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Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of Evidence

Thomas J Reed

ADMISSION OF OTHER CRIMINAL ACT EVIDENCE AFTER ADOPTION OF THE FEDERAL RULES OF EVIDENCE

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I. INTRODUCTION

The first and second parts of this series analyzed the common law propensity rule developed by federal appellate courts.¹ The analysis involved comparing English and American cases on the propensity rule up to 1900² and then studying the case-by-case process by which the federal appellate courts progressively formulated the exclusionary version of that rule which prohibited evidence of criminal activities not listed in the indictment or information charging the accused with a crime.³ By 1975, a majority of the federal circuits had settled on a common law rule that excluded evidence of the accused's other criminal activities.⁴ This exclusionary rule did not operate when the government introduced the defendant's prior acts to prove motive, intent, plan or design, knowledge, or identity.⁵ Also, if another criminal act were so interwoven with the crime alleged in the indictment that the government could not prove its principal case without proving the other criminal act, federal courts permitted evidence of the other criminal act to be introduced.⁶ In cases not involving these well-defined exceptions to the exclusionary rule, the majority of federal circuits before 1975 simply forbade admission of other crimes evidence.⁷ A minority held, however, that the federal propensity rule should be considered an inclusionary rule of relevance, allowing the introduction of any prior criminal acts

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1. Reed, *The Development of the Propensity Rule in Federal Criminal Causes 1840-1975*, 51 U. CIN. L. REV. 299 (1982) [hereinafter cited as Reed, *Propensity II*]; Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidenced in Federal Criminal Trials*, 50 U. CIN. L. REV. 713 (1981) [hereinafter cited as Reed, *Propensity I*].

2. Reed, *Propensity I*, *supra* note 1, at 720-35.

3. Reed, *Propensity II*, *supra* note 1, at 301-25.

4. *Id.* at 303-04.

5. *Id.* at 302-03.

6. *Id.* at 319. This exception to the propensity rule was often used by the government in tax evasion cases when the accused had failed to report income derived from criminal activity. See *Capone v. United States*, 51 F.2d 609 (7th Cir.), *cert. denied*, 284 U.S. 669 (1931).

7. Reed, *Propensity II*, note 1, at 303-04.

of the accused for any relevant purpose other than to prove the accused's bad character.⁸

This third article analyzes the impact on federal jurisprudence of the adoption of Rules 403, 404, 405 and 608 of the Federal Rules of Evidence. The structure of these rules closely parallels Dean Wigmore's character rule.⁹ Dean Wigmore believed that an accused's character was highly relevant to his guilt or innocence and that evidence of prior criminal acts should be admitted, the only exception being evidence offered solely to establish the accused's criminal propensity.¹⁰ Thus, the inclusion in Rules 404, 405 and 608 of Wigmore's guidelines for admitting evidence of character seemed to augur greater use of prior instances of bad conduct to establish any point at issue other than the accused's bad character. To counterbalance the inclusionary character rules, Rule 403 excludes character evidence if the prejudice it causes to the accused substantially outweighs its probative value. Because United States Courts of Appeals had arrived at this position following guidelines proposed by Dean McCormick in the mid-1950's, it was to be anticipated that in post-1975 cases decided under the Federal Rules of Evidence courts would apply these rules to permit greater flexibility in the introduction of other criminal act evidence.¹¹

This final Article examines the present state of federal law on the propensity rule through an analysis of cases decided since 1975. The purpose of this evaluation is first to show how the judiciary has allowed ever greater prosecutorial use of other criminal act evidence. Second, the reasons for this continuing expansion are elaborated. Finally, it is urged that other criminal act evidence should not be admitted without safeguards.

II. THE FEDERAL RULES OF EVIDENCE: NEW, REVISED STANDARDS FOR ADMISSION OF OTHER CRIMES, WRONGS, OR ACTS

The first sentence of Rule 404(b) of the Federal Rules of Evidence states that "[e]vidence of other crimes, wrongs, or acts is not ad-

8. This view was taken by the Second and Tenth Circuits before the adoption of the Federal Rules of Evidence. *See* *King v. United States*, 402 F.2d 289, 291 (10th Cir. 1968); *United States v. Bradwell*, 388 F.2d 619, 621-22 (2d Cir. 1968).

9. For a discussion of Wigmore's views on the character rule, see Reed, *Propensity I*, *supra* note 1, at 735-39.

10. *Id.* at 737 (citing J. WIGMORE, EVIDENCE § 216 (1904)).

11. Reed, *Propensity II*, *supra* note 1, at 324.

missible to prove the character of a person in order to show that he acted in conformity therewith.”¹² In form, this sentence seems to restate the traditional exclusionary rule. Indeed, several circuits have so interpreted it since 1975.¹³ The second sentence of Rule 404(b), however, has been the basis for departing from traditional views and for allowing greater use of other criminal act evidence at trial: “[Evidence of other crimes] may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”¹⁴ The comments of the House Judiciary Committee and of persons who testified at the hearings held by that committee on the proposed Federal Rules of Evidence shed little light on the intent of Congress in adopting this formulation of the propensity rule. Nevertheless, the second sentence of Rule 404(b) has been the source of a substantial change in the jurisprudence of several circuits since 1975.¹⁵ Those courts have expanded the admissibility of prior acts evidence to such an extent that a serious constitutional issue now exists. Analysis of the decisional law of the past eight years demonstrates that this increase in prosecutorial use of evidence of prior criminal activity may deprive defendants of their right to a fair trial and render them incapable of making a proper defense to the charges brought against them.

The Federal Rules of Evidence also include an express provision for the judicial balancing of interests as a general standard for limiting admission of otherwise relevant evidence. This standard was incorporated into Rule 403.¹⁶ Rule 403 authorizes the discretionary exclusion of relevant evidence by the trial court. It was designed to

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

13. *See, e.g.*, *United States v. Foskey*, 636 F.2d 517, 523 (D.C. Cir. 1980); *United States v. Frederickson*, 601 F.2d 1358, 1365 n.9 (8th Cir.), *cert. denied*, 444 U.S. 934 (1979).

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

15. *See, e.g.*, *United States v. Wesevich*, 666 F.2d 984, 988 (5th Cir. 1982); *United States v. Dothard*, 666 F.2d 498, 501 (11th Cir. 1982); *United States v. Beahm*, 664 F.2d 414, 417 (4th Cir. 1981); *United States v. Diggs*, 649 F.2d 731, 737 (9th Cir. 1981); *United States v. Beechum*, 582 F.2d 898, 910-11 (5th Cir.), *cert. denied*, 440 U.S. 920 (1978). These circuits clearly have adopted an “inclusionary rule” paralleling that adopted earlier by the Second Circuit before the effective date of the Federal Rules of Evidence. For example, the court in *Diggs* stated: “This circuit has adopted the position that Rule 404(b) is an inclusionary rule—i.e., evidence of other crimes is inadmissible under this rule only when it proves nothing but the defendant’s criminal propensity.” 649 F.2d at 737.

16. FED. R. EVID. 403 provides:

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 undue delay, waste of time, or needless presentation of cumulative evidence.

override all other evidentiary rules.¹⁷ However, as later analysis shows, the use of Rule 403 in conjunction with Rule 404(b) by the federal judiciary has not entailed for the most part any major limitations on the admission of other criminal acts. The reason lies in the balancing process itself. Rule 403 requires the court to weigh prejudice to the accused against the probative value of the evidence to the prosecution. Logically, therefore, the stronger the probative value of the evidence the more likely such evidence will be admitted, despite the risk of substantial prejudice to the defendant. This probability has been particularly evident in the widespread use of defendant's prior arrests and convictions as substantive evidence in drug cases.¹⁸

A. Exceptions to the Traditional Propensity Rule Under the Federal Rules of Evidence

Part II of this series identified six exceptions to the traditional rule that barred use of prior crimes to show propensity: prior crimes evidence was admissible to show motive, intent, guilty knowledge, design or plan, identity of the accused and inseparable crimes.¹⁹ Since 1975, substantial case law has been generated under each of these traditional exceptions to the prohibition of the propensity rule.²⁰ Those cases confirm that all six traditional exceptions have survived the adoption of the Federal Rules of Evidence.²¹ In addition, the wording of the second sentence of rule 404(b) has generated an entirely new exception to the propensity rule, the "opportunity" exception, which is analyzed in conjunction with the more traditional exceptions.²²

1. Motive

In an earlier analysis of motive as an object of proof, it was stated that motive is not an element of any offense set forth in the Federal Criminal Code.²³ Before 1975, "motive" often was used as a synonym for "intent" or "knowledge," suggesting that a court that admitted other crimes evidence under the motive exception to the

17. J. WEINSTEIN & M. BERGER, 1 WEINSTEIN'S EVIDENCE § 403[01] (1982).

18. See *infra* notes 123-36 and accompanying text.

19. Reed, *Propensity II*, *supra* note 1, at 301-19.

20. See *infra* notes 223-226 and accompanying text.

21. *Id.*

22. See *infra* notes 227-244 and accompanying text.

23. Reed, *Propensity II*, *supra* note 1, at 304.

propensity rule was in reality allowing the evidence in to show “identity, the requisite mental state or the corpus delicti.”²⁴ Also, courts often gave “motive” as the rationale for admitting other crimes evidence to prove malice aforethought as an element of murder.²⁵ Indeed, one of the earliest post-Rules cases to deal with the motive exception was a murder case, *United States v. Coppola*.²⁶ The defendant was charged with murdering a fellow inmate in a federal prison. At trial, despite defense objections based on the propensity rule, the court permitted the government to introduce extensive evidence of the defendant’s status as principal narcotics distributor at Leavenworth.²⁷ The court held that the evidence was relevant to prove defendant’s motive.²⁸

Other federal homicide cases permitted introduction of prior criminal acts evidence to show “motive” for the homicide charged.²⁹ Thus, the motive exception to the propensity rule, in one line of cases under Rule 404(b), simply serves as a conduit for admissibility of other criminal act evidence tending to show identity, deliberation, malice or specific intent.³⁰ In *United States v. Corr*, a securities fraud case, the Second Circuit allowed proof that the defendant, prior to the date of the offenses alleged in the indictment, had given a “wooden ticket” to a stock broker.³¹ The court acted on the theory that the prior fraudulent behavior involving securities was evidence of later motivation to commit securities fraud.³² The Eighth Circuit took a similarly overbroad view of the motive exception to the propensity rule in *United States v. Scharf*, a tax evasion case.³³ Scharf had not withheld federal taxes on that part of his employees’ in-

24. *Id.*

25. *Id.* at 305; see *Suhay v. United States*, 95 F.2d 890 (10th Cir. 1938) (leading pre-Rules case on motive and malice aforethought).

26. 526 F.2d 764 (10th Cir. 1975).

27. *Id.* at 771-72.

28. *Id.* at 772.

29. See, e.g., *United States v. Benton*, 637 F.2d 1052 (5th Cir. 1981) (admission of evidence of previous murders); *United States v. Day*, 591 F.2d 861 (D.C. Cir. 1978) (previous thefts of automobiles and guns admissible in homicide trial); *United States v. Free*, 574 F.2d 1221 (5th Cir. 1978) (evidence of homosexual affair between defendant and other inmates admissible to show motive for murder).

30. *United States v. Benton*, 637 F.2d 1052, 1056 (5th Cir. 1981).

31. 543 F.2d 1042, 1053 (2d Cir. 1976).

32. *Id.* The Fifth Circuit, on similar facts, had excluded admission of an earlier SEC cease and desist order that allegedly established motive for later mail fraud in marketing oil leases. *United States v. Cook*, 557 F.2d 1149 (5th Cir. 1977). The cease and desist order was excluded on the ground that it was of little probative value and posed a serious threat of prejudice. *Id.* at 1154-55.

