject to cross-examination about his own bad character.¹⁰⁵ The rationale was to let the co-defendant elicit whatever evidence he could to discredit the testifying defendant and thereby convince the jury that the defendant was the one guilty of the charged crime.¹⁰⁶ Now, under the 2003 CJA, the evidence is admissible whenever the defendant’s case is undermined by a co-defendant; the defendant’s testimony and a direct attack are not required.¹⁰⁷

By limiting the responsive use of bad character evidence to that which has “substantial probative value,” the 2003 CJA provides some restrictions on the common law rule of co-defendant character evidence.¹⁰⁸ The 2003 CJA expands, however, the scope of admissible character evidence beyond that which helps to establish credibility to issues of propensity. Thus, testimony is not required to trigger this use of bad character evidence.¹⁰⁹

Evidence that makes the co-defendant’s version of the events more likely than the defendant’s version has substantial probative value under gateway (e).¹¹⁰ Courts have found a wide range of character evidence admissible under this gateway.¹¹¹ For instance, evidence introduced by a

102. See CROWN PROSECUTION SERVICE, *supra* note 52.

103. See *id.*

104. See KEANE, *supra* note 1, at 469. Keane points out that gateways (e), (f), and (g) all “broadly correspond to and widen pre-existing grounds of admissibility.” *Id.*

105. See Lawson, [2006] EWCA (Crim) 2572 at [32].

106. See KEANE, *supra* note 1, at 500.

107. Compare Criminal Justice Act, 2003, c. 44, § 104(1) (Eng.), with *Murdoch v. Taylor*, [1965] A.C. 574 (H.L.) 587 (appeal taken from Eng.).

108. See Lawson, [2006] EWCA (Crim) 2572 at [32].

109. See *id.*

[O]nce defendant A had given evidence against defendant B, which included any case in which the nature or conduct of his defence undermined that of B, there was no restriction upon what could be put to him in cross-examination. The earlier statute proceeded by providing the defendant with a shield against cross-examination as to bad character, but then stipulating that he lost that shield in certain circumstances of which this was one. The new statute proceeds by a different route. Cross-examination as to credit is no longer unrestrained. Whether evidence of bad character is adduced by cross-examination of the defendant or otherwise, it must have substantial probative value in relation to the issue.

Id.

110. See *id.* at [43] (citation omitted).

111. See, e.g., *R v. Rosato*, [2008] EWCA (Crim) 1243, [20]–[23] (Eng.). In *Rosato*, the court explained that:

[A] person whose history of criminal behaviour or other misconduct is such as to be

co-defendant that the defendant had prior instances of holding and then stealing jewelry being offered for sale on consignment has substantial probative value.¹¹² In addition, where a co-defendant testifies that it was the defendant who was the sole perpetrator of a robbery, evidence that the defendant had prior shoplifting convictions is properly admissible by the prosecution under gateway (e).¹¹³ Evidence that a defendant confessed to the charged crime also makes the co-defendant's version more likely than that of the defendant.¹¹⁴

F. Gateway (f): To Correct a False Impression Given by the Defendant

Gateway (f) permits the prosecution to offer bad character evidence about the criminal defendant when the defendant is responsible for making an express or implied assertion apt to give the court or jury a misleading impression about him.¹¹⁵ The assertion must be about the

capable of showing him to be unscrupulous and/or otherwise unreliable should be enabled to present that history before the jury for its evaluation of the evidence of the witness. Such suggested unreliability may be capable of being shown by conduct which does not involve an offence of untruthfulness; it may be capable of being shown by widely differing conduct, ranging from large scale drug—or people—trafficking via housebreaking to criminal violence. Whether in a particular case it is in fact capable of having substantive probative value in relation to the witness' reliability is for the trial Judge to determine on all the facts of the case.

Id. at [20] (quoting *Lawson*, [2006] EWCA 2572 at [34]). The *Rosato* court determined that prior convictions involving theft and burglary were properly admissible by a co-defendant under this gateway. *Id.* at [23].

112. See *R v. Jarvis*, [2008] EWCA (Crim) 488, [19]–[20], [2008] Crim. L.R. 632 (Eng.). *But cf.* *R v. Land*, [2006] EWCA (Crim) 2856, [40]–[51] (Eng.) (evidence that a sword, body armor, a gas canister, and heroin were recovered from the co-defendant's home during prior searches was not necessarily substantially probative towards the co-defendant's duress defense, and declining to admit this evidence did not make the conviction unsafe).

113. See *R v. Davies*, [2009] EWCA (Crim) 957, [9]–[21] (Eng.). See also *R v. Randall*, [2003] UKHL 69, [29], [2004] 1 W.L.R. 56 (appeal taken from Eng.) (citing other authorities suggesting that the propensity of a co-accused may be relevant).

114. See *Musone v. R.*, [2007] EWCA (Crim) 1237, [46], [2007] 1 W.L.R. 2467 (Eng.) (noting that while “[c]learly section 101(e) imposes a higher requirement than that of mere relevance as demonstrated by the contrasting adjectives within section 101(1)(d) and (e),” the meaning of “[s]ubstantial[”] is not clearly defined and the explanatory notes “suggest that the reference to substantial was only intended to exclude evidence of marginal or trivial value.”(citation omitted)); *R v. Recica*, [2007] EWCA (Crim) 2471, [24]–[25] (Eng.) (holding that the prior convictions for fraud of one co-defendant where the co-defendants were brothers charged with conspiracy to violate immigration laws were admissible under this gateway). A prior conviction for robbery, however, does not provide much assistance to a jury in a case when the jury is deciding between murder and manslaughter; the prior conviction can be used for propensity purpose, but only when the jury receives an appropriate instruction from the judge about how to use it. See *R v. B.*, [2008] EWCA (Crim) 1402, [3]–[4] (Eng.) (finding that the lack of proper jury instruction made the conviction unsafe).

115. Criminal Justice Act, 2003, c. 44, §§ 101(1)(f), 105(1)(a) (Eng.).

accused and not about mere witnesses or other people.¹¹⁶

The defendant is responsible for both the assertions he makes at trial as well as those that he elicits from any witness (as long as the information was not an unintended or inadvertent response to a question not designed to elicit that information).¹¹⁷ This standard is very broad. Claiming to be employed or religious, wearing a certain type of clothing (though not simply dressing up for court), or only confessing to one prior offense when guilty of others can open the path to this gateway.¹¹⁸ On the other hand, asserting that a defendant has only one prior *conviction* when he may have other charges *pending*, does not create a *false impression*.¹¹⁹ Determining whether the defendant has created a false or misleading impression is very fact-specific.¹²⁰

While gateway (f) is easy to enter, it is also easy to escape by withdrawal or disassociation.¹²¹ A defendant who simply gets caught in an overstatement, however, cannot withdraw or disassociate himself from the misimpression.¹²²

116. See *R v. Hanson*, [2005] EWCA (Crim) 824, [51], [2005] 1 W.L.R. 3169 (Eng.). If the accused states, for example, that the complainant is fabricating the story about the offense, that is not a false impression about the accused, and thus the gateway remains shut.

117. Criminal Justice Act § 105(2).

118. See KEANE, *supra* note 1, at 509.

119. See *R v. U*, [2008] EWCA (Crim) 1457, [6]–[9], [15] (Eng.). In *R v. U*, a defendant charged with a drug offense wanted to present evidence that he had only one previous conviction for assault when he was a youth. *Id.* at [6]. The defendant, however, was also soon to be tried on robbery and false imprisonment charges arising from the same transaction. *Id.* at [10]. The Crown argued that if the former conviction was offered to show that the defendant was not that bad a guy, then the pending trial evidence should be admitted as well, to correct a false impression. *Id.* The trial judge agreed, and so the defendant decided to forego bringing in the evidence of the single conviction. *Id.* at [12]–[13]. This error by the trial court rendered the conviction unsafe. *Id.* at [15].

