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FRE 404(b) in Personal Injury Cases: Tipping the Scales With Evidence of Prior Bad Acts and Uncharged Incidents

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Today's faculty features:

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

SYLVIA WELLS, ET AL	*	**CIVIL ACTION**
	*	
	*	**NO: 07-9488**
VERSUS	*	
	*	**SECTION: "S"**
THE CITY OF NEW ORLEANS, ET AL	*	
	*	**MAG: "2"**
	*	

* *

MEMORANDUM IN SUPPORT OF COURT ORDERED AND RE-URGED MOTION *IN LIMINE*

MAY IT PLEASE THE COURT:

Per the Court's June 2, 2010, Order (Rec. Doc. 60), Defendants/counter-claimant ("Defendants") re-urge and re-file the Motion *in Limine* previously filed on May 27, 2010 (Rec. Doc. 46).

Defendants seek to exclude from evidence, and to prevent Plaintiffs from making any mention whatsoever of any alleged or purported "prior bad acts" or "character" evidence, most especially concerning the events surrounding the Danziger Bridge in September, 2005, for the reasons

elucidated below. Defendants move that the testimony and evidence presented at trial be limited to the facts and circumstances of ***this*** case.

DEFENDANTS ADOPT THEIR PRIOR ARGUMENTS

First and foremost, Defendants hereby adopt and incorporate herein by reference as if copied *in extenso* the arguments previously made in Defendants' original Motion *in Limine* (Rec. Doc. 46), as well as Defendants' memorandum in reply to Plaintiffs' memorandum in opposition thereto (Rec. Doc. 56), pursuant to Rule 10 of the Federal Rules of Civil Procedure.

Specifically, and by way of summation, Plaintiffs are precluded from seeking to introduce evidence of Officer Villavaso's indictment in connection with the events on the Danziger Bridge by Rules 608(b) insofar as ***a witness may not be impeached by inquiry into specific acts of misconduct not resulting in a conviction***. See, e. g., *U.S. v. Cox*, 536 F.2d 65 (5th Cir. 1976)(emphasis added). Plaintiffs are further precluded from seeking to introduce any such evidence by Rule 404(a), insofar as evidence of a person's character or a trait of character is ***not*** admissible for the purpose of proving action in conformity therewith on a particular occasion, except as provided in Rule 608 (*supra*). Moreover, evidence of other crimes,

wrongs or acts is inadmissible under Fed. R. Evid. 404(b) insofar as "***the liability of the individual police officer arises out of this particular incident and as such evidence of other similar incidents could only show a propensity for excessive use of force. This is the sort of "conduct in conformity with character" evidence which 404(b) prohibits.***"[1]

Furthermore, and in the alternative, any such inquiry into the Danziger event ought to be excluded pursuant to Rule 403 of the Federal Rules of Evidence. There is simply no question that any potential probative value is overwhelmingly outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Lastly, Plaintiffs ought to be excluded from seeking to introduce any evidence whatsoever, whether character evidence of otherwise, not contained in the Pre-Trial Order.

II. DEFENDANTS SUPPLEMENT THEIR ARGUMENT

Defendants submit further that the evidence sought to be introduced by Plaintiffs is inadmissible under Rule 404(b) to prove motive or intent. At oral argument on Defendants' original motion, counsel for Plaintiffs

[1] *See City of Reno v. Segura*, 116 F.R.D. 42, 44 (U.S.D.C. 1987).

indicated that the evidence was intended to show that Officer Villavaso was "evil" and therefore was motivated by his "evil" nature to deprive Mr. Arthur of his constitutional rights in this case. Such is not the legal standard however. Indeed, Plaintiffs would have this Court believe that the determination of the reasonableness of an officer's use of force is a ***subjective***, as opposed to an ***objective*** test.

The law is supremely well-established that the determination of the reasonableness of an officer's actions is an objective analysis.

> Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant... As we have repeatedly explained, the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action. '[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.' '[E]ven handed law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.'" *Devenpeck*, at 543-594.

The basic claim in this case is that the Officers used excessive force against Mr. Arthur. Under *Graham v. Connor*, 490 U.S. 386, 397 (1989), the

issue, therefore, is ***solely*** "whether the officers' actions were ***objectively*** reasonable in light of the facts and circumstances confronting [them], ***without regard to his underlying intent or motivation.***[2]" Accordingly, the officers' motive is simply ***not*** at issue and completely irrelevant.

Moreover, the evidence sought to be introduced is inadmissible under Fed. R. Evid. 404 insofar as Plaintiffs, as admitted by counsel at oral argument (see *supra*), intend to use the evidence to show the proclivity of the Defendant officer(s) to engage in the conduct alleged in Plaintiffs' Complaint. Indeed, as held by the Eighth Circuit in *Hopson v. Fredericksen*, 961 F.2d 1374, 1379 (8th Cir. 1992), "[s]howing a 'proclivity to engage' in conduct is the same as showing a propensity to engage in conduct and both are prohibited by the Rule."

Furthermore, and notwithstanding the foregoing, the evidence sought to be introduced by Plaintiffs ought to be excluded under Fed. R. Evid. 403 insofar as any potential probative value is overwhelmingly outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Indeed, as held by the Seventh Circuit in *Soller v.*

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[2] Emphasis added.

Moore, 84 F.3d 964, 968 (7th Cir. 1996), if received, the trial will no doubt detour into an entire reply of the Danziger incident and there will effectively be a trial within a trial. Accordingly, the Court ought to exercise its broad discretion to prevent manifest injustice.

WHEREFORE, Defendants pray that this Motion be granted, and the evidence and testimony set forth above be excluded from the trial of this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing pleading has been served on all counsel of record via electronic filing, hand delivery and/or U.S. Mail this 4th day of August, 2010.

/s/ Jim Mullaly
JIM MULLALY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SYLVIA A. WELLS, ET AL	*	CIVIL ACTION
VERSUS	*	NUMBER: 07-9488
THE CITY OF NEW ORLEANS, ET AL	*	SECT. S, MAG. 2

* * * * * * * * * * * * * *

MEMORANDUM IN OPPOSITION TO DEFENDANTS' RE-URGED MOTION IN LIMINE TO EXCLUDE EVIDENCE UNDER FED. R. 608(b) AND 404(b)

MAY IT PLEASE THE COURT:

Defendants argue that this Court should exclude from trial of this case evidence that defendant Anthony Villavaso killed and injured unarmed civilians on the Danziger Bridge in September 2005 and then participated in a police conspiracy to cover up these events.

The defendants' Motion in Limine should, however, be denied for two reasons. First, the Danziger Bridge evidence is highly relevant to defendant Villavaso's credibility, which is a core issue in this case. The plaintiffs should therefore be permitted to cross-examine Villavaso regarding Danziger pursuant to Federal Rule of Evidence 608(b).

Second, the evidence is admissible under Rule 404(b) because it is not offered to show propensity. Instead, it is offered as proof of Villavaso's motive and intent when he violated Mr. Arthur's civil rights. Furthermore, the Danziger evidence helps to establish the fact of a police conspiracy to lie about the circumstances in this case. It is, moreover, relevant to whether

Villavaso maliciously caused Mr. Arthur harm and is therefore subject to punitive damages. Finally, the Danziger evidence is independently relevant to plaintiffs' contention that the City is liable under Louisiana state law for negligently retaining Villavaso as one of its employees when he was clearly unfit for the job.

Because Rules 608(b) and 404(b) specifically permit these proposed uses of the Danziger evidence, the defendants' Motion in Limine should be denied.

Background

The plaintiffs in this case accuse defendant, former New Orleans Police Department Officer Anthony Villavaso, of choking Mr. Gerald Arthur to death in violation of Mr. Arthur's civil rights. There are at least four witnesses who will testify that Villavaso strangled Mr. Arthur during the course of an arrest on December 14, 2006. Further, two pathologists have opined that Arthur died as a result of asphyxia, or lack of oxygen to the brain and body. One of these experts, Dr. George Posey, will testify that the asphyxia was caused by manual strangulation of Mr. Arthur's neck.

The plaintiffs seek punitive damages for Villavaso's malicious and intentional behavior.

The plaintiffs also allege that Villavaso conspired with co-defendant NOPD officers to cover up his excessive and deadly use of force. The conspiracy to cover up Villavaso's actions included the "making of false statements and reports by all of the named defendants which include claims that Arthur refused to cease resistance and that they did not strangle or choke Arthur for two or three minutes after he lost consciousness." The defendants, furthermore, fabricated evidence, failed to collect evidence that would have contradicted their story, including

witnesses' statements, and committed other acts to make it appear that their actions were justified.

One of the individuals, Villavaso, is alleged to have conspired with is Sgt. Gerard Dugue. The defendant, Villavaso, and Sgt. Dugue are at the center of another police conspiracy to cover up civil rights violations resulting in civilian deaths. According to federal Indictments and Factual Basis made public in an on-going probe, Villavaso was one of the NOPD officers who fired on unarmed civilians on the Danziger Bridge on September 4, 2005, just fifteen months before he encountered Mr. Arthur. After the Danziger shootings, Villavaso and Sgt. Dugue participated in a cover-up that included the fabrication of false statements to make the shootings appear justified. This cover up and conspiracy were on-going in December 2006, when Villavaso choked Mr. Arthur to death. In fact, state authorities were aggressively investigating the Danziger events at that time, and a state indictment for first-degree murder on the Danziger Bridge was filed against Villavaso just two weeks after Mr. Arthur's death, on December 29, 2006.

Although the state indictment was later quashed, the United States Attorney's Office indicted Villavaso and Sgt. Dugue on July 13, 2010, for their participation in the Danziger Bridge shooting and subsequent cover-up. U.S. Magistrate Louis Moore has ordered that Villavaso be held without bail pending disposition of the case.

Because Villavaso and other officers have denied that anyone choked Mr. Arthur, their credibility will be a core issue in this case.

Law and Argument

The plaintiffs hereby incorporate and re-urge all arguments made in their original Memorandum in Opposition to the defendants' Motion in Limine, record document #49. They augment and amplify these arguments as follows.

I. The Plaintiffs Should be Permitted to Cross Examine Villavaso Regarding Danziger Pursuant to Rule 608(b).

Rule 608(b) specifically permits the cross examination of a witness on instances of conduct that reflect on the witness's character for truthfulness or untruthfulness:

> **(b) Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness and untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness ...

Federal Rule of Evidence 608(b).

Accordingly, the plaintiffs should be permitted to cross-examine Villavaso regarding whether he lied about what happened on the Danziger Bridge in September 2005. Did Villavaso lie to investigators when he claimed that he was fired on by male and female civilians on the Danziger Bridge? Did he lie when he claimed that the civilians possessed guns? Did he make a false report to authorities in an effort to cover up his unjustified killing of civilians on the bridge? These questions would clearly reflect on Villavaso's character for truthfulness or untruthfulness?

The plaintiffs, furthermore, have a good faith basis for the inquiry. The U.S. Attorney has indicted Villavaso in part because of his false statements and participation in the cover up of the true facts surrounding the bridge shooting. Multiple defendants in the Danziger case have now pleaded guilty to crimes arising out of the shootings. As detailed in the plaintiffs' original

Opposition, the Factual Basis for these defendants show Villavaso's participation in the shooting and subsequent cover up.

For example, in a Factual Basis filed on April 28, 2010, in *United States v. Robert Barrios, Criminal No. 10-103, Section L*, former New Orleans Police officer Robert Barrios identifies Villavaso as Officer C. The Factual Basis recounts how Barrios watched Officer C (Villavaso) fire on civilians on the Danziger Bridge who were clearly unarmed. Immediately after the shooting, Officer C (Villavaso) tried to claim that the men and women he shot at had been armed. When Barrios confronted Officer C (Villavaso) about the claim, Villavaso admitted that the females were unarmed. Barrios goes on to admit that none of the civilians had been armed that day on the bridge. The Factual Basis then describes the conspiracy to cover up the "bad shoot" on the Danziger Bridge, including a meeting that occurred at an abandoned police station in which all the officers involved in the shooting, including Villavaso, agreed to falsify statements to investigators to support their claim that the shootings were justified.

Ignoring the plain language of Rule 608(b), the defendants argue that plaintiffs should not be permitted to question Villavaso regarding Danziger because he has not yet been convicted of a crime arising out of the events. This argument is simply wrong.

The Fifth Circuit permits inquiry into specific instances of conduct reflecting on a witness's credibility even where that conduct has not resulted in a conviction. *See, e.g., United States v. Tomblin*, 46 F.3d 1369, 1388 (5th Cir. 2005) (permitting cross examination regarding instances of fraud and embezzlement that did not result in conviction); *United States v. Simpson*, 709 F.2d 903, 907-08 (5th Cir. 1983) (permitting cross examination on securities violations that

did not result in criminal conviction); *United States v. Cole*, 617 F.2d 151, 153 (5th Cir. 1980) (allowing cross examination on falsification of work reports).

The Fifth Circuit's position is consistent with the plain language of Rule 608(b), which makes clear that the use of convictions at trial is governed by Rule 609, not Rule 608: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, *other than conviction of crime as provided in rule 609*, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness and untruthfulness, be inquired into on cross-examination of the witness . . . ". Rule 608(b) does not limit the scope of cross-examination to instances of conviction. Indeed, Rule 608(b)'s whole purpose is to identify when and under what conditions a litigant may cross exam a witness regarding conduct that did not result in a criminal conviction.

The cases the defendants cite in support of their position all pre-date the enactment of the current Federal Rules of Evidence, including Rule 608. *See, e.g., United States v. Cox*, 536 F.2d 65 (5th Cir. 1976) (noting that case pre-dates enactment of federal rules of evidence). Consequently, the Fifth Circuit has previously labeled these cases, including *United States v. Cox*, "not helpful" in determining questions under Rule 608(b). *Cole*, 617 F.2d at 153, n. 2.

Furthermore, the only modern case the defendants cite in support of their position does not say what they claim it says. In *United States v. Davis*, 2003 U.S. Dist. LEXIS 6548, *5 (E.D. La. 2003), Judge Vance addressed whether a Magistrate should have granted a Motion to Quash a subpoena issued for Public Integrity Bureau reports regarding a police officer. Finding that the Motion should have been granted, Judge Vance focused on the fact that the reports were "unsubstantiated," meaning that they were found to be untrue. *Id*. at *7-8. Because the reports

were deemed untrue, they did not reflect on the officer's credibility, and thus fell outside the purview of Rule 608(b). *Id*. Furthermore, even if the reports had been substantiated, they were precisely the type of extrinsic evidence that Rule 608(b) prohibits. Thus, under the plain language of Rule 608(b), the reports were inadmissible. *Id*. Judge Vance's ruling in *Davis* thus turned on the fact that the reports did not meet the criteria expressly stated in Rule 608(b). The opinion did not impose a requirement that the at-issue conduct must have resulted in a conviction of the witness. The defendants' suggestion otherwise is inaccurate.

II. **The Danziger Evidence is Admissible under Rule 404(b).**

The evidence regarding Villavaso's participation in the Danziger shooting and cover up is also admissible under Rule 404(b), which permits evidence of "other crimes, wrongs, or acts" to be introduced at trial in order to prove facts such as motive, intent, knowledge, and absence of mistake:

> **(b) Other Crimes, Wrongs, or Acts.**—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .

Fed. R. Evid. 404(b). As numerous cases have held, Rule 404(b) is "inclusionary" rather than "exclusionary," meaning that it generally favors the introduction of otherwise relevant evidence that is offered for a permissible purpose. *United States v. Vance*, 871 F.2d 572, 575-76 (6th Cir. 1989); *United States v. Ackal*, 706 F.2d 523, 531 (5th Cir. 1983).

In this case, the Danziger evidence is not offered to show Villavaso's propensity for violence or his character. Instead, it is offered to prove motive, intent to cause harm, and the fact of a conspiracy to violate Mr. Arthur's rights. It is, furthermore, independently relevant to

plaintiffs' state law claim that the City negligently retained Villavaso after it should have been apparent that he was unfit to serve as a police officer.

1. Motive

The Danziger evidence is, first of all, relevant to establish a motive for Villavaso to lie about the events surrounding Mr. Arthur's death. More specifically, in December 2006, at the time he encountered Mr. Arthur, Villavaso was the subject of a state grand jury investigation into the events on the Danziger Bridge. This investigation was at a critical juncture; the grand jury indicted Villavaso just two weeks after Mr. Arthur's death. Given that situation, the admission that Villavaso had choked Mr. Arthur to death would have been explosive. A jury reasonably could conclude that Villavaso feared that such an admission would prompt even greater scrutiny of Danziger and make a first-degree murder indictment against him even more likely. A jury also could conclude that Villavaso feared the impact such an admission would have on public opinion regarding the events on the bridge and make a jury more willing to convict him if he were put on trial. The hope of avoiding or at least mitigating a prosecution for first-degree murder is a powerful motive to lie.

Courts have recognized the desire to avoid prosecution for a crime as a motive to commit another offense. They have thus permitted parties to introduce details of the prior crime into evidence under Rule 404(b). In *United States v. Talley*, for example, a well-respected sheriff's deputy was indicted for soliciting the murder of an FBI agent and a witness. 164 F.3d 989, 999-1000 (6th Cir. 1999). The Court permitted the government to introduce evidence establishing that the deputy was motivated to do so by his desire to avoid prosecution for a number of serious offenses, including drug trafficking. *Id*. Similarly, in *United States v. Cummings*, the Court

permitted the introduction of evidence showing that a witness obstructed justice out of a desire to avoid prosecution for drug trafficking. 969 F.2d 223, 226 (6th Cir. 1992). *See also United States v. Blum*, 62 F.3d 63, 68 (2d Cir. 1995) (holding that district court erred by excluding evidence showing that witness, rather than defendant, was motivated to falsify record books so as to cover up witness's own commission of a crime). Here, the crime Villavaso sought to avoid was even more serious. He faced potential first-degree murder charges in state court. He had a motive to tell any lie that would make such charges less likely, and denying that he had killed yet another person was clearly such a lie.

2. Intent

The Danziger evidence is, second of all, relevant to show Villavaso's intent to cause Mr. Arthur harm. Quite simply, evidence that Villavaso was willing to kill and injure civilians on the Danziger Bridge in violation of their civil rights and then concoct a story to cover it up makes it more likely that he was willing (intended) to do the same thing to Mr. Arthur.

Courts have approved the use of Rule 404(b) evidence to establish that an individual had the same intent on two different occasions. In *United States v. Brown*, for example, the government charged the defendant, a police officer working as a bouncer at a club, with using excessive force after a patron disrespected him. 250 F.3d 580, 585 (7th Cir. 2001). To show that the defendant intentionally used excessive force at the club, the government proposed to introduce evidence that he had also used excessive force on another occasion when a motorist disrespected him. *Id.* Holding that proving a common intent or motivation on two different occasions was a proper use of Rule 404(b) evidence, the Court permitted the government to introduce the evidence. *Id.*

Contrary to the defendants' assertions, *see* Rec. Doc. # 67 at 3-5, Villavaso's intent to cause Mr. Arthur harm is relevant to this case in at least two ways. First, establishing Villavaso's intent to cause harm supports the factual accuracy of the plaintiffs' version of events—which is that Villavaso unjustifiably choked Mr. Arthur to death—and undermines the defendants' claim that they never applied a choke hold and that Mr. Arthur died either from over-exertion or cocaine toxicity. In other words, if plaintiffs can show that Villavaso intended to do something (cause harm to Mr. Arthur), it is more likely that he in fact carried out his intent and committed the act.

Second, Villavaso's intent is relevant to this case because the plaintiffs are seeking punitive damages for the violation of Mr. Arthur's civil rights. In order to establish a right to punitive damages, the plaintiffs must show that Villavaso was "motivated by evil intent" or "reckless and callous indifference to a person's constitutional rights." *Williams v. Kaufman*, 352 F.3d 994, 1015 (5th Cir. 2003). Thus, Villavaso's intent is directly relevant to an issue that the jury must decide.

3. Fact of a Conspiracy

The Danziger evidence is also admissible under Rule 404(b) because it tends to establish that there was a conspiracy to cover up the violation of Mr. Arthur's civil rights. It does so in two interrelated ways. First, it helps to establish Villavaso's intent to join the conspiracy. Second, it shows Villavaso's past criminal association with Sgt. Dugue, who participated with Villavaso in the Danziger cover up. The Danziger evidence thus makes a conspiracy between the defendant, Villavaso, and Sgt. Dugue more likely in this case.

The Fifth Circuit has specifically approved the use of Rule 404(b) evidence to establish a defendant's intent to join a conspiracy. In *United States v. Roberts*, the Court addressed whether the government could introduce evidence that the defendant had previously run a gambling house with certain individuals to prove that he conspired with those same individuals to run a gambling house on another occasion. 619 F.2d 379, 382-83 (5th Cir. 1980). Noting that intent to join a conspiracy was a necessary but difficult element to prove, the Court permitted the use of this evidence under Rule 404(b) because it helped to establish the defendant's intent: "Proof that [the defendant] had intentionally joined in a conspiracy to operate a gambling business four years prior to his present participation in such an operation increases the likelihood that he had conspired with others to establish and operate the gambling business." *Id*. at 384. Similarly, in this case, proof that defendant Villavaso intended to conspire with others—including his Danziger co-defendant, Sgt. Dugue—to cover up the Danziger Bridge incident increases the likelihood that he intended to conspire to cover up his excessive use of force against Mr. Arthur.

Courts have also permitted the introduction of Rule 404(b) evidence where it shows alleged co-conspirators' past criminal association, thereby increasing the likelihood that there was in fact a conspiracy between them at the time in question. *See, e.g., United States v. Tse*, 375 F.3d 148, 155-56 (1st Cir. 2004) ("In a conspiracy case, the district court may admit evidence of other bad acts if they tend to suggest a criminal association between the alleged conspirators."). These courts have reasoned that showing co-conspirators' past association can, among other things, show the background of a relationship and the mutual trust that exists because of past criminal dealings. *United States v. Procopio*, 88 F.3d 21, 29 (1st Cir. 1996).

In this case, the Danziger evidence should be admitted because it shows Villavaso and co-defendant Sgt. Dugue knew each other at time of Mr. Arthur's death. Indeed, they had previously conspired with each other to cover up the true facts regarding Villavaso's actions on the bridge. The Danziger evidence will therefore show that the two likely trusted each other enough to engage in a second conspiracy to cover up Villavaso's actions with regard to Mr. Arthur.

4. Negligent Retention

Fourth and finally, the Danziger evidence should be admitted under Rule 404(b) because it supports the plaintiffs' claim that the City is liable for negligently retaining Villavaso as a police officer after it should have been apparent that he was unfit for duty. To prove the tort of negligent retention, plaintiffs must show that the City knew or should have known of Villavaso's unfitness for duty. *See, e.g., McCrink v. City of New York*, 71 N.E.2d 419 (1947) (imposing liability on municipality that had previous knowledge or should have known of law enforcement officer's unfit character, but nonetheless retained him on the force). The facts surrounding the Danziger incident clearly show his unfitness. They should therefore be admitted as independent proof of this state law tort.

Conclusion

For the aforesaid reasons, the defendants' Motion in Limine should be denied.

Respectfully submitted;

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2010 August 11, 2010 I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all parties.

s/Gary W. Bizal
GARY W. BIZAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SYLVIA WELLS, ET AL.	**CIVIL ACTION**
VERSUS	**NO: 07-9488**
THE CITY OF NEW ORLEANS, ET AL.	**SECTION: "S" (2)**

ORDER AND REASONS

IT IS HEREBY ORDERED that Plaintiffs' Motion *in Limine* to Exclude Evidence of Gerald Arthur's Prior Convictions (Doc. #63) is **GRANTED**.

IT IS FURTHER ORDERED Defendants' Re-Urged Motion *In Limine* to Exclude Evidence of the Danziger Bridge Incident of September 2005 (Doc. #67) is **GRANTED**.

BACKGROUND

Plaintiffs are the mother and children of decedent, Gerald Arthur ("Arthur"). Plaintiffs allege that on December 14, 2006, Arthur was operating a motor vehicle in New Orleans, Louisiana when he was illegally stopped for a traffic violation by defendants, Victor Gant ("Gant"), David Ogozalek ("Ogozalek"), and Anthony Villavaso ("Villavaso"), who were members of the New Orleans Police Department. Plaintiffs claim that the officers attempted to illegally and falsely arrest Arthur, and then Arthur attempted to flee from them. When the officers caught Arthur, they allegedly threw him

to the ground, beat, and choked him, even after he stated that he was not resisting them. Arthur was rendered unconscious. Thereafter, emergency medical technicians arrived on the scene and purportedly did not treat Arthur, but rather treated an officer who sustained minor injuries. Plaintiffs allege that Arthur died as a result of the chocking and/or denial of medical treatment. Plaintiffs also allege that the officers attempted to cover up the incident by creating a false story, fabricating evidence, and failing to collect and/or destroying or ignoring exculpatory evidence in Arthur's favor. Additionally, plaintiffs allege that defendants Warren Riley, the Superintendent of the New Orleans Police Department, and the City of New Orleans, are liable for their policies of allowing such choke holds, improper accountability and discipline for officers, failure to supervise, monitor, train, and control defendants, failure to terminate the officers, and failure to properly investigate such incidents.

Plaintiffs claim that their and Arthur's rights under the Fourth and Fourteenth Amendments of the Constitution of the United States were violated. Plaintiffs also make claims under Louisiana law.

ANALYSIS

1. Plaintiffs' Motion *in Limine*

Plaintiffs filed a motion *in limine* seeking to exclude evidence of Arthur's prior drug convictions. Plaintiffs argue that this evidence is inadmissible because defendants did not list it in the pre-trial order. They also argue that it is inadmissible under Rule 609 of the Federal Rules of Evidence because Arthur will not testify, and thus is not subject to cross-examination. Further, plaintiffs argue that the evidence is inadmissible under Rule 403 of the Federal Rules of Evidence

because it is more prejudicial than probative and under Rule 404 of the Federal Rules of Evidence because they admit that Arthur ran from the police because there was cocaine in his car.