33. 558 F.2d 498 (8th Cir. 1977).

come that the employees themselves took from the gross receipts they collected from Scharf's coin-operated vending machines.³⁴ Scharf was charged with willful failure to collect and to pay over the withholding taxes.³⁵ Over objections, the prosecution introduced collection documents that the defendant had falsified prior to the period covered by the indictment.³⁶ On appeal, the defendant argued that these documents constituted "other crimes" not charged in the indictment, but the Eighth Circuit affirmed their admission on the ground that they went to prove the motive, "intent and willfulness" of the defendant.³⁷

This use of other criminal acts evidence, appropriately controlled by judicial use of Rule 403, does not exceed former federal practice.³⁸ Nevertheless, it can lead to grave difficulties, because the motive exception continues to be applied loosely.³⁹ In fact, a review of the cases suggests that the motive exception, if used as a general principle of relevance for admission of other criminal acts evidence at trial, might expand to the point of allowing trial of the accused by propensity.

During the last one hundred years, the "motive" exception to the propensity rule has been used far less than other exceptions to that rule. Although in every criminal case one may ask why the perpetrator "did it," the criminal law does not require proof of motivation to convict the defendant of a crime.⁴⁰ Consequently, the motive exception has been a conduit for introducing other criminal act evidence to prove such elements of an offense as malice aforethought, intent, plan or preparation.⁴¹ One may question whether 'motive' should be considered a separate category for introduction of other crimes evidence at all.

34. *Id.* at 500.

35. *Id.* at 499.

36. *Id.* at 501.

37. *Id.*

38. Reed, *Propensity II*, *supra* note 1, at 304-05.

39. It is hard to see, for example, why the District of Columbia Circuit held that evidence of the White House plumbers' breaking and entering of Daniel Ellsberg's psychiatrist's office was relevant to H.R. Haldeman's motive for covering up the 1972 Watergate break-in. *United States v. Haldeman*, 559 F.2d 31, 88-91 (D.C. Cir. 1976). A charge of conspiracy might permit proof of prior conspiratorial acts not alleged as overt acts in the indictment to show the nature and extent of the conspiracy. Prior acts not alleged in the indictment also might tend to prove the plan, design, or scheme of the conspiracy. But such prior acts certainly would not be proof of motive, because motivation was not at issue. *Id.*

40. Reed, *Propensity II*, *supra* note 1, at 304.

41. See *supra* notes 23-25 and accompanying text.

2. Intent

Our earlier discussion of this exception to the propensity rule indicated that evidence of other criminal acts was admissible to establish both *mens rea* or general criminal intent and, where appropriate, specific intent.⁴² Because every crime requires proof of general criminal intent, one might suspect that evidence of other crimes is admissible only if the defendant makes an issue of *mens rea* by insisting that he or she committed the alleged criminal act through mistake, negligence, inadvertence or entrapment. In the seventy-five years preceding the adoption of Rule 404, general federal practice forbade admission of other crimes evidence to prove intent unless intent was more than a merely formal issue.⁴³ Consequently, if the defendant were willing to stipulate that he or she had the requisite intent at the time he or she committed the acts charged in the indictment or information, general criminal intent would not be an issue in the case and evidence of other crimes would be barred.⁴⁴ Under prior practice, a plea of not guilty did not put general criminal intent at issue, and the government therefore could not introduce automatically other criminal acts evidence to show intent if the defendant pleaded not guilty.⁴⁵

After the adoption of Rule 404, federal courts continued to permit proof of other criminal acts if the government had charged the defendant with a crime requiring proof of specific intent.⁴⁶ Because

42. Reed, *Propensity II*, *supra* note 1, at 305-06.

43. *Id.* at 307.

44. *Id.* & n.61 (citing *United States v. Buckhanon*, 505 F.2d 1079, 1083 n.1 (8th Cir. 1974)).

45. *Id.* at 307 & n.62.

46. A major effect of Rule 404 seems to have been the greater latitude with which federal courts have allowed proof of other criminal acts to show specific intent. This effect is apparently due to the institution of an "intent" test as a corollary to Rule 404(b). The standard for admitting other criminal acts to show intent of the accused has been described best in *United States v. Frederickson*, 601 F.2d 1358, 1365 (8th Cir.), *cert. denied*, 444 U.S. 934 (1979), as a four-step process of evaluating the proximity of the extrinsic act in time and quality to the crime charged in the indictment. The four requirements of that test are (1) that a material issue has been raised on which prior crimes evidence is admissible; (2) that the evidence is relevant; (3) that evidence of the other crimes sought to be introduced is clear and convincing; and (4) that the other crimes are "similar in kind and reasonably close in time to the charge at trial." *Id.* at 1365 (citations omitted). This test resembles the pre-rules Seventh Circuit test for admitting prior criminal acts to prove any issue other than propensity for crime stated in *United States v. Fierston*, 419 F.2d 1020 (7th Cir. 1969). The Ninth Circuit in *United States v. Brashier*, 548 F.2d 1315 (9th Cir. 1976), *cert. denied*, 429 U.S. 1111 (1977) had adopted a slightly different formula, which the *Frederickson* court emulated:

Evidence of prior acts is admissible to demonstrate a defendant's criminal intent if (1) the prior act is similar and close enough in time to be relevant (2) the evidence

specific intent was an element of the crime and thus a bona fide issue in the case, federal courts have admitted other crimes evidence to establish intent to deceive in cases involving mail fraud,⁴⁷ wire fraud,⁴⁸ and fraud on federal agencies.⁴⁹ Other crimes evidence also has been allowed in to prove intent in extortionate extension of credit,⁵⁰ Hobbs Act⁵¹ and racketeering⁵² cases, as well as in prosecutions for income tax evasion,⁵³ making and uttering forged instruments,⁵⁴ making false applications for loans at federally insured institutions⁵⁵ and perjury.⁵⁶ Other crimes evidence also has been held admissible in criminal copyright,⁵⁷ firearms act⁵⁸ and Mann Act cases.⁵⁹

Defendants charged with possession of narcotics with intent to distribute may expect that their prior arrests and convictions for sale of drugs will be admitted in evidence against them.⁶⁰ When conspiracy is alleged together with a substantive offense, prior

of the prior act is clear and convincing, and (3) the trial court determines that the probative value of the evidence outweighs any potential prejudice.

Frederickson, 601 F.2d at 1325.

47. *United States v. Margiotta*, 662 F.2d 131 (2d Cir. 1981); *United States v. Diggs*, 649 F.2d 731 (9th Cir. 1981); *United States v. Engleman*, 648 F.2d 473 (8th Cir. 1981).

48. *United States v. Puckett*, 692 F.2d 663 (10th Cir. 1982); *United States v. Diggs*, 649 F.2d 731 (9th Cir. 1981); *United States v. O'Brien*, 618 F.2d 1234 (7th Cir. 1980).

49. *United States v. Mitchell*, 666 F.2d 1385 (11th Cir. 1982) (converting grain under lien to F.H.A.); *United States v. Reed*, 639 F.2d 896 (9th Cir. 1980) (embezzling union pension funds).

50. *United States v. DeVincent*, 632 F.2d 147 (1st Cir. 1980); *United States v. Dennis*, 625 F.2d 782 (8th Cir. 1980).

51. *United States v. Kovic*, 684 F.2d 512, 515-16 (7th Cir. 1982) (dicta).

52. *United States v. Kopituk*, 690 F.2d 1289 (11th Cir. 1982); *United States v. Calabrese*, 645 F.2d 1379 (10th Cir.), *cert. denied*, 454 U.S. 831 (1981).

53. *United States v. Verkuilen*, 690 F.2d 648 (7th Cir. 1982); *United States v. Vannelli*, 595 F.2d 402 (8th Cir. 1979); *United States v. Brashier*, 548 F.2d 1315 (9th Cir. 1976).

54. *United States v. Hamilton*, 684 F.2d 380 (6th Cir. 1982); *United States v. Indelicato*, 611 F.2d 376 (1st Cir. 1979); *United States v. Sparks*, 560 F.2d 1173 (4th Cir. 1977).

55. *United States v. Miller*, 573 F.2d 388 (7th Cir. 1978); *United States v. McFayden-Snyder*, 552 F.2d 1178 (6th Cir. 1977).

56. *United States v. D'Auria*, 672 F.2d 1085 (2d Cir. 1982); *Government of Canal Zone v. Thrush*, 616 F.2d 188 (5th Cir. 1980).

57. *United States v. Whetzel*, 589 F.2d 707 (D.C. Cir. 1978).

58. *United States v. Hooton*, 662 F.2d 628 (9th Cir. 1981); *United States v. Green*, 634 F.2d 222 (5th Cir. 1981); *United States v. Curtis*, 520 F.2d 1300 (1st Cir. 1975).

59. *United States v. Vik*, 655 F.2d 878 (8th Cir. 1981); *United States v. Saunders*, 641 F.2d 659 (9th Cir. 1981); *United States v. Oliver*, 525 F.2d 731 (8th Cir. 1975), *cert. denied*, 424 U.S. 973 (1976).

60. *See, e.g.*, *United States v. Holman*, 680 F.2d 1340 (11th Cir. 1982) (conspiracy to unlawfully possess marijuana with intent to distribute); *United States v. Jones*, 676 F.2d 327 (8th Cir. 1982); *United States v. Booth*, 673 F.2d 27 (1st Cir. 1982).

criminal acts relevant to the defendants' intent to enter into the unlawful contract or agreement will be admissible to establish their intent to conspire.⁶¹ Furthermore, federal courts have gone so far as to allow the government to anticipate the defendant's allegations of lack of criminal intent and have permitted prosecutorial use of prior bad acts evidence in the government's case-in-chief, rather than on rebuttal.⁶² None of the foregoing uses of the intent exception, however, conflicts with prior law.⁶³

Naturally, when the defendant claims that the government entrapped him or her into committing a crime, the government, following *United States v. Sorrells*⁶⁴ as analyzed in part two of this series,⁶⁵ may offer evidence of the defendant's predisposition to commit the crime charged.⁶⁶ A defendant claiming entrapment thus must withstand a searching inquiry into his past conduct directed towards showing his predisposition to commit the offense charged. *United States v. Mack* shows the traditional use of other criminal acts to rebut an entrapment defense.⁶⁷ Mack was charged with two counts of unlawful distribution of cocaine and hashish, and with conspiracy to distribute

61. See, e.g., *United States v. Marquardt*, 695 F.2d 1300 (11th Cir. 1983) (conspiracy to distribute cocaine); *United States v. Puckett*, 692 F.2d 663 (10th Cir. 1982) (conspiracy to commit mail fraud); *United States v. Kovic*, 684 F.2d 512 (7th Cir. 1982) (conspiracy to commit mail fraud); *United States v. Holman*, 680 F.2d 1340 (11th Cir. 1982) (conspiracy to possess marijuana with intent to distribute); *United States v. Kopituk*, 680 F.2d 1289 (11th Cir. 1982) (conspiracy to racketeer).

62. In *United States v. Hamilton*, 684 F.2d 380 (6th Cir. 1982), the government introduced a prior instance of the defendant's altering a \$2 bill to prove intent to utter an altered instrument. The defendant claimed intent was not an issue, although specific intent is required by 18 U.S.C. § 472 (1982). On appeal, the court held that the government had an affirmative burden to prove every element of the offense beyond a reasonable doubt. The prior incident was relevant to prove specific intent. 684 F.2d at 384. In *United States v. Buchanan*, 633 F.2d 423 (5th Cir. 1981), a mail fraud case, prior instances of check kiting were admitted to prove intent although the defendant claimed intent was no issue. The Fifth Circuit stated that the government, when introducing evidence during its case in chief, is not required to anticipate the defenses that the defendant pleading not guilty will raise during his case in defense. *Id.* at 426.

63. For a discussion of federal practice before adoption of the Federal Rules of Evidence, see Reed, *Propensity II*, *supra* note 1, at 308-10.

64. 287 U.S. 435 (1932).

65. Reed, *Propensity II*, *supra* note 1, at 308-10.

66. See, e.g., *United States v. Moschiano*, 695 F.2d 236 (7th Cir. 1982) (later and earlier purchases of Preludin and heroin held admissible to rebut entrapment on charge of possession of heroin with intent to sell); *United States v. Salisbury*, 662 F.2d 738 (11th Cir. 1981) (audio tape of conversation of defendant with FBI agent admitted to show prior instances of fencing stolen property in rebuttal to entrapment defense); *United States v. Murzyn*, 631 F.2d 525 (7th Cir. 1980) (evidence that defendant had threatened to kill a federal agent and to have an assassination carried out against another party, had used crude sexual slang and had committed larcenies held admissible to rebut entrapment).