120. See KEANE, *supra* note 1, at 509.

121. See Hall, *supra* note 85, at 7.

122. See *R v. Renda*, [2005] EWCA (Crim) 2826, [16]–[17], [19], [21], [2006] 1 W.L.R. 2948 (Eng.). In *Renda*, the defendant attempted to convey that he was a good person, stating that he had served in the military, been injured during his service, and that he had held a job as a security guard. *Id.* at [16]. On cross-examination, the defendant admitted that while it was true that he had served in the armed forces, he suffered his injury while on holiday away from his military service, and his so-called “security guard” job was only a short-term position checking passes. *Id.* at [17]. The prosecution then used gateway (f) to ask questions about his previous convictions involving violent behavior that had to do with his credibility. *Id.* at [19]. The defense objected, arguing that his responses on cross-examination were adequate to disassociate himself from the false impression and to close gateway (f). *Id.* at [21]. The appellate court disagreed, stating:

There is a significant difference between the defendant who makes a specific and positive decision to correct a false impression for which he is responsible, or to dissociate himself from false impressions conveyed by the assertions of others, and the defendant who in the process of cross-examination is obliged to concede that he has been misleading the jury. A concession extracted in cross-examination that the defendant was not telling the truth in part of his examination-in-chief will not normally amount to a withdrawal or dissociation from the original assertion for the purposes of [section] 105(3).

This gateway is an expansion on the prior law, which permitted a prosecution response with bad character if the defendant offered good character evidence.¹²³ While under former law a defendant had to put his own character at issue before bad character evidence could be introduced under this gateway, today merely mentioning a circumstance that gives a false impression can open this gateway to cross-examination about the defendant's bad character. Despite this broad reading, courts do not consider denying a charge,¹²⁴ or simply claiming a defense in written documents submitted to the court and the prosecution, to be "creating a false impression."¹²⁵

Only the prosecution can admit evidence through this gateway, and the evidence will be limited to that which is "necessary to correct the false impression."¹²⁶ Thus, the admitted evidence must have some relevance and some probative value towards correcting the misimpression.¹²⁷ The jurors are instructed to use the information provided to correct the false impression as they deem relevant.¹²⁸

Id.

123. See KEANE, *supra* note 1, at 508. Keane notes that gateway (f) is an expansion of the prior law because the prior law was like that of the FRE. If the accused opens the door by presenting good character evidence, then the prosecution could respond with bad character evidence in rebuttal. *Id.*

124. See A.J. Roberts, *Evidence: Criminal Justice Act 2003 Part II – Bad Character Provisions*, 2006 CRIM. L. REV. 433, 434–35 ("[A] simple denial could not be treated as giving a false impression."). The article also discusses the case of *R v. Weir*, where one's denial of raping a woman was not a misimpression, but he "put himself forward as a man who not only had no previous convictions but also enjoyed a good reputation as a priest and was the victim of a conspiracy hatched up by members of the Mauritian community." *Id.* at 435. These misimpressions as to his own character are what opened gateway (f) and allowed in evidence of why his employment was terminated. *Id.*

125. See *R v. Iqbal*, [2006] EWCA (Crim) 1302, [16] (Eng.). In *Iqbal*, the court ruled that the defendant's pleadings and documents that set forth the contentions and nature of his defense did not constitute "an impression about him, let alone a false or misleading one without begging the very question which the jury would have to determine." *Id.* See also KEANE, *supra* note 1, at 509.

126. Criminal Justice Act, 2003, c. 44, § 105(6) (Eng.).

127. See *R v. Assani*, [2008] EWCA (Crim) 2653, [5], [11]–[13], [2009] Crim. L.R. 514 (Eng.). In *Assani*, after hearing a defense witness state that the defendant was not the type of person to "turn around and stab someone, nor was he one to 'throw his weight around,'" the court ruled that evidence of a prior incident of the defendant hitting a person in the face with a shovel, fourteen years prior to the current trial, was properly excluded because the single incident was so long ago that it did not establish a propensity towards violence and thus did not have probative value. *Id.*

128. See *R v. Doncaster*, [2008] EWCA (Crim) 5, [41], [43], [2008] J.P. 202 (Eng.). The *Doncaster* court explained that perhaps the judge should instruct the jury to consider "which counted with them more—the absence of previous convictions or the evidence of bad character; and if the former, then they should take that into account in favour of the defendant, and if the latter, then they would be entitled to take that into account against him." *Id.* at [43].

G. *Gateway (g): Defendant Attacks Another Person's Character*

A defendant opens gateway (g) when he introduces evidence attacking another person's character, when he asks a question on cross-examination intended to elicit a character attack on another, or when he challenges the character of another *while being questioned, charged or officially told that he might be prosecuted for the charged offense*.¹²⁹ The other person need not be a party, victim, or witness in the case, but must be an identifiable individual, rather than a category or class or people.¹³⁰ Once the door has been opened, whether at trial or before trial, only the prosecution can respond with evidence attacking the defendant's character.¹³¹ Co-defendants may not use this gateway.¹³²

The prosecution may attack a person's character by offering evidence that the person has committed an offense, or has behaved or is disposed to behave, in a "reprehensible" way.¹³³ The Crown Prosecution Service states that terminology in (g) is "particularly wide and what behaving in a reprehensible way means will vary from generation to generation."¹³⁴ For instance, in *Lamaletie v. R*, an accusation that a person started a fight and "was attacking me everywhere" qualified as an allegation of "reprehensible conduct."¹³⁵ The court explained that where the character of one person is attacked in this way, the jury is entitled to know about the character of the accuser as well through gateway (g).¹³⁶ Where a defendant alleged that the police were trying to "set him up" or "stitch him up," and the defendant "attacked the bona fides" of the police officers and accused them of "discreditable conduct," that was enough to admit the bad character evidence through gateway (g) as long as no unfairness would result.¹³⁷ Simply being known for shouting a lot, in contrast, does not constitute a character attack or an allegation of

129. Criminal Justice Act § 101(1)(g).

130. *Id.*

131. *Id.* § 106(3).

132. See *R v. Edwards*, [2005] EWCA (Crim) 3244, [18], [25], [51], [2006] 1 W.L.R. 1524 (Eng.). In *Edwards*, each co-defendant blamed the other for the large quantity of drugs found in their possession and sought to admit evidence of the other's non-drug convictions. *Id.* at [8]. The court found it was error to admit prior convictions under gateway (g) when offered by a co-defendant. *Id.* at [18]. It must come in under gateway (e). *Id.* at [25]. Similarly, in a case involving violence reported in the same decision, prior convictions of a violent nature committed by one co-defendant and offered by another co-defendant were determined to have "substantial probative value" and thus were admissible under gateway (e). *Id.* at [51] (citation omitted).

133. See *id.* at [24].

134. CROWN PROSECUTION SERVICE, *supra* note 52. The Crown Prosecution Service correlates acting "in a reprehensible way" with the definition of "bad character." *Id.*

135. *Lamaletie v. R*, [2008] EWCA (Crim) 314, [8] (Eng.).

136. *Id.* at [15] (citation omitted).

137. See *R v. Williams*, [2007] EWCA (Crim) 1951, [20] (Eng.).

“reprehensible” behavior.¹³⁸

Evidence under gateway (g) is admissible whether or not the accused testifies.¹³⁹ This is a departure from common law, which only opened this door if the accused testified at trial.¹⁴⁰ Nevertheless, in *R v. Littlechild*, the court pointed out that “in the case of gateway (g) it may well be that there is a greater overlap between the old law and new than there is in some other areas.”¹⁴¹ Under the former law, suggesting that a complaining witness fabricated her story would not amount to a character attack, but that same suggestion does amount to such an attack under gateway (g).¹⁴² The court cannot admit evidence under this gateway if there is an adverse effect on fairness, the length of time passed being a key consideration.¹⁴³ Another fairness consideration is that the responding bad character evidence admitted against the defendant must be in proportion to the attack on the other person.¹⁴⁴

There is some uncertainty about the scope of this gateway. According to some authorities, evidence admitted under the gateway can be used not only for credibility, but also for propensity purposes.¹⁴⁵ Others disagree, finding that the relevance of evidence admitted under this gateway is limited to credibility.¹⁴⁶ Keane acknowledges that while former law limited the gateway’s use to credibility, today, evidence of propen-

138. See *R v. Osbourne*, [2007] EWCA (Crim) 481, [14], [34] (Eng.). In *Osbourne*, one witness testified that “[i]f he did not have his medication, he was liable to snap at any time.” *Id.* at [14]. He stated that “[the defendant] would be very aggressive for no reason at all—both to me and Shane; shouting at us. But he was never violent.” *Id.* The appellate court found that:

[I]n the context of this charge of murder, we do not accept that shouting at a partner in the manner described can amount to reprehensible behavior within the meaning of Section 202 of the 2003 Act. Shouting between partners over the care of a very young child is not of course to be commended but in the context of a charge of murdering a close friend, it does not cross the threshold contemplated by the words of the statute.

Id. at [34].