Defendants oppose the motion arguing that the evidence is admissible for the purpose of refuting plaintiffs' claims for damages for loss of support and loss of love, companionship, and affection is undermined by the possibility that Arthur would have been incarcerated due to another drug conviction. Defendants argue that the evidence is admissible under Rule 404(b) because it shows Arthur's intent in running from the police. Further, defendants argue that the evidence is more probative than prejudicial under Rule 403 because the plaintiffs should not be permitted to mislead the jury by painting "a picture of Mr. Arthur and the events of that day that are patently untrue."

Rule 609 provides that evidence of a witness's prior convictions can be admitted to attack his or her credibility. Arthur is deceased, and cannot testify. Therefore, evidence of Arthur's prior drug convictions is not admissible under Rule 609.

Rule 404(b) provides that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Plaintiffs admit that Arthur ran from the police because he had cocaine in the car. Therefore, the evidence of his prior drug convictions is not necessary to prove motive, opportunity, intent,

preparation, plan, knowledge, identity, or absence of mistake or accident, unless the plaintiffs attempt to introduce evidence of Arthur's good character.

Thus, plaintiff's motion *in limine* is GRANTED, and evidence of Arthur's prior drug convictions will be excluded, unless the plaintiff attempt to introduce evidence of Arthur's good character.

2. Defendants' Motion *in Limine*

Defendants filed motion *in limine* seeking to exclude evidence of prior bad acts or character evidence. Defendants are particularly concerned that plaintiffs may seek to introduce evidence of Villavaso's involvement in the Danziger Bridge incident as one of the officers on that scene that allegedly fired shots. Villavaso has not been convicted of a crime in connection with the Danziger Bridge incident, but he has been indicted by a Grand Jury in the United States District Court for the Eastern District of Louisiana for crimes he allegedly committed in connection with that incident. Defendants argue that such evidence is inadmissable under Rules 608(b) and 404(a) Federal Rules of Evidence because such evidence is irrelevant to the facts of this case and is not admissible for the purpose of showing a person's conformity with a character trait. Defendants also argue that the evidence should also be excluded under Rule 403 because it is more prejudicial than probative and would serve to confuse the issues and lead the jury to base their decision on emotions surrounding the Danziger Bridge incident. Further, defendants argue that the evidence should be excluded pursuant to Rule 16 of the Federal Rules of Civil Procedure because plaintiffs did not inform them of their intent to use such evidence until after the final pre-trial conference, and there are no witnesses or exhibits in the pre-trial order that relates to any prior bad acts or character on behalf

of any defendant.

Plaintiffs argue that the evidence is admissible because Rule 608(b) permits cross examination on issues that are probative of the witness' character for truthfulness or untruthfulness. Plaintiffs argue that Villavaso's involvement in the Danziger Bridge incident and subsequent coverup shows that he has a tendency to be untruthful. Specifically, plaintiffs want to ask: (1) whether Villavaso lied in a pervious case when he claimed he was fired on by the male and female Danziger civilians; (2) whether he lied in a pervious case when he claimed they had guns; (3) whether he lied and conspired in a previous case to cover up the truth of the Danziger shootings. Plaintiffs also argue that Villavaso's involvement in the Danziger incident is being introduced to prove his intent to cause harm and a pattern of absence of mistake in connection with his plan to conspire and coverup events in this case. Further, plaintiffs claim that such evidence shows the lack of discipline, supervision and training of Villavaso by the city, and that it goes to the issue of punitive damages because it shows that he acted intentionally in this incident. Finally, plaintiffs claim that they made their intent to use the evidence known as soon as the conspiracy in the Danziger incident became evident due to the guilty pleas of the officer defendants regarding that incident.

Rule 608(b) provides in pertinent part:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided by Rule 609, may not be proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or

> untruthfulness of another witness as to which character the witness being cross examined has testified.

Plaintiffs argue evidence concerning Villivaso's alleged participated in the Danziger Bridge incident are relevant to show his character for truthfulness. While this may be true, any such evidence is inadmissable under Rule 403 because it is more prejudicial than probative. Rule 403 provides that: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of delay, waste of time, or needless presentation of cumulative evidence.

Admitting evidence regarding the Danziger Bridge incident would undoubtedly confuse this issues in this unrelated case and potentially mislead the jury. Therefore, defendants' motion *in limine* is GRANTED, and evidence regarding the Danziger Bridge incident will be excluded, unless the evidence at trial attempts to show that Villavaso's reputation for truthfulness or good character.

CONCLUSION

IT IS HEREBY ORDERED that Plaintiffs' Motion *in Limine* to Exclude Evidence of Gerald Arthur's Prior Convictions (Doc. #63) is **GRANTED**.

IT IS FURTHER ORDERED Defendants' Re-Urged Motion *In Limine* to Exclude Evidence of the Danziger Bridge Incident of September 2005 (Doc. #67) is **GRANTED**.

New Orleans, Louisiana, this 17th day of August, 2010.

MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SYLVIA A. WELLS, ET AL	*	CIVIL ACTION
VERSUS	*	NUMBER: 07-9488
THE CITY OF NEW ORLEANS, ET AL	*	SECT. S, MAG. 2

* * * * * * * * * * * * * *

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO RECONSIDER COURT'S RULING GRANTING THE DEFENDANTS' MOTION IN LIMINE TO EXCLUDE RULE 404(b) AND 608(b) EVIDENCE OR IN THE ALTERNATIVE MOTION TO BIFURCATE THE TRIAL

This Court should reconsider its ruling on the Defendants' Motion in Limine because evidence regarding defendant Villavaso's involvement in the events on the Danziger Bridge is crucially relevant to the plaintiffs' state-law claim that the City of New Orleans was negligent in hiring, retaining, and supervising Villavaso in December 2006, when the events at issue in this case occurred. It is also necessary for the plaintiffs' claim for punitive damages. Given the centrality of this evidence to these claims, the Court's recent ruling on the defendant's Motion in Limine unfairly restricts the plaintiffs' ability to present their case. Furthermore, there are in general less restrictive alternatives to granting the defendants' Motion that would ameliorate any concerns regarding unfair prejudice that might result from introduction of the Danziger evidence. Plaintiffs submit that the Court should reconsider its recent ruling in light of these alternatives and fashion

some compromise between the unfettered use of the highly relevant Danziger evidence and its exclusion from trial of this case.

Law and Argument

First and foremost, the plaintiffs feel compelled to note that whatever prejudicial effect the Danziger evidence has, it is a circumstance of the defendants' own making. It is thus hard to see how this prejudice could be "unfair" under Rule 403. The plaintiffs did not force defendant Villavaso to shoot innocent civilians on the bridge in September 2005, and they did not encourage him to join a conspiracy to cover up the true facts of the shooting. Nor did the plaintiffs have any part in the City's decision to keep Villavaso on active street patrol while he was under investigation for first-degree murder by State authorities in December 2006. It is worth considering the reality of that for a moment: At a time when the State of Louisiana was on the cusp of accusing this man of murdering multiple civilians while acting in the course and scope of his employment as a police officer, the City did absolutely nothing to prevent him from killing again. In fact, his superiors gave him a gun, a baton, and a badge and sent him back out on the streets with no apparent regard for the consequences.

The Court's recent ruling on the defendants' Motion in Limine effectively rewards this bad behavior by permitting the defendants to pretend like it didn't happen. Indeed, the Court's ruling seems to suggest that the Danziger evidence must be excluded simply because it is so egregious and puts the defendants' actions in such a bad light. But

that is a strange outcome—Why should defendants who do really bad things get the benefit of having evidence excluded simply because it would be so bad for their side?

Here, the Danziger evidence is crucial to the plaintiffs' claim that the City was negligent for permitting Villavaso to continue acting as a regular police officer when he was under investigation for murdering civilians. The Court's ruling on the Motion in Limine guts this claim by preventing the plaintiffs from explaining to the jury why the City was negligent in not firing Villavaso or, at the very least, assigning him to desk duty while the State charges were pending. Indeed, it is hard to see how the plaintiffs can prove this claim at all without the Danziger evidence. The evidence is likewise crucial to the plaintiffs' claim for punitive damages, which requires proof that Villavaso or others acted intentionally and maliciously.

The Danziger evidence is thus similar to proof that a defendant has previously been convicted of a crime in a prosecution for unlawful possession of a weapon under 18 U.S.C. § 922(g). Although such evidence usually would be excluded unless the defendant testified at trial, in a § 922(g) prosecution this highly prejudicial evidence is permitted because it is essential to the government's case. The U.S. Supreme Court discussed this dynamic in *Old Chief v. United States*, 519 U.S. 172 (1997). In that case, the Court cautioned district courts to consider the necessity of the proffered evidence to a party's case as well as any evidentiary alternatives before making Rule 403 decisions. Where evidence is crucial to a claim at issue, its evidentiary value is, correspondingly, much higher, and it should not generally be excluded:

> [W]hat counts as the Rule 403 "probative value" of an item of evidence . . . may be calculated by comparing evidentiary alternatives. . . . The Notes to Rule 403 [state] that when a court considers "whether to exclude on grounds of unfair prejudice," the "availability of other means of proof may … be an appropriate factor." . . . Thus the notes leave no question that when Rule 403 confers discretion by providing that evidence "may" be excluded, the discretionary judgment may be informed not only by assessing an evidentiary item's twin tendencies, but by placing the result of that assessment alongside similar assessments of evidentiary alternatives.

Old Chief v. United States, 519 U.S. 172, 184-185 (U.S. 1997). *See also Wright & K. Graham, Federal Practice and Procedure* § 5250, pp. 546-547 (1978) ("The probative worth of any particular bit of evidence is obviously affected by the scarcity or abundance of other evidence on the same point").

The Danziger evidence in this case is highly and perhaps uniquely relevant to the plaintiffs' negligent hiring and retention claim. Because there is simply no other available evidence to prove this claim, the Danziger evidence should be admitted despite its admittedly prejudicial effect (which the defendants brought on themselves).

There are also several alternatives to exclusion that, speaking more generally, could address the Court's concerns regarding the prejudicial effect of the Danziger evidence without the harsh remedy of total exclusion. The Court could, for example, instruct the jury on the limited purposes for which the evidence is being introduced. These instructions could be propounded both at the time of the evidence's introduction and during normal jury instructions. Alternatively, the Court could bifurcate the plaintiffs' negligent retention and punitive damages claim so that evidence relating to these issues is put before the jury after it has made a decision on individual liability.

Given these alternatives to total exclusion, the Court's recent decision on the Motion in Limine seems to unnecessarily restrict the plaintiffs' ability to present their case. The plaintiffs also believe the decision works an injustice: If the ruling stands un-modified, then defendant Villavaso will be permitted to take the stand and try to convince the jury of his credibility without the plaintiffs being able to cross-examine him under Rule 608(b) regarding the lies he told in Danziger. Again, this holding seems to reward a defendant for having told really bad lies about particularly egregious acts. Precluding cross-examination on Danziger is thus palpably unfair to the plaintiffs and provides the defendants an undeserved windfall.

Conclusion

For these reasons, and those explained in the plaintiffs' Opposition to Defendants' Motion in Limine, the plaintiffs respectfully request this Court to reconsider and modify its holding on the defendants' Motion in Limine.

Respectfully submitted;

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2010 August 11, 2010 I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all parties.

s/Gary W. Bizal
GARY W. BIZAL

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

Edward J. Imwinkelried*

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

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

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

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

3. Francescani, *supra* note 2.

4. *Id.*

> (b) Crimes, Wrongs, or Other Acts
>
> (1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) Permitted Uses . . . . This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.[5]

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

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

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

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

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

7. *See id.*

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

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

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

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

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

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

By the same token, there is legitimate non-character relevance when the prosecution can show that the charged and uncharged crimes share a unique, one-of-a-kind modus operandi. When the prosecution can link the accused to an uncharged crime committed with the identical, unique modus operandi as the charged crime, the trier of fact may infer the accused's guilt of the charged crime without positing any assumption about the accused's bad character. Both the British[16] and American cases recognize this non-character theory. The American cases use such expressions as "distinctive," "earmark," "fingerprint," "handiwork," "identifying," "signature,"

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

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

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

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

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

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

Another theory – a theory that the prosecution has invoked in the Cosby case[20] - is the doctrine of objective chances. The doctrine rests on informal or intuitive [21] probability reasoning.[22] If the frequency of a type of event in a given case exceeds the normal incidence of such events, the extraordinary coincidence renders it implausible that random, innocent chance explains the higher frequency.[23]

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

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

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

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

20. Francescani, *supra* note 2.

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

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

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

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

25. *Id.*

26. *Id.* at 233.

of whether Mundy's death was "accidental."[27] The court reasoned that either Smith was one of the unluckiest persons alive, or one or some of the deaths in question were the product of an actus reus.[28] The American courts have followed *Smith* and approved the use of uncharged misconduct evidence to rebut defense claims that there was no actus reus.[29]

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

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

27. *Id.* at 237.

28. *Id.* at 233.

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

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

31. *Id.*

32. *Id.* at 133.

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

> recurrence of a similar result . . . tends (increasingly with each instance) . . . to negate . . . innocent mental state . . . . [34]

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

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

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

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34. *Id.*

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

36. Francescani, *supra* note 2.

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

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

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

40. *Id.* at 441-42.

41. *Id.* at 446, 453.

42. *Id.* at 459.

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

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

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

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

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

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

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

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

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

46. Francescani, *supra* note 2.

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

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

49. *Id.* at 1039.

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

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

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

The thesis of this article is that there are fundamental differences between the modus operandi theory for proving identity and the doctrine of objective chances theory. The first part of this article is descriptive. Part I reviews the traditional uses of the doctrine of chances to prove actus reus and mens rea. Part II turns to the much more controversial use of the doctrine to rationalize the admission of uncharged misconduct evidence to prove identity, as in the Cosby case. Initially, Part II addresses the threshold policy question of whether the prosecution should be permitted to resort to this variation of the doctrine to prove identity. Part II concludes that that question should be answered in the affirmative. Part II then turns to the task of specifying the required foundation for a proper invocation of the doctrine. In doing so, Part II distinguishes this variation of the doctrine from the use of the modus operandi for the same purpose, namely, to justify the admission of an accused's uncharged misconduct to prove identity. The article concludes that although in principle this adaptation of the doctrine can serve as a legitimate basis for admitting uncharged misconduct evidence, in practice the courts should proceed with circumspection. In general, uncharged misconduct is highly prejudicial.[52] As Justice Cardozo remarked, uncharged misconduct evidence can be a "peril to the innocent."[53] Caution is especially warranted here; there is not only a fine line[54] between verboten character reasoning and non-character theories of logical relevance but also an even thinner line between the applications of the modus operandi and doctrine of chances theories for proving identity.

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

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

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

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

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

Logical Relevance

As the introduction noted, Rule 404(b)(1) generally[55] prohibits the prosecution from introducing testimony about an accused's uncharged misconduct on a character theory of logical relevance. The prosecution cannot rely on the theory depicted in the following figure:

FIGURE 1

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

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

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

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

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

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

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

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

59. *Id.* at 61-65.

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

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

62. Thigpen v. Thigpen, 926 F.2d 1003, 1014 (11th Cir. 1991); Daniel D. Blinka, *Evidence of Character, Habit, and "Similar Acts" in Wisconsin Civil Litigation*, 73 MARQ. L. REV. 283, 295 (1989).

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

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

65. *See supra* text accompanying note 64.

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

FIGURE 2

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

This theory of logical relevance is not only superficially different than the theory depicted in Figure 1. More importantly, it is distinguishable from the first theory in terms of the probative dangers that inspire the character prohibition codified in Rule 404(b)(1). As previously stated, in Figure 1, to decide whether to draw the first inference, the jury must consciously address the question of the accused's personal, subjective character. The doctrine of chances does not require the jurors to do so. Rather than focusing on the accused's subjective character, the jurors must consider the objective probability or plausibility of so many accidents befalling the accused. The jury considers the cluster,[66] concatenation,[67] or string[68] of events, including both the charged and uncharged incidents. It is true that individually, the events may appear innocent.[69] However, the jury must decide whether in aggregate or collectively,[70] the events constitute an implausible, extraordinary coincidence[71]—simply stated, "an affront to common sense."[72]

66. Fienberg & Kaye, *supra* note 22.
67. MCCORMICK, *supra* note 47, § 190, at 1040.
68. LEONARD, *supra* note 17, § 9.4.2, at 611.
69. MCCORMICK, *supra* note 47, § 190, at 1040.
70. *Id.*
71. PHIPSON ON EVIDENCE 548-49 (Hodge M. Malek ed., 19th ed. 2018).
72. R v. Boardman [1975] AC 421 (HL) 459 (appeal taken from Eng.).

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

This theory is distinguishable from character reasoning in another respect. At the second step in Figure 1, the trier of fact employs character as a predictor of conduct on the charged occasion. The doctrine of chances theory depicted in Figure 2 does not entail that inference. Rather, the prosecutor urges the jurors to do precisely what the pattern instructions in most jurisdictions direct the jurors to do, that is, draw on their common sense[74] and experience[75] in order to decide which inference is more plausible. Is it more plausible to infer that all the events represent innocent happenstance,[76] or does it seem more probable that one or some of the events involve an actus reus and criminal agency?

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

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73. United States v. York, 933 F.2d 1343, 1350 (7th Cir. 1991), *overruled on other grounds by* Wilson v. Williams, 182 F.3d 562 (7th Cir. 1999); *see also* United States v. Aguilar-Aranceta, 58 F.3d 796, 799 (1st Cir. 1955) ("The justification . . . is that no inference as to the defendant's character is required."); Nancy Bauer, Casenote, *People v. Spoto: Teasing the Defense on Prior Bad Acts Evidence*, 63 U. COLO. L. REV. 783, 803 (1992) ("In theory, the doctrine has no bearing at all on the defendant's character . . . .").

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

75. *Boardman*, [1975] AC 421 (HL) 445; EGGLESTON, *supra* note 22, at 89. *See* United States v. Gainey, 111 F.3d 834, 836 (11th Cir. 1997) ("In evaluating the facts of a case, the law permits jurors to 'apply their common knowledge, observations and experiences in the affairs of life.' . . . [I]n assessing credibility or the reasonableness of a position, people inherently apply conclusions about human behavior based on *common experiences of daily living* . . . . [J]urors may use 'common sense,' derived from the repetitive pattern of human behavior and experiences common to all of us . . . .") (citation omitted); United States v. Flores-Chapa, 48 F.3d 156, 161 (5th Cir. 1995) ("Juries are free to use their common sense and apply common knowledge, observation, and experience gained in the ordinary affairs of life . . . ."); United States v. Donovan, 24 F.3d 908, 913 (7th Cir. 1994) ("[W]e expect jurors to draw on their experience as well as their common sense to draw reasonable inferences from the circumstantial evidence."); Zada v. Scully, 847 F. Supp. 325, 328 (S.D.N.Y. 1994) ("Jurors can and are expected to apply common sense in evaluating evidence . . . .").

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

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

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

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

1. To Prove the Occurrence of an Actus Reus

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

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

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

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

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

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

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

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

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

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

is arson prosecutions. When there have been numerous fires at properties owned or occupied by the accused in an arson or insurance fraud case, American[85] as well as British[86] precedents approve of the admission of testimony about the prior fires as uncharged misconduct evidence. Objectively, it is highly unlikely that a single person will be victimized by multiple fires in a short period of time.[87]

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

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

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

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

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

89. 94 P.2d at 570.

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

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

92. *Id*.

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

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

> [W]ith regard to no single child was there any legally sufficient proof that defendant had done any act which the law forbids. Only when all of the evidence concerning the nine other children and Paul is considered collectively is the conclusion impelled that the probability that some or all of the other deaths, cyanotic seizures, and respiratory deficiencies were accidental or attributable to natural causes was . . . remote . . . .[100]

In these cases, the prosecution need not prove that the other, uncharged incidents were crimes. It is sufficient if the prosecution demonstrates that the accused has a significant connection to[101] or link with[102] the other incidents—having occupied the other premises where the fires occurred or having had custody of the other children who died. Once that nexus is established, the doctrine of chances comes into play.[103] At that point, an objective probability assessment of the extraordinary incidence of fires or

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93. *Id.*

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

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

96. *Id.* at 129-30.

97. *Id.* at 130-31.

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

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

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

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

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

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

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

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

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

FIGURE 3[105]

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

This is the variation of the doctrine that Dean Wigmore had in mind when he formulated his famous hypothetical about the three shots. In the past British courts have often admitted uncharged misconduct to rebut an accused's claims of ignorance or mistake[106] or a contention of innocent, unknowing possession.[107]

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

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

105. Edward J. Imwinkelried, *A Small Contribution to the Debate Over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions*, 44 SYRACUSE L. REV. 1125, 1133 (1993).

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

107. *Id.* at 312-15.

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

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

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

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

FIGURE 4

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

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

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

111. Francescani, *supra* note 2.

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

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

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

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

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

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

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

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

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

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

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

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

116. *Id.* § 7:18, at 7-71.

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

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

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

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

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

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

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

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

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

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

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

122. *Id.* at 1019.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. The Independence of the Accusations

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

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

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

135. R v. Boardman [1975] AC 421 (HL) 452 (Lord Hailsham) (appeal taken from Eng.).
136. 2018 UT 5, ¶ 54, 417 P.3d 116.
137. *Id.*
138. *Boardman*, [1975] AC 421 (HL) 441-42.
139. [1946] 1 KB 531 (Eng.).
140. *Boardman*, [1975] AC 421 (HL) 444.

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

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

141. *Id.*

142. *Id.* at 448.

143. *Id.* at 461.

144. *Id.* at 460.

145. *Id.* at 459.

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

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

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

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

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

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

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

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

2. The Similarity and Relative Frequency of the Accusations

Distinguishing Between the Doctrine of Chances and the Modus Operandi Theory

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

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

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

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

155. *Id.* § 15.07[a], at 915.

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

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

FIGURE 5

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

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

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

156. 1 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 8, § 3:11.
157. *Id.* § 3:12.
158. R v. Morris [1970] 54 Crim. App. 69 at 80 (Eng.).
159. DPP v. P [1991] 2 AC 447 (HL) (appeal taken from Eng.).
160. *Id.* at 462.

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

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

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

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

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

162. *Id.* at 462.

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

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

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

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

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

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

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

167. Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575, 590-91, 597 (1990) [hereinafter *The Doctrines*].

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

169. *Id.* ¶ 57.

170. *See Id.* ¶¶ 40, 50.

171. *Id.* ¶¶ 50, 57.

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

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

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

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

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

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

Estimating the Relative Frequency of Similar Accusations

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

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

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

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

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

Failing proof of a "once in a lifetime" experience or startlingly high numbers, the prosecution might present expert epidemiological testimony about the frequency of the type of occurrence involved in the case: the death of an infant of a certain age due to cyanosis[183] or cardiac arrest incidents among hospital patients.[184] In short, in many cases involving the use of the doctrine to negate accident claims, there will be a reliable basis for generating a frequency estimate.

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

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

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

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

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

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

183. *Id*. at 135.

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

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

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

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

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

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

186. *Id.* at 5-78.

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

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

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

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

188. *Id.*

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

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

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

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

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

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

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

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

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

196. *Id.* at 595-96.

III. CONCLUSION

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

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

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

197. *See supra* text accompanying notes 44-45.
198. *See supra* text accompanying note 43.
199. Francescani, *supra* note 2.
200. R v. Boardman [1975] AC 421 (HL) 453 (Lord Hailsham) (appeal taken from Eng.).
201. *Id.* at 457 (Lord Cross).
202. *Id.* at 452, 456 (Lord Hailsham).

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

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

203. FED. R. EVID. 105.

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

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

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Comment

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A TALE OF TWO WIVES: 404(B) EVIDENCE SIMPLIFIED

Federal Rule of Evidence 404(b) is a constant source of confusion, contempt, and convoluted reasoning. Rule 404(b) prohibits evidence of an individual's prior bad acts when used to prove conformity with a character trait. No Federal Rule of Evidence generates more appellate pages. This Comment argues that there are foundational issues with a rule that generates so much dispute. That proposition becomes even more evident through examination of the murder conviction of Harold Henthorn. The government's case against Mr. Henthorn relied heavily on the introduction of evidence surrounding his first wife's death. That evidence of prior uncharged conduct--404(b) evidence--became the focus of Mr. Henthorn's appeal. This Comment argues for a reworked Federal Rule of Evidence 404(b) that focuses on clarity and the realities of the jury trial system. The Henthorn *case provides an instructive example of how 404(b) creates confusion and provides an example of how a new rule might operate. It no longer makes sense to allow 404(b) to remain unchanged, and this Comment presents a new rule that considers all sides of the debate surrounding prior bad act evidence.*

*294 Introduction

Reports of death on the news commonly recite that no foul play is suspected.[1] When someone dies in an apparent accident, it is reasonable to inquire if the death was actually an accident, or if foul play *was* involved. When Harold Henthorn's first wife died in an apparent accident, no charges were filed; no foul play was suspected.[2] Mr. Henthorn, however, could not avoid charges when his *second* wife died.[3] Harold Henthorn was convicted of first-degree murder in the death of Toni Henthorn after

a nine-day jury trial.[4] There was minimal evidence to support the charge of first-degree murder when viewed in isolation.[5] The government used two of the nine trial days to present evidence regarding the death of Mr. Henthorn's *first* wife.[6] The government also presented evidence regarding a ***295** prior incident where Toni Henthorn was seriously injured.[7] The district court allowed the jury to hear the evidence as proof that the incidents were intentional acts by Mr. Henthorn, and not accidents.

The purpose of prior bad act evidence is to use past incidents to illuminate murky areas in a current case.[8] While discussing prior bad act evidence, a Seventh Circuit judge mused: "The man who wins the lottery once is envied; the one who wins it twice is investigated."[9] The judge was specifically referencing Dean John Henry Wigmore's "doctrine of chances."[10] The doctrine of chances is the theory that the improbability of a string of events can act as objective proof that at least one of the events was a criminal act, not mere coincidence.[11] Descriptions of the doctrine of chances can be esoteric, but the doctrine is important to understand. An example will help illustrate both its appeal and its mechanics.