67. 643 F.2d 1119 (5th Cir. 1981).

these drugs. He claimed to be an innocent chicken farmer who kept small amounts of cocaine on hand for training his fighting cocks. Mack asserted that federal agents lured him into making a sale from this stock. At trial, the government introduced evidence showing that Mack had sold two ounces of cocaine to federal undercover agents at a Fort Worth, Texas truck stop after the dates of the conspiracy and overt acts alleged in the indictment. The defendant objected to use of this evidence on the grounds that it proved another, later crime.⁶⁸ The court noted that the common law before the advent of the Federal Rules of Evidence would have permitted introduction of later, similar criminal acts to rebut entrapment.⁶⁹ Adhering to the test for admission of other criminal act evidence devised by the Fifth Circuit in *United States v. Beechum*,⁷⁰ the court found that the evidence properly was admitted to rebut entrapment and that its probative value exceeded its prejudice to the accused.⁷¹

On the other hand, in *United States v. Murzyn*, the court went well beyond the traditional entrapment rebuttal limitations.⁷² The defendant had been charged with interstate transportation of stolen motor vehicles and with conspiracy to do the same. Murzyn claimed he was entrapped by federal agents into driving a stolen car from Illinois to Indiana. At trial, the government introduced evidence that Murzyn had threatened to kill a federal agent with a gun after the alleged transportation incident, and it put witnesses on the stand to testify that Murzyn had tried to get another individual assassinated, had used crude sexual slang and had displayed guns to an undercover agent.⁷³ Denial by the trial court of the defendant's motion for a mistrial was sustained by the Seventh Circuit. Balancing the probative value of the evidence against the prejudice to Murzyn, the appellate court found the trial court did not err in allowing this evidence to stand.⁷⁴

68. *Id.* at 1121.

69. *Id.*

70. 582 F.2d 898 (5th Cir. 1978). The *Beechum* rule for admission of other criminal act evidence requires the court to make two series of findings: "First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its unique prejudice and must meet the other requirements of [Rule] 403." *Id.* at 911.

71. *United States v. Mack*, 643 F.2d 1119, 1121-23 (5th Cir. 1981).

72. 631 F.2d 525 (7th Cir. 1980).

73. *Id.* at 530. The defendant claimed he had been intimidated by the federal agents. The court found the government's evidence was "narrowly geared" to the identical issues the defendant had raised in his defense of coercion and entrapment. *Id.*

74. *Id.* at 530-31.

The *Murzyn* court's decision is questionable. The primary objective of a *Sorrells* anti-entrapment probe into the defendant's criminal past is to show that the defendant had a predisposition to commit the crime charged, not that the defendant had a general disposition to commit evil actions. Consequently, the usual *Sorrells* examination aims at eliciting criminal acts similar to the acts charged.⁷⁵ Before 1975, dissimilar criminal acts simply were not considered relevant to rebut entrapment.⁷⁶

A related basis for admission of other criminal act evidence is the need to rebut the defendant's assertion that his crime was due to inadvertence or to being gulled by a co-perpetrator. In such cases, prior federal law allowed proof of related types of criminal activity to show that the defendant in reality had the required intent.⁷⁷ Prior, *dissimilar* acts of an accused would be logically irrelevant to prove that the accused was free from error when he committed the crime charged. Post-Federal Rules of Evidence cases are essentially congruent with these earlier results.⁷⁸

If the accused claimed that he or she was incapable of general criminal intent because of insanity, the federal courts allowed the government to rebut the claim by introducing evidence that the accused previously had committed similar acts.⁷⁹ This practice continued under the Federal Rules of Evidence.⁸⁰ In *United States v.*

75. See, e.g., *United States v. Tyson*, 470 F.2d 381 (D.C. Cir. 1972), *cert. denied*, 410 U.S. 985 (1973); *Robison v. United States*, 379 F.2d 338 (9th Cir. 1967); *Hansford v. United States*, 303 F.2d 219 (D.C. Cir. 1962).

76. See, e.g., *De Jong v. United States*, 381 F.2d 725 (9th Cir. 1967); *United States v. Beno*, 324 F.2d 582 (2d Cir. 1963); *Marko v. United States*, 314 F.2d 595 (5th Cir. 1963).

77. See, e.g., *United States v. Kirkpatrick*, 361 F.2d 866 (6th Cir. 1966) (prior acts of falsification admissible to prove lack of mistake); *Tandberg-Hanssen v. United States*, 284 F.2d 331 (10th Cir. 1960) (prior absconding with rented car admissible to show lack of inadvertence).

78. See, e.g., *United States v. Foote*, 635 F.2d 671 (8th Cir. 1980) (prior acts of writing unauthorized checks admitted to show lack of mistake); *United States v. Johnson*, 634 F.2d 735 (4th Cir. 1980) (testimony of HEW auditor that defendant had been investigated for Medicare fraud because she had four times as many Medicare patient services as any other doctor in Virginia admissible to show lack of mistake in failing to report income from Medicare patients); *United States v. Luttrell*, 612 F.2d 396 (8th Cir. 1980) (later failure to file tax returns admissible to show lack of mistake).

79. See, e.g., *Bell v. United States*, 210 F.2d 711 (D.C. Cir. 1953) (fact that defendant had lover of his own admissible to rebut claim of temporary insanity caused by wife's infidelity). But see *United States v. Lawrance*, 480 F.2d 688 (5th Cir. 1973) (prior heroin purchase from defendant not relevant to rebut claim of insanity at time of offense charged); *Davis v. United States*, 413 F.2d 1226 (5th Cir. 1969) (reversible error to admit testimony that defendant appeared sane when he recovered a counterfeit \$10 bill from witness after date of offense charged).

80. See, e.g., *United States v. Emery*, 682 F.2d 493 (5th Cir. 1982); *United States v. Madrid*, 673 F.2d 1114 (10th Cir. 1982). For a similar case involving intoxication as

Madrid, the defendant was charged with bank robbery.⁸¹ Following his apprehension, he was confined to a mental facility for observation. A psychiatrist then decided that the defendant was not mentally competent to stand trial, and the defendant was committed to the New Mexico State Hospital. Upon re-examination six months later, the defendant was found competent to be tried.⁸² At trial, three psychiatrists and a clinical psychologist testified that Madrid was schizophrenic and depressed and was legally insane at the time of the offense. In rebuttal, the government called Dr. Dempsey, the examining psychiatrist from the New Mexico State Hospital who had cleared Madrid to be tried. Dr. Dempsey stated that an important basis for his opinion was Madrid's statements to him in his initial interview that he had committed armed robberies of stores prior to the offense in question.⁸³ The trial court overruled defense objections to Dr. Dempsey's repetition of Madrid's admissions. The Tenth Circuit sustained Madrid's conviction on the strength of *United States v. Bell*, a pre-1975 case that allowed admission of other criminal acts of the defendant if the acts formed part of the basis for a psychiatric opinion as to the defendant's sanity.⁸⁴ As Madrid's former robberies had been committed to support his heroin habit, the Tenth Circuit found the prejudice caused to the defendant by evidence of such prior acts relatively high, especially because there was no evidence Madrid used heroin at the time of the offense charged.⁸⁵ Nonetheless, the Tenth Circuit held that the trial court did not abuse its discretion under Rule 403.⁸⁶

Likewise, use of prior criminal activity similar to that charged would be logically relevant to rebut a claim of duress.⁸⁷ The same would be true any time the defendant makes more than a merely

a defense to *mens rea*, see *United States v. Smith*, 552 F.2d 257 (8th Cir. 1977), which allowed evidence that a day prior to the alleged sale of amphetamines, the defendant had approached a DEA informer to buy cocaine for him.

81. 673 F.2d 1114 (10th Cir. 1982).

82. *Id.* at 1117.

83. *Id.* at 1118. The record is unclear as to whether these admissions were elicited at the first or second examination by Dr. Dempsey or at both interviews. The court in any case disposed of the 18 U.S.C. § 4244 (1976) prohibition of using materials from the original competency examination at trial by distinguishing this case from *United States v. Alvarez*, 519 F.2d 1036 (3d Cir. 1973) and holding that because defense counsel had consented to the second examination that raised the same issues as the first, he had waived any objection to the use of material from the first competency examination. This was a strained interpretation of 18 U.S.C. § 4244 and FED. R. CRIM. P. 12.2.

84. 500 F.2d 1287, 1289-90 (2d Cir. 1974).

85. *Madrid*, 673 F.2d at 1122.

86. *Id.*

87. See *United States v. Uramoto*, 638 F.2d 84, 86 n.2 (9th Cir. 1980) (dicta).

formal issue of lack of intent.⁸⁸ Excepting a few harmless error cases,⁸⁹ federal courts have denied admission of similar criminal acts only when such evidence was deemed excessively prejudicial to the defendant's cause with respect to its probative value.⁹⁰

However, the principal judicial gloss on the intent exception to the propensity rule has concerned the similarity between acts charged in the indictment and extrinsic acts and the unrelated question of the government's burden of proof as to the existence of the extraneous acts. The Ninth Circuit in *United States v. Brashier* was the first court to grapple with the similarity issue.⁹¹ The defendant was indicted for violating the Investment Company Act and for willful failure to file an income tax return. A co-defendant, Rhoads, testified for the government against another co-defendant, Coughlan, relating details of a similar stock swindle which Coughlan had perpetrated prior to the Advance Container stock swindle for which Coughlan was indicted. This evidence was admitted over Coughlan's objections that because the government had not shown that the two stock swindles were identical, the evidence was not relevant to determine intent to defraud. The Ninth Circuit affirmed the conviction of Coughlan and his associates and established a formula for evaluating evidence offered to prove intent:

Evidence of prior acts is admissible to demonstrate a defendant's criminal intent if (1) the prior act is similar and close enough in time to be relevant, (2) the evidence of the prior act is clear and convincing, and (3) the trial court determines that the probative value of the evidence outweighs any prejudice.⁹²

The issue of similarity between the crime charged and the alleged criminal acts offered to show intent had appeared troublesome to the Sixth Circuit at the time Rule 404 was adopted, and that court required that other criminal acts introduced into evidence be essen-

88. See *United States v. Grimes*, 620 F.2d 587 (6th Cir. 1980) (defendant cashed government check over forged endorsement claiming lack of knowledge of forgery: government evidence showing defendant had cashed other government checks over forged endorsements admissible to rebut contention of lack of intent); *United States v. Dolliole*, 597 F.2d 102 (7th Cir. 1979) (evidence that defendant had planned two other robberies admissible to rebut contention of lack of intent in driving getaway car).

89. *E.g.*, *United States v. Hernandez-Miranda*, 601 F.2d 1104 (9th Cir. 1979) (apparently prejudicial admission of prior heroin smuggling convictions to prove intent to import held error but not reversible).

90. See, *e.g.*, *United States v. Shavers*, 615 F.2d 266 (5th Cir. 1980); *United States v. Mohel*, 604 F.2d 748 (2d Cir. 1979).

91. 548 F.2d 1315 (9th Cir. 1976), *cert. denied*, 429 U.S. 1111 (1977).