139. KEANE, *supra* note 1, at 511.

140. See *id.* (citing *R v. Butterwasser*, [1948] 1 K.B. 4 [5]–[6] (Eng.)).

141. *R v. Littlechild*, [2006] EWCA (Crim) 2126, [16] (Eng.). The *Littlechild* court goes on to state:

There are of course many differences between the scheme of the old Act and the scheme of the new. Cross-examination as to credit is no longer unrestrained. Bad character evidence may be admitted whether the defendant gives evidence or not, and when it is admissible it now goes to propensity to commit the offence in situations where previously it went only to credit. Those are only examples of the differences, but they underlie the necessity to work from the new Act forward rather than to look backwards to the old.

Id. at [17].

142. See *R v. Hanson*, [2005] EWCA (Crim) 824, [51]–[52], [2005] 1 W.L.R. 3169 (Eng.).

143. See Criminal Justice Act, 2003, c. 44, § 101(3)–(4) (Eng.).

144. See Roberts, *supra* note 124, at 711.

145. See *R v. Highton*, [2005] EWCA (Crim) 1985, [22], [2005] 1 W.L.R. 3472, [22] (Eng.).

146. See *R v. Lafayette*, [2008] EWCA (Crim) 3238, [48]–[49], [2009] Crim L.R. 809 (Eng.).

sity to commit offenses of the type similar to the charged offense can be admitted under gateway (g) and thus be used by the jury for a propensity purpose.¹⁴⁷ Based on the conflicting authorities, it seems that the courts are still sorting out the scope of gateway (g).

This completes the summary of the 2003 CJA. The next section examines the differences between the admission and uses of bad character evidence through these gateways and the corresponding FRE.

III. PART THREE: CONTRASTING OUTCOMES UNDER THE 2003 CRIMINAL JUSTICE ACT WITH THE FEDERAL RULES OF EVIDENCE

A. *Gateway (a) Does Not Have a Corresponding Federal Rule*

Recall that gateway (a) permits evidence of the defendant's bad character "if, but only if, all parties to the proceeding agree to the evidence being admissible."¹⁴⁸ The FRE do not contain an explicit mechanism that permits the parties to agree to admit character evidence that otherwise violates the Rules. As a practical matter, however, character evidence that violates the FRE can be admitted if neither the prosecution nor the defense objects.¹⁴⁹ The federal prosecutor would not object to a defendant offering good character evidence because it opens the door to a prosecution response with bad character evidence under FRE 404. Litigators know that the jury is more likely to focus on the negative character evidence and thus the defense is likely to object.¹⁵⁰

If neither party objects, a judge could make a decision to exclude the evidence in the absence of an objection, but judges are unlikely to do

In considering how evidence admissible under gateway (g) but not under gateway (d) should be used, the *Lafayette* court reasoned:

[T]he better course is for the direction to be so fashioned in a gateway (g) only case that the jury understand that the relevance of these kinds of previous convictions goes to credit and they should not consider that it shows a propensity to commit the offence they are considering, at least if there is a risk that they might do so. That is not to say that the words "credit" and "propensity" should be or need to be used.

Id. at [49].

147. See KEANE, *supra* note 1, at 470. See also *R v. Livesey*, [2007] EWCA (Crim) 361, [12] (Eng.). The *Livesey* court noted:

To the extent that cross-examination as to credit is no longer unrestrained, but must if it involves a suggestion of past bad character events pass the test of judicial admission under section 100, the present law is less, rather than more, likely to give rise to cross-examination upon past unproven complaints.

Id.

148. Criminal Justice Act § 101(1)(a).

149. FED. R. EVID. 103(a)(1) ("Error may not be predicated upon a ruling which admits or excludes evidence . . . unless a timely objection or motion to strike appears of record").

150. Goodman, *supra* note 23, at 2.

so unless a substantial right or privilege is impacted.¹⁵¹ Thus, the effect of neither side objecting under the FRE would be substantially the same as an agreement by both sides under the 2003 CJA.

Gateway (a) also permits the prosecution to offer bad character evidence about the defendant even before the defendant opens the door to his character.¹⁵² Some would say that the same outcome applies under the FRE, if the defendant does not object. A court is likely to find, however, that a miscarriage of justice has occurred when the prosecution introduces character evidence in its case-in-chief that violates FRE 404 and no exception is available to render that evidence admissible.¹⁵³

B. Gateway (b) is More Restrictive than FRE 404

Gateway (b) allows evidence that is “adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it.”¹⁵⁴ Gateway (b) is similar to FRE 404(a)(1), which permits the accused to offer character evidence about a pertinent character trait.¹⁵⁵

The 2003 CJA is both broader and narrower than the FRE here. The 2003 CJA is narrower because gateway (b) applies to evidence of bad character only, and thus not the type of evidence that a defendant usually offers on his own behalf under FRE 404(a)(1). In some cases, a defendant may offer evidence of his bad character in order to inoculate against the prosecution presenting the evidence later.¹⁵⁶ The prosecution cannot prevent the defendant from offering character evidence on a pertinent trait under the FRE (unless the undue prejudice is great enough to tip the balance in favor of excluding the evidence under FRE 403).¹⁵⁷

Gateway (b) is also narrower than FRE 404(a)(1) because it does not allow the prosecution to respond to the defendant’s evidence admitted through it.¹⁵⁸ The prosecution is not permitted to offer any evidence through gateway (b), whereas the FRE gives the prosecution an opportunity, in fairness, to offer evidence to rebut whatever evidence the defen-

151. See FED. R. EVID. 103(d) (“Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.”).

152. Criminal Justice Act § 101(1)(a).

153. See generally MCCORMICK ON EVIDENCE, *supra* note 1, at 248 (noting that “the dangers of prejudice outweigh the probative value” before the accused has opened the door to character exception).

154. Criminal Justice Act § 101(1)(b).

155. FED. R. EVID. 404(a)(1).

156. See L. TIMOTHY PERRIN ET AL., THE ART & SCIENCE OF TRIAL ADVOCACY 220–24 (2003).

157. FED. R. EVID. 403.

158. FED. R. EVID. 404.

dant offers about his own (usually good) character trait.¹⁵⁹ The rationale for this distinction might simply be that this gateway only applies to bad character evidence, and thus when the defendant uses it to offer bad character evidence about himself, the prosecution has no need to respond to that bad character evidence with more bad character evidence. In contrast, FRE 404(a)(1) generally involves the defendant offering good character evidence about himself and thus the prosecution needs a mechanism for responding.¹⁶⁰

In the United Kingdom, the defendant's ability to offer his own good character evidence is not governed by the 2003 CJA, but rather by common law.¹⁶¹ If in response to that good character evidence the prosecutor would like to offer bad character evidence about the accused, there are several other gateways available for this purpose, including gateway (c): important explanatory; gateway (d): relevant to a matter at issue between defendant and prosecution; or gateway (f): to correct a false impression given by the defendant.¹⁶²

Another way in which the 2003 CJA and the FRE differ is that the FRE is limited to opinion and reputation character evidence if the defendant is offering evidence about his own character.¹⁶³ The 2003 CJA does not have such a limitation under gateway (b), and it is likely that most of the evidence presented through this gateway concerns specific instances.¹⁶⁴ In contrast, the FRE only permits inquiry into specific instances on cross-examination, and does not permit proving up those specific instances by the defendant or the prosecution.¹⁶⁵

C. *Gateway (c) is Noticeably Broader than FRE 404(b)*

Gateway (c) allows both the prosecution and the defendant to offer "important explanatory evidence" which is defined as evidence without which the trier of fact "would find it impossible or difficult properly to understand other evidence in the case, and its value for understanding the case as a whole is substantial."¹⁶⁶ As the discussion in Part One indicates, this includes similar fact evidence and evidence of other

159. FED. R. EVID. 404(a)(1).

160. In order to effectively respond to a prosecutor's offer of bad character evidence, a defendant would tend to provide evidence of the opposite trait—his good character in that respect. See, e.g., FED. R. EVID. 404 advisory committee's notes (noting "[i]n most jurisdictions today . . . an accused may introduce pertinent evidence of good character").

161. See Criminal Justice Act § 99.

162. *Id.*

163. FED. R. EVID. 404(a)(1).

164. Criminal Justice Act § 101(b).

165. The one exception is specific instances of convictions, which can be proven by extrinsic evidence. See FED. R. EVID. 608(b), 609.