In *United States v. York*, a man sought to collect insurance money in two separate instances: first, when his wife was murdered, and second, when his business partner was murdered.[12] In *York*, the doctrine of chances highlighted the sheer improbability that: (1) a man's wife will get murdered, (2) then his business partner will get murdered, and (3) that he will be the insurance beneficiary both times.[13]

***296** That improbability also created the inference of criminal intent or planning. The doctrine of chances operates as an intuitive tool to place prior bad act evidence within the larger scheme of more concrete admissible evidence. The doctrine of chances was the issue of the appeal following Mr. Henthorn's conviction, which the Tenth Circuit recently upheld.[14]

The use of prior bad act evidence is governed by Federal Rule of Evidence 404(b).[15] Rule 404(b) prohibits the use of prior bad act evidence to show conformity with a character trait, but that is essentially its lone prohibition. It permits the introduction of evidence for certain other purposes, such as proof of intent, opportunity, or motive. The list of permitted uses for prior bad act evidence is not exhaustive and "the rule is one of inclusion, rather than exclusion."[16] Accordingly, 404(b) evidence is frequently introduced for a variety of purposes, as it was in *Henthorn*.[17] When the evidence is offered for multiple ***297** purposes, it can be hard for the jury to make meaningful distinctions between those purposes, and the evidence can functionally devolve into evidence of bad character.[18] The result is confusion; it is difficult to determine whether the jury convicted the defendant for the charged crime, for previous bad acts, or for some combination.[19] Thus, the central question in the *Henthorn* appeal became--as it arguably becomes in many prior bad acts cases--did the jury convict the defendant for the charged crime or something else? Did the jury convict Mr. Henthorn for the death of his first wife, the death of his second wife, or both?[20] Rule 404(b) is the most cited and litigated Federal Rule of Evidence for just this reason.[21] While there are evidentiary safeguards designed to alleviate issues, 404(b) in its current form is flawed and in need of change.[22]

***298** This Comment argues that the current iteration of 404(b) is broken; it presents a different version of 404(b) that would provide clarity for judges and juries, while still favoring admissibility and effective use of prior bad act evidence.[23] Part I discusses *Henthorn* in detail, with specific focus on the use of 404(b) evidence and how the evidence was presented to the district court.[24] Part II examines the internal tension within 404(b) and addresses the central arguments on both sides of the debate surrounding its usage.[25] While the two sides can seem irreconcilable, this Comment attempts to find middle ground that incorporates critical features of both arguments. Part III demonstrates that all 404(b) evidence is propensity evidence and offers a proposed change to 404(b) that addresses this reality.[26] The proposed change rejects semantic labels such as "propensity" and "character" and instead takes a realistic and pragmatic approach to prior bad act evidence. The purpose of a more pragmatic approach is to aid both judges and juries who have to make difficult and strained decisions concerning 404(b) evidence. Part IV applies this proposed rule to *Henthorn*, a fascinating modern case laden with unique facts and the common confusion that

surrounds 404(b).[27] This Comment concludes that an examination of *Henthorn* and all the controversy surrounding 404(b) shows that the rule needs to be redrafted with a focus on the realities and history of 404(b).[28]

I. The *Henthorn* Case

On the afternoon of September 29, 2012, Harold Henthorn took his wife on a surprise hike for their twelfth wedding anniversary.[29] The hike ended when his wife fell 128 feet off of ***299** a cliff.[30] She did not survive the fall, and Mr. Henthorn was charged with murder.[31] There were no eyewitnesses, and scant evidence was available to the government, outside of a map with an X drawn where Toni fell.[32] Due in part to the lack of hard evidence, the government introduced evidence surrounding the death of Mr. Henthorn's first wife, Lynn, to prove its case.[33]

A. 404(b) Evidence in Henthorn

The use of 404(b) evidence was essential for the government to secure a conviction.[34] Because there was a lack of physical evidence and eyewitness testimony in the Henthorn murder trial, the judge's decision to include 404(b) evidence was critical to the outcome of the trial.[35] As required by 404(b), the government provided notice of intent to introduce prior bad act evidence.[36] The government noted that this evidence would be "critical" and intended to introduce it to show Mr. Henthorn's "intent, motive, and plan."[37] Later in the notice, however, the government stated that they intended to introduce evidence surrounding the death of Mr. Henthorn's first wife to show "intent, motive, preparation, plan, and lack of accident."[38] The only enumerated 404(b) purposes that the ***300** government did not include were identity, knowledge, and opportunity.[39] The government offered every purpose that could reasonably be presented.

The jury was asked to sort through that variety of 404(b) purposes concerning the same information and make a key determination. As noted above, the 404(b) evidence was critical. The government admitted that the scarcity of hard evidence made the 404(b) evidence more admissible.[40] Unsurprisingly, while the government referenced the highly probative value of the evidence, it did not mention its similar, arguably greater, prejudicial effect.[41] In order to demonstrate the probative value of the evidence, the government listed the similarities in the deaths of Mr. Henthorn's wives and invoked the doctrine of chances.[42]

Mr. Henthorn moved to have this evidence precluded from admission.[43] The motion goes into great detail about the accidental nature of Lynn Henthorn's death.[44] Mr. Henthorn argued against the inclusion of the evidence because the evidence would result in a "trial within a trial" and invite impermissible character inferences.[45] The core of Mr. Henthorn's argument was that the government must precisely articulate how the evidence will be used and for what purpose, ***301** without any inference of character or criminal proclivities.[46] Both Mr. Henthorn and the government made mention of the oft-cited "four-prong" test that has become commonplace in 404(b) analysis, which mirrors the evidentiary safeguards mentioned above.[47] As will be discussed in Part II, evidentiary problems stem mainly from 404(b) confusion and overreliance on jury instructions as a remedy if the jury gets confused or misled.

In its notice, the government stated its full list of proffered 404(b) purposes and then briefly described how the evidence shows plan, preparation, or lack of accident.[48] The government then explained how the doctrine of chances is itself the articulation of a precise purpose that is required by 404(b).[49] This notion further complicates the role of 404(b) because it forces jurors to: (1) sort through and compartmentalize the 404(b) evidence; (2) figure out how it fits with any of five offered purposes; (3) reconcile all of the 404(b) evidence with a theory based on objective mathematical probabilities; and (4) somehow keep out any thought of criminal propensity. While jury instructions are intended to alleviate these concerns, they are rarely effective.[50]

The government proposed jury instructions that listed ***302** every proper use of 404(b) referenced in the rule.[51] This instruction, however, was merely the pattern jury instruction for 404(b) in the Tenth Circuit.[52] The defense countered with an instruction that limited the evidence to that which directly rebutted Mr. Henthorn's story--evidence showing lack of accident, planning, and intent.[53] More importantly, the instruction stated that "[i]f you decide that Mr. Henthorn did not commit the Douglas County act, then you are not to consider the evidence about the act for any purpose."[54]

B. District Court Decision

The district court allowed in the 404(b) evidence, stating that a reasonable jury could conclude by a preponderance of the evidence that Mr. Henthorn "orchestrated the murder of Lynn Henthorn."[55] The court relied heavily on the inconsistencies in Mr. Henthorn's account of events.[56] The court, like the government, downplayed the existence of any unfair prejudice.[57] But the court did limit the proffered evidence to show plan, intent, and absence of accident, as opposed to the ***303** more expansive list offered by the government.[58]

The district court's order contained an inaccuracy: it accepted the government's contention that the Supreme Court had adopted the doctrine of chances as a permissible evidentiary tool.[59] The government relied on the case *Lisenba v. California* for this proposition; but a close reading of *Lisenba* reveals that the cite by the district court is misleading.[60] This error grafted a Supreme Court gloss on the use of 404(b) evidence; it is impossible to know how much the court relied on that misstated precedent in its ruling. The district court's ruling further muddles an already confusing doctrine and could have a damaging precedential effect, not unlike *Lisenba* itself. This confusion highlights the complicated and inconsistent treatment of 404(b) that necessitates a reworked rule.

The case of *United States v. Henthorn*[61] demonstrates the recurring issues with prior bad act evidence: (1) 404(b) evidence offered for a multitude of purposes that the jury must untangle; (2) allowing the lack of concrete evidence to increase the probative value of prior uncharged acts; (3) general confusion about precedent and the lack of cognizable standards; (4) the inevitability of character inferences; and (5) the ineffectiveness of jury instructions. Through that lens, this Comment argues in favor of an amended rule that would reduce confusion for both judges and juries, cut down on unfair prejudice, and still preserve the use of 404(b) evidence in cases where it is probative, relevant, and assists the government in prosecutions.[62]

Before offering an amended rule--in hopes of finding a ***304** sensible, effective middle ground--it is important to examine and understand the arguments on both sides of 404(b) in its current form.

II. Inherent Conflict in Federal Rule of Evidence 404(b)

Criticisms of 404(b) and proposals for an amended version abound.[63] But these criticisms and proposals continue to come up short by either presenting criticism with only a general proposal for change, or by proposing looser restrictions on 404(b) with the expectation that a jury instruction will cure all ails.[64] When viewing these particular criticisms through *Henthorn*, it is clear that more judicial discretion will not solve the issues, nor will any version of a jury instruction.[65] There should be more focus placed on Rule 403 balancing--weighing the probative and prejudicial effects of evidence--with more than a passing reference to the prejudicial effects.

The problem with 404(b) decision making centers around ***305** the definition of what "propensity" evidence is, whether or not "propensity" evidence is fair and viable, and if there truly is a difference between "specific propensity" and "general propensity."[66] One school of thought, developed by Paul F. Rothstein, contends that all 404(b) evidence is propensity evidence

and will always lead to impermissible character inferences.[67] The opposing view, held by Edward J. Imwinkelried, is focused on objectivity and abstraction, using the doctrine of chances to attempt to remove any impermissible character inferences.[68] This Part argues that there is no true difference between the two; all 404(b) evidence is propensity evidence.

A. 404(b) Evidence Is Propensity Evidence

Rothstein posits that *any* evidence offered under 404(b) is propensity evidence, either "general propensity" (propensity to be violent, commit a crime, etc.) or "specific propensity" ("the propensity to do a certain thing in a certain way repeatedly").[69] Specific propensity to do something can take the form of plan, intent, motive, etc.[70] As Rothstein points out, the first sentence in 404(b) appears to ban general propensity evidence, while the second sentence appears to permit specific propensity evidence.[71] This is the internal incoherence in 404(b) that ***306** draws Rothstein's criticism.[72] How does one separate general from specific propensity? Is there truly a difference, or is it an artificial distinction? There are no easy answers. But if the specific propensity could be singled out and supported-- evidence of a plan or of specific knowledge--it would be less likely that a jury would make an impermissible character evaluation.[73] The narrower the focus, the easier the evaluation. It is in that way that specific propensity can be useful without being unduly prejudicial, unlike general propensity, which will always present as conformity with a character trait.

Defenders of the current state of 404(b) demand a focus on the objective aspects of the evidence.[74] As noted above, the distinction between general propensity and specific propensity is arguably artificial.[75] To alleviate this apparent artificial distinction, the argument is that the attention should be on the act--not the actor--with an objective focus.[76] In this way, juries can avoid impermissible character inferences by objectively focusing on the *act* (the receipt of stolen property) and not subjectively towards the *actor* (one who tends to receive stolen property). Then, they can utilize the evidence without impugning the defendant's overall "character." This has also been referred to as a focus on "independent relevance" outside of the character context.[77] The doctrine of chances ***307** operates as a useful tool, if used properly, to return the focus to objective specificity. Even if all 404(b) evidence *is* propensity evidence, 404(b) is still a valuable and often indispensable tool. Rule 404(b) should therefore be revised with an infusion of simplicity and coherence.

B. The Doctrine of Chances As a Sword

As seen in *Henthorn*, objectivity is often demonstrated through the doctrine of chances. Essentially the jury is asked one question: What are the chances?[78] In combination with the list of permissible 404(b) purposes, the more specific questions begin to form: What are the chances the defendant did not know something? What are the chances that a particular occurrence wasn't planned? What are the chances that a particular incident was an accident? In this way, the doctrine of chances attempts to shift the focus from character to probabilities.[79] However, as critics of the doctrine of chances have stated, the doctrine still appears to rely on propensity reasoning.[80]

Andrew Morris offered the example of flipping a coin.[81] The chance of flipping a coin and it landing heads is 50%. Before the first flip, the chance of flipping two heads in a row is ***308** 50% x 50%, or 25%. More flips in a sequence further decrease the odds that every flip will be heads. At some point, consistently flipping heads ceases to look like coincidence. The coin-flipper begins to look like a cheater; a character inference is born.[82] This example shows both the logic behind the doctrine of chances as an objective probability determination and the way in which a character inference becomes almost inevitable.

Imwinkelried rejects this line of reasoning.[83] He argues that even if a person has a propensity towards lawful or unlawful conduct, in the moment, that propensity can be ignored in favor of free will.[84] Additionally, he attacked Morris's apparent

oversimplification of the chance/cheater dichotomy and elucidated a more complex, four-outcome model.[85] The four potential outcomes are: coincidence, a cheater who cheats every time, someone who is not a cheater that still chooses to cheat, and a combination of chance and situational cheating.[86] He argued for the process of elimination of the four outcomes--where an outcome is eliminated and the probabilities of each remaining outcome increase--and theorized that jurors are perfectly capable of performing that exercise.[87] As you will hopefully see, performing the same exercise in *Henthorn* is instructive. And keep in mind, juries are expected to fully understand this analysis and make a just determination.

Option One of the coincidence of two wives dying in bizarre accidents, with no witnesses, can safely be eliminated as too unlikely for purposes of this exercise. It is possible for a spouse to suffer that misfortune twice, but the chances are low. Option Three of merely situational choices can also be eliminated; it defies logic for the purposes of this exercise to say Mr. ***309** Henthorn has no criminal or murderous propensity, but situationally murdered two wives in devious insurance money schemes. In that situation, one could argue he had no criminal propensity when he killed his first wife. Maybe it was impulsive; maybe it was absentminded. It could have been a situational choice that does not show an overall criminal propensity. That reasoning falls apart with the second murder. A second murder demonstrates some degree of criminal propensity.

This leaves Option Two, criminal/murder propensity, and Option Four, random chance mixed with situational choice. Option Two necessarily contemplates that Mr. Henthorn had both the general propensity of criminality and the specific propensity to devise careful schemes to murder his wives, collect insurance money, and not get caught.[88] In that situation, it would be hard to argue the evidence was unfairly introduced or that Mr. Henthorn faced undue prejudice. It cannot be asserted, however, that Option Two is the most probabilistic option. But, because Options One and Three can be reasonably eliminated, the probability of Option Two increases significantly over the base position with four options. There is enough circumstantial evidence in the two deaths to argue that Option Two--criminal propensity--is viable.

Option Four presents the most interesting hypothetical: in this combination, Mr. Henthorn either murdered his first wife and his second wife died accidentally, or his first wife died accidentally and he murdered his second wife. Option Four illuminates the troubling use of 404(b) evidence in *Henthorn*. Mr. Henthorn either got away with murder and was then wrongfully convicted, or evidence of an accidental death was used to secure a conviction for the murder he *did* commit. Even the model proposed by one of the most ardent supporters of the ***310** doctrine of chances has serious flaws when practically applied to a current case.

C. The Doctrine of Chances As a Shield

The doctrine of chances has also been defended on a different theory: it may be the only way to preserve the character evidence prohibition.[89] Dain Smoland gleaned from the relaxed character evidence prohibition that, in some cases, not allowing 404(b) evidence in a particularly brutal or heinous case could lead to the kind of public outrage that would pressure legislators to end the character prohibition altogether.[90] Smoland argues that the doctrine of chances provides the safety valve that upholds the character evidence prohibition and ends up serving defendants better than any attempt to abolish the doctrine of chances.[91] He also makes a critical distinction that is relevant to *Henthorn*: the doctrine of chances makes more sense in situations where there is a clear "statistical anomaly"; there is a real difference between using the doctrine of chances in cases with fairly regular occurrences, like bank robberies, and the famous case of a man whose wives kept dying in the bathtub in "accidental" drownings.[92] *Henthorn* fits neatly into the latter variety of cases. While Smoland conceded that the doctrine of chances does invite "a character propensity judgment," he argues that the issue can ***311** be alleviated with a narrower construction of 404(b) and a heightened focus on 403 balancing, and that the doctrine's preservation may be what saves the character evidence prohibition in its entirety.[93]

As Kenneth Mellili argues, "[t]he doctrine of chances ... is often simply a different way of articulating how evidence might come within one or more of the specified permissible theories of admissibility contained in the second sentence of Rule 404(b)."[94] That view, combined with the pragmatic approach offered by Smoland, shows that problems with the doctrine of chances can

be solved through fixing the problems with 404(b) generally. The doctrine of chances is a valuable, intuitive tool that can help juries focus on objectivity and specificity. But the veracity of the doctrine of chances is dependent on the overall structure and usage of 404(b). A more effective 404(b) will in turn make for a more effective doctrine of chances.

III. Proposed New Version of Federal Rule of Evidence 404(b)

As a refresher, 404(b) permits the introduction of prior bad act evidence to show: motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[95] Redrafting 404(b) necessarily involves analysis and a fuller understanding of what those purposes actually mean in legal terms. In the interest of simplicity and clarity, the list can be shortened. Plan and preparation are duplicative and can be fully encapsulated in plan.[96] A similar method can be applied to intent and absence of mistake. Logically, an absence of mistake or accident involves some level of intent, and intent better captures the issue. Even if the evidence was offered to ***312** show that an incident was not a mistake, the absence of a mistake or accident invites intent to fill the void.[97] Analysis of identity also delves into modus operandi and is beyond the scope of this article. Therefore, this Part will focus on plan, intent, and knowledge.

A. Plan

In the 404(b) context, what does "plan" actually mean? Plan is "one of the most popular theories for introducing evidence of an accused's uncharged misconduct" and "courts have tended to liberally admit uncharged misconduct under the rubric of 'plan.'"[98] Imwinkelried posits that there are three versions of plan that are "vying for judicial acceptance": (1) the unlinked plan, where the evidence can be admitted when the charged and uncharged acts share a common methodology; (2) the linked methodology, where the evidence can be admitted if it shows that the methodology itself was planned, without needing to show a "grand design" between the charged and uncharged act; and (3) the linked acts, where it needs to be shown that the charged and uncharged acts were part of an overall plan or scheme.[99]

The unlinked plan option is untenable because it too easily devolves into a character inference.[100] For a court to allow plan evidence of this variety would invite the proponent to cram almost any prior uncharged act into the framework of a "plan." In this way, any prior uncharged bad act with a simple methodology that occurred within reasonable temporal proximity could be used as proof of the accused act with the same simple methodology. Not all crimes are complex, and allowing simple methodology alone as probative evidence is far too generic to be useful.

The linked methodology option requires planning of the ***313** methodology itself, not mere coincidence or happenstance.[101] Imwinkelried offers two versions of this option: the template model and the repeated choice model.[102] This option is distinguished from general propensity character evidence because it is focused on "situationally specific propensity" and is too narrow to be viewed as a general character trait.[103] However, Imwinkelried is not convinced that this is a viable option for a logical definition of plan because, "all the prosecutor is showing, in essence, is that the accused committed similar physical acts because the accused made similar methodological choices."[104] But if the common methodology looks more like a pre-formed methodology--a *template*--it provides the vital link between the charged act and the prior bad act that makes the prior act more probative.[105]

The linked acts option is the most restrictive and requires "a single, overall grand design encompassing the charged and uncharged crimes."[106] This option fits best with a common sense idea of the word "plan," and would be the hardest to prove.[107] The linked acts option also provides a logical connection point to the doctrine of chances and shows how it can avoid character inferences. The level of detail and evidence required to show a linked acts plan belies any mental shortcuts and forces a jury to evaluate the full plan presented to them. Linked acts require the level of proof and objective focus that can restore viability to 404(b).

There are also several versions of the linked acts option: the sequential plan, the chain plan, and the bizarre plan.[108] ***314** The sequential plan is offered with a common example of a defendant stealing a key and then using the key to commit an additional theft.[109] Whichever of those crimes the defendant was charged with, evidence of the other crime would be relevant, probative, and contain very little danger of prejudice. In this way, the sequential linked act theory is an acceptable usage of prior bad acts. The chain theory, however, does not require the same sequential structure; the acts all go towards the same overall goal, but in a less discernible pattern.[110] Outside of temporal clarity, this version has essentially the same features as the sequential plan, where any of the bad acts are probative of the others when the grand scheme can be identified. The third version, the bizarre plan, is unlikely to be presented and may suffer from more prejudicial issues than Imwinkelried cares to mention.[111] If the evidence is offered to show plan, the proponent should be required to present enough evidence to show a plan actually exists.

A prior scheme that develops into multiple bad acts, one or more of which the defendant is charged with, is exactly the sort of situation where 404(b) can be a useful tool. Plan is first and foremost in any list of acceptable uses for 404(b) evidence.

B. Intent

Prior bad act evidence used to show the intent of a defendant in a charged act is perhaps the most controversial usage, yet arguably the most useful to prosecutors.[112] The ***315** contention is that no matter what someone has done in the past, *present* intent is its own separate evaluation.[113] Evidence used in this manner offers possibly the greatest danger of both prejudice and an impermissible character inference, because it often presents in a way that is "logically indistinguishable from showing a propensity" to commit the charged act.[114] The relative probity of this evidence essentially turns on whether specific intent is a contested issue at trial and whether the defendant himself puts intent at issue.[115] Because intent is often one of the most contested issues at trial, and can be the hardest for the prosecutor to prove, its highly probative nature often cuts in favor of admissibility.[116] Therefore, intent evidence should be allowed only in the narrowest circumstances if it is to survive the character evidence prohibition.[117]

Prior bad act evidence used to show intent is often presented under the doctrine of chances.[118] This follows logically from the question: what are the chances the defendant lacked the intent based on this (or these) other act(s)?[119] In ***316** fact, it is perhaps the only way to present evidence of intent that is not merely presenting evidence of character in disguise. Intent evidence must be included under a narrow construction in combination with the doctrine of chances.

C. Knowledge

Proving knowledge is often essential in a criminal prosecution.[120] To prove knowledge of a specific thing (like what certain drugs look like), prior act evidence is probative to show that the knowledge existed in the mind of the defendant. It is another example of evidence that the jury can narrowly focus on without easily delving into character inferences.[121] Moreover, the "propensity to retain knowledge" is not the sort of impermissible propensity evidence prohibited by 404(b).[122]

But there are situations where evidence used to show knowledge can enter prejudicial waters, such as when a defendant asserts "mere presence" as a defense.[123] This situation often appears in receipt of stolen property cases, where evidence of a prior incident of receiving stolen property could be offered to show that, when charged with the same or a similar crime, the defendant knew the property was stolen.[124] The "mere presence" of the stolen property in the defendant's possession would not be enough to convict; the prosecution would have to prove knowledge. Again, like in most situations with 404(b) evidence, the more tenuous the connection between the prior bad act and the charged act, the greater danger for prejudice.[125] Because of this,

403 balancing should do the lion's share of work for knowledge evidence as part of the larger evidentiary safeguards that have been adopted.

***317** Knowledge evidence is useful and makes both intuitive and practical sense. However, the utility of knowledge evidence also makes it more difficult to encourage courts to monitor such evidence as effectively as they should.[126] In other words, if the court decides the knowledge evidence is substantially more prejudicial than it is probative, then they should exclude it; otherwise, the evidence should go to the jury.[127]

D. The New 404(b)

This Comment proposes a new version of 404(b) that would essentially require the proponent to choose which specific purpose the evidence is being offered for--not several purposes, not all purposes. The jury can then focus on the *one* discrete purpose and determine if the evidence makes sense for that purpose. The potential for improper use and impermissible character inferences can then be reduced significantly. If the jury determines that the proffered purpose makes sense and was proven, they can graft the evidence onto the case-in-chief and deliver an informed verdict. For example, if the evidence is offered to show plan, the jury can focus on the plan objectively and determine: (1) if there was a plan, (2) if the 404(b) evidence fits into the plan, and (3) if the charged act also fits into the plan. This narrow, objective focus diminishes the chances of character determinations or the jury having to focus on a "trial within a trial." When the prior bad act is offered as proof of multiple purposes, the jury may decide it fits one, but not others, and be unsure of what that means for their deliberation. Or the jurors may take mental shortcuts and focus just on the bad act itself and make a character determination. They may treat the prior bad act as the real focus and hand down a conviction based on the prior act, not the current charged act. In that situation, 403 balancing becomes a toothless fiction.

The enumerated list should also be treated exhaustively and presented as such.[128] Instead of 404(b) stating that the ***318** evidence can be presented for purposes "such as ...," it should be written as "only ...," followed by the narrower enumerated list. The rule could be amended periodically with additional uses if the legislature deems something important had not been included. As this Comment shows, however, the enumerated list is followed almost exclusively. This proposal has the dual purpose of allowing all parties to focus on a discrete list of uses and signaling to the courts that the evidence should be carefully evaluated.

The danger of a "trial within a trial" is the perfect lens through which to examine the issues with, and potential solutions for, 404(b).[129] In that spirit, the standard the Supreme Court established for the introduction of 404(b) evidence in *Huddleston*--that no preliminary determination needs to be made--should be supplanted.[130] If prior bad acts were formally charged and brought to trial, they would require proof beyond a reasonable doubt to convict.[131] A lower standard for the introduction of 404(b) evidence, or no standard at all, results in evidence getting shoehorned into a trial through a lower burden of proof. A standard of clear and convincing evidence for prior bad acts should be adopted federally, as many states have chosen to do.[132] A clear and convincing evidence standard finds middle ground between no standard and the reasonable doubt standard required for criminal convictions. This protects the defendant from having to stand trial for a criminal charge without a significant showing by the prosecutor that a reasonable jury could have convicted with the evidence. Any lesser standard erodes the right of a defendant to receive a fair trial.