92. *Id.* at 1325.

tially similar in kind to those alleged in the indictment.⁹³ The Eighth Circuit adopted a slightly different formulation in *United States v. Frederickson*:⁹⁴ there had to be a material issue raised as to the accused's intent, and an offering of relevant evidence of another criminal act that was capable of clear and convincing proof and constituted wrongdoing both similar in kind and reasonably close in time to the crime charged.⁹⁵

Other federal appellate courts grappled with the problem of similarity between the offense charged in the indictment and the other criminal act offered to prove intent.⁹⁶ The District of Columbia Circuit required a close correspondence between the type of crime charged and the type of prior act offered to prove intent.⁹⁷ The Tenth Circuit has been relatively lenient in admitting other criminal acts similar but not identical to those for which the accused was indicted.⁹⁸ The Fifth Circuit has focused on whether the criminal intent formed in both criminal acts was identical.⁹⁹ Consequently, the same kind of extrinsic criminal act evidence may be held admissible to show intent in one circuit and inadmissible for that purpose in another solely on the strength of the forum's test for similarity of crimes. This difference in result has in fact occurred in the case of admission of an earlier arrest for unlawful possession of the same drug involved in the indictment.¹⁰⁰ This multiplicity of definitions and

93. See *United States v. Ring*, 513 F.2d 1001 (6th Cir. 1975). Although *Ring* did not arise under the Federal Rules of Evidence, the court evinced deep concern for the future growth of admissibility of similar criminal acts to prove intent and used the proposed rules as a guideline for its decision.

94. 601 F.2d 1358 (8th Cir.), *cert denied*, 444 U.S. 934 (1979).

95. *Id.* at 1364-66. This standard resembled the old Seventh Circuit standard for admission of other criminal acts before the adoption of the Federal Rules of Evidence. See *United States v. Fierston*, 419 F.2d 1020 (7th Cir. 1969).

96. See, e.g., *United States v. Tisdale*, 647 F.2d 91, 92-93 (10th Cir. 1981); *United States v. Foskey*, 636 F.2d 517, 524 (D.C. Cir. 1980).

97. See *United States v. DeLoach*, 654 F.2d 763, 769 (D.C. Cir. 1980) (bad acts introduced as proof of intent to rebut defense of mistake need not be identical to crimes charged if closely related to offense charged); *United States v. Foskey*, 636 F.2d 517, 524 (D.C. Cir. 1980).

98. See *United States v. Tisdale*, 647 F.2d 91, 93 (10th Cir. 1981).

99. See *United States v. Guerrero*, 650 F.2d 728, 733 (5th Cir. 1981).

100. Compare the handling of a prior arrest for the same crime in *United States v. Glen-Archila*, 677 F.2d 809 (11th Cir. 1982), decided in a circuit which is still feeling its way toward a resolution of the propensity rule, with the rough treatment given the admission of an arrest on a similar charge in *United States v. Foskey*, 636 F.2d 517 (D.C. Cir. 1980). In *Glen-Archila*, the Eleventh Circuit sustained admission of a prior arrest for illegal importation of marijuana. 677 F.2d at 816. In *Foskey*, the defendant also had been arrested earlier for unlawful possession of phenmetrazin and dilaudid. The D.C. Circuit excluded evidence of the earlier arrest because the defendant was not formally charged and therefore did not legally have the same intent. 636 F.2d at 524.

standards for admitting other criminal acts to prove intent handicaps the courts when they must deal with the serious constitutional problems raised by such admissions.

3. Knowledge

One of the theoretical problems posed by the creation of a separate “knowledge” exception to the propensity rule in pre-Federal Rules of Evidence practice and by the maintenance of that exception in Rule 404(b) is the practical identity of knowledge and intent in criminal law.¹⁰¹ While reformers have attempted to disentangle knowledge and intent,¹⁰² the early confusion between the two notions persists.¹⁰³ Obviously, neither general nor specific intent can be established in a criminal prosecution if the accused did not know what he or she was doing. Further, some statutory crimes specifically require proof of knowledge, e.g. “knowing” possession or “knowing” passage or transfer of contraband, counterfeit or stolen property. It is this latter category of crimes requiring a variety of proof of specific criminal intent that opens the door to the prosecution to bring in extrinsic criminal acts to prove guilty knowledge.¹⁰⁴

One of the most common situations in which the courts regularly admit proof of other criminal acts to establish knowledge involves indictments for possession of stolen property. For a person to be convicted of that offense, knowledge that an article has been stolen must be proven beyond a reasonable doubt. Prior federal practice permitted evidence of extrinsic similar criminal acts occurring before¹⁰⁵ or after¹⁰⁶ the date of the possession offense charged in the indictment. Those criminal acts could be established by the defen-

101. For a good summary of the problem, see W. LAFAVE & A. SCOTT, JR., *HANDBOOK ON CRIMINAL LAW* § 28 (1972).

102. See, e.g., MODEL PENAL CODE § 2.02(2)(a), (2)(b), (7).

103. LAFAVE & SCOTT, *supra* note 101, at 198.

104. See Reed, *Propensity II*, *supra* note 1, at 311.

105. E.g., *Corey v. United States*, 305 F.2d 232, 238-39 (9th Cir. 1962) (prior arrest for possession of stolen jewelry admissible to show guilty knowledge); *United States v. Antrobus*, 191 F.2d 969, 971 (3d Cir. 1951), *cert denied*, 343 U.S. 902 (1952) (defendant's admission on cross-examination of prior instances of driving stolen vehicles across state lines with father admissible to show guilty knowledge of both defendants).

106. E.g., *Le Fanti v. United States*, 259 F. 460 (3d Cir. 1919) (later purchase of stolen property from codefendant admissible to show earlier guilty knowledge); *Sapir v. United States*, 174 F. 219 (2d Cir. 1909) (later act of receiving stolen United States property admissible to show guilty knowledge). *But see* *Witters v. United States*, 106 F.2d 837 (D.C. Cir. 1939) (as against defendant charged with possession of stolen property, admission of three later instances of receiving similar stolen bicycles from other persons held reversible error).

dant's own admission or by the testimony of co-perpetrators or witnesses.¹⁰⁷ The adoption of Rule 404 did not alter this pattern. *United States v. Hadaway* is typical of those situations in which extrinsic criminal acts are admissible under Rule 404(b) to prove a specific kind of knowledge.¹⁰⁸ The defendant was charged with aiding and abetting the theft of television sets from an interstate shipment. The crime required proof that the defendant knew he was aiding in a theft.¹⁰⁹ The alleged hijacking of television sets was supported by evidence that Hadaway had assisted in three later hijackings.¹¹⁰ The Fourth Circuit upheld the admission of the later instances of aiding and abetting by the defendant because the defendant often used his truck to haul normal merchandise. Without proof of guilty knowledge, i.e. that his friends were hijackers, the government could not prove its case beyond a reasonable doubt.¹¹¹ The court also suggested that the later extrinsic criminal acts helped to prove that Hadaway had the required criminal intent.¹¹² The dissent characterized the admission of these later extrinsic acts as "overkill," viewing the evidence, moreover, as going to establish only intent.¹¹³ The confusion between motive/intent and knowledge exhibited by the *Hadaway* court is apparent in many cases involving introduction of extrinsic criminal acts to show guilty knowledge. Indeed, knowledge evidence is often admissible in the alternative as proof of criminal intent or of a criminal design or plan, or is so bound up with the crime charged as to be inseparable from it. This is due to the fact that once established, motive, plan or scheme may prove by inference the author's criminal intent, guilty knowledge, or identity.¹¹⁴

As a rule, similar extrinsic criminal acts may be admitted to show guilty knowledge whenever such knowledge is required for convic-

107. For an example of similar acts by defendant's own admission, see *United States v. Antrobus*, 191 F.2d 969 (3d Cir. 1951), *cert. denied*, 343 U.S. 902 (1952). For an example of similar offenses established by co-participants, see *United States v. Boyd*, 446 F.2d 1267 (5th Cir. 1971). For examples of eyewitness testimony of other similar extrinsic criminal acts, see *United States v. Lester*, 282 F.2d 750 (9th Cir. 1927), *cert. denied*, 276 U.S. 637 (1929).

108. 681 F.2d 214 (4th Cir. 1982).

109. 18 U.S.C. §§ 2, 659 (1976).

110. 681 F.2d at 217.

111. *Id.*

112. *Id.* at 218. Hadaway contended that intent was no issue, but the court held that the government was not bound to exclude from its case-in-chief evidence of extrinsic acts relevant to intent. *Id.* at 218-19.

113. *Id.* at 220 (Widener, J. dissenting).

114. See MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 190, at 448 (2d ed. 1972).

tion, as for example in indictments for knowingly passing a forged United States Treasury check,¹¹⁵ possession of a stolen or an unregistered firearm,¹¹⁶ knowing transportation of women across state lines for immoral purposes,¹¹⁷ knowing transportation of illegal aliens,¹¹⁸ knowingly making false statements¹¹⁹ or knowing possession of counterfeit currency.¹²⁰ If the accused disclaims criminal intent by claiming that he or she lacked sufficient knowledge of the facts to form criminal intent, for example by alleging inadvertence, then prior similar criminal acts may be offered to prove that the accused did not act through inadvertence.¹²¹ Again, the outside limitation on admission of this sort of evidence is the judge's discretion pursuant to the balancing test of Rule 403: if the probative value of the extrinsic criminal incident is outweighed by the prejudice it causes to the defendant, the evidence is inadmissible.¹²²

The knowledge exception to the propensity rule is, therefore, like

115. *E.g.*, United States v. Robinson, 545 F.2d 301, 304 (2d Cir. 1976).

116. *See, e.g.*, United States v. Herrell, 588 F.2d 711 (9th Cir. 1978) (defendant also denied owning unregistered firearm); United States v. Johnson, 562 F.2d 515 (8th Cir. 1977); United States v. Dudek, 560 F.2d 1288 (6th Cir. 1977) (prior acceptance of stolen merchandise admissible to show knowing possession of stolen firearm).

117. *E.g.*, United States v. Drury, 582 F.2d 1181 (8th Cir. 1978) (defendant's own out of court admissions to prior pimping admissible).

118. *See, e.g.*, United States v. Rubio-Gonzales, 674 F.2d 1067 (5th Cir. 1982); United States v. Longoria, 624 F.2d 66 (9th Cir. 1980); United States v. Herrera-Medina, 609 F.2d 376 (9th Cir. 1979).

119. *See, e.g.*, United States v. Satterfield, 644 F.2d 1092 (5th Cir. 1981) (making false customs declaration excluding cash over \$5,000); United States v. Watson, 623 F.2d 1198 (7th Cir. 1980) (perjury before grand jury).

120. *See, e.g.*, United States v. Allain, 671 F.2d 248 (7th Cir. 1982); United States v. Ible, 630 F.2d 389 (5th Cir. 1980).

121. *See, e.g.*, United States v. Marshall, 683 F.2d 1212, 1215 (8th Cir. 1982) (1976 auditor's report admissible to rebut defendant's alleged ignorance of proper food stamp procedure); United States v. Regner, 677 F.2d 754 (9th Cir. 1982) (defendant denied knowledge of proper preparation of insurance claims; cross-examination on prior filing of claims admissible); United States v. Roe, 670 F.2d 956, 966-67 (11th Cir. 1982) (similar franchise scheme perpetrated by defendants in past admissible to rebut lack of knowledge); United States v. Espinoza, 641 F.2d 153, 172-73 (4th Cir. 1981) (prior orders for child pornography placed with defendant admissible to show knowledge that warehouse used to store child pornography); United States v. Witschner, 624 F.2d 840, 842-43 (8th Cir. 1980) (forty-three patient account cards showing inflated or false medical claims admitted to show defendant, who claimed lack of knowledge of falsified insurance claims, had requisite knowledge); United States v. Olsen, 589 F.2d 351, 352 (8th Cir. 1978) (earlier false cattle weight tickets sent by defendant admissible to rebut lack of knowledge).

122. *See, e.g.*, United States v. Melia, 691 F.2d 672, 676-77 (4th Cir. 1982) (probative value of testimony by convicted burglar that he had visited defendant's barbershop to fence stolen property prior to events charged in indictment outweighed by prejudice to defendant); United States v. Manafzadeh, 592 F.2d 81, 86-89 (2d Cir. 1979) (later incident in which defendant tried to recruit another person to deposit checks under assumed name inadmissible to prove plan, intent or guilty knowledge).

the motive exception, a conduit to prove criminal intent by indirect means. When used for a purpose other than to establish intent, the knowledge exception, by facilitating the admission of extrinsic criminal acts, may have more insidious effects than the drafters of the Federal Rules of Evidence contemplated.