166. Criminal Justice Act § 102.

crimes.¹⁶⁷ Similar facts and evidence of prior bad acts are admissible under FRE 404(b) for a non-conduct in conformity purpose, which means to prove something other than the defendant's predisposition to act in a particular way.¹⁶⁸

While gateway (c) covers much of what is included under FRE 404(b), it is actually a substantial departure from the FRE; once evidence of other crimes and similar facts has been admitted as important explanatory evidence, it can be used for whatever purpose the jury finds relevant.¹⁶⁹ In contrast, under the FRE, evidence of similar facts, crimes, wrongs, or other acts, while admissible under FRE 404(b), is not admissible to show conduct in conformity or a propensity.¹⁷⁰ Rather, such evidence is admissible as circumstantial evidence of a propensity, using one of the so-called "I-PIMP-O-MACK" factors.¹⁷¹

The federal prosecutor cannot argue that the accused committed a crime because the accused engaged in prior wrongful acts, but instead must limit the argument to something circumstantial like whether the accused had knowledge or the opportunity to commit the current charged crime because of prior bad acts. On the other hand, the Crown prosecutor can argue propensity *in addition to* knowledge and opportunity.

The only exceptions to this non-propensity requirement under the FRE are when the accused opens the door by bringing in his own good character evidence or the bad character of the victim under FRE 404(a), and in the cases of sex and child molestation crimes, under FRE 413 and FRE 414.¹⁷² Specific instances of character are admissible only under the sex crime and child molestation exceptions.¹⁷³ Inquiries about specific instances may be made on cross-examination, but they cannot be proven by extrinsic evidence under the FRE.¹⁷⁴

Is there really a practical difference in the outcome of the 2003 CJA and the FRE provisions here? Some say that jurors in federal courts will use the evidence for whatever purpose they think is appropriate, which is

167. See *infra* Part I.

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

169. See *infra* notes 55–63 and accompanying text at Part II.C.

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

171. See *id.*; CHRIS CHAMBERS GOODMAN, EXAMPLES & EXPLANATIONS: CALIFORNIA EVIDENCE 30–33 (2011) ("I-PIMP-O-MACK" is a shorthand reference for the list of non-propensity purposes in section 1101(b) of the California Evidence Code, which parallels FRE 404(b) with an additional "c" for consent in sexual assault cases.). See CAL. EVID. CODE § 1101(b) (West 2011).

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

173. FED. R. EVID. 413, 414.

174. FED. R. EVID. 608(b).

exactly how juries in the United Kingdom are instructed.¹⁷⁵ If federal juries indeed ignore the instructions about how to use FRE 404(b) evidence, then does the federal system reach the same result as the United Kingdom under gateway (c)? Not quite: the main reason being that, under the FRE, the prosecution *cannot explain the propensity purpose in closing argument*, whereas the judge's summation under the 2003 CJA can—and often does—remind the jurors that they can use the evidence for both propensity and non-propensity purposes, as long as the evidence helps them to better understand the case.¹⁷⁶ This focus on the propensity rationale makes jurors even more likely to use the evidence for propensity purposes in U.K. courts.

D. *Gateway (d) Exceeds the Scope of the FRE by Disregarding the General Rule of FRE 404 that Propensity Evidence Generally is Prohibited*

Gateway (d) permits the prosecution, not the defendant,¹⁷⁷ to offer character evidence if “it is relevant to an important matter in issue between the defendant and the prosecution.”¹⁷⁸ The definition includes “whether the defendant has a propensity to commit offences of the kind with which he is charged.”¹⁷⁹ Propensity includes having committed an offense of the same description as that which is currently charged, or in the same category as that which is currently charged.¹⁸⁰ The evidence will be admissible unless factors such as the time elapsed since conviction make it “unjust for it to apply in his case.”¹⁸¹ This gateway is not limited to convictions, however. Evidence other than convictions, such as allegations of prior misconduct (like prior bad acts under the FRE), is also admissible through gateway (d). One important exception is when the propensity does not make it more likely that the defendant committed the offense.¹⁸²

As discussed in Part Two above, this gateway is a substantial departure both from the common law and from the FRE. The FRE follows the general common law prohibition on using character evidence to

175. See Goodman, *supra* note 23, at 17–19; R v. Edwards, [2005] EWCA (Crim) 3244, [18], [2006] 1 W.L.R. 1524 [1526] (Eng.) (instructing the jury that “bad character under section 98 is broadly defined. Once admitted (no matter through which gateway) it can be used for any purpose for which it is relevant”).

176. See *id.* See also R v. Highton, [2005] EWCA (Crim) 1985, [2005] 1 W.L.R. 3472 (Eng.).

177. Criminal Justice Act, 2003, c. 44, § 103(6) (Eng.).

178. *Id.* § 101(1)(d).

179. *Id.* § 103(1)(a).

180. *Id.* § 103(2).

181. *Id.* § 103.

182. *Id.* § 103(1)(a).

prove propensity or conduct in conformity on a particular occasion.¹⁸³ There are several exceptions under the FRE. For instance, evidence of propensity is admissible by the prosecution only in cases of intimate crimes or sexual offenses and child molestation cases.¹⁸⁴ Evidence admitted under FRE 413 and FRE 414 also would fit under gateway (d). The 2003 CJA limitation on when the propensity does not make it more likely that the accused committed the current offense¹⁸⁵ is satisfied by the FRE because of the high-reported recidivism rates of those who commit sexual assaults and child molestation.¹⁸⁶

In the federal courts, however, this evidence is admissible in the limited class of federal cases involving sexual assault or child molestation.¹⁸⁷ As these crimes are generally state rather than federal offenses, the impact on jurisprudence is not as substantial as it could be if such crimes were more readily prosecuted by federal authorities.¹⁸⁸

In contrast, the 2003 CJA does not limit admissibility to certain types of offenses with notable recidivism rates. Rather, the evidence is admissible to prove conduct in conformity in any type of criminal case.¹⁸⁹

Gateway (d) also allows the admission of evidence addressing the question of “whether the defendant has a propensity to be untruthful.”¹⁹⁰ The exception is where there is no suggestion that “the defendant’s case is untruthful in any respect.”¹⁹¹ On the truthfulness issue, the federal analog is FRE 609, which permits evidence of prior convictions to undermine truthfulness.¹⁹² FRE 609, however, applies to a defendant only when he testifies at trial, and where the prior crime is a felony or a misdemeanor whose terms involve dishonesty or false statement.¹⁹³ Other specific instances of non-convictions may be inquired into but may not be proven with extrinsic evidence.¹⁹⁴

183. See KEANE, *supra* note 1, at 455.

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

185. The courts need to further develop the parameters of this limitation on the propensity not making the crime more likely, because in almost every case, the fact that someone has committed a particular crime before would make a repeat more likely. Counter-examples would include crimes committed under duress or threat, or the heat-of-passion killing of a spouse or other person.

186. See 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).

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

188. Of course, some states have similar statutes that permit specific instance evidence in certain types of cases, including California. See CAL. EVID. CODE §§ 1108, 1109 (West 2011) (domestic violence and elder and child abuse).

189. Criminal Justice Act, 2003, c. 44 § 101(1)(d) (Eng.).

190. *Id.* § 103(1)(b).

191. *Id.*

192. FED. R. EVID. 609.

193. See *id.*

194. See FED. R. EVID. 608(b).

Thus, the 2003 CJA expands the credibility purpose to include other specific instances of lying and allows a whole range of evidence that is excluded under the FRE. This broadening of the use of specific instance character evidence to undermine credibility is similar to the approach taken by California courts in the aftermath of the state constitutional amendment entitled the "Truth-in-Evidence" provision, which permits the use of such evidence in criminal trials only.¹⁹⁵ Nevertheless, in California courts, the defendant still must testify in order to implicate his credibility through prior convictions.¹⁹⁶ Under the 2003 CJA, this gateway is open regardless of whether the defendant puts his credibility at issue by becoming a witness and testifying at his trial.