The doctrine of chances is essentially a thought exercise ***319** that attempts to boil down the evaluation of guilt to probabilities that focus on the act--not the actor--and can be applied to *any* of the enumerated 404(b) purposes. While the doctrine of chances can often utilize propensity reasoning, if the 404(b) evidence itself is carefully scrutinized, the harm the doctrine can do is limited. The final amended Federal Rule of Evidence 404(b) proposed by this Comment would read:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. The evidence may only be admitted as proof of motive, opportunity, intent, plan, knowledge, or identity.

Furthermore, to present the evidence to the jury, it must meet the clear and convincing evidence burden of proof to ensure a fair trial. This heightened burden of proof encourages judges to scrutinize the evidence. In order to examine the viability of this proposed rule, the next Part will apply its principles to *Henthorn*.

IV. Application to *Henthorn*

The case of *United States v. Henthorn* provided the impetus to reexamine 404(b) with a focus on clarity; this Part will analyze *Henthorn* with this Comment's proposed 404(b) to see if clarity can be found. As burdens of proof are central to evidentiary analysis, it is important to note that the 404(b) evidence in *Henthorn* was introduced by a preponderance of the evidence standard. The proposed rule would require a clear and convincing evidence standard.[133] While it is impossible to know whether the court would have admitted the evidence under a heightened standard, there are context clues that indicate the evidence would still have been admitted.[134]

*320 *A. Intent in* Henthorn

The proposed rule requires the government to choose *one* enumerated purpose under which to present the evidence. The government used three at trial: intent, plan, and absence of mistake or accident. For purposes of intent-- combined with the doctrine of chances--the question would be: what are the chances that, in light of Lynn Henthorn's death, Mr. Henthorn did not intend for Toni Henthorn to die? Even if the jury were to believe that Lynn Henthorn's death was an accident, when presented with all the evidence from her death, the jury would certainly reframe how they would look at Toni Henthorn's death. Within the context of one wife dying in a terrible accident, or even having been killed, putting another wife in harm's way seems to indicate some level of intent. There appears to be enough context to show some level of intent here. At the very least, it appears Mr. Henthorn intended to put Toni in harm's way, perhaps hoping an accident would occur. Therefore, the chance that he was unaware of the danger, or oblivious to the real possibility of a tragic accident, appears low. Outside of an inference of general criminality, if the jury were allowed to focus on what his intent was for the hike generally, and where they went on the hike specifically, in light of the death of a prior wife, the jury could certainly presume he intended for her to die. Such an intent would be fairly damning for Mr. Henthorn. However, intent alone does not prove murder. Proof may require focusing on a plan instead.

B. Plan in Henthorn

If the government chose plan as its purpose for the evidence, then the evidence could fit under either the repeated choice model, the template model, or the linked acts model discussed in Section II.A.[135] Under the repeated choice model, the idea is that Mr. Henthorn thought: “My first wife died (regardless of how) and I collected money from it. That worked pretty well. I would like that again.” His plan was not necessarily a grand scheme to kill multiple wives and collect insurance money. But when presented with the opportunity, perhaps after growing weary of the marriage, he referred back ***321** to a prior methodology that worked and implemented it.

For the template model, that would require Mr. Henthorn to devise--prior to Lynn Henthorn's death--a template detailing how to get out of multiple marriages and collect insurance money. The two deaths would then be iterations of the same template and look much more like a grand scheme. With that template, it would be hard to say Mr. Henthorn suffered any prejudice at trial.

The linked acts model is a tougher fit. The two deaths are simply too far from each other in time to be part of one discrete plan. The plan would not really fit the sequential or chain models and would look more like a bizarre plan. The bizarre plan could present as: “my plan is to never be married longer than I want and to get paid when I leave.” This would be the functional equivalent of the template model.

Imwinkelried saw the linked methodology models as having limited viability at best. In *Henthorn*, the repeated choice model would not have enough probative value to withstand challenge. Even if Mr. Henthorn was pleased at how Lynn's death worked out for him, that does not mean he either wanted Toni to die or contributed to her death. That leaves only the template model. This appears to be the exact kind of situation where the template model makes sense. Arguably, Mr. Henthorn at some point decided how he would beneficially end a marriage if that situation arose. The jury could focus on that one, specific, nuanced theory and determine if there was enough evidence to believe he had such a template. If they believed Mr. Henthorn adopted that template, that would likely be enough evidence to convict. If not, he likely would have been acquitted based on the scarcity of other evidence. This hypothetical shows how allowing the jury to focus on something simpler and more discrete narrows the analysis and reduces the chance that the jury will focus on character.

Absence of mistake or accident would obviously rebut the story offered by Mr. Henthorn that Toni slipped and fell. However, based on the specifics of the case, the doctrine would not serve any useful purpose that plan or intent would not. Claiming the death was no accident is essentially the same as saying that "he intended it" or "he planned it." *Henthorn* is a good demonstration of how it is difficult for "absence of mistake or accident" to do any independent work or be worthy of inclusion in the enumerated list.

***322** Therefore, under the proposed rule, the government likely would have selected the template model of plan evidence. It would have had to argue that Mr. Henthorn did in fact develop a template and then show the jury how the deaths of Mr. Henthorn's wives were similar. At that point, the jury would have been presented with one question to decide and the answer to that question would determine the trial's outcome. Because of how narrow and specific the question would be, the danger of prejudice would be reduced.

While it is impossible to know how the jury would have handled that more specific question, this new proposed rule would have simplified the analysis and changed the framework of the trial for the better. Mr. Henthorn would have had to face the undisputed facts in the face of his peers with no confusion or character attacks. The current form of 404(b) is too readily reduced to confusion tactics, character inferences, and the Trojan-horsing of evidence over an artificially low burden of proof. *Henthorn* demonstrates that these issues are still prevalent for judges, attorneys, juries, and defendants.

Conclusion

Federal Rule of Evidence 404(b) is a constant source of consternation. *Henthorn* offers an opportunity to fully examine these issues and think more reasonably and logically about the realities of trials. In essence, juries are composed of subjective laypeople. The current rule allows for, if not encourages, use of confusion as a tool or trial strategy. Defendants should not be convicted because a juror or jury was confused. Defendants should be convicted because they committed a crime, not because they are "criminals." The government should develop a more nuanced theory to introduce 404(b) evidence in order to ensure that the evidence is viable. The government should not be able to throw whatever they can at the jury in hopes of a conviction. But the government should be able to use a defendant's past to shed light on dark corners of a case in order to serve justice.

What courts need is a balanced approach that keeps all stakeholder interests in mind. The amended 404(b) presented by this Comment attempts to do that through simplicity and pragmatism. We ask our peers to be the gatekeepers of justice and decide our guilt and innocence. ***323** We owe it to them and to ourselves to make that task more intuitive, more just, and more focused.

Footnotes

a1 Josiah Beamish, J.D. Candidate, May 2018. I want to thank all of my terrific editors for encouraging me and supplying me with invaluable input. Specifically I would like to thank Simon Vickery, Greg Carter, and Lydia Lulkin. This article is dedicated to my brother Eric Beamish, without whom I would be nothing. Rest in power brother.

1 *See, e.g.*, David Shortell, *Official: No Foul Play in Death of Russian Ambassador to UN*, CNN (Mar. 10, 2017), http://www.cnn.com/2017/03/10/world/russian-ambassador-heart-attack/ [https://perma.cc/86SP-G9NE].

2 Michael E. Miller, *'Lethal Love': Harold Henthorn had Two Wives. Both Died in Bizarre, Brutal Ways*, Wash. Post, (Sept. 22, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/09/22/lethal-love-harold-henthorn-had-two-wives-both-died-in-bizarre-brutal-ways/?utm_term=.b28b05861cbb [https://perma.cc/MC2P-YH88].

3 Answer Brief of the United States at viii, United States v. Henthorn, No. 14-CR-00448-RBJ (10th Cir. Oct. 21, 2016) [hereinafter Answer].

4 *Id*.

5 *See* Appellant's Opening Brief at 3, United States v. Henthorn, No. 14-CR-00448-RBJ (10th Cir. July 18, 2016) [hereinafter Opening] (referencing the government's case as "circumstantial" due to the lack of physical evidence).

6 *Id*. at 8. Lynn Henthorn, Mr. Henthorn's first wife, died when their jeep fell on her while they were changing a tire. *Id*. at 9. Law enforcement ruled the death an accident, and Mr. Henthorn was never charged with a crime. *Id*. at 10.

7 *Id*. at 6. In May 2011, Toni Henthorn was seriously injured when she was struck in the back of the neck by a piece of plywood that Mr. Henthorn was tossing off the deck as he worked. *Id*. at 12. Foul play was not suspected in this incident. *Id*.

8 *See* Robert L. Gottsfield, *We Just Don't Get It: Improper Admission of Other Acts Under Evidence Rule 404(b) as Needless Cause of Reversal in Civil and Criminal Cases*, 33 Ariz. Att'y 24, 24 (1997).

9 United States v. York, 933 F.2d 1343, 1350 (7th Cir. 1991). In *York*, the court admitted evidence that the defendant had collected life insurance after his first wife was murdered in order to help prove he killed his business partner in a similar scheme to collect insurance money. *Id*. at 1349-51. The evidence was used to show intent to defraud the insurance company. *Id*. at 1351.

10 *Id*. at 1350 ("[T]he recurrence of a similar result ... tends to establish ... the presence of the normal, i.e. criminal, intent accompanying such an act.") (citation omitted).

11 *See* Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, the Doctrine of Chances*, 40 U. Rich. L. Rev. 419, 435 (2006) (discussing one of the earliest invocations of the "doctrine of chances," where it was used to rebut the defendant's claim that his wife drowned in the bathtub accidentally by introducing evidence that prior wives drowned in the bathtub).

12 *York*, 933 F.2d at 1349.

13 *See id*. at 1350 ("That the same individual should later collect on exactly the same sort of policy after the grisly death of a business partner who owed him money raises eyebrows; the odds of the same individual reaping the benefits, within the space of three years, of two grisly murders of people he had reason to be hostile toward seem incredibly low, certainly low enough to support an inference that the windfalls were the product of design rather than the vagaries of chance.").

14 United States v. Henthorn, 864 F.3d 1241 (10th Cir. 2017).

15 Federal Rule of Evidence 404(b) states:
(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:
(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
(B) do so before trial--or during trial if the court, for good cause, excuses lack of pretrial notice.
Fed. R. Evid. 404(b). One of the issues with 404(b) is that evidence from prior acquittals may be admitted as "other act" evidence in subsequent unrelated cases. *See* Cynthia L. Randall, *Acquittals in Jeopardy: Criminal Collateral Estoppel and the Use of Acquitted Act Evidence*, 141 U. Pa. L. Rev. 283 (1992).

16 United States v. Sarracino, 131 F.3d 943, 949 (10th Cir. 1997) (finding harmless error in the district court's failure to analyze certain evidence under Fed. R. Evid. 404(b), where the evidence was used for context) (internal citation and quotation omitted).

17 Opening, *supra* note 5, at 13. The evidence was offered to show lack of accident, intent, and planning. *Id. But see* United States v. Edwards, 540 F.3d 1156, 1163 (10th Cir. 2008) (finding it problematic that the government presented the evidence "to prove the defendant's intent in the current case, to prove his knowledge, to prove his motive in this case, to prove that there was no mistake or accident, and to corroborate the testimony of several other witnesses") (internal quotation omitted).

18 When referencing the prohibition against the use of character evidence, Justice Jackson notably opined: "The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." Michelson v. United States, 335 U.S. 469, 475-76 (1948).

19 *See* Opening, *supra* note 5, at 15 ("[T]he evidence concerning Lynn Henthorn's death made up a substantial portion of the government's case and quickly devolved into a mini-trial on her death, putting the defense in the difficult position of essentially having to try both murder cases at once."). The primary purpose of the exclusion of character evidence is that we want the accused to be tried for "what he did, not for who he is." *See* Edward G. Mascolo, *Uncharged - Misconduct Evidence and the Issue of Intent: Limiting the Need for Admissibility*, 67 Conn. B.J. 281, 284-85 (1993) ("Moreover, while the government may be reluctant to admit it, the reasons proffered to admit extrinsic-acts evidence may often be a subterfuge for the real motive ... an urge to impugn the defendant's character."). This rule was adopted from England and incorporated into the greater Anglo-American common law system to ensure that the defendant is actually convicted of the current charged crime. *Id*. at 284. However, the use of prior bad act evidence is becoming more expansive and threatens to transform the American courts into an inquisitorial system where a defendant is forced to prove his or her innocence, as opposed to the adversarial system where the government must prove guilt. *Id*. A commitment to the adversarial system requires proper use of prior bad act evidence.

20 Opening, *supra* note 5, at 15.

21 *See* United States v. Davis, 726 F.3d 434, 441 (3d Cir. 2013) ("Uncontroversial at the time of adoption, Rule 404(b) has become the most cited evidentiary rule on appeal.").

22 Fed. R. Evid. 104 (the court must determine ahead of time if the evidence is admissible before the jury ever hears it, conducting a hearing if necessary); Fed. R. Evid. 105 (the court must provide a limiting instruction to the jury about the scope of the evidence); Fed. R. Evid. 401 (evidence must be relevant); Fed. R. Evid. 403 (evidence must be probative and not unduly prejudicial); Fed. R. Evid. 404(b) (notice of intent to use prior bad act evidence must be given in advance). *But see* Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 Loy. L.A. L. Rev. 1259, 1260 (1995) ("The first and second sentences [of 404(b)] cannot be construed consistently in light of their interpretation of case law.").

23 *See* Huddleston v. United States, 485 U.S. 681, 688 (1988) (noting that the legislative history of 404(b) shows that the law was meant to favor admissibility).

24 *See infra* Part I.

25 *See infra* Part II.

26 *See infra* Part III.

27 *See infra* Part IV.

28 *See infra* Conclusion.

29 Alan Gathright, *Murder Trial Evidence Documents Harold Henthorn's Elaborate Plot to Push Wife off Cliff at RMNP*, Denver Channel, http://www.thedenverchannel.com/news/front-range/denver/murder-trial-evidence-documents-harold-henthorns-elaborate-plot-to-shove-wife-from-cliff-at-rmnp (last updated Oct. 3, 2015, 12:56 AM) [https://perma.cc/4XXN-GPPN].

30 *Id*.

31 *Id*.

32 *Id*.

33 Government's Notice of Rule 404(b) Evidence at 1, United States v. Henthorn, No. 14-CR-00448-RBJ (D. Colo. Jan. 29, 2015) [hereinafter Notice].

34 *Id*.

35 *See id*. at 5 ("[T]he proof that he murdered her must rely on the circumstances leading up to her death as well as prior actions that suggested he planned to kill her."). The Government conceded that the 404(b) evidence was potentially determinative for the case. Therefore, the entire case may have rested on the trial court judge's decision regarding said evidence. Logically, this makes sense. Defendants are presumed innocent. When a jury is presented with scant evidence of guilt, this presumption will likely hold. However, when the jury is presented with evidence that erodes that presumption, the jury will be more inclined to rely on that same scant evidence. Because of what they heard about the defendant's prior bad acts, now they *want* to believe the government.

36 *Id*. at 1.

37 *Id*.

38 *Id*. at 4.

39 Fed. R. Evid. 404(b). Presumably, the government made that choice because none of those matters were in dispute. The identity of the only possible suspect was known. The government was not trying to prove that Mr. Henthorn had specific knowledge. Mr. Henthorn's opportunity to commit the crime was also not in dispute.

40 *See* Notice, *supra* note 33, at 13 (citing Old Chief v. United States, 519 U.S. 172, 184-85 (1997) for the proposition that "scarcity of evidence on point increases its probative value in Rule 403 balancing"). Federal Rule of Evidence 403 is critical to the introduction of all evidence and requires that the probative value of evidence outweigh its prejudicial effect.

41 *Id*.

42 *Id*. at 10-11. The similarities between the deaths were listed as: bizarre "accidents," insurance benefits, remote locations, Mr. Henthorn as the lone witness, deaths after about 12 years of marriage, inconsistent stories from Mr. Henthorn about the deaths, both wives were doing atypical things when they died, Mr. Henthorn was eager to have both bodies cremated, and he spread both wives' ashes in the same mountains. *Id*.

43 Defendant Henthorn's Motion *in Limine* Regarding Proposed Douglas County 404(b) Evidence, United States v. Henthorn, No. 14-CR-00448-RBJ (D. Colo. Mar. 16, 2015) [hereinafter MIL].

44 *See generally id*.

45 *Id*. at 11 ("If the prosecution is successful in speculating about the past by slandering his character, it follows that the prosecution will never have to prove its case.").

46 *Id*. at 12.

47 *Id*. at 14; Notice, *supra* note 33, at 6. The test is: (1) the evidence must be offered for a proper purpose under Rule 404(b); (2) the evidence must be relevant; (3) the court must determine that, under Rule 403, the probative value of the evidence is not "substantially outweighed by its potential for unfair prejudice;" and (4) if requested under Rule 105, the court must instruct the jury that the evidence is to be considered only for the purpose for which it was admitted. United States v. Joe, 8 F.3d 1488, 1495 (10th Cir. 1993).

48 Government's Response to Henthorn's Motions in Limine to Exclude 404(b) Evidence at 5-6, United States v. Henthorn, No. 14-CR-00448-RBJ (D. Colo. Apr. 6, 2015) [hereinafter Response].

49 *Id*. at 7 ("[T]he government did so in its 404(b) notice when it explained that Lynn's death is relevant under a doctrine of chances theory.").

50 *See* Robert C. Power, *Reasonable and Other Doubts: The Problem of Jury Instructions*, 67 Tenn. L. Rev. 45, 98 (1999) (discussing how studies have shown that many jurors "fail to comprehend key instructions"); *see also* Antonia M. Kopeć, *They Did It Before,*

They Must Have Done It Again; The Seventh Circuit's Propensity to Use a New Analysis of 404(b) Evidence, 65 DePaul L. Rev. 1055, 1087 (2016) (citing studies that show juries' cognitive functions are not affected by limiting jury instructions, but are affected by evidence of prior bad acts). Kopeć uses a colorful illustration to demonstrate this point: "If a person is told not to imagine a purple elephant in the middle of the room, she immediately imagines just that." *Id*.

51 Objection to Defendant's Proposed Jury Instruction Regarding Similar Acts Evidence at 7, United States v. Henthorn, No. 14-CR-00448-RBJ (D. Colo. Aug. 26, 2015) [hereinafter Jury Instructions]. The instruction read:
You have heard evidence of other acts engaged in by the defendant. You may consider that evidence only as it bears on the defendant's motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident and for no other purpose. Of course, the fact that the defendant may have previously committed an act similar to the one charged in this case does not mean that the defendant necessarily committed the act charged in this case.
Id.

52 *Id*.

53 *Id*. at 8.

54 *Id*. The "Douglas County act" referenced was the death of Lynn Henthorn, Mr. Henthorn's first wife. The introduction of prior bad acts is often referred to as a "trial within a trial," where the court holds a hearing to determine whether or not the jury should hear the 404(b) evidence. *See* Louis F. Meizlish, *Evidence*, 59 Wayne L. Rev. 1033, 1089 (2014).

55 Order at 5, United States v. Henthorn, No. 14-CR-000448 (D. Colo. Nov. 5, 2014) (order denying motion in limine in part) [hereinafter Order].

56 *Id*. ("The government exposed a number of discrepancies in Mr. Henthorn's various accounts of the events leading to the death of Lynn Henthorn.").

57 *Id*. at 11 ("Although this evidence might provoke an emotional response, it would not do so 'wholly apart' from its relevance to rebutting the defense of accident or to showing plan and intent. The prejudice resulting from the admission of this evidence is therefore not 'unfair.'").

58 *Id*. at 4. As a refresher, the list originally offered by the government was "intent, motive, preparation, plan, and lack of accident." Notice, *supra* note 33, at 4.

59 Order, *supra* note 55, at 8 ("[T]he Supreme Court has in fact adopted the 'widely recognized principle that similar but disconnected acts may be shown to establish intent, design, and system.' *Lisenba v. California*, 314 U.S. 219, 227 (1941).").

60 The full quote is: "Testimony *was* admitted concerning the death of James' former wife, on the widely recognized ...." Lisenba v. California, 314 U.S. at 227. The Court further stated that "[w]e do not sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence." *Id*. at 229. The Court was not adopting the "doctrine of chances," rather, the Court was referencing that the state of California had adopted it, and that was well within its purview.

61 United States v. Henthorn, 864 F.3d 1241 (10th Cir. 2017).

62 *See infra* Part IV.

63 *See* Paul F. Rothstein, *Needed: A Rewrite. Where the Federal Rules of Evidence Should Be Clarified*, 4 Crim. Just. 20, 23 (1989) ("The new rule should produce results more in accord with the intention of the present rule and the common law: If a broad-based attack on the type of person is the aim, the evidence should be excluded; but if some pattern truly more probative or less morally charged than that is involved, the evidence should be viewed more favorably."); *see also* Thomas J. Leach, *"Propensity" Evidence and FRE 404: A Proposed Amended Rule with an Accompanying "Plain English" Jury Instruction*, 68 Tenn. L. Rev. 825, 827 (2001) ("[J]udges and practitioners alike cannot understand it well enough to apply it soundly--not because they are unintelligent, but because the rule is hopelessly opaque ... the Rule causes all involved in the trial process ... to leave the trial with queasy feelings that justice has been slighted or short-changed.").

64 *See* Rothstein, *supra* note 63, at 23 ("When the evidence is to be used against a criminal defendant, the probative value must *substantially* outweigh.") (emphasis in original); Leach, *supra* note 63, at 827 ("I urge that a looser form of the Rule should invest

more discretion with the trial bench, with the added safeguard of a jury instruction that gives sufficient guidance to prevent misuse of the evidence.").

65 *See* Power, *supra* note 50, at 98-99 ("Too often instructions are stated in abstract legal terms that further aggravate jury confusion."). Jurors are frequently presented with pattern jury instructions that are rendered in the abstract and riddled with "jargon and legalese." *Id*. at 98. An important consideration, especially in the character evidence context, is that "jurors are not selected for their intelligence or their impartiality." *Id*. at 103. Perhaps more importantly, jury instructions are given after all evidence and closing arguments, at a point where jurors have likely made up their minds as to what they believe happened, what "story" they believe. *Id*. at 104.

66 *See, e.g.*, Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 B.Y.U. L. Rev. 1547, 1560-61 (1998) (arguing that the distinction between specific propensity and general propensity or the distinction between character and non-character evidence is an illusion, stating that "the distinction present in both Rule 404(b) and its predecessor common law rules between inadmissible 'propensity' evidence and admissible 'noncharacter' evidence only makes sense if that distinction is real. There must be an articulable, comprehensible boundary between the two.").

67 *See generally* Rothstein, *supra* note 22. Rothstein is a professor of law at Georgetown University and was a consultant on the Federal Rules of Evidence. He has published several books and over one hundred articles.

68 *See generally* Imwinkelried, *supra* note 11. Imwinkelried is the former chairman of the Evidence Section of the American Association of Law Schools and has written extensively on 404(b), including the book *Uncharged Misconduct Evidence*.

69 Rothstein, *supra* note 22, at 1264 (explaining the artificial distinction between specific propensity and general propensity).

70 *Id*.

71 *Id*. at 1260 ("The first sentence commands, in effect, 'Thou shalt not use other crimes, wrongs or acts to prove character in order to prove an act in conformity with that character.' The second sentence, however, says, in effect, 'Yes, but you may use those other crimes, wrongs, or acts in order to prove ....'"). While it is generally understood that 404(b) is inclusionary and the list of exceptions non-exhaustive, proponents tend to stay within the enumerated list. *See* Melilli, *supra* note 66, at 1561 ("It seems after centuries of experimentation, the universe of possible 'noncharacter' theories of relevance has become substantially closed, the inclusionary formulation of the rule notwithstanding.").

72 Rothstein, *supra* note 22, at 1260 ("This dichotomy does not hold up under closer examination.").

73 *See id*. at 1264-65 ("These propensities are too specific in that they are addressed to the manner or means of carrying out the offense."). However, these specific propensities may have a "moral tinge." *Id*.

74 *See, e.g.*, Imwinkelried, *supra* note 11, at 431.

75 *See, e.g.*, Melilli, *supra* note 66, at 1554-55. Melilli uses the example of a bank robber who robs banks with a similar methodology. The evidence of prior bank robberies is used to show the defendant has the specific propensity to use certain modus operandi to rob banks. However, when presented with this evidence, "one cannot learn how the defendant robs banks without being informed that the defendant robs banks." *Id*. at 1555. In this way, it is impossible to avoid a determination that the defendant has a criminal propensity.

76 Imwinkelried, *supra* note 11, at 431.

77 Huey L. Golden, *Knowledge, Intent, System, and Motive: A Much Needed Return to the Requirement of Independent Relevance*, 55 La. L. Rev. 179, 181 (1994) (explaining that the second sentence of 404(b) is one that allows in evidence as long as it has independent relevance outside of character).

78 Rothstein, *supra* note 22, at 1262 (reasoning that the doctrine of chances "asks a question that supposedly reconciles the dilemma" regarding the internal tension in 404(b) between objectivity and subjectivity).

79 *See* Imwinkelried, *supra* note 11, at 437 ("Rather, the proponent offers the evidence to establish the objective improbability of so many accidents befalling the defendant or the defendant becoming innocently enmeshed in suspicious circumstances so frequently. The proponent must establish that, together with the uncharged incident, the charged incident would represent an extraordinary coincidence."). The doctrine of chances fits perfectly with cases like *Henthorn*.

80 *Id*. at 450 ("They must therefore mean that if we eliminate the possibility of random chance, the only remaining logical route to the conclusion of fault requires an inference that the defendant's propensity prompted the defendant to form the wrongful intent."). Specifically, the mathematical basis for the doctrine of chances relies on the difference between the expected value of an event's occurrence and the actual value. *Id*. For example, in *Henthorn*, the expected value of losing one's spouse in a freak accident would be incredibly low, say 0.1%. The expected value of it happening twice would be significantly lower still, 0.1% x 0.1%, or .01%. However, for Mr. Henthorn, the actual value of both ended up being 1 or 100%. Critics of the "doctrine of chances" would point out that the only way to explain that difference is some sort of propensity reasoning, or even a character inference.