In many cases decided after the adoption of the Federal Rules of Evidence, federal courts have allowed the knowledge exception to the propensity rule to be used to introduce an extrinsic act as an intermediate means of establishing a criminal plan or design, rather than the reverse. This phenomenon is most clearly reflected in the handling of drug offender "profile" cases, in which the prosecutorial plan of attack is to portray a drug dealer as a repeated violator of federal laws concerning controlled substances.¹²³ In many respects, these cases are at variance with the purpose of the common law propensity rule. The introduction by the government of a mass of prior and subsequent similar drug offenses to which the defendant was an alleged party results in the defendant's being denied the right to make a meaningful defense.

United States v. Mehrmanesh is typical of this type of case.¹²⁴ Mehrmanesh was charged with unlawful possession of heroin and attempted possession of heroin with intent to distribute. At trial, the government introduced in its case-in-chief and again on cross-examination the fact that in 1975 the defendant had possessed hashish packets smuggled into the United States.¹²⁵ The government also was permitted to prove that Mehrmanesh was a cocaine user and to show that, on his arrest, search of his home disclosed large quantities of drugs on the premises.¹²⁶ Finally, the government produced evidence indicating prior and subsequent sales of heroin and cocaine by the accused.¹²⁷ The Ninth Circuit determined that use of Mehrmanesh's conviction for his 1975 possession of hashish, due to its high degree of prejudice to the defendant, was inadmissible to impeach Mehrmanesh under Rule 609, but it held that the trial court's admission of the conviction was harmless error because the conviction in any event was admissible to show Mehrmanesh's knowledge that the suitcase involved was full of heroin

123. For a discussion of the drug dealer profile issue, see Note, *Drug Courier Profile Stops and the Fourth Amendment: Is the Supreme Court's Case of Confusion in its Terminal Stage?*, 15 SUFFOLK U.L. REV. 217 (1981); see also Comment, *Probability Theory and Constructive Possession of Narcotics: On Finding that Winning Combination*, 17 HOUS. L. REV. 541 (1980).

124. 689 F.2d 822 (9th Cir. 1982).

125. *Id.* at 830.

126. *Id.* at 832.

127. *Id.*

at the time of the alleged offense.¹²⁸ The court concluded that admission of Mehrmanesh's prior drug use was erroneous, but harmless, because the evidence was unrelated to any item of proof other than the defendant's criminal propensity.¹²⁹ It then held that the jury legitimately could draw the inference that Mehrmanesh had more than a purely personal use for the heroin in his suitcase from the fact that he had large quantities of drugs in his possession and continued to sell cocaine and heroin before and after his arrest.¹³⁰

The federal appellate courts have adopted what may be an overly lenient attitude toward the prior and subsequent similar offenses of alleged drug sellers. The *Mehrmanesh* decision represents a clear-cut example, in which the defendant, overwhelmed with evidence on collateral issues relating to similar crimes, obviously could not prepare a defense to each and every allegation. Other federal appellate courts apparently sanction widespread use of historical data concerning drug dealers at their trial.¹³¹ The use of a prior conviction for hashish smuggling to reinforce evidence showing the defendant possessed hashish at the time of conviction is particularly prejudicial. Because the propensity rule is intended to avoid convicting the accused on evidence of his or her other propensity to do evil, the social policy behind the propensity rule is frustrated by such cases.

United States v. Jackson provides an illustration of how the knowledge exception to the propensity rule may be abused.¹³² Dr. Jackson,

128. *Id.* at 833-34.

129. *Id.* at 832.

130. *Id.*

131. *See, e.g.,* *United States v. Moccia*, 681 F.2d 61, 63 (1st Cir. 1982) (prior state court conviction on unrelated possession of marijuana charge admissible to show knowledge); *United States v. Federico*, 658 F.2d 1337, 1342 (9th Cir. 1981) (notebook containing information on prior drug sales admissible to show knowledge); *United States v. Contreras*, 602 F.2d 1237, 1240 (5th Cir. 1979) (offer to sell cocaine to DEA undercover agent at time of heroin "buy" and defendant's sniffing of cocaine held admissible to prove guilty knowledge); *United States v. Sigal*, 572 F.2d 1320, 1323 (9th Cir. 1978) (prior conviction of conspiracy to import marijuana held admissible to prove knowledge and intent); *United States v. Trevino*, 565 F.2d 1317, 1319-20 (5th Cir. 1978) (testimony by co-defendant concerning marijuana sales with defendant prior to date of substantive offense and overt acts of conspiracy admissible to show knowledge); *United States v. Batts*, 558 F.2d 513, 518 (9th Cir. 1977) (evidence of defendant's prior arrest for unlawful possession of cocaine admissible to impeach defendant); *United States v. Rocha*, 553 F.2d 615, 616 (9th Cir. 1977) (prior unsuccessful prosecution for unlawful distribution of marijuana admissible to show defendant's guilty knowledge); *United States v. Catano*, 553 F.2d 497, 500 (5th Cir. 1977) (testimony concerning defendant's planned future cocaine smuggling operations admissible to show defendant's guilty knowledge); *United States v. Alejandro*, 527 F.2d 423 (5th Cir. 1976) (defendant's prior conviction for sale of heroin admissible to show his guilty knowledge).

132. 576 F.2d 46 (5th Cir. 1978).

the defendant, was indicted for prescribing methaqualone outside the scope of normal medical practice. At trial, the government put the defendant's controlled substance register into evidence. The register showed more than 5,000 prescriptions of methaqualone during the fifteen months prior to his apprehension. Most of these prescriptions were not alleged in the indictment. To clear himself of the implication that the prescriptions represented unlawful dispensing of methaqualone, the defendant would have had to offer evidence that each of the 5,000 prescriptions were within the limits of regular practice. Nevertheless, the Fifth Circuit sustained the conviction, finding that the register was relevant to prove defendant's guilty knowledge with respect to the incidents of sale listed in the indictment.¹³³ Even if, in this instance, the government otherwise had an overwhelming case against Dr. Jackson, he could not possibly have offered an explanation at trial as to each and every methaqualone prescription in his register. As in *Mehrmanesh*, the defendant was tried on his propensity for drug dealing.

The government has not always been successful in stretching Rule 404(b) to permit introduction of a drug dealer's prior criminal history to prove guilty knowledge. In *United States v. Figueroa*, DEA officers, acting on a tip from an undercover informant, attempted to arrest the defendant and to seize heroin on his person.¹³⁴ The defendant threw away a bag of brown powder while fleeing from the officers, and the officers were unable to retrieve the substance for later use at trial. Although none of the three defendants testified at trial, the government produced Acosta's record of conviction for unlawful sale of heroin in 1968.¹³⁵ The previous conviction was supposed to show Acosta's guilty knowledge that the brown powder in the missing bag was heroin. The Second Circuit overturned Acosta's conviction, holding the prior conviction inadmissible to show his present knowledge of the contents of the bag. The court also noted that Acosta's intent was not an issue in the case.¹³⁶ The cases which follow the limiting principles of *Figueroa*, however, are far fewer in number than those which permit wide proof of extrinsic similar drug offenses.

Finally, in rare instances, evidence of a defendant's previous criminal activity has been admitted when the effect of the defendant's background on the state of mind or knowledge of the victim

133. *Id.* at 49.

134. 618 F.2d 934 (2d Cir. 1980).

135. *Id.* at 938-42.

136. *Id.* at 940.

of a crime was important to the government's case. An example is *United States v. De Vincent*, in which the defendant was charged with extortionate extension of credit.¹³⁷ In order to show that the victim of the loan sharking scheme believed that violent means might be used to collect the debt, the government put into evidence De Vincent's twenty-year-old armed robbery conviction as well as a ten-year-old indictment for murder. The First Circuit affirmed De Vincent's conviction, holding that the prior conviction and indictment were relevant to show the victim's mental state.¹³⁸ Although these prior violent criminal acts did tend to show that De Vincent could put the victim in fear for his safety, the important question of whether the victim knew of these earlier acts of violence seems not to have been raised at trial.

4. Plan or Preparation

In federal practice prior to the adoption of Rule 404, criminal acts not posited as overt acts in a conspiracy indictment were nevertheless held admissible to show the nature and extent of the criminal combination.¹³⁹ The acts were admitted whether they were similar¹⁴⁰ or dissimilar¹⁴¹ to the overt acts alleged in the indictment. Furthermore, as long as the acts were committed during the life of the con-

137. 546 F.2d 452 (1st Cir. 1976).

138. *Id.* at 456-57.

139. See Reed, *Propensity II*, *supra* note 1, at 312.

140. See, e.g., *United States v. Lukasik*, 341 F.2d 325, 329-30 (7th Cir. 1965) (similar counterfeit selective service cards and voter cards); *Koolish v. United States*, 340 F.2d 513, 533 (8th Cir. 1965) (similar false solicitations for charitable contributions); *Carbo v. United States*, 314 F.2d 718, 745 (9th Cir. 1963) (similar extortion threats); *United States v. Crosby*, 294 F.2d 928, 946 (2d Cir. 1961) (similar securities frauds); *Briggs v. United States*, 176 F.2d 317, 321 (10th Cir.) (prior conviction for bootlegging), *cert. denied*, 338 U.S. 861 (1949); *United States v. Turley*, 135 F.2d 867, 869 (2d Cir. 1943) (prior instance of stealing securities from United States District Court); *United States v. Glasser*, 116 F.2d 690, 703 (7th Cir. 1940) (similar solicitation of bribe money).

141. See, e.g., *United States v. Miller*, 508 F.2d 444, 448-50 (7th Cir. 1974) (plot to rob bank and to kidnap tow truck operator and Illinois state policeman, and unlawful transportation of firearms and ammunition across state lines proved as part of conspiracy); *United States v. Clay*, 495 F.2d 700, 705-07 (7th Cir. 1974) (prior embezzlement by conspirator from bank burglarized admissible); *Hanger v. United States*, 398 F.2d 91, 101-02 (8th Cir. 1968) (unindicted co-conspirator testified to supermarket robbery after bungled bank hold up); *Feyrer v. United States*, 314 F.2d 110, 112-13 (9th Cir. 1963) (later cover up of conspiracy by making false statements to FBI held admissible); *Rizzo v. United States*, 304 F.2d 810, 828-29 (8th Cir. 1962) (evidence that defendant had cashed forged checks at teller's window where "fake" bank robbery took place held admissible); *Rodriguez v. United States*, 284 F.2d 863, 867-68 (5th Cir. 1960) (holding undercover agent captive in automobile admissible to show conspiracy).

spiracy, they were admissible whether they occurred after,¹⁴² before¹⁴³ or at the same time¹⁴⁴ as the date of the alleged overt acts. In addition, former federal practice allowed proof of similar¹⁴⁵ and dissimilar¹⁴⁶ acts by a single defendant in cases in which no conspiracy count had been alleged. As long as they were related logically to proof of a single criminal scheme or plan, the acts were admissible whether they occurred before, after or during the acts alleged in the indictment.¹⁴⁷

Rule 404 has had little impact on the admissibility of acts of conspirators not alleged to be overt acts in the indictment. Federal courts routinely allow the government to prove such acts, similar¹⁴⁸ or

142. *See, e.g.*, *Hanger v. United States*, 398 F.2d 91, 101-02 (8th Cir. 1968); *Rodriguez v. United States*, 284 F.2d 863, 867-68 (5th Cir. 1960); *Hubby v. United States*, 150 F.2d 165, 167-68 (5th Cir. 1945).

143. *See, e.g.*, *United States v. Clay*, 495 F.2d 700, 705-07 (7th Cir. 1974); *United States v. Sutherland*, 428 F.2d 1152, 1156-57 (5th Cir. 1970); *Koolish v. United States*, 340 F.2d 513, 533 (8th Cir. 1965); *United States v. Stadter*, 336 F.2d 326, 328-29 (2d Cir. 1964); *United States v. Kahaher*, 317 F.2d 459, 470-72 (2d Cir. 1963); *Carbo v. United States*, 314 F.2d 718, 745 (9th Cir. 1963).