E. *Gateway (e) Opens Avenues Not Available Under the FRE*

Co-defendants are permitted to introduce bad character evidence about the other defendants through gateway (e), where the evidence "has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant."¹⁹⁷ Evidence admitted under this gateway must be adduced, or provided upon cross-examination, by the co-defendant.¹⁹⁸

The kind of evidence that meets this definition includes evidence about the defendant's propensity for untruthfulness, which parallels the prosecution's abilities under gateway (d), except that under gateway (e), it is limited to situations where the "nature or conduct" of the defendant's defense undermines the defense of this co-defendant.¹⁹⁹ The 2003 CJA does not elaborate on what types of evidence not concerning untruthfulness may trigger this gateway, but subsequent cases have found prior bad acts, prior convictions, and prior acts of dishonesty to be adequate.²⁰⁰ In addition, while honesty is the only category specifically mentioned, the definition is not exhaustive, and the *Hanson* and *Lawson* cases²⁰¹ explain that propensity evidence is admissible under this gateway as well. The main limitation is whether the prior act evidence has "substantial probative value," which some courts say is satisfied as long as the evidence is not minimal or insubstantial.²⁰²

In contrast, the FRE does not provide a mechanism for allowing a co-defendant to offer bad character evidence against another defendant

195. CAL. CONST. art. I, § 28(f)(2).

196. CAL. EVID. CODE § 788 (West 2011).

197. Criminal Justice Act, 2003, c. 44, § 101(1)(e) (Eng.).

198. *See id.* § 104(2).

199. *Id.* § 104(1).

200. *See supra* Part II.E.

201. *See id.* (describing the cases in more detail).

202. *See id.*

in the case. The exceptions that allow evidence of the bad character of the criminal defendant allow the defendant himself to offer the evidence, or the prosecution or the “government” to offer the evidence.²⁰³ There is no mention or allowance for co-defendants in criminal cases.

Some might argue that the co-defendant is not precluded from using FRE 413 or FRE 414 to offer evidence about another defendant’s prior sexual assault or child molestation. The explicit language of the federal statute says that the evidence “may be considered for its bearing on any matter to which it is relevant.”²⁰⁴ A defendant’s prior sex crimes would be relevant in a case where the co-defendant claims the other defendant was the sole perpetrator, and the co-defendant would want to present that evidence. Still, the prosecution likely would present the evidence first in the prosecution case-in-chief against both parties, and thus there would be no need for a co-defendant to do so.²⁰⁵

For other situations not involving sex crimes or child molestation, the federal co-defendant’s only options for bringing in bad character evidence of the defendant is the victim exception or to challenge the credibility of a witness if the defendant testifies in the case. If the defendant claims to be a victim, then the co-defendant can offer bad character evidence about the defendant in his role as victim, but it is unlikely that a defendant would also be considered a victim in the same criminal case.²⁰⁶ Thus, considering how rarely this use of the victim exception is available to a co-defendant, evidence proffered by a co-defendant regarding the defendant’s character generally is not admissible under the FRE.²⁰⁷ Conversely, a co-defendant under the 2003 CJA has freedom to

203. See FED. R. EVID. 404 (permitting the defendant to offer evidence and the “prosecution” to respond). See also FED. R. EVID. 413(b), 414(b) (explaining the steps the “government” must take to offer prior acts of sexual assault or child molestations as evidence). None of the statutes provide any language referring to anyone other than the defendant, prosecution, or government.

204. FED. R. EVID. 413(a), 414(b).

205. In the United Kingdom, there are situations under which the prosecution may not present the evidence and thus the co-defendant would want to use this gateway to do so. See *R v. Edwards*, [2005] EWCA (Crim) 3244, [48]–[50], [2006] 1 W.L.R. 1524 (Eng.). In *Edwards*, the judge rejected the Crown’s application to adduce evidence of the appellant’s prior offenses, because “there [was] no propensity here shown to such an extent that it would be relevant and, in any event, it seem[ed] a bit unfair.” *Id.* at [48]. Separate considerations apply to gateway (e), such as relevance as to whether a previous offense makes it more likely that defendant 1, rather than defendant 2, committed the act before the court. *Id.* at [50]. The judge decided that the previous conviction was relevant to this fact and allowed defendant 2 to question defendant 1 on his bad character. *Id.* In addition, evidence admitted through gateway (e) is not subject to a prejudicial effect balancing test and therefore the court has no discretion to exclude the evidence as it does when the prosecution offers the evidence through another gateway. *Id.* at [26].

206. See FED. R. EVID. 404(a)(2). There is no mention of anyone other than the prosecution or defendant offering evidence in response to this exception.

207. Those with a greater level of familiarity with the FRE might consider the first aggressor non-character trigger of FRE 404(a)(2). That scenario, however, would not work to admit the

offer this evidence that would be excluded in a federal court.

F. *Gateway (f) is Substantially Broader than FRE 404 and FRE 608*

Under gateway (f), the prosecution can offer evidence of the defendant's bad character "to correct a false impression given by the defendant."²⁰⁸ When the defendant "is responsible for the making of an express or implied assertion which is apt to give the court or jury a false or misleading impression about the defendant," this gateway is opened for bad character evidence²⁰⁹ that has "probative value in correcting" the false or misleading impression.²¹⁰ This gateway can only be employed so long as it "goes no further than is necessary to correct the false impression."²¹¹

At first glance, it seems that gateway (f) is most analogous to what some call the "fairness provision" of FRE 404(a)(1), which permits the prosecution to offer bad character evidence about the defendant to rebut any good character evidence that he offered about himself.²¹² In addition, gateway (f) resembles FRE 608 by permitting a rebuttal to character evidence offered by the other side.²¹³ Note that FRE 608 is the flipside of gateway (f) because it permits the defendant to offer evidence of his good character for truthfulness after evidence of his bad character for truthfulness has been admitted.²¹⁴

The most notable difference between this gateway and the FRE is that gateway (f) addresses both implicit and explicit assertions. The FRE does not address implicit assertions as to character, and the court cases discussing when a character door is opened focus on explicit assertions.²¹⁵ Implicit assertions can include evidence that is not character evidence. As discussed in Part II above, a defendant's dress, employment status, and religious affiliation can trigger a gateway (f) response.²¹⁶ Although these implicit assertions of status, employment, or religion are not character assertions, they trigger a bad character evi-

evidence here because the victim must be from a homicide case, and therefore, the victim would be dead. *See* FED. R. EVID. 404(a)(2) (a dead victim is not eligible to be a co-defendant).

208. Criminal Justice Act, 2003, c. 44, § 101(1)(f) (Eng.).

209. *Id.* § 105(1)(a).

210. *Id.* § 105(1)(b).

211. *Id.* § 105(6).

212. FED. R. EVID. 404(a)(1).

213. Criminal Justice Act § 101(1)(f); FED. R. EVID. 608.

214. *Id.*

215. FRE 404 merely refers to "evidence" and does not address the difference between explicit and implicit assertions as to character. For instance, a defendant can offer evidence that he does not remember where he was when the crime occurred, which implicitly suggests that he was not at the scene of the crime, and is evidence of what occurred, rather than evidence of his character.

216. *See* KEANE, *supra* note 1, at 509.

dence response by the prosecution. In contrast, while the FRE permit a good character response on the issue of truthfulness if the witness' character for truthfulness has been attacked by character evidence "or otherwise,"²¹⁷ there is no such exception for responding with the defendant's bad character for traits other than truthfulness.²¹⁸ Gateway (f) is likely to severely limit the defendant's presentation of any evidence at trial (particularly character evidence, but even other evidence). While the FRE has a similar impact, it limits the defendant's use of character evidence, not the defendant's use of non-character evidence that might create a false impression implicitly. Gateway (f) admits a substantially wider body of evidence than the corresponding FRE.

G. *Gateway (g) Broadens the Time Frame for Opening the Door to Character Evidence*

Gateway (g) provides a way for the prosecution to attack the defendant's bad character when the defendant himself makes an attack on another person's character.²¹⁹ The other person need not be a victim, witness, or co-defendant in the case; any character attack on any other person, such as one that has committed an offense, or "has behaved, or is disposed to behave, in a reprehensible way" triggers this gateway.²²⁰

There is no directly analogous provision under the FRE. The closest one is much narrower than gateway (g). The FRE permits the prosecution to offer bad character evidence of the defendant for a particular trait when the defendant attacks the victim's same trait.²²¹ But the FRE is not unlimited in terms of which traits can be attacked in rebuttal; only the trait challenged can be refuted.²²² In contrast, under the 2003 CJA, the defendant's character attack on the victim's aggression, for instance, triggers a response on the defendant's aggression, as well as on any other relevant character trait of the defendant.²²³ In addition, under the 2003 CJA, a character attack on anyone—even those who are not participants in the trial—triggers a character attack on the defendant.²²⁴

Thus, if the defendant offers that "Bertrand is a violent person who has a short fuse and seems on the verge of beating everyone he sees" as an explanation for why the defendant ran from Bertrand and, in doing so, injured the victim in this case, the defendant's character for violence

217. FED. R. EVID. 608(a).

218. Except the "first aggressor" condition in homicide cases. *See* FED. R. EVID. 404(a)(2).

219. *See* Criminal Justice Act, 2003, c. 44, § 101(1)(g) (Eng.).