81 Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 Rev. Litig. 181, 193 (1998).

82 *See* Imwinkelried, *supra* note 11, at 450.

83 *See id*. at 451 (explaining away the criticism of the doctrine of chances by focusing on human free will).

84 *Id*.

85 *Id*. (explaining that there are actually four outcomes in the coin-flip hypothetical: "(1) random chance was at work; (2) the person flipping has a propensity to cheat ... causing him to cheat on all five occasions; (3) although the person flipping has no propensity to cheat, on all five occasions the person made a situational choice to cheat; and (4) ... random chance accounts for some of the flips that resulted in heads, and on the remaining flips the person made a free, situational choice to cheat").

86 *Id*.

87 *Id*. at 452.

88 However, it would take more than a preponderance of the evidence standard to introduce the 404(b) evidence in order to definitively say that Henthorn has that level of criminal propensity. The Supreme Court has stated that "[t]he court simply examines the evidence in the case and decides whether the jury could reasonably find the conditional fact ... by a preponderance of the evidence." Huddleston v. United States, 485 U.S. 681, 690 (1988). This is the precedent that was relied upon by the district court in Henthorn. Order, *supra* note 55, at 5 ("The first question, then, is whether the proffer and evidence submitted by the government are sufficient for a jury to reasonably find the conditional fact--that Mr. Henthorn orchestrated the murder of Lynn Henthorn--by a preponderance of the evidence. The Court finds that they are.").

89 Dain Smoland, *Keep Calm and Argue the Facts: A Pragmatic Approach to the Doctrine of Chances*, 26 Utah B. J. 45, 46 (2013) (referencing the expansion of prior bad act evidence to allow for character evidence in child molestation cases by stating, "[t]he legislature decided that evidence of past child molestation is simply too important and probative to be restricted by the character prohibition. There is no reason the exception couldn't be widened, or the general character evidence prohibition done away with entirely").

90 *Id*. at 46-47.

91 *Id*. at 47 ("With the general character prohibition gone, judges would be left doing Rule 403 balancing for every case with prior bad acts evidence, and doing it *without* the scale automatically tipped away from bad character evidence. It would be very time consuming and probably result in the admission of more such prior bad acts evidence. I would argue that the general character prohibition serves defendants better, even with the shadow of the [doctrine of chances] over it.").

92 *Id*. ("The distinguishing question, then, is whether the facts of each case present an 'improbably rare misfortune'--a statistical anomaly that tends to rule out the possibility of innocent bad luck."). The famous case referenced is Rex v. Smith, 11 Cr. App. R. 22 (1915), which occurred in 1915 in England, referred to by Smoland as the "'original' DOC case." *Id*. at 46-47.

93 *Id*. at 48-49 ("[T]he DOC need not be the exception that swallows the rule, but just another fact-specific and somewhat nebulous exception in an area of law already thick with them.").

94 Melilli, *supra* note 66, at 1565.

95 Fed. R. Evid. 404(b).

96 *See, e.g.*, Jacob Scott, *Codified Canons and the Common Law of Interpretation,* 98 Geo. L.J. 341, 365 (2010) ("Ten states have codified the rule against surplusage, and none have rejected it."). The rule against surplusage would require courts to strain to find distinct meaning for plan and preparation that would likely be soaked in legal fiction. This is because the rule against surplusage requires courts to read statutes to give independent meaning to all parts. *Id*. If the goal is a more effective tool for jurors, adding legal gymnastics does not serve that goal.

97 As 404(b) analysis centers on how juries use the evidence, it is always important to consider basic sense and logic.

98 Edward J. Imwinkelried, *Using a Contextual Construction to Resolve the Dispute over the Meaning of the Term "Plan" in Federal Rule of Evidence 404(b)*, 43 U. Kan. L. Rev. 1005, 1008 (1995).

99 *Id*. at 1009-10.

100 *Id*. at 1012 ("When the prosecutor relies on this minimal showing, the prosecutor is implicitly saying, 'The accused did it once recently; therefore, the accused did it again.'").

101 *Id*. at 1013 ("[I]n Dean Wigmore's words, there must be 'such concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.'").

102 *Id*. The template model involves a predetermined template to be employed whenever the opportunity to commit the crime occurs, where the repeated choice model does not involve the same degree of predetermined contemplation, but more of an ad hoc decision to employ prior, successful methods. As Imwinkelried puts it, "[i]t worked before; I'll try the same plan again." *Id*.

103 *Id*. at 1014.

104 *Id*. at 1037.

105 *See id*. (noting that the template model may still be a rare tool for prosecutors because it could be hard to "establish the necessary predicate").

106 *Id*. at 1014-15 ("[A]ll the crimes are integral components of the same plan; each criminal act is a step or stage in the execution of the plan.").

107 *Id*. at 1014.

108 *Id*. at 1015-16.

109 *Id*. at 1015 ("On Day 1, the accused steals the key from the residence of the owner of the business where the safe is kept. On Day 2, the accused uses the key to burglarize the business establishment and empty the safe.").

110 *See id*. at 1016 ("All of the acts are links in a chain ultimately leading to the accomplishment of the overall objective.").

111 *See id*. Imwinkelried describes this version as one in which a grand design or scheme cannot be readily identified, but it is clear that the bad acts are steps or stages in service of some greater plan. He contends that "proof that the accused carried out one act would be logically relevant on a noncharacter theory to prove that he executed another 'phase' or 'step' of the plan; the prosecutor would not have to rely on a generalized character inference." *Id*. However, a claim that some grand plan exists when it cannot be proven or is not readily obvious could have the same misleading characteristics that most problematic 404(b) evidence contains. It would incentivize the prosecutor to claim there was a plan and then make the case that all the bad acts were in furtherance of that plan. *Id*.

112 *See, e.g.*, David A. Sonenshein, *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts*, 45 Creighton L. Rev. 215 (2011); Vivian M. Rodriguez, *The Admissibility of Other Crimes, Wrongs or Acts Under the Intent Provision of Federal Rule of Evidence 404(b): The Weighing of Incremental Probity and Unfair Prejudice*, 48 U. Miami L. Rev. 451 (1993).

113 Sonenshein, *supra* note 112, at 217 ("[I]nferring intent in the present case from a similar act in a different situation, which perhaps happened decades before, is highly questionable as a matter of both human personality analysis and simple logic.").

114 *Id*. at 218.

115 *Id*. at 226 ("If the defendant's intent is not contested, then the incremental probative value of the extrinsic offense is inconsequential when compared to its prejudice; therefore, in this circumstance the evidence is uniformly excluded." (quoting United States v. Beechum, 582 F.2d 898, 914 (5th Cir. 1978)).

116 *See id*. at 232.

117 *Id*. at 276 ("[A] court should only admit such evidence where the defendant has placed his lack of intent in issue and the government has no other significant probative evidence of intent."). No matter how problematic or prejudicial prior bad act evidence used to prove intent generally may be, because intent almost always has to be proven through circumstantial evidence, it must stay in 404(b). *See* Golden, *supra* note 77, at 193 ("[I]ntent must be established through the introduction of other evidence."). The Henthorn case offers a good example of the use of intent evidence. Mr. Henthorn claims that his wife fell and therefore he did not intend for her to die. Because he is putting his intent directly at issue, and proving his intent is central to the case, 404(b) evidence finds a good home.

118 *See* Rodriguez, *supra* note 112, at 459 ("The rationale that the government may offer evidence that the defendant committed a similar wrongdoing on other occasions to increase the probability of his intent to commit the charged crime is based on the doctrine of chances.").

119 Golden, *supra* note 77, at 193-94 ("The greater the similarity, the more likely the state of mind is held by the actor in performing both acts.").

120 *See* David P. Leonard, *The Use of Uncharged Misconduct Evidence to Prove Knowledge*, 81 Neb. L. Rev. 115, 121-22 (2002).

121 *Id*. at 124 ("[T]he uncharged event or events themselves are so suggestive, and so similar to the charged event, that the inference of knowledge is easy to draw and the danger of unfair prejudice by jury misuse of the evidence is slight.").

122 *Id*. at 126.

123 *Id*. at 139.

124 *Id*. at 143.

125 *Id*. at 144 ("[T]he less similarity between the charged and uncharged acts, the weaker the inference of knowledge from one to the other, and the greater the risk that the jury will employ forbidden reasoning. It is in these types of cases that the kind of caution urged by commentators, and exhibited by some courts is most needed.").

126 *See id*. at 168 (explaining both the failure of courts to monitor knowledge evidence properly, and the extreme importance that they do so).

127 *See* Fed. R. Evid. 403.

128 Rule 404(b) states in full:
(1) *Prohibited Uses*. Evidence of a crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
(2) *Permitted Uses; Notice in a Criminal Case*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, or lack of accident.
Fed. R. Evid. 404(b).

129 *See* Meizlish, *supra* note 54.

130 Huddleston v. United States, 485 U.S. 681, 691 (1988).

131 Any prior bad acts that could have been charged as crimes would have required proof beyond a reasonable doubt if brought to trial.

132 Jason Tortora, *Reconsidering the Standards of Admission for Prior Bad Acts Evidence in Light of Research on False Memories and Witness Preparation*, 40 Fordham Urb. L.J. 1493, 1511-12 (2013) (explaining that many states have rejected the *Huddleston* standard).

133 This is technically a change to Fed. R. Evid. 104, but because it is critical to a 404(b) analysis, it is included in the proposal.

134 In the 404(b) Order, the court mentioned that the death of Lynn Henthorn, the first wife, is now being investigated as potential murder. The court's detailed evaluation of the reasons the evidence met the standard could also be used to surmise it would have come in under a higher standard as well. Order, *supra* note 55, at 4-6.

135 *Supra* Section II.A.

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The (Mis)application of Rule 404(b) Heuristics

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The (Mis)application of Rule 404(b) Heuristics

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In all of the federal circuit courts of appeals, application of Rule 404(b) of the Federal Rules of Evidence has been distorted by judicially-created "tests" that, while intended to assist trial courts in properly admitting or excluding evidence, do not actually test for the kind of evidence prohibited by this rule. Rule 404(b) prohibits evidence of "crimes, wrongs, or other acts" if the purpose for admitting the evidence is to prove action in accordance with a character trait. This evidence is commonly referred to as "propensity" evidence, or "once a drug dealer, always a drug dealer" evidence.

This Article examines three counter-productive heuristics that the federal circuit courts of appeals have created: (1) multi-factor tests based on a paragraph of dicta from the Supreme Court's opinion in Huddleston v. United States; (2) a set of "exceptions" based on a misreading of the list of permitted purposes for admitting other-acts evidence found in Rule 404(b)(2); and (3) a set of additional "exceptions" extrapolated from an advisory committee note's reference to "intrinsic" evidence. Recently, the U.S. Court of Appeals for the Seventh Circuit, in an en banc decision, recognized that its approach to Rule 404(b) had become so distorted that a new approach was required. This Article concludes that the other federal circuit courts of appeals should follow this example and proposes that such a reframing of a circuit's approach to Rule 404(b) should not require a decision of the court en banc.

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INTRODUCTION

A heuristic is a cognitive shortcut.[1] Although some heuristics are helpful, the particular heuristics that the federal circuit courts of appeals have created for applying Rule 404(b) of the Federal Rules of Evidence have caused more confusion than clarity. This Article proposes that the courts should abandon these heuristics in favor of an approach that is more closely connected to the rule itself.

Rule 404(b) is perhaps the most controversial of the Federal Rules of Evidence. Not only is this rule the subject of more appellate court opinions than any other rule of evidence,[2] it has inspired extended debate about whether the rule excludes too much or too little relevant evidence.[3] Additionally, as this Article explains, all of the federal courts of appeals have created elaborate, multi-factor "tests" of and "exceptions" to Rule 404(b) that add layers of complexity and confusion to the rule.[4]

Rule 404(b)(1) is intended to prohibit "propensity reasoning," in the language of the common-law cases, or as the rule currently reads: "Evidence of a crime, wrong, or other act is not admissible to

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[1] In the realm of the law, heuristics have been defined as "simplistic, rule-like tests developed by the courts to deal with otherwise complex cases in a more efficient manner." Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 116 (2012) (quoting Hillary A. Sale, *Judging Heuristics*, 35 U.C. DAVIS L. REV. 903, 906 (2002)) (internal quotation marks omitted).

[2] United States v. Davis, 726 F.3d 434, 441 (3d Cir. 2013) ("Rule 404(b) has become the most cited evidentiary rule on appeal.") (citation omitted); *cf.* FED. R. EVID. 404 advisory committee's note to 1991 amendment ("Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence.").

[3] *Compare* Deena Greenberg, Note, *Closing Pandora's Box: Limiting the Use of 404(b) to Introduce Prior Convictions in Drug Prosecutions*, 50 HARV. C.R.-C.L. L. Rev. 519, 526–27 (2015) (arguing that the rule excludes too little), *with* Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. CRIM. L. & CRIMINOLOGY 493, 494 (2011) (arguing that the rule excludes too much evidence).

[4] *See* discussion *infra* Sections II.D.1–12.

prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."[5] This is a fairly straightforward rule, as the Federal Rules of Evidence go, that prohibits one thing: the admission of evidence of "a crime, wrong, or other act" for the purpose of proving "a person's character in order to show that on a particular occasion the person acted in accordance with the character."[6] Despite this rule's relative straightforwardness, the federal circuit courts of appeals have created several heuristics that, although intended to simplify application of the rule, instead have distorted it so that the test of admissibility of "other acts" evidence has little if anything to do with whether the evidence is offered to prove action in accordance with character. Like law students who acquire armfuls of outlines and supplements that purport to do the work of understanding a case for them, rather than just reading the case, these "Rule 404(b) tests" that the federal circuit courts of appeals have amassed are a poor substitute for simply applying the rule itself.

The Rule 404(b) heuristics can be grouped into three types.[7] One type of Rule 404(b) heuristic is a multi-factor test based on a paragraph of dicta from the Supreme Court's opinion in *Huddleston v. United States*, a case that did not directly concern the task of identifying and excluding propensity evidence.[8] In *Huddleston*, the defendant conceded that the government's evidence was not offered to prove propensity, and so the Rule 404(b) tests that are based on this case are not especially helpful when a defendant argues that the government's evidence is offered to prove propensity.[9] Two additional types of Rule 404(b) heuristics ask whether the proffered evidence satisfies one of the 404(b) "exceptions." Rule 404(b) itself does not include any exceptions; these 404(b) "exceptions" exist only because the courts have created them.[10] One source of these "exceptions" is the list of examples of non-propensity purposes included in

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

6 *Id.*

7 These heuristics are discussed in detail *infra* Part II.

8 485 U.S. 681, 682 (1988).

9 *Id.* at 686.

10 Some other rules (specifically, Rules 413, 414, and 415) do establish exceptions to Rule 404(b), but Rule 404(b) itself does not establish any exceptions. FED. R. EVID. 404(b), 413–15.

Rule 404(b)(2).[11] The second source of these "exceptions" is the reference, in an advisory committee note, to evidence that is "intrinsic" to the charged offense and thus is evidence of the same act rather than an "other" act.[12]

The purpose of this Article is not to argue that the use of these Rule 404(b) heuristics necessarily results in erroneous decisions regarding other-acts evidence. The claim of this Article is more limited: that the use of these Rule 404(b) heuristics results in erroneous reasoning by the courts. Courts might (or might not) reach the correct result to admit (or exclude) evidence by applying these heuristics, but applying these heuristics produces opinions—and as discussed in Part II.B, exchanges at oral argument—that at best are unnecessarily confusing and at worst are objectively incorrect statements of the rule.

Recently, the Seventh Circuit reformed its approach to Rule 404(b).[13] Specifically, this court recognized that Rule 404(b) prohibits one kind of evidence—evidence offered to prove propensity.[14] This Article proposes that the other circuits should similarly abandon their Rule 404(b) heuristics and simply apply Rule 404(b) to exclude other-acts evidence when offered for the purpose of proving action in accordance with character.

Part I of this Article presents a brief overview of how Rule 404(b) was intended to operate. Part II examines how Rule 404(b) actually operates under the heuristics, focusing on cases decided within the last three years. Overall, courts' application of Rule 404(b) is woefully confused because, under the Rule 404(b) heuristics, the admissibility of other-acts evidence has come to depend on several factors, none of which are the single factor—propensity—that is provided for in Rule 404(b). Part III briefly reviews each circuit court of appeals' approach to Rule 404(b), including the Seventh Circuit's recent abandonment of the *Huddleston* and "exceptions" heuristics in favor of a more straightforward, rule-based test

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[11] FED. R. EVID. 404(b)(2).

[12] FED. R. EVID. 404(b) advisory committee's note to 1991 amendment (stating that the rule "does not extend to evidence of acts which are 'intrinsic' to the charged offense").

[13] United States v. Gomez, 763 F.3d 845, 853 (7th Cir. 2014) (en banc). This case is discussed *infra* Part III.

[14] *Id.* at 855–56.

of admissibility under Rule 404(b). Additionally, this Part explains why other circuit courts likely do not need to decide a case en banc to adopt the Seventh Circuit's approach.

I. THE PURPOSE OF RULE 404(B)

Rule 404(b) exists because common-law judges feared that juries would over-value character evidence.[15] Character evidence is acknowledged to often be relevant; someone who robbed a bank in the past is more likely, as compared to someone who has never robbed a bank, to be the person who robbed the bank in the present.[16] However, the fact that someone robbed a bank in the past is not conclusive proof that this person also robbed a bank in the present, yet juries might interpret the prior conduct as proof of present conduct. Although it is true that people do often act in accordance with particular character traits, it is also true that people often act "out-of-character." Additionally, a jury might conclude that someone who robbed a bank in the past has a bad kind of character and deserves to be punished even if she did not commit the present bank robbery. It is best, the common-law judges reasoned, to simply remove the issue of character from juries' consideration. As Professor Wigmore stated:

> The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present

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[15] Old Chief v. United States, 519 U.S. 172, 181 (1997).

[16] As the Supreme Court stated in *Old Chief*:

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. . . . The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Id. at 181 (quoting Michelson v. United States, 335 U.S. 469, 475–76 (1948)).

> charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.[17]

Rule 404(b) of the Federal Rules of Evidence reflects this understanding of the perils of character evidence. According to the Advisory Committee's Note, the problem with evidence of crimes, wrongs, or other acts is that this evidence "subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."[18]

II. THE UNITED STATES COURTS OF APPEALS' RULE 404(B) HEURISTICS

There are several problems with most federal circuit court of appeals' approach to Rule 404(b). The first is the crafting of multi-factor tests that have read the propensity ban on "other acts" evidence out of the rule, on the basis of a paragraph of dicta from the Supreme Court's opinion in *Huddleston v. United States*. The second is a fixation on fictitious "exceptions" to Rule 404(b). Some of these "exceptions" are based on the permitted purposes listed in 404(b) and some are based on a reference to "intrinsic" evidence in the Advisory Committee's Note to the 1991 amendment. The result is an extensive and confusing assortment of Rule 404(b) "tests" that do not in fact test for propensity reasoning.

A. Huddleston *was Not About Propensity*

One wrong turn that federal courts have taken in applying Rule 404(b) is to create multi-factor tests of admissibility. The Ninth Circuit's test, as stated by one recent case, is typical:

> The government must show that (1) the evidence tends to prove a material point; (2) the other act is not too remote in time; (3) the evidence is sufficient to support a finding that defendant committed the other

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[17] 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 194, at 646 (3d ed. 1940).

[18] FED. R. EVID. 404 advisory committee's note on proposed rules (citation omitted).

> act; and (4) (in certain cases) the act is similar to the offense charged.[19]

This test essentially rewrites Rule 404(b) to allow other-acts evidence so long as it is relevant. Nowhere in this test is there any consideration of whether the evidence is relevant because it proves propensity. This four-factor test might exclude irrelevant evidence, or remote evidence, or dissimilar evidence, but it does not necessarily or intentionally exclude propensity evidence.

Almost all of the other U.S. Circuit Courts of Appeals have adopted *n*-factor tests similar to the Ninth Circuit's.[20] The similarity of these tests stems from their common origin: a paragraph of dicta in the opinion of the Supreme Court in *Huddleston v. United States*.[21] The Second,[22] Third,[23] and Tenth[24] Circuits even refer to the elements of their tests as "*Huddleston* factors."

While *Huddleston* did concern Rule 404(b), Huddleston himself conceded that the government was offering the evidence at issue—television sets that the government alleged were stolen—for a proper purpose.[25] As the Court stated, "Petitioner acknowledges that this evidence was admitted for the proper purpose of showing his

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[19] United States v. Lloyd, 807 F.3d 1128, 1157–58 (9th Cir. 2015) (citations and internal quotation marks omitted). This same formulation is recited in numerous recent Ninth Circuit opinions. *See, e.g.*, United States v. Iturbe-Gonzalez, 679 F. App'x. 531, 533 (9th Cir. 2017), *amended and superseded*, 705 F. App'x 486 (9th Cir. 2017); United States v. Foster, 664 F. App'x 644, 646 (9th Cir. 2016); United States v. Tam Quang Do, 617 F. App'x 786, 787 n. 1 (9th Cir. 2015); United States v. Martin, 796 F.3d 1101, 1106 (9th Cir. 2015).

[20] The other U.S. circuits' approaches are examined *infra* Part III.

[21] 485 U.S. 681, 691 (1988).

[22] United States v. Samlal, 415 F. App'x 280, 281 (2d Cir. 2011) ("The *Huddleston* factors were satisfied. . . . Accordingly, we find that the district court did not abuse its discretion in admitting the prior act evidence and thus affirm the judgment of conviction.").

[23] United States v. Maurizio, 701 F. App'x 129, 137 (3d Cir. 2017) ("After conducting an analysis of the *Huddleston* factors, the District Court found that the evidence was admissible under Rule 404(b).").

[24] United States v. Mares, 441 F.3d 1152, 1159 (10th Cir. 2006) ("In sum, the district court properly found the evidence satisfied all four *Huddleston* factors. The evidence was thus properly admitted under Rule 404(b).").

[25] *Huddleston*, 485 U.S. at 686.

knowledge that the Memorex tapes were stolen."[26] Huddleston argued that the trial court should have held a pretrial hearing to determine whether the television sets were in fact stolen,[27] and he argued that the government should have to prove that the television sets were stolen by clear and convincing evidence,[28] but he did not argue that evidence of the television sets was offered for the purpose of proving character or action in accordance with character.[29] Rather, Huddleston conceded that the television sets were admitted for the proper purpose of proving his knowledge that the cases of VCR tapes were stolen.[30] Because the Supreme Court was not deciding whether evidence of the television sets was offered for a proper non-character purpose, the Court's opinion should not be taken as a thorough examination of how a trial court should go about determining whether evidence of crimes, wrongs, or other acts is admissible under Rule 404(b). Nevertheless, almost all of the U.S. Circuit Courts of Appeals have adopted a "Rule 404(b) test" that essentially repeats one summative paragraph of the Supreme Court's opinion in *Huddleston*:

> We share petitioner's concern that unduly prejudicial evidence might be introduced under Rule 404(b). We think, however, that the protection against such unfair prejudice emanates not from a requirement of a preliminary finding by the trial court, but rather from four other sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402—as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice, and fourth, from

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[26] *Id.*

[27] This was the issue that the Supreme Court agreed to decide. *Id.* at 685 ("We granted certiorari to resolve a conflict among the Courts of Appeals as to whether the trial court must make a preliminary finding before 'similar act' and other Rule 404(b) evidence is submitted to the jury.") (citation omitted).

[28] *Id.* at 684.

[29] *Id.* at 686.

[30] *Id.*

> Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.[31]

In this paragraph, the Supreme Court was not articulating a test for determining when evidence of crimes, wrongs, or other acts is admissible for a non-character or non-propensity purpose. The Court's only acknowledgement of the heart of Rule 404(b)—propensity—is the cursory reference to the requirement that "the evidence be offered for a proper purpose."[32] The Court did not explain how a trial court should determine whether evidence is being offered for a proper purpose. In using this dicta as a basis for a general test of Rule 404(b) admissibility, federal courts have sidestepped the question that must be asked before turning to the factors that the Court listed. Because the factors the Court listed do not instruct trial courts how to determine whether evidence is offered for a non-character purpose, the tests based on these factors do not clearly or necessarily protect against the admission of evidence for the purpose of proving action in accordance with character.

B. *Examples are Not Exceptions*

Rule 404(b)(1) states: "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."[33] This straightforward prohibition of propensity evidence has been confused, however, by Rule 404(b)(2), which provides a long list of examples of "permitted uses," including "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[34] Many federal courts have interpreted this list not as examples of permitted purposes but as specifically enumerated exceptions, with the result that trial courts undertake to determine the admissibility of other-acts evidence by asking whether the evidence "fits" an "exception," not whether the evidence is offered for the purpose of proving propensity.

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[31] *Id.* at 691–92 (footnote and citations omitted).

[32] *Id.* at 691.

[33] FED. R. EVID. 404(b)(1).

[34] FED. R. EVID. 404(b)(2).