144. *See, e.g.*, *United States v. Miller*, 508 F.2d 444, 448-50 (7th Cir. 1974); *United States v. Parker*, 469 F.2d 884, 889-90 (10th Cir. 1972); *United States v. Montalvo*, 271 F.2d 922, 927 (2d Cir. 1959); *United States v. Iacullo*, 226 F.2d 788, 793-94 (7th Cir. 1955); *Kobey v. United States*, 208 F.2d 583, 599 (9th Cir. 1953).

145. *See, e.g.*, *United States v. Fearn*, 501 F.2d 486, 490-92 (7th Cir. 1974) (twenty-five or thirty forged checks not listed in indictment admissible to prove plan or design); *United States v. McGovern*, 499 F.2d 1140, 1144 (1st Cir. 1974) (sale of counterfeit bill by defendant admissible to show scheme or design); *United States v. Addington*, 471 F.2d 560, 567-68 (10th Cir. 1973) (later falsified storage records admitted to show plan); *United States v. Pittman*, 439 F.2d 906, 908 (5th Cir. 1971) (sale of narcotics not listed in indictment admissible); *United States v. Bradwell*, 388 F.2d 619, 621-22 (2d Cir. 1968) (threat made to second witness admissible to show defendant's course of conduct).

146. *See, e.g.*, *United States v. Cochran*, 475 F.2d 1080, 1082-83 (8th Cir. 1973) (kidnapping of hostage drivers and attempted abduction of high school administrator admissible to show design or plan for robbery); *United States v. Leftwich*, 461 F.2d 586, 589 (3d Cir. 1972) (evidence showing defendant stole getaway car admissible to show preparation for robbery); *United States v. Knohl*, 379 F.2d 427, 438-39 (2d Cir. 1967) (evidence showing defendant had scheme to cash embezzled treasury bills admissible to show plan, design or extent of criminal operation). *But see* *Mills v. United States*, 367 F.2d 366, 367 (10th Cir. 1966) (evidence showing defendant passed NSF checks before buying car with NSF check not admissible to show plan or design for car theft).

147. *See, e.g.*, *United States v. McGovern*, 499 F.2d 1140, 1144 (1st Cir. 1974) (subsequent sale of counterfeit bills germane to charge of counterfeiting); *United States v. Van Scoy*, 482 F.2d 347, 349 (10th Cir. 1973) (defendant's former prison sentence admissible to prove acquaintance with his co-defendant prior to their robbing a bank); *United States v. Pittman*, 439 F.2d 906, 908-09 (5th Cir. 1971) (sale of narcotics to agent not charged in indictment admissible to prove that during time of acts charged defendants had narcotics in their home and trusted agent enough to sell him narcotics).

148. *See, e.g.*, *United States v. Heater*, 689 F.2d 783, 788 (8th Cir. 1982) (statements by coconspirator admissible to prove defendants joined conspiracy with knowledge of its illicit purpose); *United States v. Torres*, 685 F.2d 921, 924-25 (5th Cir. 1982) (overt act

dissimilar¹⁴⁹ to those alleged as overt acts in the indictment, on condition that the acts occurred during the life of the conspiracy. Furthermore, since the adoption of Rule 404, federal courts have been more willing to allow the government to prove one or more extrinsic offenses of a co-conspirator occurring *outside* the life of the conspiracy. As source of authority for admission of this evidence, the courts recite a number of different grounds under Rule 404, but the exact rationale remains obscure.¹⁵⁰ *United States v. Angelilli* is representative of this type of case.¹⁵¹ The defendants, auctioneers and marshals in the New York City Municipal Court system, were responsible for conducting liquidation sales of property seized on execution. The marshals arranged with the auctioneers to unload the goods at rigged prices, the buyers agreeing to kick back “top money” to the marshal and auctioneer for the privilege of buying the goods.¹⁵² At trial, the government called a former marshal and twelve buyers and auctioneers to testify that as a matter of habit, custom and routine practice, all New York City Municipal Court marshals demanded “top money” at the sales they conducted.¹⁵³ None of this testimony related to any overt act of the defendants in furtherance of their conspiracy. The trial court initially admitted the evidence as background but then altered its position and instructed the jury that “evidence on custom and practice [was being admitted] because you may infer from the custom and practice and all the other evidence infer that the defendants engaged in the general custom and practice. . . .”¹⁵⁴ The defendants objected that this testimony

of selling sample not alleged in indictment admissible to show criminal plan); *United States v. Pirollo*, 673 F.2d 1200 (11th Cir. 1982) (defendant's admissions to DEA agents of other sales admissible to show plan or design).

149. *See, e.g.*, *United States v. Marino*, 658 F.2d 1120, 1122-24 (6th Cir. 1981) (possession of illegal firearms not charged in conspiracy indictment admissible to show nature of criminal design); *United States v. De La Torre*, 639 F.2d 245, 249-50 (5th Cir. 1981) (illegal firearms seized during arrest for conspiracy admissible to show design or plan because pistols constituted part payment for drugs).

150. *See, e.g.*, *United States v. Robinson*, 635 F.2d 981, 987 (2d Cir. 1980) (admission of prior instances of smuggling heroin from Amsterdam using female courier admissible to show common plan or design); *United States v. Roberts*, 619 F.2d 379, 381-84 (5th Cir. 1980) (prior conviction of defendant on gaming charge admissible to show intent to conduct conspiracy); *United States v. Williams*, 577 F.2d 188, 191-92 (2d Cir. 1978) (pre-conspiracy conviction for receiving proceeds of bank robbery admissible to show plan and intent of defendant in crime charged).

151. 660 F.2d 23 (2d Cir. 1981).

152. *Id.* at 27.

153. *Id.* at 37-38.

154. *Id.* at 38. In the final charge to the jury, the court said:

Now, there was evidence of sales that were not charged in the indictment. Evidence came before you on the custom and practice among marshalls in conducting sales,

was irrelevant and constituted evidence of criminal practices with which they had not been charged and that involved them by association. The defendants' objections were overruled, and the case went to the jury. The jury asked for a repetition of instructions, and the trial court told them they could consider evidence of custom and practice solely on the issue of the existence of a conspiracy.¹⁵⁵ On appeal, the Second Circuit found this evidence admissible to show the plan of the conspiracy, noting that so far as the evidence reflected the conspiracy itself, it was not evidence of another criminal act and was admissible to prove the conspiracy charged.¹⁵⁶ The Second Circuit held that because the district court's final instructions had limited the consideration of this evidence to the issue of the existence of the conspiracy and had kept the jury from using it to infer that the defendants had acted in conformity with the custom prevailing among marshals, the district court's earlier instruction during trial, allowing the jury to infer that the defendants had acted in conformity with the custom, through erroneous, was not sufficiently harmful to require a reversal.¹⁵⁷

The plan or design exception to the propensity rule is intended to permit proof of a criminal enterprise, whether conducted by several defendants as a conspiracy, by a single defendant or by an accessory and principal defendant. The "one-man conspiracy" or criminal enterprise operated by a single individual has been treated traditionally as a subject to be proved by criminal acts committed as part of the enterprise.¹⁵⁸ For the most part, the cases decided after

just generally among what was called the business of selling judgment-debtors' assets. The evidence of sales that were not charged in the indictment may only be used in determining whether the government established the existence of the conspiracy charged and for no other purpose. The evidence of custom and practice on the conduct of marshalls' sales may be considered on determining whether the conspiracy charged was established. It is limited to such use and may not be considered in determining whether the accused committed the other crimes in the indictment.

Id.

155. *Id.*

156. *Id.* at 39. This was true, the court said, even though the testimony was presented in summary form by the witnesses. *Id.*

157. *Id.* at 38-40. The trial court's confusion is evident from the opinion. The trial court at first meant to permit use of the testimony as proof that the defendants had acted in conformity with an enterprise-wide habit of taking kickbacks on sales. *Id.* at 38. This use would violate the inference forbidden under FED. R. EVID. 404(b). Under these conditions, the defendants should have had the benefit of a reversal, because the jury must have been just as confused about the relevance of this evidence as the trial judge.

158. See Reed, *Propensity II*, *supra* note 1, at 312-13; Reed, *Propensity I*, *supra* note 1, at 733.

the adoption of Rule 404 conform to earlier case law.¹⁵⁹ However, since 1975, admissibility of criminal acts to prove the extent of a “one man conspiracy” has expanded to include acts not clearly a part of that conspiracy. Thus, despite orthodox cases such as *United States v. Lewis*, which involved a continuing criminal enterprise and in which the evidence offered probably would have been admissible before the introduction of Rule 404,¹⁶⁰ cases such as *United States v. Lea* have bent the plan or design exception to permit proof of extrinsic acts which were not clearly a part of the defendant’s alleged criminal enterprise.¹⁶¹ *Lea*, a meat buyer accused of taking

159. Prior law allowed admission of criminal acts which were part of the enterprise of the defendant or of his accessory in two situations: acts prior to the crime charged but within the enterprise period; and acts after the crime charged, but within the enterprise period. For cases decided after the effective date of the Federal Rules of Evidence allowing prior criminal acts connected with the enterprise to be admitted, see, e.g., *United States v. Smith*, 685 F.2d 1293, 1295-96 (11th Cir. 1982) (prior fraudulent insurance claims not charged in indictment but connected with defendant’s plan admissible); *United States v. DeLoach*, 654 F.2d 763, 767-70 (D.C. Cir. 1980) (prior instances in which Iranians had false work permits completed by DeLoach admissible to show continuing plan or scheme); *United States v. Precision Medical Laboratories, Inc.*, 593 F.2d 434, 446-47 (2d Cir. 1978) (prior instance in which co-defendant misled government inspectors into believing testing was done in the laboratory held admissible to show design or plan).

160. 693 F.2d 189 (D.C. Cir. 1982). *Lewis* indicates how the plan or design exception may properly be used within the scope of FED. R. EVID. 404(b). The defendant was linked to the processing of twenty stolen money orders that he allegedly forged and cashed. At trial, the government presented a witness who testified that the defendant recruited people to pass the stolen money orders. The government also introduced evidence concerning other stolen money orders not charged in the indictment but that could be inferred to have come from the same stolen shipment as the twenty money orders the defendant allegedly passed. *Id.* at 191-92. Because the defendant was running an enterprise in furtherance of which he enticed others to cash money orders written up on stolen blanks, the testimony and unindicted instances of passing stolen money orders were clearly relevant to show the nature and extent of the enterprise. *Id.* at 195. The court said:

Nor is the government, as appellant asserts, restricted to establishing appellant’s guilt beyond a reasonable doubt solely on the basis of crimes charged in the indictment. . . . [E]vidence of other similar acts is admissible to show design or plan The evidence in this case proves just such a plan. . . . Appellant had possession of the stolen money orders, a check-writing machine with which to encode amounts, and an arrangement with Denise Lewis and her friends to pass these orders at a bank. The evidence is admissible even though appellant was charged only with single counts of a continuing offense, and it is not plain error for the court to admit evidence of a plan in which those single offenses were only isolated examples.

Id. at 195-96. The court found that the acts testified to by the witnesses had occurred during Lewis’s operation of his enterprise. Consequently, the evidence was clearly admissible to show a criminal plan or design. *Id.* at 193-94. Moreover, the court held that because the defendant had not objected to the testimony at trial, he could not object on appeal that the trial court had failed to make a finding that the probative value of the evidence exceeded any prejudice to the accused. *Id.* at 193.