220. *Id.* at § 106(2)(b); *see also supra* Part II (defining "reprehensible").

221. *See* FED. R. EVID. 404(a)(2).

222. *Id.*

223. Criminal Justice Act § 101(1)(g).

224. *Id.*

and every other relevant trait could be offered by the prosecution. The rationale seems to be that if the defendant is going to offer evidence about someone else's bad character, the jury is entitled to know about the defendant's character to help them decide whether or not to believe the defendant. Nevertheless, admitting this additional evidence multiplies the issues and takes more time. Moreover, information regarding a defendant's violent nature is not very helpful in deciding whether he is telling the truth about what happened in the case. Finally, there is a risk that the jury could simply condemn the defendant because he sounds like a bad person, and conclude that he is not to be believed.

Evidence is admissible under the 2003 CJA if the defendant makes an imputation about the other individual "(i) on being questioned under caution, before charge, about the offence with which he is charged, or (ii) on being charged with the offence or officially informed that he might be prosecuted for it."²²⁵ This gateway is triggered even if the defendant made the attack while he was being questioned, before his attorney appeared, and before he was even charged with the crime. This is a significant difference from the FRE, which allows for opening the door to character evidence only with evidence presented at trial, or based on the criminal charges alone in the two special cases of sexual assault and child molestation.²²⁶

IV. PART FOUR: EVALUATING THE MAJOR DISTINCTIONS AND RECOMMENDATIONS FOR REFORM

A. *Four Important Distinctions Between the 2003 CJA and the FRE*

The discussion in Part Three above described the major differences between each of the 2003 CJA gateways and the corresponding FRE. This section will explain and evaluate four of the most significant differences between the 2003 CJA and the FRE. Each difference highlights the wider latitude prosecutors have to offer evidence of the defendant's bad character under the 2003 CJA. The differences focus on the prosecution's ability to do the following: (1) offer evidence of the defendant's character for untruthfulness regardless of whether the defendant testifies at trial; (2) use evidence admitted for one purpose to prove something else; (3) allow the defendant's pre-trial statements to open the door to the prosecution's bad character response; and (4) provide a much broader use of specific instance character evidence in criminal cases.

225. Criminal Justice Act § 106(1)(c).

226. See FED. R. EVID. 413, 414.

1. TESTIMONY IS NOT NEEDED TO TRIGGER THE DEFENDANT'S CHARACTER FOR UNTRUTHFULNESS

The first important distinction concerns whether the defendant must testify to put his character for untruthfulness at issue. It has long been standard procedure to admit character evidence about the untruthfulness of those who testify at trial.²²⁷ The rationale for this long-standing rule is that by taking the oath and testifying, the person testifying is in effect asserting that he takes the oath seriously and is therefore telling the truth when giving testimony.²²⁸

When a criminal defendant testifies in his own case, he is deemed to be a witness and therefore opens the door to evidence about his character for truth-telling. That door is opened for anyone who testifies at trial.²²⁹ Testifying after taking the oath is like vouching for one's own credibility. When that witness has a reputation for lying or otherwise being dishonest, it is important for the jury to consider that reputation when evaluating whether to believe the witness or to disregard his testimony.

The FRE operates in much the same way as the law in the United Kingdom before the 2003 CJA. A criminal defendant's character for credibility is not at issue under the FRE unless or until he testifies at trial.²³⁰ Once he testifies at trial, he becomes a witness, and his character for honesty or dishonesty is admissible.²³¹ Thus, the federal defendant retains control over whether or not the prosecution can offer evidence about his character for dishonesty.

The 2003 CJA recognizes that the credibility of the defendant may be implicated even where the defendant does not testify at trial, particularly when the jury must decide whether to believe a witness to the crime.²³² If various witness stories are consistent with each other, and the defendant has a character trait of dishonesty, the jurors may properly conclude that the defendant's version of events, as explained through his witnesses and argued through his counsel, is not the most accurate version.

Thus, the 2003 CJA considers a defendant's propensity for untruthfulness to be an important "matter at issue" between the defense and the

227. See FED. R. EVID. 608.

228. MCCORMICK ON EVIDENCE, *supra* note 1, at 37 (noting that "[o]ne of the main functions of cross-examination is to afford an opportunity to elicit answers impeaching the witness's veracity").

229. FRE 608 applies generally to all witnesses.

230. FED. R. EVID. 404(a)(3).

231. *Id.*

232. Criminal Justice Act, 2003, c. 44, § 101(1)(d) (Eng.).

prosecution.²³³ As an important “matter at issue,” the prosecution may offer evidence of the defendant’s bad character trait of untruthfulness under gateway (d) in all criminal cases.²³⁴ The 2003 CJA permits the prosecution to offer character evidence about a criminal defendant’s character for truthfulness regardless of whether the defendant appears as a witness at trial.²³⁵

The impact of this first difference may be significant when a criminal defendant, along with his counsel, is trying to decide whether the defendant should testify on his own behalf. The potential bad character attack that arises from in-court testimony under the FRE may deter many defendants from testifying in federal criminal cases. If the defendant has a prior felony conviction, or even a misdemeanor with dishonesty or false statement as a necessary component of the crime, the defendant is told that the conviction will be admitted into evidence if he becomes a witness at trial.²³⁶ For that reason, among others, many criminal defendants exercise their right not to testify in their own federal cases.²³⁷

While exercising this right may be a good strategic decision for many criminal defendants, others might benefit from having the jurors hear their testimony, and they may be better able to convince the jurors of their innocence. The 2003 CJA takes this pressure away from the defendant by admitting the convictions into evidence regardless of whether the defendant testifies at trial.²³⁸ By removing the defendant’s power to control whether his convictions are admissible, the 2003 CJA allows the defense to make a strategic decision regarding whether or not to testify on the merits of the case without fear of prejudice from disclosure of past convictions. The courts recognize that it is important that jurors understand that a prior conviction does not mean that the defendant is an untruthful person.²³⁹ For this reason, the 2003 CJA may be preferable to the FRE on the admissibility of prior convictions.

233. *Id.* § 103(1)(b).

234. *See id.* § 101(1)(d). The only limitation to offering character evidence for untruthfulness is where “it is not suggested that the defendant’s case is untruthful in any respect.” *Id.* § 103(1)(b).

235. *See* Criminal Justice Act § 101.

236. FED. R. EVID. 608.

237. *See* MCCORMICK ON EVIDENCE, *supra* note 1, at 65 (noting the “harsh dilemma” an accused faces in deciding whether to remain silent or testify).

238. Criminal Justice Act § 103(1)(a) (permitting evidence of prior convictions).

239. *See* R v. Highton, [2005] EWCA (Crim) 1985, [56], [2005] 1 W.L.R. 3472 (Eng.). The Highton court explained that:

[T]he jury should be directed that they should not conclude that the defendant is guilty or untruthful merely because he has convictions . . . [T]he [R]ecorder gave the necessary warnings in a manner which adequately brought home to the jury the need to take proper care when deciding how much weight, if any, to place on the appellant’s previous convictions. In particular [the Recorder] dealt separately with

The 2003 CJA, however, also permits evidence of prior bad acts other than convictions to prove untruthfulness.²⁴⁰ This component of the new rules may be even more prejudicial to criminal defendants. Convictions result either from a guilty plea or a unanimous decision by the trier of fact. Thus, we understandably have more confidence in relying upon the existence of the conviction: either the defendant admitted doing the crime, or a jury of his peers found that he did the crime. In contrast, prior bad acts and other wrongs relating to untruthfulness have not been proven to any degree of certainty prior to being introduced at trial. Thus, when the bad character evidence involves something short of a conviction, like a prior bad act where no criminal charges were filed, admitting evidence of prior bad acts other than convictions may be even more prejudicial to the criminal defendant. For this reason, the danger of the misuse of non-conviction character evidence under gateway (d) is more pronounced than the potential misuse of such evidence under the FRE.