The Ninth Circuit is a particularly egregious transgressor. An examination of cases decided in that circuit in the past three years reveals that the examples of permitted purposes listed in Rule 404(b)(2) are routinely described as "exceptions." For example, the court has stated that "Rule 404(b)(2) functions as an exception to 404(b)(1)"[35] and that "[w]hen the Government offers evidence of prior or subsequent crimes or bad acts as part of its case-in-chief, it has the burden of first establishing relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of Rule 404(b)."[36]

The Ninth Circuit has also taken to naming various exceptions, such as the "plan exception,"[37] the "identity exception,"[38] and "the inextricably intertwined exception."[39] In one recent case, the judges spent several minutes of oral argument attempting to determine whether appellant's counsel had waived by failing to argue on appeal "one of the exceptions" because she had not specifically named it in her brief.[40] The very first question, asked by Judge Nelson, involved "the 404(b) exceptions": "Trial counsel focused on the plan exception, and appeal counsel focused on a mistaken identity. What are you focusing on?" Appellate counsel responded that it didn't matter which label was applied to the evidence.[41] Judge Wardlaw disagreed with this response, stating, "Well, they are two different exceptions," and "No, it's two different things."[42] Continuing this attraction to if not fixation on the "exceptions," the court's opinion begins with the statement: "In his opening brief, Firempong argues only that Dr. Owens' testimony was admissible under Federal Rule of Evidence 404(b)(2)'s 'identity' exception. Thus, to the extent that

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35 United States v. McElmurry, 776 F.3d 1061, 1067 (9th Cir. 2015).

36 United States v. Wolverine, 584 F. App'x 646, 647 (9th Cir. 2014) (quoting United States v. Hernandez–Miranda, 601 F.2d 1104, 1108 (9th Cir.1979)).

37 United States v. Firempong, 624 F. App'x 497, 499 (9th Cir. 2015).

38 *Id.*

39 United States v. Sangalang, 580 F. App'x 597, 600 (9th Cir. 2014).

40 *Firempong*, 624 F. App'x at 499. The video of the oral argument in this case is available on the court's website. *Watch Recording for Case: USA v. Owusu Firempong, No. 14-50118*, U.S. COURTS FOR THE NINTH CIRCUIT, http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000008048 (last visited Mar. 12, 2018) [hereinafter *Firempong Oral Argument*].

41 *Firempong Oral Argument*, *supra* note 40, at 0:33.

42 *Id.* at 1:37.

Owens' testimony may have been admissible under Rule 404(b)(2)'s 'plan' exception, this argument is waived."[43]

The problem with this approach is that whether the purpose for admitting the evidence is or is not listed in Rule 404(b)(2) is irrelevant; what matters is whether the purpose for offering the evidence is to prove propensity. It is confusing and potentially misleading to focus on whether the evidence is "plan evidence" or "identity evidence" when what matters is whether the evidence is propensity evidence.

In sum, the essential flaw in the Ninth Circuit's approach to Rule 404(b)[44] is that the permitted purposes listed in 404(b)(2) are not a list of exceptions; they are a list of examples. Misinterpreting the examples as exceptions has caused the court to ask whether evidence of crimes wrongs, or other acts "fits" one of the listed "exceptions," not whether it is propensity evidence, with the result that the court's test for admissibility is not the test provided by the rule.

C. *Evidence Not Covered by a Rule Is Not Admissible as an Exception to the Rule*

The third distorting Rule 404(b) heuristic that the federal courts have created is based on the Advisory Committee's Note to the 1991 amendment, which states: "The amendment does not extend to evidence of acts which are 'intrinsic' to the charged offense."[45] While there is nothing inherently objectionable about this commentary, the problem is that federal courts have used this language to identify several additional "exceptions" to Rule 404(b), including not only an "intrinsic evidence exception" but also a "*res gestae* exception," an "intertwined (or in some cases "inextricably intertwined") exception," a "background exception," and a "completing the story exception."

Most of the circuit courts of appeals have created some "exception" based on the advisory committee's reference to "intrinsic" evidence. The most common is perhaps the "inextricably intertwined exception." For example, the Fifth Circuit recently stated:

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[43] *Firempong*, 624 F. App'x at 499 (citation omitted).

[44] The Ninth Circuit might be the worst transgressor, but it is not the only one; the other U.S. circuits' "exceptions" heuristics are discussed *infra* Part III.

[45] FED. R. EVID. 404(b) advisory committee's note to 1991 amendment (citation omitted).

> Here, we conclude that the evidence of Judge Cobos's bribe was intrinsic because it was "inextricably intertwined" with the conspiracy to defraud the United States in that it completed the story of the crime by proving the immediate context of events in time and place, allowing the jury to assess all of the circumstances under which Madrid and Garcia acted.[46]

Similarly, according to the Ninth Circuit: "The uncharged transactions were 'intrinsic' to the charged counts of wire fraud as they were all part of a single scheme; therefore, evidence of the uncharged transactions was also admissible under the 'inextricably intertwined' exception to Rule 404(b)."[47]

Another "exception" related to "intrinsic" evidence is the "*res gestae* exception." As the Sixth Circuit recently stated: "*Res gestae* evidence, also described as 'background' or 'intrinsic' evidence, is 'an exception' to the Rule 404(b) bar on propensity evidence."[48] Some federal courts recognize a related "complete-the-story exception." For example, according to the Fourth Circuit:

> The intrinsic act doctrine allows evidence of bad acts to be admitted if the acts arose out of the same series of transactions as the charged offense, or if the evidence is necessary to complete the story of the crime on trial. Other criminal acts are intrinsic when they are inextricably intertwined or both acts are part of a

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[46] United States v. Madrid, 610 F. App'x 359, 385 (5th Cir. 2015) (citation and alterations omitted); *accord* United States v. Ebert, 178 F.3d 1287, 1999 WL 261590, at *25 (4th Cir. 1999) (unpublished table decision) (discussing the "inextricably intertwined exception to Rule 404(b)").

[47] United States v. Cuenca, 692 F. App'x 857, 858 (9th Cir. 2017).

[48] United States v. Gibbs, 797 F.3d 416, 423 (6th Cir. 2015) (citation omitted); *accord* United States v. Hughes, 562 F. App'x 393, 396 (6th Cir. 2014) ("The district court did not abuse its discretion in determining that this other-acts evidence was intrinsic to the charged offenses and therefore came within the background or *res gestae* evidence exception to Rule 404(b)."); United States v. Adams, 722 F.3d 788, 810 (6th Cir. 2013) ("Background or *res gestae* evidence is an exception to Rule 404(b).") (citation omitted).

> single criminal episode or the other acts were necessary preliminaries to the crime charged.[49]

The Eleventh Circuit similarly stated:

> Evidence of uncharged criminal activities is inadmissible unless the uncharged acts arose from the same transaction, are necessary to complete the story of the crime, or are inextricably intertwined with the evidence regarding the charged offense. Even if the evidence meets one of these exceptions, it may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.[50]

These various "exceptions" that federal courts have spun out of the Advisory Committee's reference to "intrinsic" evidence are problematic for two reasons. First, it is conceptually wrong to say that evidence is admissible pursuant to an exception if the evidence is truly intrinsic evidence—if the rule does not extend to the evidence, then the evidence is not an exception to the rule; the rule simply does not apply to the evidence.

Additionally, not only do these "exceptions" confuse the question whether evidence is admissible for a non-propensity purpose, the "exceptions" also confuse the question whether evidence is subject to the notice requirement of Rule 404(b).[51] If the evidence is truly intrinsic, then it is not other-act evidence and should not be subject to the notice requirement. Federal courts, however, disagree about whether this "*res gestae*" or "inextricably intertwined" or "completes the story" evidence is intrinsic or extrinsic. For example, the Eighth Circuit has called it intrinsic: "Evidence of other wrongful conduct is considered intrinsic when it is offered for the purpose of providing the context in which the charged crime occurred. Such evidence is admitted because the other crime evidence 'completes

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[49] United States v. Francis, 329 F. App'x 421, 427 (4th Cir. 2009) (citations, alterations, and internal quotation marks omitted).

[50] United States v. Daniel, 173 F. App'x 766, 769 (11th Cir. 2006) (citations and internal quotation marks omitted).

[51] FED. R. EVID. 404(b)(2) ("On request by a defendant in a criminal case, the prosecutor must: (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and (B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.").

the story' or provides a 'total picture' of the charged crime."[52] The Fifth Circuit, however, has said that it is extrinsic: "The Government contends that the evidence regarding Torres' involvement in the robberies and Guerrero's connection to him was admissible because it completes the story of the crime. Pursuant to Rule 404(b), our court has approved such extrinsic evidence."[53]

These "exceptions" have shifted the federal courts' focus from determining whether evidence is offered for a propensity purpose to determining whether one of the "exceptions" applies. Several courts have acknowledged that "inextricably intertwined," "*res gestae*," "background," and "completes the story" are concepts without clear boundaries. For example, the D.C. Circuit has stated: "The 'complete the story' definition of 'inextricably intertwined' threatens to override Rule 404(b)."[54] The Third Circuit similarly has observed: "Like its predecessor res gestae, the inextricably intertwined test is vague, overbroad, and prone to abuse, and we cannot ignore the danger it poses to the vitality of Rule 404(b)."[55] The Seventh Circuit also recognized the confusion created by the "inextricably intertwined exception"; however, its solution was simply to shift the confusion to another "exception," stating that "[b]ecause motive is an express exception to the Rule 404(b) bar, there is no need to spread the fog of inextricably intertwined over it."[56] Courts should abandon the "fog" inherent in all of the "exceptions" and return to the test set forth in Rule 404(b) itself.

D. *Current Approaches to Rule 404(b) in the Circuit Courts of Appeals*

The following subsections summarize each circuit court of appeals' (mis)use of three Rule 404(b) heuristics: the *n*-factor *Huddle-*

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[52] United States v. Johnson, 463 F.3d 803, 808 (8th Cir. 2006) (citation and internal quotation marks omitted).

[53] United States v. Guerrero, 169 F.3d 933, 943 (5th Cir. 1999) (citations omitted).

[54] United States v. Bowie, 232 F.3d 923, 928 (D.C. Cir. 2000).

[55] United States v. Green, 617 F.3d 233, 248 (3d Cir. 2010).

[56] United States v. Schmitt, 770 F.3d 524, 533 (7th Cir. 2014) (citations, alterations, and internal quotation marks omitted).

ston heuristic; the "enumerated exceptions" heuristic; and the "intrinsic acts exceptions" heuristic. The analysis focuses on cases decided within the past three years.

1. THE FIRST CIRCUIT

a. The n-Factor *Huddleston* Heuristic

The First Circuit presently has one of the more abbreviated Rule 404(b) tests, consisting only of two factors, one of which is not even about Rule 404(b) but instead is about Rule 403. According to the court: "We utilize a two-part test in evaluating admissibility under Rule 404(b). First, we ask whether the evidence has 'special relevance'; then, we apply Rule 403 and consider whether its probative value is substantially outweighed by the danger of unfair prejudice."[57]

The first part of this test is based on *Huddleston*. As the court recently stated:

> The Supreme Court has explained that, in evaluating the admissibility of Rule 404(b) evidence, a court initially must decide whether the evidence submitted is probative of a material issue other than character. *Huddleston v. United States*, 485 U.S. 681, 686 (1988). To implement this directive, we have required that Rule 404(b) evidence be shown to have special relevance to an issue in the case such as intent or knowledge.[58]

b. The "Enumerated Exceptions" Heuristic

It might be thought that asking whether evidence has "special relevance" would entail a determination whether evidence is offered for a non-character purpose. Although this might have been the goal, in practice it amounts to asking whether the proponent of the evidence has said that the evidence is being offered for one of the examples of permitted purposes included in Rule 404(b)(2). For example, the First Circuit recently stated: "Rule 404(b)(2) specifically

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[57] United States v. Ford, 839 F.3d 94, 109 (1st Cir. 2016) (citation omitted).

[58] United States v. Raymond, 697 F.3d 32, 38 (1st Cir. 2012) (citation and internal quotation marks omitted).

permits the admission of a prior conviction to prove intent, and we have repeatedly upheld the admission of prior drug dealing by a defendant to prove a present intent to distribute."[59] More generally, the court views Rule 404(b)(2)'s list of permitted purposes to be an "exception" to 404(b)(1):

> Rule 404(b)(1) states that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." However, Rule 404(b)(2) provides for an exception, stating that such "evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[60]

Adding insult to injury, the First Circuit has stated that these "exceptions" are applied "broadly." For example, the court recently explained that "when the other-acts evidence is introduced to show knowledge, motive, or intent, the Rule 404(b) exceptions to the prohibition against character evidence have been construed broadly."[61]

c. The "Intrinsic Evidence Exceptions" Heuristic

Although it relies heavily on the "enumerated exceptions" heuristic, the First Circuit has largely avoided the "intrinsic acts exception" heuristic. In numerous recent cases, the court has properly defined "intrinsic evidence" as evidence of the charged offense, as opposed to evidence of "other acts," and has avoided referring to this "same act" evidence as an "exception" to Rule 404(b). For example, it recently stated:

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[59] United States v. Henry, 848 F.3d 1, 8 (1st Cir. 2017) (citations omitted); *accord id.* at 9 (stating that "the district court did not abuse its discretion in ruling that the prior-conviction evidence qualified under the intent exception to Rule 404(b)").

[60] United States v. Monteiro, 871 F.3d 99, 110 n.7 (1st Cir. 2017), *petition for cert. filed*, No. 17-8041 (U.S. Mar. 7, 2018).

[61] United States v. Rodríguez-Soler, 773 F.3d 289, 298 (1st Cir. 2014) (internal quotation marks omitted) (quoting United States v. Flores Perez, 849 F.2d 1, 4 (1st Cir. 1988)).

> Rule 404(b)'s prohibition of evidence of prior bad acts applies to evidence that is extrinsic to the crime charged, and is introduced for the purpose of showing villainous propensity. But when the evidence presented is intrinsic to the crime charged in the indictment Rule 404(b) is really not implicated at all.[62]

2. THE SECOND CIRCUIT

a. The n-Factor *Huddleston* Heuristic

The Second Circuit currently follows a *Huddleston*-inspired four-factor test that is nearly identical to the Ninth Circuit's test:[63]

> This Court applies the inquiry in *Huddleston v. United States* in order to determine whether a district court properly admitted other act evidence. Under that inquiry, the reviewing court considers whether (1) it was offered for a proper purpose; (2) it was relevant to a material issue in dispute; (3) its probative value is substantially outweighed by its prejudicial effect; and (4) the trial court gave an appropriate limiting instruction to the jury if so requested by the defendant.[64]

As with most circuits' tests, this test provides no guidance concerning the key Rule 404(b) question—how to determine whether the evidence is offered for a proper purpose. Under this test, the trial court must determine that the evidence is "offered for a proper purpose," but the test does not further state that a proper purpose exists only when the relevance of the evidence does not depend upon a propensity inference.

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[62] *Monteiro*, 871 F.3d at 110 (citations, alterations, and internal quotation marks omitted); *accord* United States v. DeSimone, 699 F.3d 113, 124 (1st Cir. 2012) ("Evidence intrinsic to the crime for which the defendant is charged and is on trial is not governed by Rule 404(b)."") (citation omitted).

[63] *See supra* Section II.A.

[64] United States v. Alcantara, 674 F. App'x 27, 30 (2d Cir. 2016) (citations and internal quotation marks omitted); *accord* United States v. Barret, 677 F. App'x 21, 23–24 (2d Cir. 2017).

b. The "Enumerated Exceptions" Heuristic

Generally, the Second Circuit properly states that all evidence that is not propensity evidence is admissible under Rule 404(b). For example, the court recently stated that "prior act evidence is admissible if offered for any purpose other than to show a defendant's criminal propensity."[65] On occasion, however, the Second Circuit has referred to one of the listed examples of permitted purposes as a particular kind of exception. For example, the court has referred to "the proof of motive exception"[66] and "the opportunity exception."[67]

c. The "Intrinsic Evidence Exceptions" Heuristic

The Second Circuit often states that evidence intrinsic to the charged offense is not "other act" evidence and therefore is not governed by Rule 404(b). The court has repeated in numerous cases:

> Evidence of uncharged criminal activity is not considered other crimes evidence if it arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial.[68]

While this definition of "other crimes" evidence avoids the improper "exceptions" conception of some other circuits' approaches, the Second Circuit's test does—like the circuits that use the "exceptions" approach—broaden the scope of intrinsic evidence to include not just evidence of the charged act but also evidence that is "inextricably intertwined" with or needed to "complete the story" of that act. For example, the court recently stated:

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[65] United States v. Dupree, 870 F.3d 62, 76 (2d Cir. 2017) (citation and internal quotation marks omitted), *petition for cert. filed sub nom.* Gill v. United States, No. 17-7828 (U.S. Feb. 20, 2018).

[66] Sims v. Blot, 354 F. App'x 504, 507 (2d Cir. 2009).

[67] United States v. Slaughter, 248 F. App'x 210, 212 (2d Cir. 2007).

[68] United States v. Lyle, 856 F.3d 191, 206 (2d Cir. 2017) (citations, alterations, and internal quotation marks omitted), *petition for cert. filed*, No. 17-5992 (U.S. Sept. 14, 2017); *accord* United States v. Fama, 636 F. App'x 45, 47–48 (2d Cir. 2016); United States v. Morillo-Vidal, 547 F. App'x 29, 31 (2d Cir. 2013); United States v. Alvarez, 541 F. App'x 80, 85 (2d Cir. 2013).

> We have explained that evidence of uncharged criminal conduct, if it is "inextricably intertwined with the evidence regarding the charged offense," is not evidence of "other crimes, wrongs, or acts" under Rule 404(b). Rather, if it "completes the story of the crime on trial," then the evidence of the uncharged act is properly treated as part of the very act charged, or, at least, as proof of that act.[69]

3. THE THIRD CIRCUIT

a. The n-Factor *Huddleston* Heuristic

Many Third Circuit opinions recite that the court applies a *Huddleston* four-factor test. One recent example states:

> Admissibility under Rule 404(b) requires the satisfaction of four distinct steps: (1) the other-acts evidence must be proffered for a non-propensity purpose; (2) that evidence must be relevant to the identified non-propensity purpose; (3) its probative value must not be substantially outweighed by its potential for causing unfair prejudice to the defendant; and (4) if requested, the other-acts evidence must be accompanied by a limiting instruction. *See Huddleston v. United States*, 485 U.S. 681, 691 (1988).[70]

However, several other recent decisions have focused specifically on whether evidence is relevant for a non-character purpose and whether that relevance exists independent of any propensity reasoning. One case that acknowledges the inadequacy of the four-factor test and advocates a closer examination of whether other-acts evidence is offered for a propensity purpose is *United States v. Caldwell*.[71] In this case, the Third Circuit stated:

> In proffering prior act evidence, the government must explain how the evidence fits into a chain of

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[69] *Fama*, 636 F. App'x at 47–48 (citations, alterations, and internal quotation marks omitted).

[70] United States v. Repak, 852 F.3d 230, 241 (3d Cir. 2017).

[71] 760 F.3d 267 (3d Cir. 2014).

> inferences—a chain that connects the evidence to a proper purpose, no link of which is a forbidden propensity inference. We require that this chain be articulated with careful precision because, even when a non-propensity purpose is "at issue" in a case, the evidence offered may be completely irrelevant to that purpose, or relevant only in an impermissible way.
>
> The Government argues that Caldwell's prior convictions are relevant to show his knowledge, yet it has failed to satisfactorily explain why this is so. There is in the record no articulation by the Government of a logical chain of inferences showing *how* Caldwell's prior convictions are relevant to show his knowledge. Nor does the Government present such a chain of logical inferences in its argument on appeal. Instead, the Government repeatedly returns to its baseline position that the evidence is generally relevant to show Caldwell's knowledge that he possessed the gun. This tells us nothing about how the evidence accomplishes this task, and is insufficient to secure admission under Rule 404(b).[72]

The court concluded:

> In sum, we conclude that the admission under Rule 404(b) of Caldwell's prior convictions for unlawful firearm possession was erroneous and that the error was not harmless. While it may be that this opinion breaks no new ground, we believe it necessary to reiterate the importance of a methodical approach by the proponent of prior act evidence and a carefully reasoned ruling by the trial judge who must decide the question of admissibility.[73]

The Third Circuit has reaffirmed this more rule-based approach in additional recent cases. For example:

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[72] *Id.* at 281 (citations and internal quotation marks omitted).
[73] *Id.* at 290.

> We have recently reiterated the importance of concretely connecting the proffered evidence to a non-propensity purpose. . . . [T]he Government failed to articulate a chain of inferences supporting the admission of Repak's uncharged solicitations. Instead, the Government stated only that a logical chain connecting the evidence to a non-propensity purpose exists. That statement is not enough to demonstrate the admissibility of Rule 404(b) evidence. The District Court should have asked the Government to explain how the proffered evidence should work in the mind of a juror to establish Repak's knowledge and intent related to the roof and excavation services.[74]

Aside from the Seventh Circuit's 2014 en banc decision in *United States v. Gomez*, which explicitly acknowledged the inadequacies of the *n*-factor *Huddleston* test and adopted a more rule-based test,[75] the Third Circuit's opinion in *Caldwell* is perhaps the clearest statement of how trial judges should decide whether to admit other-acts evidence under Rule 404(b).

b. The "Enumerated Exceptions" Heuristic

Despite the *Caldwell* Court's recognition that Rule 404(b) requires a propensity-free chain of reasoning, the court also explicitly embraced the idea that the examples of permitted uses function like exceptions, stating: "The 'permitted uses' of prior act evidence set forth in Rule 404(b)(2) are treated like exceptions to this rule of exclusion."[76] Similarly, the court has stated: "'Knowledge' and 'intent' are also both exceptions under Federal Rule of Evidence 404(b) permitting the use of the defendant's prior 'Crimes, Wrongs, or Other Acts.'"[77]

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[74] *Repak*, 852 F.3d at 243–44 (citations and internal quotation marks omitted).

[75] The *Gomez* case is discussed *infra* Part III.

[76] *Caldwell*, 760 F.3d at 276.

[77] United States v. Sussman, 709 F.3d 155, 174–75 n. 21 (3d Cir. 2013); *accord* United States v. Ushery, 400 F. App'x 674, 677 (3d Cir. 2010) ("[W]e do not begin to balance the evidence's probative value under Rule 401 against Rule 403 considerations unless the evidence is offered under one of the Rule 404(b) exceptions.") (citation omitted).

Despite these statements, the Third Circuit does not use the "enumerated exceptions heuristic" as a means to determine the admissibility of evidence nearly so much as some other circuits. Additionally, the court is not generally using the "enumerated exceptions" as a fast-track to admitting evidence. For example, after the *Caldwell* Court observed that the enumerated examples of permitted purposes "are treated like exceptions," the court then stated:

> Our opinions have repeatedly and consistently emphasized that the burden of identifying a proper purpose rests with the proponent of the evidence, usually the government. This hurdle is not insurmountable, but it must be satisfied before the exception can be invoked . . . . Once the proponent identifies a non-propensity purpose that is "at issue" in the case, the proponent must next explain how the evidence is relevant to that purpose. This step is crucial. The task is not merely to find a pigeonhole in which the proof might fit, but to actually demonstrate that the evidence proves something other than propensity.[78]

Given this proper statement regarding the need to exercise care in applying the "exceptions," it is not clear why the court does not take the next logical step and reject the "exceptions" heuristic altogether.

c. The "Intrinsic Evidence Exceptions" Heuristic

The Third Circuit has specifically rejected the "intrinsically intertwined" heuristic. In the 2010 case *United States v. Green*, the court undertook an extensive analysis of the "inextricably intertwined" test.[79] The court observed:

> There are at least three problems with the "inextricably intertwined" test and its subsidiary formulations. The first is that the test creates confusion because, quite simply, no one knows what it means. Such an impediment stands as an obstacle to helpful analysis.

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[78] *Caldwell*, 760 F.3d at 276 (citations, alterations, and internal quotation marks omitted).

[79] 617 F.3d 233, 246–48 (3d Cir. 2010).

> Indeed, we have criticized the "inextricably intertwined" standard as "a definition that elucidates little." . . . .
>
> The second problem with the inextricably intertwined test is that resort to it is unnecessary. . . . [T]he same evidence would also be admissible *within the framework* of that rule because allowing the jury to understand the circumstances surrounding the charged crime—completing the story—is a proper, non-propensity purpose under Rule 404(b). All that is accomplished by labeling evidence "intrinsic" is relieving the Government from providing a defendant with the procedural protections of Rule 404(b).
>
> The third problem with the inextricably intertwined test is that some of its broader formulations, taken at face value, classify evidence of virtually any bad act as intrinsic.[80]

Finally, the court concluded that "the inextricably intertwined test is vague, overbroad, and prone to abuse, and we cannot ignore the danger it poses to the vitality of Rule 404(b)."[81]

4. THE FOURTH CIRCUIT

a. The n-Factor *Huddleston* Heuristic

The Fourth Circuit's three-part, *Huddleston*-based test provides: "Under Rule 404(b), evidence of other bad acts is admissible only if it is 'probative of a material issue other than character.' *Huddleston v. United States*, 485 U.S. 681, 686 (1988)." Such evidence is properly admitted when it is (1) relevant to an issue other than character, (2) necessary, and (3) reliable."[82] As previously discussed, the problem with this test is that factor one is the only factor that remotely relates to Rule 404(b)'s prohibition of propensity evidence, but requiring that evidence be "relevant to an issue other than character" in no way guarantees that the relevance to the non-character

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80 *Id.* (citations and footnotes omitted).

81 *Id.* at 248.

82 United States v. Oaks, 185 F. App'x 298, 300 (4th Cir. 2006).

issue does not rely on character inferences. For example, evidence of a prior drug conviction may be relevant to proving the issue of intent by relying on the inference that the defendant is the kind of person who intends to commit drug offenses.

b. The "Enumerated Exceptions" Heuristic

The Fourth Circuit occasionally relies on the examples of permitted purposes listed in Rule 404(b)(2) to determine whether evidence is offered for a purpose other than to prove character. For example, the court has stated: "Teran's prior firearms conviction is admissible under the 'intent' exception to bad character evidence. Because Teran pled not-guilty to possession of a firearm, any past firearm conviction was relevant as to his intent."[83] More generally, the court has expressly embraced the "enumerated exceptions" heuristic, stating:

> Although prior "bad act" evidence is inadmissible under Rule 404(b) to demonstrate a defendant's bad character, such evidence is not always barred from the trial altogether. The Rule itself provides a number of exceptions allowing for the admission of prior "bad act" evidence, including evidence of "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, [and] absence of mistake or accident."[84]

c. The "Intrinsic Evidence Exceptions" Heuristic

The Fourth Circuit has adopted a variety of versions of the "inextricably intertwined" approach to "intrinsic" evidence. Like other circuits, the Fourth Circuit has defined "inextricably intertwined" to include evidence that "completes the story."[85] The court also has

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[83] United States v. Teran, 496 F. App'x 287, 293 n.* (4th Cir. 2012) (citation omitted); *accord* United States v. Cooper, 482 F.3d 659, 663 (4th Cir. 2007) ("Rule 404(b) explicitly allows evidence that furnishes proof of the defendant's knowledge and the absence of mistake or accident.") (internal quotation marks omitted).