161. 618 F.2d 426 (7th Cir. 1980).

kickbacks from wholesalers, was charged with multiple counts of mail fraud for allegedly using the United States mail to solicit the kickbacks.¹⁶² A government witness testified that Lea had solicited a kickback from him ten or twelve years prior to the trial and two to four years prior to the offenses charged in the indictment. That evidence was admitted to show motive and intent over objections to its relevance and creation of undue prejudice.¹⁶³ The Seventh Circuit sustained Lea's conviction, holding that the prior solicitation was relatively close in time to those charged in the indictment, and indicated that the defendant had a similar method of operation with brokers not listed in the indictment.¹⁶⁴

The theory behind the "one man conspiracy" exception to the propensity rule is that because the "conspiracy" of a single individual is similar to the criminal enterprise of a group of conspirators, criminal act evidence relative to the one-man "enterprise" should be admissible only if the criminal act occurred during the alleged period of existence of the enterprise, as is the case in multiparty conspiracies.¹⁶⁵ In *Lea*, the extrinsic acts held admissible by the court arguably had occurred before the alleged enterprise began. Recent cases, however, have shown a disturbing tendency to disregard the rule limiting proof of extrinsic acts to those occurring during the life of the conspiracy.¹⁶⁶ Furthermore, case law now countenances extrinsic acts outside the scope of the conspiracy as admissible to show the nature and extent of the enterprise or the defendant's intent and plan or motive.¹⁶⁷ Such cases only serve to obfuscate proper application of the criminal enterprise theory as a vehicle for admitting evidence of extrinsic related crimes. Principled judicial restraint is clearly called for. A court that allows a criminal enterprise, i.e. a criminal plan or design, to be proven by evidence of

162. *Id.* at 428-29.

163. *Id.* at 431.

164. *Id.* at 431-32. Although the court did not use the words "plan or design" in finding the evidence admissible, it implied that the unindicted instance of receiving a kickback was evidence of the defendant's criminal design or plan.

165. See generally J. WEINSTEIN & M. BERGER, *supra* note 17, at ¶ 404[16], 89-91.

166. See *United States v. Sherer*, 653 F.2d 334, 338-39 (8th Cir. 1981) (later incidents of double billing by psychiatrist admitted to show earlier plan or scheme); *United States v. Drebin*, 557 F.2d 1316, 1325-26 (9th Cir. 1977) (prohibited sales of film prints outside period indicated in indictment admissible to show plan or modus operandi).

167. See, e.g., *United States v. Smith*, 629 F.2d 650, 652 (10th Cir.) (prior uncharged drug sales admissible to show plan or design), *cert. denied*, 449 U.S. 994 (1980); *United States v. Young*, 618 F.2d 1281, 1289 (8th Cir. 1980) (unrelated instances of check kiting by defendant admissible to show plan or intent); *United States v. Potter*, 616 F.2d 384, 387-88 (9th Cir. 1980) (evidence that prostitutes paid defendant for qualudes with oral sex admissible to show motive).

extrinsic criminal acts should require independent proof of the existence of that criminal enterprise, whether a conspiracy or a one-person scheme. The independent proof should establish the dates on which the enterprise began and ended, and extrinsic act evidence should be limited to acts committed during the life of the enterprise. Extrinsic criminal acts committed by the accused before the alleged enterprise began or after it ended should not be admissible to prove the accused's plan or design, although given proper foundation they might be admissible to show the criminal intent or the identity of the accused.

5. Identity of the Accused

Extrinsic criminal acts of the accused were admissible under former federal practice as direct or circumstantial proof of identity. First, extrinsic criminal acts could be direct proof of the identity of the accused in a case in which an object acquired in a previous crime committed by the defendant was used to perpetrate a later crime in which the accused's identity as perpetrator was in dispute.¹⁶⁸ Second, extrinsic criminal acts could be circumstantial proof of identity if they constituted evidence of a *modus operandi* or "signature" from which to infer the identity of the perpetrator of the crime charged.¹⁶⁹ These extrinsic "signature" crimes had to be established by clear and convincing evidence, and the method of commission had to be similar enough to allow the inference that one person perpetrated both crimes.¹⁷⁰ Also, for extrinsic acts to be admitted as proof of identity, identity had to be an issue.¹⁷¹ Pre-1975 federal practice clearly required more than a not guilty plea for the prosecution to put the issue of identity before the court. However, the government could always make an issue of identity. Even when it presented eyewitness identification of the defendant, the prosecution could show that cross-examination of the eyewitnesses had

168. See Reed, *Propensity II*, *supra* note 1, at 314.

169. See Reed, *Propensity I*, *supra* note 1, at 730-35 (analyzing *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286 (1901) and discussing formation of the *modus operandi* exception to the common law propensity rule).

170. See, e.g., *Bradley v. United States*, 433 F.2d 1113, 1120-21 (D.C. Cir. 1969) (extrinsic crime must have enough in common with crime charged to justify judgment that probative force of similar details outweighs harm to the accused); *Parker v. United States*, 400 F.2d 248, 251 (9th Cir. 1968) (factors considered when admitting extrinsic acts include unique or bizarre nature of conduct and geographical area of its commission); *Drew v. United States*, 331 F.2d 85, 92-93 (D.C. Cir. 1964) (lack of similarity in all respects bars admission of extrinsic evidence).

171. See Reed, *Propensity II*, *supra* note 1, at 314.

shaken their credibility, thereby creating a need for the government to reinforce its case with extrinsic criminal act evidence.¹⁷² This fact led to the creation of a third exception to the propensity rule: the "mug shot" exception, through which, within the trial court's discretion, the government was permitted to bolster eyewitness identification of the accused by showing that the eyewitnesses had picked out the accused from photo spreads.¹⁷³

Since 1975, relatively few cases have dealt with the first "physical object" branch of the identity exception to the propensity rule. For example, admission of the defendant's driver's license obtained under false pretenses was sustained in *United States v. Phillips*, a racketeering and Travel Act case that involved a conspiracy to import and sell marijuana.¹⁷⁴ One defendant denied having participated in the scheme under the name "Artino." His driver's license in that name was then introduced by the government to show that he and "Artino" were one and the same person.¹⁷⁵ Two other cases decided since 1975 dealt with physical objects that identified the defendant while constituting proof of another crime because they were the direct fruit of the crime in question.¹⁷⁶

On the other hand, the *modus operandi* or "signature" exception, a second subdivision of the identity exception to the propensity rule, has seen wide use in federal litigation since the adoption of the Federal Rules of Evidence. In most instances, the defendant had made identity an issue either by denying guilt outright or by attacking the credibility of eyewitness identification.¹⁷⁷ The *modus operandi* exception has been particularly valuable in establishing the identity of bank robbers, because eyewitness identification of the perpetrators of bank robberies particularly has been subject to impeachment. Consequently, the courts frequently have permitted introduction of other similar robberies committed by the defendant to establish the identity of the accused as perpetrator of the crime

172. *See id.* at 314-15.

173. *See id.* at 315-17 (discussing the leading case of *United States v. Harrington*, 490 F.2d 487 (2d Cir. 1973) and its precursors).

174. 664 F.2d 971, 1028-29 (5th Cir. 1981).

175. *Id.*

176. *United States v. Waldron*, 568 F.2d 185, 187 (10th Cir. 1977) (testimony of accomplice that defendant helped him steal guns admissible to show identity), *cert. denied*, 434 U.S. 1080 (1978); *United States v. Little*, 562 F.2d 578, 580-81 (8th Cir. 1977) (stolen firearm given by defendant to gas station attendant admissible to prove defendant was perpetrator of prior sales of stolen guns from same collection).

177. *See, e.g.*, *United States v. Bailleaux*, 685 F.2d 1105, 1110 (9th Cir. 1982) (outright denial of guilt by defendant); *United States v. Pisari*, 636 F.2d 855, 857 (1st Cir. 1981) (defendant testified he was elsewhere at time of robbery).

charged.¹⁷⁸ As in cases involving the intent exception, the courts in *modus operandi* cases have examined with great attention the similarity in technique, number of perpetrators, and other details of the extrinsic offenses before qualifying them for admission.¹⁷⁹ Judicial scrutiny also has been directed at the quantum of proof necessary to render the existence of extrinsic acts sufficiently certain for them to be admissible. A few courts, for example, have required that the extrinsic act be established by clear and convincing evidence.¹⁸⁰

The approach taken by the courts in bank robbery cases has carried over into most of the post-1975 *modus operandi* cases. *United States v. Bailleaux* is illustrative of most *modus operandi* cases.¹⁸¹ The defendant, charged with conspiracy to interfere with commerce, attempted to extort money from a California supermarket chain by claiming to have put poison in a processed food product. The defendant demanded a payoff in diamonds rather than in money and required that his victims use a local radio station to send messages to him.¹⁸² Defendant, when apprehended, denied being the perpetrator of the extortion plot. At trial, the government introduced evidence of two strikingly similar supermarket extortion plots for which Bailleaux had been convicted in Oregon.¹⁸³ In affirming his conviction, the Ninth Circuit held that the two prior Oregon convictions were for crimes of a pattern strikingly similar to that of the offenses for which Bailleaux was on trial.¹⁸⁴ The Ninth Circuit

178. See, e.g., *United States v. Hayes*, 553 F.2d 824, 826 n.1, 828-29 (2d Cir. 1977) (unindicted bank robbery by defendant admissible to prove identity in both earlier and later robberies); *United States v. Davis*, 551 F.2d 233, 234-35 (8th Cir.) (defendant's admission of prior bank robberies in conversation with informant admissible to prove *modus operandi*), *cert. denied*, 431 U.S. 923 (1977). But see *United States v. Pisari*, 636 F.2d 855, 859 (1st Cir. 1981) (prior robbery of drug store with knife insufficient as "signature" to prove identity).

179. For cases dealing with the balancing of similarity factors, see *United States v. Pisari*, 636 F.2d 855, 857-60 (1st Cir. 1981) (commonality of weapon used in two different robberies insufficient to support admission of extrinsic crime evidence); *United States v. Phillips*, 599 F.2d 134, 136-37 (6th Cir. 1979) (testimony concerning prior bank robberies inadmissible when series of robberies does not indicate common plan); *United States v. Myers*, 550 F.2d 1036, 1044-48 (5th Cir. 1977) (prior bank robbery or distinctive pattern must be so similar in nature and style to mark it as handiwork of same individual).

180. See, e.g., *United States v. Bailleaux*, 685 F.2d 1105, 1110 (9th Cir. 1982) (one prerequisite for admission of extrinsic act is clear and convincing proof that defendant committed other crimes); *United States v. Silva*, 580 F.2d 144, 147-48 (5th Cir. 1978) (extrinsic acts evidence must be plain, clear and convincing).

181. 685 F.2d 1105 (9th Cir. 1982).

182. *Id.* at 1110.

183. *Id.*

184. *Id.*

also found that the government had satisfied the prerequisites for admitting modus operandi evidence: establishment of the elements of the prior crimes was by clear and convincing evidence; the prior crimes were sufficiently close in time to the crimes charged in the indictment; and the government had established that the earlier crimes were so similar to the current crimes as to make the inference that each had been committed by the same perpetrator a logical conclusion.¹⁸⁵ Finally, the great probative value of this evidence counterbalanced its obvious prejudice to the defendant.¹⁸⁶

The landmark modus operandi case, however, is *United States v. Woods*, decided by the Fourth Circuit in 1973.¹⁸⁷ In that case, defendant had been charged with intentionally smothering to death an eight-month-old child entrusted to her. The government introduced proof at trial that other infants entrusted to the defendant's care and for whom defendant had acted as natural parent, foster mother and babysitter subsequently had developed cyanosis and either died or been rushed to the hospital for resuscitation. These earlier deaths and injuries were held to constitute a signature of the perpetrator.¹⁸⁸ They were held relevant, however, not so much to establish identity but to exclude death by accident or by negligence.¹⁸⁹ Several more such cases have been decided since *Woods*, culminating in the 1981 case of *United States v. Harris*.¹⁹⁰ Airman Harris was charged with the murder on federal property of his eight-month-old son and with a prior assault on the infant. The government tried defendant on a theory of repeated aggravated child abuse. The defendant contended that the boy died following an accidental fall.¹⁹¹ At trial, the government put on evidence that Harris suffered from recurring emotional problems, that these caused him to assault and abuse his children, and that prior to the incidents in the indictment he had contacted his commanding officer about his problem and had sought psychiatric help at his air force base.¹⁹² The government also introduced considerable expert medical testimony to show that at some time in the past the victim had received severe beatings resulting in a fractured clavicle, four fractured ribs and a fractured wrist. Harris objected to evidence of his prior solicitation of

185. *Id.* at 1111.

186. *Id.* at 1111-12.