2. EVIDENCE ADMITTED FOR ONE PURPOSE CAN BE USED FOR ANOTHER PURPOSE

The second important difference between the 2003 CJA and the FRE concerns whether character evidence admitted for one primary purpose can be used for another purpose. Under the 2003 CJA, as long as the evidence is relevant to that secondary purpose, it can be used to prove both the primary and secondary purposes.²⁴¹ Conversely, under the FRE, the general rule is that character evidence cannot be used to prove something secondary to the rationale for admitting it.²⁴² For instance, evidence admitted to counteract a false impression under gateway (f) might be primarily admitted for credibility purposes to show that the defendant did not present the complete story; however, once the evidence is admitted to undermine the defendant's credibility, the prosecution can also argue that the evidence may be used to show propensity.²⁴³ The U.K. courts have explained that whether evidence is admissible

issues of truthfulness and guilt and indicated how different convictions might be relevant to those issues.

Id. at [59].

240. Criminal Justice Act § 103(1)(a) (permitting evidence of a propensity to commit a crime).

241. KEANE, *supra* note 1, at 471.

242. FED. R. EVID. 404.

243. KEANE, *supra* note 1, at 471. Keane explains that Lord Chief Justice Phillips provided some general principles of interpretation in *Campbell v. R.*, [2007] EWCA (Crim) 1472, [2007] 1 W.L.R. 2798 (Eng.). Noteworthy is Keane's assertion that "[o]nce evidence has been admitted though a gateway it is open to the jury to attach any significance to it in any respect in which it is relevant." *Id.* Keane also points out that "[i]n considering the inferences to be drawn from bad character the courts have in the past distinguished propensity to offend and credibility. This distinction is usually unrealistic." *Id.* (referring to *Campbell*).

through one of the gateways is a separate question from how that evidence may be used once admitted.²⁴⁴ Some evidence admitted through a gateway for credibility purposes also will be relevant for propensity purposes.²⁴⁵

For instance, under the 2003 CJA, prior convictions can be admitted to correct a false impression, and also as substantive evidence of the defendant's propensity to commit the type of crime charged.²⁴⁶ In contrast, under the FRE, evidence that is admissible through FRE 608 to undermine the criminal defendant's character once he has testified at trial is admissible only on the credibility issue, and cannot be used to show propensity.²⁴⁷ The most notable illustration of this contrast is with prior convictions. When a prior conviction is admissible under FRE 609 (i.e., when the defendant becomes a witness at trial by testifying, and the conviction was for either a felony or a misdemeanor whose elements require dishonesty or false statement), the only propensity argument that the prosecutor can make under the FRE is that the defendant has the propensity to be dishonest.²⁴⁸ The prosecutor may not use the conviction as evidence of the defendant's propensity to commit the charged crime.²⁴⁹

This difference extends beyond evidence of past convictions to other character evidence as well. For instance, as noted above,²⁵⁰ the FRE permit the prosecution to offer character evidence of the defendant's dishonesty once he has opened the door by testifying and thus

244. See *Highton*, [2005] EWCA (Crim) 1985, [1]. *Highton* solidified the following rule:

We therefore conclude that a distinction must be drawn between the *admissibility* of evidence of bad character, which depends upon it getting through one of the gateways, and the *use* to which it may be put once it is admitted. The use to which it may be put depends upon the matters to which it is relevant rather than upon the gateway through which it was admitted.

Id. at [10].

245. See *Highton*, [2005] EWCA (Crim) 1985, [1]

It is true that the reasoning that leads to the admission of evidence under gateway (d) may also determine the matters to which the evidence is relevant or primarily relevant once admitted. That is not true, however, of all the gateways. In the case of gateway (g), for example, admissibility depends on the defendant having made an attack on another person's character, but once the evidence is admitted, it may, depending on the particular facts, be relevant not only to credibility but also to propensity to commit offences of the kind with which the defendant is charged.

Id.

246. See Criminal Justice Act § 101(1)(f); *R v. Highton*, [2005] EWCA (Crim) 1985, [10], [2005] 1 W.L.R. 3472 (Eng.).

247. FED. R. EVID. 608.

248. FED. R. EVID. 609.

249. Note that there is an exception in the special cases of sexual crimes and child molestations. See FED. R. EVID. 413, 414; *supra* Part I.B.

250. See *supra* Part IV.A.1.

implicitly vouched for his honesty.²⁵¹ In a federal homicide case where the defendant testifies on his own behalf, the prosecution can bring up the defendant's reputation for being a liar, and can use that evidence to make arguments about the defendant's dishonesty to the jury.²⁵² The federal prosecutor, however, is limited in closing argument to using that evidence to prove that the accused is dishonest.²⁵³ The prosecution cannot argue that because the criminal defendant has a reputation for being a liar, he has a propensity to commit homicide even if he lied about the reason he was present in order to cover up the killing. The evidence admitted for credibility purposes cannot be used to argue propensity to commit the underlying crime.²⁵⁴

This second difference has far-reaching implications when evidence is admitted for a non-character purpose. Recall that prior to the 2003 CJA, evidence of similar crimes or acts was admissible despite the general character evidence ban.²⁵⁵ Similarly, under the FRE, such evidence is admissible for a non-propensity purpose—in other words, to prove something other than conduct in conformity with that character on a specific occasion.²⁵⁶ These non-conduct-in-conformity purposes include showing specialized knowledge and to provide context for a larger plan or scheme. Under the FRE, that evidence is admitted solely for a non-character purpose.²⁵⁷ Under the 2003 CJA, however, it appears that evidence admissible for a non-character purpose, such as one dealing with an important matter between the defense and prosecution, will be used for character and non-character purposes alike.

By way of illustration, evidence that a person has broken into bank vaults in the past can be used to prove that he possesses the specialized knowledge of how to break into bank vaults. Now, under the 2003 CJA, this evidence also may be used to prove that the person has the propensity to break into bank vaults because he has previously demonstrated that he knows how to do so. In this way, the jury will be confronted with the propensity purpose even in situations where propensity is not the reason for admitting the evidence. The fact that evidence admitted through one gateway can be used for any purpose for which it is relevant dramatically extends the use of character evidence for a propensity purpose.

The benefits of this extension of the use of non-propensity evidence

251. FED. R. EVID. 608.

252. FED. R. EVID. 404.

253. *Id.*

254. *Id.*

255. See *supra* notes 13–14 and accompanying text at Part I.A.

256. *Id.*

257. FED. R. EVID. 404(b) (listing non-propensity purposes).

are unclear at best. While the 2003 CJA may be more realistic about the fact that many jurors use non-propensity evidence for propensity reasons despite instructions and admonitions to the contrary, there are jurors who take their roles seriously and who, if properly cautioned, refrain from using non-propensity evidence for an impermissible purpose.²⁵⁸ It may be that U.K. jurors are even more likely than those in the United States to take their oath to faithfully apply the laws and instructions given by the judge seriously. Therefore, they may be better able to use character evidence for one purpose and not another, if given the proper instruction. When the instruction or caution indicates, however, that the evidence can be used as circumstantial evidence as well as propensity evidence, the breadth of these two options gives fuel to defense arguments that convictions are based more on past behaviors rather than on what occurred in the current case.

3. PRETRIAL STATEMENTS OPEN A GATEWAY TO BAD CHARACTER EVIDENCE AT TRIAL

The third important distinction is that under the 2003 CJA, a defendant's pretrial attacks on the character of other persons trigger the prosecution's ability to offer bad character evidence about the defendant at trial,²⁵⁹ whereas under the FRE, trial testimony is virtually the only trigger. A criminal defendant under the 2003 CJA can open the door to the prosecution's use of character evidence before he even gets to trial merely by making statements while in police custody.²⁶⁰ A drunk person could say something like, "My neighbor is the one who called you right? He is a lying junkie drug dealer." That simple statement suggests that the neighbor is guilty of "reprehensible" conduct²⁶¹ and thus amounts to an attack on the neighbor's character. The intoxicated person may have just concocted the allegation about drug dealing and lying. He may not even remember it in the morning. But that simple statement will open a door weeks or months later when he becomes a defendant on trial and permit the prosecution to offer evidence of his bad character.

Under the FRE, the defendant cannot open the door to character evidence before trial (unless he is charged with a sexual assault or child molestation crime, where the mere charge opens the door to his bad

258. See Goodman, *supra* note 23, at 56–57. See also Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CALIF. L. REV. 733, 743–44, 756 (1995).

259. Criminal Justice Act § 101(1)(g).

260. Criminal Justice Act § 105(2)(b)(1) (showing that a defendant can be responsible for making a false impression if an assertion is made while he is being questioned before being charged with the offense).