[84] United States v. McBride, 676 F.3d 385, 395 (4th Cir. 2012) (citation omitted) (alteration in original).

[85] *See, e.g.*, United States v. Logan, 593 F. App'x 179, 183 (4th Cir. 2014) ("Evidence of uncharged conduct is not other crimes evidence subject to Rule

used a "context" definition; for example, the court has stated: "Evidence is intrinsic if it is necessary to provide context relevant to the criminal charges."[86] Additionally, the court has created a "necessary preliminaries" definition; for example, in several recent cases the Fourth Circuit has stated: "Other bad acts are intrinsic—as opposed to extrinsic—when those acts are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged."[87] It is not clear whether (or how) "completes the story," "context," and "necessary preliminaries" differ from each other, or whether any of these definitions differ from the typical "background" definition used by other circuits.

5. THE FIFTH CIRCUIT

a. The n-Factor *Huddleston* Heuristic

Like the First Circuit, the Fifth Circuit applies a two-factor test that combines *Huddleston*'s reference to relevance to a non-character issue with Rule 403:

> Evidence of an uncharged crime or other act must be sufficient to support a finding that the crime or act actually occurred. If evidence of the crime or act is sufficient, its admissibility under Rule 404(b) hinges on whether (1) it is relevant to an issue other than the defendant's character, and (2) it possesses probative value that is not substantially outweighed by its undue prejudice under Federal Rule of Evidence 403.[88]

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404 . . . if evidence of the uncharged conduct is necessary to complete the story of the crime on trial.") (citation and internal quotation marks omitted).

[86] United States v. Basham, 561 F.3d 308, 326 (4th Cir. 2009) (citation and internal quotation marks omitted).

[87] United States v. Sterling, 701 F. App'x 196, 206 (4th Cir. 2017) (citation and internal quotation marks omitted); *accord Logan*, 593 F. App'x at 183; United States v. Marfo, 572 F. App'x 215, 223, 226 (4th Cir. 2014).

[88] United States v. Thomas, 847 F.3d 193, 207 (5th Cir. 2017) (citation and internal quotation marks omitted).

b. The "Enumerated Exceptions" Heuristic

The Fifth Circuit on occasion relies on Rule 404(b)(2)'s list of examples ("exceptions") in determining whether evidence is relevant for a non-character purpose. For example, the court has stated that "intent is a permitted use of extrinsic evidence under 404(b)(2)"[89] and "Rule 404(b)(2) includes an exception to the propensity evidence ban to demonstrate knowledge or lack of mistake."[90]

Despite such examples of the court's use of the "enumerated exceptions" heuristic, the Fifth Circuit has recognized that this heuristic is an incorrect application of the rule:

> Generally, Rule 404(b)(1) excludes evidence of a person's past misdeeds if the sole value of such evidence is to prove the existence of a trait of character, and, from that trait, an inference of particular conduct. The rule then provides what is mistakenly described as an exception to this general bar on propensity evidence: Evidence of a crime, wrong, or other act may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Fed. R. Evid. 404(b)(2).[91]

c. The "Intrinsic Evidence Exceptions" Heuristic

The Fifth Circuit uses an assortment of "inextricably intertwined" definitions that is similar to the Fourth Circuit's. For example, the court has used the "context," "necessary preliminaries," and "completes the story" definitions of "intrinsic":

> Evidence is "intrinsic" when the evidence of the other act and the evidence of the crime charged are "inextricably intertwined," if both acts are part of a

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[89] United States v. Rojas, 812 F.3d 382, 405 (5th Cir. 2016); *accord* United States v. Smith, 804 F.3d 724, 736 (5th Cir. 2015) (stating that "an uncharged offense is relevant to intent, a proper non-character issue under Rule 404(b)") (citation omitted).

[90] Brewer v. Hayne, 860 F.3d 819, 825 n.25 (5th Cir. 2017).

[91] United States v. Gutierrez-Mendez, 752 F.3d 418, 423 (5th Cir. 2014) (footnotes and citation omitted).

> "single criminal episode," or if the other acts were "necessary preliminaries" to the crime charged. Intrinsic evidence is admissible to complete the story of the crime by proving the immediate context of events in time and place, and to evaluate all of the circumstances under which the defendant acted, and thus does not implicate Fed. R. Evid. 404(b).[92]

6. THE SIXTH CIRCUIT

a. The n-Factor Huddleston Heuristic

The Sixth Circuit generally follows a three-part test:

> Trial courts employ a three-part test to determine the admissibility of 404(b)(2) evidence. First, a court determines whether there is sufficient evidence that the crime, wrong, or other act took place. Second, it decides whether evidence of that conduct is offered for a proper purpose, *i.e.*, whether the evidence is probative of a material issue other than character. Third, the court considers whether any risk of unfair prejudice substantially outweighs the evidence's probative value.[93]

b. The "Enumerated Exceptions" Heuristic

Like most circuits, the Sixth Circuit has relied on Rule 404(b)(2) to determine whether evidence was offered for a proper purpose. For example, the court has stated: "The government offered Richardson's prior distribution conviction for the purpose of proving his intent to distribute crack in this case, and Rule 404(b) expressly permits prior bad act evidence to be used to prove intent."[94] More generally, the court has stated that Rule 404(b)(2) creates "exceptions" to Rule 404(b)(1): "Rule 404(b)(2) provides exceptions to Rule

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[92] United States v. Madrid, 610 F. App'x 359, 385 (5th Cir. 2015) (citations, alterations, and internal quotation marks omitted).

[93] United States v. Barnes, 822 F.3d 914, 920 (6th Cir. 2016) (citations and internal quotation marks omitted).

[94] United States v. Richardson, 597 F. App'x 328, 333 (6th Cir. 2015) (citation omitted).

404(b)(1); these exceptions permit the Government to offer evidence of 'a crime, wrong, or other act' in limited circumstances—to prove 'motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.'"[95]

In some cases, however, the Sixth Circuit has not only asked whether the evidence was offered for a purpose listed in Rule 404(b)(2) but has also asked whether the evidence's relevance for that purpose relies on a propensity inference. For example, in the same case in which it summarily said that intent is expressly listed as a proper purpose in Rule 404(b)(2), the court also stated:

> Where the district court erred was in finding that Richardson's prior distribution was probative of his intent to distribute in this case. Generally, where the crime charged is one requiring specific intent, the prosecutor may use 404(b) evidence to prove that the defendant acted with the specific intent. In the context of drug distribution cases, this Court has stated time and again that prior distribution evidence can be admissible to show intent to distribute. Such evidence is admissible where the past and present crime are related by being part of the same scheme of drug distribution or by having the same *modus operandi*. Such a relationship is required because the only way to reach the conclusion that the person currently has the intent to possess and distribute based solely on evidence of *unrelated* prior convictions for drug distribution is by employing the very kind of reasoning—i.e., once a drug dealer, always a drug dealer—which 404(b) excludes.[96]

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[95] United States v. Mtola, 598 F. App'x 416, 420 (6th Cir. 2015) (internal quotation marks omitted); *accord Brewer*, 860 F.3d at 825 n.25 (stating "Rule 404(b)(2) includes an exception to the propensity evidence ban to demonstrate knowledge or lack of mistake"); United States v. Armstrong, 436 F. App'x 501, 503 (6th Cir. 2011) ("There are, however, certain identified exceptions, including proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.") (citation and internal quotation marks omitted).

[96] *Richardson*, 597 F. App'x at 333–34 (citations, alterations, and internal quotation marks omitted).

Although it is likely that the court's acceptance of a proper purpose when the prior drug charges are related to the present charges still allows evidence of prior acts to be admitted even though based on a propensity inference, the court's attention to the possibility that evidence offered for a specifically listed Rule 404(b)(2) purpose might nevertheless be inadmissible because it relies on "once a drug dealer, always a drug dealer" reasoning is a step in the right direction.

c. The "Intrinsic Evidence Exceptions" Heuristic

The Sixth Circuit is one of the more egregious employers of the "intrinsic evidence exception" heuristic. The court often refers to "the intrinsic evidence exception to 404(b)"[97] or to specific subtypes of the "intrinsic evidence exception," such as the "background evidence exception"[98] and the "*res gestae* evidence exception."[99] Even more troubling, however, is the court's statement that "intrinsic" evidence is an "exception" not to the admission of other-acts evidence but to the admission of propensity evidence. For example, the court recently stated: "*Res gestae* evidence, also described as 'background' or 'intrinsic' evidence, is 'an exception' to the Rule 404(b) bar on propensity evidence."[100]

7. THE SEVENTH CIRCUIT

a. The n-Factor Huddleston Heuristic

The Seventh Circuit's current approach, which explicitly rejects the *n*-factor *Huddleston* approach in favor of a more rule-based approach, is examined in Part III.

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[97] *See, e.g.*, United States v. English, 785 F.3d 1052, 1059 (6th Cir. 2015) (citation omitted).

[98] United States v. Heflin, 600 F. App'x 407, 411 (6th Cir. 2015) ("the background evidence exception").

[99] United States v. Hughes, 562 F. App'x 393, 396 (6th Cir. 2014) ("The district court did not abuse its discretion in determining that this other-acts evidence was intrinsic to the charged offenses and therefore came within the background or *res gestae* evidence exception to Rule 404(b).").

[100] United States v. Gibbs, 797 F.3d 416, 423 (6th Cir. 2015) (citation omitted).

b. The "Enumerated Exceptions" Heuristic

The Seventh Circuit has a kind of Jekyll and Hyde approach to the list of permitted purposes. On one hand, the court often refers to the list as a set of enumerated exceptions.[101] On the other hand, the court also recognizes the danger of regarding the list as having special significance. For example, in one paragraph of a recent opinion, the Seventh Circuit referred to the "list" of permitted purposes as "an exception to the general rule of exclusion," but then in the next paragraph cautioned that judges must be careful not to allow propensity evidence to be admitted under the guise of one of the listed purposes:

> Federal Rule of Evidence 404 addresses the subject of character evidence. Subpart (a) of the rule generally prohibits the admission of character evidence "to prove that on a particular occasion the person acted in accordance with the character or trait"—in other words, to show propensity. But subpart (b)(2) operates as an exception to the general rule of exclusion; it offers the following list of permitted uses of the character evidence:
>
> > This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

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[101] *See* United States v. Lee, 724 F.3d 968, 978 (7th Cir. 2013) ("The district judge must both identify the exception that applies to the evidence in question and evaluate whether the evidence, although relevant and within the exception, is sufficiently probative to make tolerable the risk that jurors will act on the basis of emotion or an inference via the blackening of the defendant's character.") (citation omitted); United States v. Gulley, 722 F.3d 901, 907 n.2 (7th Cir. 2013) ("[I]t is unnecessary for us to explain why the evidence at issue may have been admissible under other Rule 404(b) exceptions, like identity or opportunity."); United States v. Richards, 719 F.3d 746, 759 (7th Cir. 2013) (stating that "identification of an at-issue, non-propensity Rule 404(b) exception is a necessary condition for admitting the evidence") (alterations and citation omitted); United States v. Curescu, 674 F.3d 735, 742 (7th Cir. 2012) ("The use of evidence of prior crimes to show 'absence of mistake' is an express exception to the prohibition of prior-crimes evidence.") (quoting FED. R. EVID. 404(b)(2)).

FED. R. EVID. 404(b)(2).

> We have expressed concern over the risk that practically anything can be shoehorned into this list of permitted uses if the district court is not careful. A rule of *de facto* automatic admission would wipe out the general rule prohibiting propensity evidence.[102]

The *Gomez* case has made the Seventh Circuit more focused on the proper application of Rule 404(b), but the court still adheres to the "enumerated exceptions" heuristic at least in form if not substance. For example, the court recently stated: "We have also been mindful that loose policing of Rule 404(b)'s exceptions historically appears in drug cases. *Gomez*, 763 F.3d at 853. The district court acted reasonably by accepting the Government's reasoning centered around motive."[103] And even in *Gomez*, the court stated: "[T]he district court must consider *specifically* how the prior conviction tends to serve the non-propensity exception."[104]

Of course, the recognition that simply invoking one of the "exceptions" is insufficient is a highly desirable development. However, it would have been even better—and no more difficult—for the court to state that that the district court must consider specifically how the prior conviction tends to serve the non-propensity purpose. At one point, the *Gomez* court does take care to explain that the examples of permitted purposes are not true exceptions: "A common misconception about Rule 404(b) is that it establishes a rule of exclusion subject to certain exceptions. That's not quite right."[105] However, the value of this statement is undercut by its appearance in a footnote. The court further minimizes the importance of the statement by using the dismissive qualifier "technically": "So it's technically incorrect to characterize the purposes listed in subsection

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[102] United States v. McMillan, 744 F.3d 1033, 1037–38 (7th Cir. 2014) (citations omitted).

[103] United States v. Ferrell, 816 F.3d 433, 447 (7th Cir. 2015) (citing United States v. Gomez, 763 F.3d 845, 853 (7th Cir. 2014) (en banc)); *accord* United States v. Schmitt, 770 F.3d 524, 533 (7th Cir. 2014) (stating that "motive is an express exception to the Rule 404(b) bar") (alteration and internal quotation marks omitted).

[104] *Gomez*, 763 F.3d at 856 (citation and alterations omitted).

[105] *Id.* at 855 n.3.

(2) as 'exceptions' to the rule of subsection (1)."[106] But it's not merely technically incorrect, it's conceptually incorrect, to say that the examples of permitted purposes are exceptions.

c. The "Intrinsic Evidence Exceptions" Heuristic

In the 2010 case *United States v. Gorman*, the Seventh Circuit explicitly rejected the "inextricably intertwined" approach to determining whether evidence is admissible under Rule 404(b):

> The inextricable intertwinement doctrine is based on the notion that evidence inextricably intertwined with charged conduct is, by its very terms, not *other* bad acts and therefore, does not implicate Rule 404(b) at all. . . . .
>
> We have recently cast doubt on the continuing viability of the inextricable intertwinement doctrine . . . . We again reiterate our doubts about the usefulness of the inextricable intertwinement doctrine, and again emphasize that direct evidence need not be admitted under this doctrine. If evidence is not direct evidence of the crime itself, it is usually propensity evidence simply disguised as inextricable intertwinement evidence, and is therefore improper, at least if not admitted under the constraints of Rule 404(b). . . . .
>
> There is now so much overlap between the theories of admissibility that the inextricable intertwinement doctrine often serves as the basis for admission even when it is unnecessary. Thus, although this fine distinction has traditionally existed, the inextricable intertwinement doctrine has since become overused, vague, and quite unhelpful. To ensure that there are no more doubts about the court's position on this issue—the inextricable intertwinement doctrine has

106 *Id.*

> outlived its usefulness. Henceforth, resort to inextricable intertwinement is unavailable when determining a theory of admissibility.[107]

Despite this impressive assessment of the problems with the concept of "inextricably intertwined," the Seventh Circuit still relies on some related "exceptions" heuristics. For example, the court recently stated:

> The district court's conclusion that the drug evidence was "inextricably intertwined" with the charged act and "filled the story" runs counter to our recent precedent and is not dispositive on the issue of relevance or the ultimate admissibility of the drug evidence. In the wake of several cases in which we expressed our criticism of such tongue-twisting formulas, we definitively concluded that "resort to inextricable intertwinement is unavailable when determining a theory of admissibility." *United States v. Gorman*, 613 F.3d 711, 719 (7th Cir. 2010). Instead, we focus our analysis on the government's argument, and the district court's additional reasoning, that the evidence was relevant to establish Schmitt's motive for possessing a gun. Because motive is an express exception to the Rule 404(b) bar, there is no need to spread the fog of "inextricably intertwined" over it.[108]

Rejecting the "inextricably intertwined exception" was a step in the right direction; rejecting related heuristics, such as the "motive exception" or the "absence of mistake exception,"[109] would be another step in the right direction.

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[107] 613 F.3d 711, 717–19 (7th Cir. 2010) (citations and footnote omitted).

[108] *Schmitt*, 770 F.3d at 533 (citations, alterations, and internal quotation marks omitted).

[109] United States v. Curescu, 674 F.3d 735, 742 (7th Cir. 2012) ("The use of evidence of prior crimes to show 'absence of mistake' is an express exception to the prohibition of prior-crimes evidence.") (quoting FED. R. EVID. 404(b)(2)).

8. THE EIGHTH CIRCUIT

a. The n-Factor *Huddleston* Heuristic

The Eighth Circuit applies a four-factor test to determine admissibility under Rule 404(b): "Rule 404(b) evidence is admissible if it is (1) relevant to a material issue; (2) similar in kind and not overly remote in time to the crime charged; (3) supported by sufficient evidence; and (4) higher in probative value than prejudicial effect."[110] Like other circuits' *n*-factor *Huddleston* tests, the Eighth Circuit's approach tests for several non-404(b) issues—relevance (a Rule 402 issue) and probative value weighed against unfair prejudice (a Rule 403 issue)—but does not test for propensity reasoning.

b. The "Enumerated Exceptions" Heuristic

Like most other circuits, the Eighth Circuit relies on 404(b)(2)'s listed "exceptions" to determine whether evidence is admissible. For example, the court has reasoned:

> We have held on many occasions that prior convictions of firearm offenses are admissible to prove that the defendant had the requisite knowledge and intent to possess a firearm. . . . .
>
> Thus, under the initial Rule 404(b) analysis, our precedent indicates that previous firearm-related crimes can be relevant to prove that a defendant had the necessary knowledge that a firearm was present on or near his person and that a defendant had the intent to possess the firearm solely, jointly, or constructively.[111]

Similarly, in a drug possession case, the court stated: "Fang's prior convictions for possession are relevant because they go directly to proving knowledge."[112]

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[110] United States v. Adams, 783 F.3d 1145, 1149 (8th Cir. 2015) (citation and internal quotation marks omitted).

[111] *Id.* at 1149–50 (citations and footnote omitted).

[112] United States v. Fang, 844 F.3d 775, 780 (8th Cir. 2016).

c. The "Intrinsic Evidence Exceptions" Heuristic

The Eighth Circuit uses the typical "context" and "completes the story" definitions of intrinsic evidence. For example, the court recently stated: "Intrinsic evidence includes both evidence that is inextricably intertwined with the crime charged as well as evidence that merely completes the story or provides context to the charged crime."[113]

9. THE NINTH CIRCUIT

a. The n-Factor *Huddleston* Heuristic

The Ninth Circuit's *Huddleston*-based approach is discussed in Section II.A.

b. The "Enumerated Exceptions" Heuristic

As previously discussed, the Ninth Circuit refers to the examples listed in Rule 404(b)(2) as having special powers as enumerated exceptions. For example, the court requires that the evidence fit "one of the exceptions": "When the Government offers evidence of prior or subsequent crimes or bad acts as part of its case-in-chief, it has the burden of first establishing relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of Rule 404(b)."[114] The court has also stated that Rule 404(b)(2) as a whole is an exception: "Rule 404(b)(2) functions as an exception to 404(b)(1) . . . ."[115] And the court refers to specifically-named exceptions, such as the "plan exception" and the "identity exception."[116]

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[113] United States v. Cunningham, 702 F. App'x 489, 492 (8th Cir. 2017) (citation and internal quotation marks omitted).

[114] United States v. Wolverine, 584 F. App'x 646, 647 (9th Cir. 2014) (citations and internal quotation marks omitted).

[115] United States v. McElmurry, 776 F.3d 1061, 1067 (9th Cir. 2015); *accord* United States v. Goss, 256 F. App'x 122, 125 (9th Cir. 2007) ("FRE 404(b) sets forth exceptions to the general inadmissibility of propensity evidence, one of which is to prove knowledge, for which the district court allowed the evidence here.").

[116] United States v. Firempong, 624 F. App'x 497, 499 (9th Cir. 2015).

c. The "Intrinsic Evidence Exceptions" Heuristic

The Ninth Circuit also misuses the "intrinsic evidence exception" heuristic in several ways. One problem is the use of the "exception" language as a means of explaining why evidence is admissible. For example, the court recently stated: "The uncharged transactions were 'intrinsic' to the charged counts of wire fraud as they were all part of a single scheme; therefore, evidence of the uncharged transactions was also admissible under the 'inextricably intertwined' exception to Rule 404(b)."[117] If the court is correct that the uncharged acts were intrinsic evidence of the charged acts, then the court's further statement that the evidence is admissible because of "the 'inextricably intertwined' exception" is unnecessary. Another problem is the use of "inextricably intertwined" to cover a wide range of other-acts evidence, such as evidence needed to "complete the story"[118] or to provide "context."[119] As several other circuits have observed, these are purposes that have no natural outer boundary.

10. THE TENTH CIRCUIT

a. The n-Factor *Huddleston* Heuristic

Under the Tenth Circuit's four-factor *Huddleston* test:

> To determine whether Rule 404(b) evidence was properly admitted we look to the four-part test set out by the Supreme Court in *Huddleston v. United States*. To be admissible, this test requires that those fac-

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[117] United States v. Cuenca, 692 F. App'x 857, 858 (9th Cir. 2017); *accord* United States v. Loftis, 843 F.3d 1173, 1178 (9th Cir. 2016) ("[E]vidence of the uncharged transactions falls under the first inextricably intertwined exception.").

[118] United States v. Iturbe-Gonzalez, 705 F. App'x 486, 488 (9th Cir. 2017) ("The 2015 arrest was not an 'other act' under Rule 404(b), but was necessary to tell the story of the charged crime and was thus inextricably intertwined with the conduct underlying the charged crime.").

[119] United States v. Bailey, 588 F. App'x 730, 731 (9th Cir. 2014) ("But even if Bailey did object, the evidence of other transactions between Bailey and Owens was 'inextricably intertwined' with the charged transactions and provided critical context about Bailey's relationship with Owens, such that Federal Rule of Evidence 404(b) does not apply.") (citation omitted).

> tors—often called the "Huddleston factors"—be satisfied: (1) the evidence was offered for a proper purpose under Rule 404(b); (2) the evidence was relevant under Rule 401; (3) the probative value of the evidence was not substantially outweighed by its potential for unfair prejudice under Rule 403; and (4) the district court, upon request, instructed the jury pursuant to Rule 105 to consider the evidence only for the purpose for which it was admitted.[120]

Generally, the Tenth Circuit has interpreted the first factor to mean that the evidence was offered for one of Rule 404(b)(2)'s listed examples of permitted purposes: "Evidence is admitted for a proper purpose if allowed for one or more of the enumerated purposes in Rule 404(b)."[121] Thus, this test has not required trial courts to determine whether the evidence is relevant only because of a propensity inference; it only requires that the evidence is relevant to one of the "enumerated" examples.

b. The "Enumerated Exceptions" Heuristic

The Tenth Circuit also has made use of the "enumerated exceptions" heuristics. Interestingly, the court uses this kind of "exceptions" heuristic most often when characterizing a party's argument rather than when presenting its own conclusions. For example, applying the "enumerated exceptions" heuristic, the court recently stated: "Mr. Harris objected to its admission, arguing that none of the exceptions to Rule 404(b) apply, since nothing related to the prior conviction shows plan, motive, opportunity, intent, preparation, knowledge, identity, or absence of mistake or accident."[122]

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[120] United States v. Watson, 766 F.3d 1219, 1236 (10th Cir. 2014) (quoting United States v. Becker, 230 F.3d 1224, 1232 (10th Cir. 2000)) (alterations and internal quotation marks omitted); *accord* United States v. Henthorn, 864 F.3d 1241, 1247–48 (10th Cir. 2017); United States v. Smalls, 752 F.3d 1227, 1237 (10th Cir. 2014); United States v. Farr, 701 F.3d 1274, 1280 (10th Cir. 2012).

[121] United States v. Mares, 441 F.3d 1152, 1156 (10th Cir. 2006).

[122] United States v. Harris, 526 F. App'x 845, 849 (10th Cir. 2013) (internal quotation marks omitted); *accord* United States v. Cox, 684 F. App'x 706, 707 (10th Cir. 2017) ("Cox ultimately conceded that evidence of her earlier methamphetamine transactions might qualify for admission under the Rule 404(b)(2) exception for evidence of a common plan or design between the charged crime and

c. The "Intrinsic Evidence Exceptions" Heuristic

The Tenth Circuit uses the "intrinsic evidence" heuristic to admit "inextricably intertwined" evidence, "background" evidence, and evidence of "necessary preliminaries" or "context." The court recently provided this list of examples of cases in which it has found evidence to be "intrinsic":

> We regard evidence as intrinsic when it [1] was "inextricably intertwined" with the charged conduct, [2] occurred within the same time frame as the activity in the conspiracy being charged, [3] was a necessary preliminary to the charged conspiracy, [4] provided direct proof of the defendant's involvement with the charged crimes, [5] was entirely germane background information, directly connected to the factual circumstances of the crime, or [6] was necessary to provide the jury with background and context of the nature of the defendant's relationship to his accomplice.[123]

This list reflects not only the problem of a potentially infinitely expansive concept of "intertwined"—the problem that almost any other-act can in some way be connected to the charged act—but also the problem of unnecessary application of the heuristic. If evidence "provided direct proof of the defendant's involvement with the charged crimes," then that evidence was not just "intertwined" but actually was intrinsic evidence.

11. THE ELEVENTH CIRCUIT

a. The n-Factor *Huddleston* Heuristic

The Eleventh Circuit applies a four-part test to determine whether evidence is admissible under Rule 404(b):

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the extrinsic act."); United States v. Bailey, 133 F. App'x 534, 537–38 (10th Cir. 2005) ("Mr. Bailey argues that because the seizure of the paraphernalia took place 11 months after the alleged conspiracy had terminated, the introduction of the evidence could not fall under the exceptions listed in Rule 404(b).").

[123] United States v. Kupfer, 797 F.3d 1233, 1238 (10th Cir. 2015) (footnotes and internal quotation marks omitted).

> To be admissible under Rule 404(b), the evidence must be (1) relevant to an issue other than the defendant's character; (2) established by sufficient proof that the jury could find that the defendant committed the extrinsic act; and (3) of probative value that is not substantially outweighed by undue prejudice under Federal Rule of Evidence 403.[124]

In applying this test, the court analyzes relevance at a very high level of generality and does not examine the specific chain of inferences by which the evidence is relevant to determine whether the relevance is based upon a propensity inference. For example, the court has stated:

> Regarding the first prong of the Rule 404(b) test, a criminal defendant makes his intent relevant by pleading not guilty. Additionally, evidence that a defendant engaged in similar behavior in the past makes it more likely that he did so knowingly, and not because of accident or mistake, on the current occasion.[125]

Similarly, the court has stated: "For the first prong—relevance to an issue other than character or propensity—where the state of mind required for the charged and extrinsic offenses is the same, the first prong of the Rule 404(b) test is satisfied."[126]

b. The "Enumerated Exceptions" Heuristic

Like all other circuits, the Eleventh Circuit has referred to the list of permitted purposes as exceptions; for example, the court has stated: "In this case, the district court did not abuse its discretion in denying Nowak's motion *in limine* because all of the challenged evidence fell within the enumerated exceptions of Rule 404(b)."[127]

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[124] United States v. Gaskins, 685 F. App'x 698, 700 (11th Cir. 2017) (citation omitted).

[125] United States v. Bush, 673 F. App'x 947, 950 (11th Cir. 2016) (citations omitted).

[126] *Gaskins*, 685 F. App'x at 700 (citation and internal quotation marks omitted).

[127] United States v. Nowak, 370 F. App'x 39, 42 (11th Cir. 2010).

Although such a statement is incorrect, to the extent that there are no enumerated exceptions to Rule 404(b), even more problematic is the Eleventh Circuit's statement that the examples of permitted purposes are exceptions to the inadmissibility of propensity evidence—and not simply exceptions to the inadmissibility of other-acts evidence. For example, the court has stated: "Rule 404(b)(1) generally prohibits the introduction of propensity evidence at trial. Rule 404(b)(2), however, provides an exception to this general rule for evidence that is also probative for some other purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[128]

c. The "Intrinsic Evidence Exceptions" Heuristic

Like most other circuits, the Eleventh Circuit uses the "intrinsic evidence exception" heuristic to admit a wide range of evidence. As the court has stated:

> Construing this exception, we have explained that evidence, not part of the crime charged but pertaining to events explaining the context, motive and set-up of the crime, is properly admitted if it forms an integral and natural part of an account of the crime, or is necessary to complete the crime's story for the jury.[129]

"Inextricably intertwined" evidence is also considered to be intrinsic, with "inextricably intertwined" defined essentially the same broad way: "Evidence is inextricably intertwined when it tends to corroborate, explain, or provide necessary context for evidence regarding the charged offense."[130]

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[128] United States v. Sterling, 738 F.3d 228, 237 (11th Cir. 2013) (internal quotation marks omitted).

[129] United States v. Louissaint, 407 F. App'x 378, 379 (11th Cir. 2011) (citation, alterations, and internal quotation marks omitted); *accord* United States v. Acosta, 660 F. App'x 749, 753 (11th Cir. 2016) ("Rule 404(b) does not apply where bad acts evidence concerns the 'context, motive, and set-up of the crime' and is 'linked in time and circumstances with the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.") (citation omitted).

[130] *Bush*, 673 F. App'x at 950 (citation omitted).

12. THE D.C. CIRCUIT

a. The n-Factor *Huddleston* Heuristic

The D.C. Circuit follows a two-step test similar to the First and Fifth Circuits:

> The first step requires only that the evidence be probative of some material issue other than character. The second step requires that the evidence not be inadmissible under any of the other general strictures limiting admissibility. The most important of these general strictures is Rule 403, which requires that the probative value of the evidence not be substantially outweighed by its potential prejudice.[131]

b. The "Enumerated Exceptions" Heuristic

Like other circuit courts of appeals, the D.C. Circuit refers to the Rule 404(b)(2) list of examples of permitted purposes as "exceptions," although it has stated that these "exceptions" are "narrow": "This court has repeatedly emphasized the narrow scope of the 'bad acts' evidence exceptions under Rule 404(b) (such evidence may be used to prove 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident') . . . ."[132]

The D.C. Circuit has invented several "exceptions" not directly borrowed from Rule 404(b)(2), including a "modus operandi exception" and a "common plan exception." For example, the court has explained that "modus operandi" is a variant of the "identity exception": "Although not listed in Rule 404(b)'s nonexclusive list of proper purposes, modus operandi evidence is normally admitted pursuant to the identity exception."[133] Regarding a "common plan exception," the court has explained:

> One allowable purpose which traditionally has been stated as an exception to the "other crimes" rule, but

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[131] United States v. Washington, 969 F.2d 1073, 1080–81 (D.C. Cir. 1992) (citations and internal quotation marks omitted).

[132] United States v. Nicely, 922 F.2d 850, 856 (D.C. Cir. 1991) (citations omitted).

[133] United States v. Burwell, 642 F.3d 1062, 1066 (D.C. Cir. 2011) (citations omitted), *aff' d on reh' g*, 690 F.3d 500 (D.C. Cir. 2012) (en banc).

> which was not included in the Rule 404(b) list of examples, is to show the existence of "a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of the one tends to establish the other." . . . Although we can conceive of situations in which the parts of a common scheme or plan are more related than were the two crimes with which appellant was charged, we have no doubt that the evidence in this case fits within the common scheme exception to the "other crimes" rule.[134]

c. The "Intrinsic Evidence Exceptions" Heuristic

The D.C. Circuit recognizes an "exception" for "inextricably intertwined" evidence, although it has written at some length about the problems with such evidence, and has explicitly rejected some of the "inextricably intertwined" formulations recognized in other circuits, such as the "completes the story" exception:

> When evidence is "inextricably intertwined" with the charged crime, courts typically treat it as the same crime. Every circuit now applies some formulation of the inextricably intertwined "test." . . .
>
> We have not defined "inextricably intertwined" in the few Rule 404(b) cases in which we used those terms. Our sister circuits have attempted various formulations. . . .
>
> We do not find these formulations particularly helpful. Some are circular: inextricably intertwined evidence is intrinsic, and evidence is intrinsic if it is inextricably intertwined. Others are over-broad. The "complete the story" definition of "inextricably intertwined" threatens to override Rule 404(b). A defendant's bad act may be only tangentially related to

[134] United States v. Burkley, 591 F.2d 903, 920 (D.C. Cir. 1978) (citations, footnote, and internal quotation marks omitted).

> the charged crime, but it nevertheless could "complete the story" or "incidentally involve" the charged offense or "explain the circumstances." If the prosecution's evidence did not "explain" or "incidentally involve" the charged crime, it is difficult to see how it could pass the minimal requirement for admissibility that evidence be relevant. . . .
>
> We recognize that, at least in a narrow range of circumstances not implicated here, evidence can be "intrinsic to" the charged crime. . . . In other words, if the evidence is of an act that is part of the charged offense, it is properly considered intrinsic. In addition, some uncharged acts performed contemporaneously with the charged crime may be termed intrinsic if they facilitate the commission of the charged crime.
>
> On the other hand, we are confident that there is no general "complete the story" or "explain the circumstances" exception to Rule 404(b) in this Circuit. Such broad exclusions have no discernible grounding in the "other crimes, wrongs, or acts" language of the rule. Rule 404(b), and particularly its notice requirement, should not be disregarded on such a flimsy basis.[135]

In recent cases, the court has re-asserted that its "inextricably intertwined" exception is "narrow." For example, the court recently stated: "It is true, as Clark argues, that we have rejected a 'complete the story' exception to Rule 404(b) and held that the 'inextricably intertwined' exception is narrow."[136] Similarly, the court has repeated its concerns about the over-breadth of the exception, stating: "If the government does attempt to introduce additional 'other crimes' evidence at a retrial, we encourage the district court to ad-

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[135] United States v. Bowie, 232 F.3d 923, 927–29 (D.C. Cir. 2000) (internal citations and footnotes omitted).

[136] United States v. Clark, 747 F.3d 890, 896 (D.C. Cir. 2014) (citing *Bowie*, 232 F.3d at 928–29).

dress Rule 404(b) before applying the inextricably intertwined doctrine, as there is a 'danger that finding evidence "inextricably intertwined" may too easily slip from analysis to mere conclusion.'"[137]

III. THE SEVENTH CIRCUIT'S RULE 404(B) REPENTANCE AND REDEMPTION

The Seventh Circuit recently acknowledged that its prior approach to Rule 404(b) had been misguided and proposed a different approach, focused on detecting and excluding evidence of propensity. Prior to 2014, in determining whether evidence was admissible under Rule 404(b), the Seventh Circuit followed a four-factor test that was almost identical to the four-factor test that the Ninth Circuit currently follows. As the Seventh Circuit observed in the initial, three-judge panel opinion in *United States v. Gomez*:

> A court deciding whether to admit evidence under Rule 404(b) considers whether "(1) the evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged, (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue, (3) the evidence is sufficient to support a jury finding that the defendant committed the similar act, and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, as required by Rule 403."[138]

Like the Ninth Circuit's current test, this test admitted evidence as an "exception" to the rule prohibiting propensity evidence without any consideration of whether the evidence's relevance depended upon a propensity inference. For this very reason, the Seventh Circuit reheard the *Gomez* case en banc and set forth a more rule-based

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[137] United States v. Glover, 736 F.3d 509, 517 (D.C. Cir. 2013) (quoting *Bowie*, 232 F.3d at 928).

[138] United States v. Gomez, 712 F.3d 1146, 1150 (7th Cir. 2013) (quoting United States v. Albiola, 624 F.3d 431, 439 (7th Cir. 2010)), *aff' d on reh' g*, 763 F.3d 845 (7th Cir. 2014) (en banc); *accord* United States v. Boling, 648 F.3d 474, 479 (7th Cir. 2011).

test for determining whether evidence of crimes, wrongs or other acts is admissible under Rule 404(b).[139]

A. *Why the Four-Factor Test is Flawed*

The en banc Seventh Circuit explained at length why the four-factor test did not adequately implement the core concern of Rule 404(b), the concern that propensity evidence was likely to be over-valued by fact-finders. The court began by acknowledging:

> Our four-part test for evaluating the admissibility of other-act evidence has ceased to be useful. We now abandon it in favor of a more straightforward rules-based approach. This change is less a substantive modification than a shift in paradigm that we hope will produce clarity and better practice in applying the relevant rules of evidence.[140]

The court then observed that what was wrong with the four-part test was it did not actually test for propensity.[141] Specifically, the court explained:

> Rule 404(b) is not just concerned with the ultimate conclusion, but also with the chain of reasoning that supports the non-propensity purpose for admitting the evidence. In other words, the rule allows the use of other-act evidence only when its admission is supported by some propensity-free chain of reasoning. This is not to say that other-act evidence must be excluded whenever a propensity inference can be drawn; rather, Rule 404(b) excludes the evidence if its relevance to "another purpose" is established *only* through the forbidden propensity inference.[142]

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[139] United States v. Gomez, 763 F.3d 845, 850 (7th Cir. 2014) (en banc) ("We reheard the case en banc to clarify the framework for admitting other-act evidence. We now conclude that our circuit's four-part test should be replaced by an approach that more closely tracks the Federal Rules of Evidence.").

[140] *Id.* at 853.

[141] *Id.* at 855.

[142] *Id.* at 856 (citations omitted).

The court noted that it is not enough for a trial court to determine that evidence of crimes, wrongs, or other acts is relevant to an issue such as motive, plan, or identity; instead, trial courts must further determine whether that relevance is based upon "a hidden propensity inference."[143] Therefore, before deciding that evidence is admissible,

> the district court should not just ask *whether* the proposed other-act evidence is relevant to a non-propensity purpose but *how* exactly the evidence is relevant to that purpose—or more specifically, how the evidence is relevant without relying on a propensity inference. Careful attention to these questions will help identify evidence that serves no permissible purpose.[144]

B. *The New, Propensity-Focused Test of Propensity*

In *Gomez*, the Seventh Circuit replaced its four-part *Huddleston* test with what it characterized as a "rules-based framework."[145] This approach seeks to simply apply Rule 404(b) without any four-part heuristics. Like the law student who realizes that she cannot obtain a full and accurate understanding of a case from her outlines and supplements and decides that the best way to understand the case is by focusing on the case itself, the Seventh Circuit has decided that the best approach to Rule 404(b) is found in the rule itself. As the court stated:

> Multipart tests are commonplace in our law and can be useful, but sometimes they stray or distract from the legal principles they are designed to implement; over time misapplication of the law can creep in. This is especially regrettable when the law itself provides

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143 *Id.*

144 *Id.*

145 *Id.* at 850 ("We now conclude that our circuit's four-part test should be replaced by an approach that more closely tracks the Federal Rules of Evidence. Applying a rules-based framework here . . . .").

> a clear roadmap for analysis, as the Federal Rules of Evidence generally do.[146]

What the Seventh Circuit requires for admission of other-acts evidence under *Gomez* is what Rule 404(b) requires: evidence that is not offered to prove propensity; or as the court stated, what is required is "a chain of reasoning that does not rely on the forbidden inference that the person has a certain character and acted in accordance with that character on the occasion charged in the case."[147]

C. *Post-Gomez Rule 404(b) in the Seventh Circuit*

In one way, the en banc decision in *Gomez* dramatically changed how federal courts in the Seventh Circuit apply Rule 404(b). It is no longer sufficient to determine that evidence of other-acts "fits" an "exception."[148] However, the practical effect of *Gomez* has been more difficult to assess. Shortly after the en banc *Gomez* decision, Judge Easterbrook suggested: "Prosecutors who do not understand and apply the full scope of the *Gomez* decision will find their convictions hard to sustain on appeal."[149] However, subsequent cases have shown that *Gomez* has not made affirming criminal convictions so difficult after all. Of course, in some cases, the Seventh Circuit has found that other-acts evidence was admitted in error. In many of these cases, though, the error has been found to be harmless.[150] And

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146 *Id.* at 853.

147 *Id.* at 860.

148 *Id.* at 855 n.3.

149 United States v. Lawson, 776 F.3d 519, 522 (7th Cir. 2015).

150 *See, e.g.*, United States v. Seals, 813 F.3d 1038, 1044 (7th Cir. 2016) ("Regarding Seals' conviction for being a felon in possession of a firearm, there can be no doubt that any error regarding 404(b) evidence was harmless."); *Lawson*, 776 F.3d at 522 ("As for this appeal, however: We've already stressed that Lawson's best potential arguments are not presented for decision, and now we add that any error was harmless."); United States v. Curtis, 781 F.3d 904, 911 (7th Cir. 2015) ("The court did not expressly engage in that analysis on the record here, but any error was harmless.") (citations omitted); United States v. Stacy, 769 F.3d 969, 976 (7th Cir. 2014) ("As in *Gomez*, the government's case here was strong, and the district court's error in admitting the evidence of prior acts under Rule 404(b) was harmless."); United States v. Clark, 774 F.3d 1108, 1116 (7th Cir. 2014); United States v. Schmitt, 770 F.3d 524, 538 (7th Cir. 2014); *cf.* Viramontes v. City of Chicago, 840 F.3d 423, 431 (7th Cir. 2016) (civil case; error but not reversible error).

in many other cases, the admission of the evidence has been found to have been proper.[151] Even after *Gomez*, it remains the rare case in which a conviction is reversed.[152]

Although *Gomez* appears not to have altered the outcome of many cases, the Rule 404(b) test adopted in *Gomez* is nevertheless an improvement over the prior, multi-factor test with its assorted exceptions. On appeal, the Seventh Circuit's analysis is clear: did the district court articulate a non-propensity reason for admitting the evidence?[153] And district courts' rulings on pre-trial motions to admit or exclude other-acts evidence are similarly straightforward: has the proponent of the evidence articulated a non-propensity reason for admitting the evidence?[154] Not only are these inquiries clearer and more straightforward, they also succeed in effectuating the words of Rule 404(b). For example, Judge St. Eve of the United States District Court for the Northern District of Illinois recently wrote:

> Plaintiff contends that prior, similar acts by police officers are admissible as other-act evidence showing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Plaintiff, however, may not "simply to point to a purpose in the 'permitted' list and assert that the other-act evidence is relevant to it." *Gomez*, 763 F.3d at 856. Other-act evidence may be admitted "only when its admission is supported by some propensity-free chain of reasoning." *Id*. Plaintiff, however, has failed to establish a propensity-free chain of reasoning for why similar acts in the past would be relevant

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151 United States v. Mabie, 862 F.3d 624, 633 (7th Cir. 2017) ("There is no credible argument that the government failed to comply with *Gomez*'s requirements."), *petition for cert. filed*, No. 17-7935 (U.S. Mar. 1, 2018); United States v. Carson, 870 F.3d 584, 603 (7th Cir. 2017); United States v. Gonzalez, 863 F.3d 576, 589 (7th Cir. 2017); United States v. Urena, 844 F.3d 681, 684–85 (7th Cir. 2016); United States v. Ferrell, 816 F.3d 433, 446 (7th Cir. 2015) ("*Gomez* makes no difference in the outcome"); United States v. Anzaldi, 800 F.3d 872, 882 (7th Cir. 2015) ("The propensity-free chain of reasoning is clear."); United States v. Vance, 764 F.3d 667, 670–71 (7th Cir. 2014).

152 *See, e.g.*, United States v. Chapman, 765 F.3d 720, 723 (7th Cir. 2014).

153 *Gomez*, 763 F.3d at 860.

154 *Id.*

> to a permitted purpose. . . . The Court therefore grants Defendant's motion.[155]

Prior to *Gomez*, the district court might well have considered whether the plaintiff's proffered evidence met one of the "enumerated" "exceptions" of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Instead, following *Gomez*, the district court clearly and straightforwardly considered whether the plaintiff had offered a propensity-free reason for admitting the evidence.[156] Because the plaintiff had not, the evidence was excluded.[157] Similarly, in a recent case deciding that the other-acts evidence was admissible, Judge Ellis wrote:

> Llufrio first challenges Bustamante's testimony about a small drug transaction between Bustamante and Llufrio, which the Court admitted and which Lllufrio claims prejudiced him at his drug trafficking trial . . . . The Government argued that the testimony helped prove that Llufrio had knowledge that he was involved with someone who was a cocaine dealer, Bustamante, and that drugs were in the truck that Llufrio drove for Bustamante. The Government's theory was not relevant to Llufrio's character or propensity for using cocaine or trafficking drugs. Further, the Government's theory did not rely on Llufrio's character or propensity for using cocaine—the testimony tended to show Llufrio knew that Bustamante was a cocaine dealer and that the truck was carrying drugs solely because Llufrio knew that Bustamante could afford to give cocaine away for free and could do so in the same time and proximity as Llufrio's driving work for Bustamante. Finally, although the risk of prejudice for Llufrio's cocaine

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155 Harris v. City of Chicago, No. 14-CV-4391, 2017 WL 2462197, at *3 (N.D. Ill. June 7, 2017).

156 *Id.*

157 *Id.*

> use was high, especially in a trial regarding drug trafficking of cocaine, the risk did not outweigh the probative value.[158]

D. *Post-Gomez Rule 404(b) in Other Circuits*

1. THE SEVENTH CIRCUIT APPROACH AS AN EXAMPLE

Further evidence of the desirability of the Seventh Circuit's approach is that fellow circuit courts are following its example. The Tenth Circuit has directly cited to *Gomez*, stating: "Rule 404(b) is concerned 'with the chain of reasoning that supports the non-propensity purpose for admitting the evidence,' and it 'allows the use of other-act evidence only when its admission is supported by some propensity-free chain of reasoning.'"[159] Other circuits have cited other Seventh Circuit cases, especially *United States v. Miller*,[160] a pre-*Gomez* case that called attention to the issue of Rule 404(b) by reversing a criminal conviction because of improperly admitted

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158 United States v. Llufrio, No. 15 CR 703, 2017 WL 3276860, at *1–2 (N.D. Ill. Aug. 2, 2017).

159 United States v. Rodella, 804 F.3d 1317, 1333 (10th Cir. 2015) (quoting *Gomez*, 763 F.3d at 856). *See also* United States v. Edmond, 815 F.3d 1032, 1045 (6th Cir. 2016), *vacated*, 137 S. Ct. 1577 (2017); United States v. Burnett, 827 F.3d 1108, 1118 (D.C. Cir. 2016).

160 673 F.3d 688 (7th Cir. 2012).

other-acts evidence.[161] These other circuits that have cited *Miller* include the Third,[162] the Fourth,[163] the Sixth,[164] and the Eighth.[165]

2. IS EN BANC REVIEW REQUIRED?

One reason why other circuits are citing *Miller*—a three-judge panel decision—more often than *Gomez*—the decision of the en banc court—is to avoid the question whether a three-judge panel has the authority to embrace the Seventh Circuit's approach. Recently, Judge Browning of the District of New Mexico suggested that the district court cannot formally follow the *Gomez* approach until the Tenth Circuit, sitting en banc, overrules the circuit's current four-factor *Huddleston* test:

> Because "only the en banc court can overrule the judgment of a prior panel," this four-part test binds the Tenth Circuit—and, most importantly here, all district courts within the Tenth Circuit—until the Tenth Circuit, sitting en banc, rules otherwise, *see*

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[161] The court explained:

> Miller's prior conviction for possession of cocaine with intent to distribute shows he once had an intent to distribute drugs. . . . The relevance of the prior conviction here boils down to the prohibited "once a drug dealer, always a drug dealer" argument. A prosecutor who wants to use prior bad acts evidence must come to court prepared with a specific reason, other than propensity, why the evidence will be probative of a disputed issue that is permissible under Rule 404(b). Mere recitation that a permissible Rule 404(b) purpose is "at issue" does not suffice.
>
> For these reasons, we conclude that the admission of the details of Miller's 2000 conviction was an abuse of the district court's discretion. . . .
>
> Miller's convictions for possession with intent to distribute and for possession of a firearm in furtherance of that crime are REVERSED.

Id. at 700–02 (citation omitted).

[162] *See, e.g.*, United States v. Caldwell, 760 F.3d 267, 282 (3d Cir. 2014).

[163] *See, e.g.*, United States v. Hall, 858 F.3d 254, 269 (4th Cir. 2017).

[164] *See, e.g.*, United States v. Richardson, 597 F. App'x 328, 336 (6th Cir. 2015).

[165] *See, e.g.*, United States v. Turner, 781 F.3d 374, 390 (8th Cir. 2015).

> Stephen A. Saltzburg, Professor, George Washington University Law School, The Second Best Federal Bar Seminar Ever: Evidence (May 1, 2015) (noting that United States Courts of Appeals must go en banc to change their four-part tests). Moreover, the Tenth Circuit, and every United States Court of Appeals with a four-part test, derived its test from the "four-step framework" that the Supreme Court set forth in *Huddleston v. United States*.[166]

It is true that within a circuit, a three-judge panel cannot overrule another three-judge panel, and thus it is also true that changing established law within a circuit requires a decision of the court en banc.[167] However, it is possible to argue that the approach adopted in *Gomez* was not an overruling of any previous Seventh Circuit decision but rather a reframing of its previous approach to applying Rule 404(b).

The en banc *Gomez* Court itself characterized its decision as a reframing: "We reheard the case en banc to clarify the framework for admitting other-act evidence. We now conclude that our circuit's four-part test should be replaced by an approach that more closely tracks the Federal Rules of Evidence. Applying a rules-based framework here . . . ."[168]

Several three-judge panels of the Third Circuit have taken this reframing approach. For example, as one Third Circuit decision explained, citing *Miller*:

> The reason we require the proponent and the court to articulate a logical chain of inferences connecting the

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[166] United States v. Folse, 163 F. Supp. 3d 898, 912 n.7 (D.N.M. 2015) (citation omitted). The same language appears in at least three other cases by Judge Browning: Leon v. FedEx Ground Package Sys., Inc., 313 F.R.D. 615, 625 n.2 (D.N.M. 2016); United States v. Chapman, No. CR 14-1065 JB, 2015 WL 4461243, at *8 n.4 (D.N.M. July 15, 2015); Upky v. Lindsey, No. CIV 13-0553 JB/GBW, 2015 WL 3862944, at *10 n.3 (D.N.M. June 3, 2015).

[167] *See* Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 699 n.20 (1995) (stating that "all courts of appeals follow a rule under which panel decisions are binding on later panels unless overruled by the Supreme Court or by the court of appeals en banc").

[168] United States v. Gomez, 763 F.3d 845, 850 (7th Cir. 2014) (en banc).

> evidence to a non-propensity purpose is because we must assure that the evidence is not susceptible to being used improperly by the jury. Another way to frame this requirement is to ask the prosecution to explain "exactly how the proffered evidence should work in the mind of a juror to establish the fact the government claims to be trying to prove." *Miller*, 673 F.3d at 699. Framed this way, the flaw in the evidence proffered in this case becomes apparent.[169]

CONCLUSION

The Rule 404(b) heuristics that the federal circuit courts of appeals have created should be abandoned. *Huddleston v. United States* was not about determining whether evidence was offered for the improper purpose of proving propensity. And there are no exceptions to Rule 404(b), which prohibits the admission of evidence for the purpose of proving propensity—without exception. The Seventh Circuit's decision in *United States v. Gomez* sets an example that other circuit courts of appeals have started—and should continue—to follow.

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[169] United States v. Caldwell, 760 F.3d 267, 282 (3d Cir. 2014).