261. See *supra* notes 133–35 and accompanying text (defining "reprehensible").

character on prior specific instances of sexual assault or child abuse).²⁶² Even at trial, the defendant's opening statements do not trigger a character evidence response.²⁶³ Only testimony under oath that brings up character will open the door to the prosecution offering bad character evidence in rebuttal.²⁶⁴

It seems that the FRE approach is preferable to the 2003 CJA on this third point as well. Permitting a defendant to waive his chance to avoid bad character evidence, before he has an attorney and before he has even been charged with a crime, is contrary to the policy behind evidence law: to govern the smooth operation of proof *at trial*.²⁶⁵ Some may say that we allow other pretrial statements to be used at trial, such as party admissions, and statements made by waiving the right to remain silent.²⁶⁶ Due to the peculiar harm of bad character evidence, however, this door should only be opened knowingly, intelligently, and after the advice of trial counsel. Thus, the 2003 CJA goes too far in allowing pretrial statements to trigger a response through gateway (g).

4. WIDER ADMISSIBILITY OF SPECIFIC INSTANCE EVIDENCE

Fourth, the 2003 CJA seems to have a preference for specific instance evidence rather than reputation and opinion evidence, which are two commonly admissible forms of character evidence under the FRE. Most of the cases involving propensity evidence focus on specific instances of conduct.²⁶⁷ Rarely does the prosecution seek to admit testimony in the form of a witness' opinion about the accused, and while the reputation of the accused is raised in some cases, it is not nearly as common as specific instances of the defendant's past conduct.²⁶⁸

It is easy to understand how specific instances are preferable to reputation and opinion testimony. Opinions are only as good as the basis for the opinion and the logical thought process of the person rendering

262. See *supra* Part I.B.

263. See *United States v. Green*, 648 F.2d 587, 595 (9th Cir. 1981). The *Green* court stated "[a]n opening statement, however, having no evidentiary value, cannot operate to place an issue in controversy." *Id.* See also *United States v. McLister*, 608 F.2d 785, 790 (9th Cir. 1979); *United States v. Tomaio*, 249 F.2d 683, 689 (2d Cir. 1957); *State v. Richards*, 438 S.E.2d 331, 335 (W. Va. 1993) (stating that opening statements may not "open the door" to otherwise inadmissible evidence).

264. See *Virgin Islands v. Grant*, 775 F.2d 508, 512 (3d Cir. 1985). The *Grant* court stated that "in addition to restricting defendant's use of conduct evidence, close adherence to the rules serves an important correlative purpose; it guarantees that a defendant can open the door to evidence of his bad character only if he takes specific and deliberate steps to prove his good character." *Id.*

265. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE UNDER THE RULES: TEXT, CASES AND PROBLEMS* 1-2 (3d ed. 1996).

266. See Criminal Justice and Public Order Act, 1994, c. 33, § 34 (Eng.).

267. See *supra* notes 40, 48-49, 61, 78.

268. *Id.*

the opinion. Reputation evidence is simply an amalgamation of many people's expressed opinions about the defendant's character. In contrast, specific instances are what the defendant actually has done, and thus can be the most reliable indicator of what the defendant will do in the future, or of what he did on the particular occasion at issue. For this reason, the 2003 CJA's privileged position for specific instance evidence to prove conduct in conformity actually could be preferable in a system that wishes to provide the jurors with the best assistance in ascertaining the truth of guilt or innocence.

Some jurisdictions recognize the heightened usefulness of specific instance evidence and have permitted wider use of the specific instance character evidence. For instance, in California, the Evidence Code allows the criminal defendant to offer specific instance evidence, as well as reputation and opinion evidence, about any pertinent character trait of the crime victim.²⁶⁹ When the defendant offers character evidence about the victim, the prosecution can respond with reputation, opinion, or specific instance evidence about the victim on that trait as well.²⁷⁰

In addition, when a California criminal defendant testifies at trial and thus puts his character for honesty at issue, specific instance evidence of his character for lying or truth-telling is admissible just as it is for any witness who testifies at trial.²⁷¹ This expanded use of specific instance character evidence on the issue of honesty and dishonesty was not the result of legislative deliberation. Rather, the California electorate made this decision in a voter-approved initiative that amended the state constitution to change certain provisions of the Evidence Code in criminal cases.²⁷² The California process for expanding specific instance evidence is dramatically different from the deliberative process that led to the 2003 CJA.

B. *Conclusions and Recommendations*

The 2003 CJA provides some important contributions to the ongoing dialogue on modifications and improvements that can be made to the character evidence rules that govern criminal cases. Using prior bad act evidence for a propensity purpose allows jurors to apply common sense in determining what information is and is not useful to their verdicts. By providing the jury with a broader scope of evidence to consider and fewer restrictions on the ways in which to use and apply the evidence,

269. See CAL. EVID. CODE § 1103(a)(1) (West 2011).

270. See *id.* § 1103(a)(2).

271. See *id.* § 787.

272. See MIGUEL A. MENDEZ, EVIDENCE: THE CALIFORNIA CODE AND THE FEDERAL RULES: A PROBLEM APPROACH 47–48 (4th ed. 2008).

the 2003 CJA may be preferable to the FRE in the search for truth in criminal cases.

In addition, the way that the 2003 CJA de-couples prior conviction evidence from the criminal defendant's decision to testify at trial provides greater latitude for defense attorneys to make better strategic decisions about whether the accused should testify in his own defense. If the prior conviction will be admissible for credibility purposes regardless, then the defendant will not artificially silence his voice and decline to testify simply because of his prior convictions. If this principle was incorporated into the FRE, it is likely that more criminal defendants would testify on their own behalf. An interesting next step would be to perform some empirical research in the United Kingdom to see whether a greater number of criminal defendants choose to testify under the post-2003 CJA gateways, as compared to under the prior laws.

Notwithstanding these potential benefits, if the FRE were to follow the 2003 CJA model thereby increasing the admissibility of specific instance character evidence to prove a propensity to behave in a particular way, substantial constitutional violations could result. Broad consideration of prior bad act specific instance character evidence for propensity purposes would make it exceedingly difficult for the legal system to remain faithful to the presumption of innocence. The way the 2003 CJA uses this character evidence for propensity puts a generalization on the scales of justice, adding more weight to the guilty side of the scale simply based upon what kind of person the defendant has been in the past. That cannot and should not be the weight that tips the scale in favor of conviction for a crime in the present.

United Kingdom courts may be alleviating some of these negative ramifications of the 2003 CJA with particular "cautions" to the jury. Judicial officers provide substantive, specifically tailored instructions on how the jury may use character evidence and what preliminary questions the jurors should answer before selecting particular uses of such evidence.²⁷³ These cautions, when issued properly, can satisfy the concerns addressed above. In the federal courts, however, jury instructions are more formulaic, and thus jurors in the United States would need substantially more guidance if the FRE moved in the direction of the 2003 CJA.

The most excruciating part of this gateway system is that a defendant can open gateway (g) before he even gets to trial. Preliminary statements to law enforcement officials that undermine the character of another person not only can be directly used against the defendant, but also can be used to unlock a gateway and allow the prosecution to bring

273. See *R v. Edwards*, [2005] EWCA (Crim) 3244, [2006] 1 W.L.R. 1524 [1526] (Eng.); *R v. Highton*, [2005] EWCA (Crim) 1985, [2005] 1 W.L.R. 3472 (Eng.).

in bad character evidence about him at trial. A person detained by law enforcement can open this gateway to the admissibility of his bad character at trial before he is even charged with a crime, and before he knows whether he will be going to trial.

The widespread use of character evidence for propensity purposes and the indiscriminate use of character evidence for multiple purposes will have an adverse effect on defendants in criminal trials. Pleading not guilty may cause the prosecution to offer enough bad character evidence at trial to significantly increase the likelihood of a guilty verdict. A guilty plea, perhaps to a lesser charge, is certainly another option, and may be the lesser of the two evils. This puts the defendant between the Scylla of pleading guilty to a lesser charge to avoid having the jurors hear about his other transgressions, and the Charybdis of going forward with the trial and facing a greater risk of conviction because his prior bad acts can be used to prove that he is the kind of person who does bad things. Broadening the time frame for triggering a bad character evidence response and expanding the scope of specific instance evidence for propensity purposes force criminal defendants into a perilous no-man's land prior to trial—a land not unlike the proverbial purgatory.

It may be that the 2003 CJA is the wave of the future, abolishing the common law rules disfavoring the admissibility of bad character evidence. If the FRE follow this example, however, then criminal defendants in federal courts will suffer. The impacts of the 2003 CJA may not be fully realized and understood for years to come. An important next step is for scholars to compare outcomes and juror decision-making rationales in jurisdictions with and without relaxed bad character evidence rules.