187. 484 F.2d 127, 133-35 (4th Cir. 1973).

188. *Id.* at 133-35.

189. *Id.*

190. 661 F.2d 138 (10th Cir. 1981).

191. *Id.* at 139.

192. *Id.* at 140.

psychiatric help for child abuse and to the medical evidence of prior, similar injuries to his dead son.¹⁹³ Harris's conviction was affirmed by the Tenth Circuit. First, the court noted that the government's case was based almost entirely on circumstantial evidence.¹⁹⁴ Harris was in charge of his son when the child was injured, and the medical testimony indicated that the injuries could not possibly have been the result of a fall from a crib, as Harris claimed when he took the stand in his own defense.¹⁹⁵ The government's proof of Harris's identity as the perpetrator in the earlier assault charged in the indictment was likewise circumstantial.¹⁹⁶ Pointing out that the admission of evidence of other extrinsic criminal acts to show intent or absence of mistake or surprise was well-established in child abuse cases,¹⁹⁷ the Tenth Circuit held there had been no error in admitting prior criminal acts evidence to prove Harris's identity as the perpetrator, to show his intent and to negate any claim of inadvertence.¹⁹⁸ It held that *United States v. Brown*,¹⁹⁹ cited by Harris as grounds for exclusion of the extrinsic offense evidence, was inapplicable because, unlike Brown's, Harris's responsibility for the crimes charged in the indictment had been established by other evidence of circumstantial character.²⁰⁰

Harris, a murder case involving child abuse, is an instance in which a federal appellate court countenanced conviction by propensity, on the ground that the nature and circumstances of the case required it. Because child abuse usually is established by circumstantial rather than direct evidence, and because the infant victim's death had to have been caused by an intentional act to constitute a crime, the

193. *Id.* at 141.

194. *Id.*

195. *Id.*

196. *Id.* The government called several babysitters who stated they did not abuse the child. Mrs. Harris, a defense witness, also testified she did not abuse the child. *Id.*

197. *Id.* at 142. The exceptions to the propensity rule used to admit this evidence vary from the intent exception cited in *United States v. Colvin*, 614 F.2d 44, 45 (5th Cir.), *cert. denied*, 446 U.S. 945 (1980), to the "absence of mistake or accident" exception cited in *Harris*. In these cases, identity of the accused and the *corpus delicti* itself had not been established by direct evidence. Consequently, in each case, the government had a substantial problem in meeting its burden of proof on both issues without use of other extrinsic incidents of child abuse. This was recognized by the court in *United States v. Brown*, 608 F.2d 551 (5th Cir. 1979), which held the admission of other extrinsic instances of child abuse inadmissible because the government had not established by independent evidence that the defendant was the perpetrator of the prior assaults on the deceased child.

198. *Harris*, 661 F.2d at 142.

199. 608 F.2d 551 (5th Cir. 1979) (government failed to prove that defendant was responsible for the prior acts).

200. *Harris*, 661 F.2d at 143.

court allowed the defendant's propensity for child abuse to be introduced in order to show that there was a *corpus delicti*.²⁰¹ One may question whether Harris's identity as the perpetrator of the homicide had been established beyond a reasonable doubt without resort to his earlier admission of a propensity for child abuse. If it had not been, the insidious nature of child abuse seemed to compel the court to permit Harris to be tried by an equally insidious system of circumstantial proof.

Several major defects in admission of prior act identity evidence may be underscored. A tendency on the part of federal courts has been to allow use of extrinsic, similar criminal acts to prove the identity of the accused without concern for their necessity to the government's case.²⁰² Also, no cases restrict admission of *modus operandi* "signature" crimes because the evidence they constitute is cumulative.²⁰³ Finally, the mug shot subcategory of identity exceptions to the propensity exclusionary principle is troublesome.²⁰⁴ Before the adoption of Rule 404, federal courts recognized the danger to the criminal process involved in using mug shots at trial to bolster in-court identification of the accused. The court in *United States v. Harrington*²⁰⁵ set forth a three-part test to govern the use of mug shots: the government had to demonstrate the need for such photographs; if the jury was to see them, the photographs could not be used in such a way as to imply the defendant had a prior criminal record; and the prosecution could not draw particular attention to the source or implications of the photographs while using them.²⁰⁶ Although very few post-1975 mug shot cases have reached

201. *Id.* at 141-42.

202. *See, e.g.,* *United States v. Bailleaux*, 685 F.2d 1105, 1110 (9th Cir. 1982) (prior crimes involved exact method employed in crimes charged); *United States v. Andrini*, 685 F.2d 1094, 1096-97 (9th Cir. 1982) (testimony that shortly after arson defendant described method for starting fires similar to method employed in arson admissible); *United States v. Smith*, 623 F.2d 627, 630 (9th Cir. 1980) (evidence of phone calls between defendant and co-defendants admissible to prove method of conspiracy); *United States v. Gubelman*, 571 F.2d 1252, 1255 (2d Cir. 1978) (testimony that defendant offered similar bribes prior to indicted crime admissible to prove identity); *United States v. Gano*, 560 F.2d 990, 992-93 (10th Cir. 1977) (testimony as to sexual intercourse with mother of statutory rape victim properly admitted to prove motive, preparation, plan and knowledge). *But see* *United States v. O'Connor*, 580 F.2d 38, 41-43 (2d Cir. 1978) (prior instances of bribery excluded because intent of accused not at issue and evidence showed no common scheme or plan).

203. No cases involving the identity exception to the propensity rule which reject admission as cumulative have been reported.

204. For a discussion of the mug shot exception, see Reed, *Propensity II*, *supra* note 1, at 315-17.

205. 490 F.2d 487 (2d Cir. 1973).

206. *Id.* at 494.

the appellate level, it is at present somewhat easier to use mug shot evidence.²⁰⁷ One reason may be that if identification of the accused is made in court, reference to previous out-of-court identification from photo spreads is not prejudicial to the accused.²⁰⁸ Thus, courts have shown more leniency towards admission of photo spreads that do not advertise directly their origin as law enforcement tools as well as towards oral testimony by eyewitnesses that they identified the defendant in an out-of-court photo spread.

6. Inseparable Crimes

Rule 404(b) makes no provision excluding under the propensity rule evidence of crimes that are so interwoven with the crime charged that a *prima facie* case for the principal crime proves a separate, unindicted crime. Prior federal practice permitted proof of criminal acts that technically were not extrinsic to the crime charged but rather were part and parcel of the same crime.²⁰⁹ However, a substantial possibility of undue prejudice to the accused can be caused by establishing one or more crimes not charged in the indictment but which are based on the same series of transactions as the crimes that were so charged, and courts should limit the use of such matter at trial by requiring the government to make a showing of its necessity to the case.

Cases decided subsequent to the promulgation of the Federal Rules of Evidence reflect both traditional and nontraditional use of the inseparable crime exception to the propensity rule. *United States v. Black* represents the traditional and very limited judicial view of this exception.²¹⁰ Black was charged with assaulting a federal correctional officer. He threatened a prison guard with a knife outside

207. *E.g.*, *United States v. Johnson*, 623 F.2d 339, 341 (4th Cir. 1980). The government introduced the exact photo spread from which the bank teller had identified the defendant as the robber of the bank. Only the criminal identification numbers and backs of these obvious mug shots were masked. The court asserted that little difference in quality existed between in-court identification by the victim/witness and out of court photographic identification. The court indicated that the jury was entitled to see the photo spread to determine if the identification of the accused had been made fairly. *Id.* at 341-42.

208. *Id.* at 343. However, in *United States v. Sostarich*, 684 F.2d 606, 608 (8th Cir. 1982), a former inmate of the Colorado State penitentiary, called to identify the accused, stated that he was able to make an identification from a photo spread used by the victims of the robbery because he had known the defendant in prison. The court admitted that the reference to mug shots and the evidence that the witness knew the defendant in prison were relevant to identify the accused, but the court excluded the evidence of the defendant's incarceration on appeal as prejudicial to the defendant.

209. For a discussion of this proposition, see Reed, *Propensity II*, *supra* note 1, at 319.

210. 692 F.2d 314 (4th Cir. 1982).

his cell, then retreated to the cell holding the knife. While trying to hide the knife, he threw human excrement at the officer. Although the case was reversed on other grounds, the Fourth Circuit held that the excrement incident was admissible because it was part of the original offense charged, even though it might form a separate indictable offense.²¹¹ *United States v. Two Eagle*, decided in 1980, represents a typical crime spree case in which a succession of arguably separate offenses are committed by the defendant.²¹² Two Eagle, a juvenile, was charged with assaulting one Douville on an Indian reservation with intent to do bodily harm. After beating Douville, Two Eagle stole Douville's car. At trial, Two Eagle objected that evidence indicating he was later recognized driving the stolen car constituted evidence of another crime. The Eighth Circuit affirmed Two Eagle's conviction as a juvenile offender, holding that Two Eagle's driving of the stolen car was so bound up with the crime charged as to be inseparable from it.²¹³ Such a series of transactions, it should be noted, would have been admissible under prior federal practice.²¹⁴

The interwoven or inseparable act exception to the propensity rule, when applied to overt acts in conspiracy cases, is logically part of the plan or design exception. Yet if unindicted overt acts of conspirators are part of the criminal combination and provable as part of the *res gestae* of the conspiracy, they also are admissible to show the nature and extent of the conspiracy.²¹⁵ *United States v. Torres* illustrates the problems caused by confusing these exceptions.²¹⁶ The defendants were charged with conspiracy to distribute cocaine. The overt act alleged was a single major sale of the drug. At trial, the government introduced evidence that the defendants had sold two samples of cocaine prior to making a final sale to government agents.²¹⁷ The defendants objected to admission of the two sample

211. *Id.* at 315-16.

212. 633 F.2d 93 (8th Cir. 1980).

213. *Id.* at 95-97.

214. *See* *Burcham v. United States*, 163 F.2d 761, 762 (D.C. Cir. 1947).

215. *See, e.g., United States v. Sonntag*, 684 F.2d 781, 787-88 (11th Cir. 1982) (former sales of drugs in drug conspiracy case admissible as part of *res gestae*); *United States v. Brugman*, 655 F.2d 540, 544-45 (4th Cir. 1981) (unindicted overt act in drug conspiracy held admissible because so bound up with crime as to be inseparable); *United States v. Killian*, 639 F.2d 206, 211-12 (5th Cir. 1981) (pistols, cocaine and amphetamines found during consent search of drug case after arrest admissible as inseparable from conspiracy charge).

216. 685 F.2d 921 (5th Cir. 1982).

217. *Id.* at 923.

transactions, arguing they were evidence of other crimes.²¹⁸ The Fifth Circuit affirmed the defendants' convictions, holding that these sample sales were so inextricably intertwined with the overt act of sale alleged in the indictment that they could not be separated. The government, the court said, showed that the sales were preliminary steps to the final purchase and thus were not "other acts."²¹⁹ The court also asserted that it made no difference that the indictment did not allege these sales as overt acts of the conspiracy. Finding that the probative value of the sample sales exceeded whatever prejudice they caused to the accused, the court held them admissible.²²⁰ If the inseparable act doctrine is applied to conspiracy cases such as *Torres*, it is in fact includible within the *Rule in Horne Tooke's Case* which, when a criminal combination is established by other means, permits further proof of a criminal combination by acts of the conspirator showing the nature and extent of that combination.²²¹ Consequently, when this inseparable crime exception is applied to conspiracies, it constitutes in reality a branch of the plan or design exception to the propensity rule.

Similarly, when applied to allow admission of extrinsic criminal acts of a single defendant or of an accessory and principal, the inseparable offense exception actually may be simply a way of admitting those extrinsic criminal acts to show the nature of a criminal plan or design. Cases such as *United States v. Gibson*, a kidnap case in which the government put on evidence tending to show that after the kidnapping one victim had been assaulted sexually and the other robbed of a calculator, both being threatened with death if they called the police, seem to be of this type.²²² Post-1975 decisions indicate that extrinsic act evidence in a number of similar one-person criminal enterprise cases has been rationalized under the rule of the interwoven offense cases.²²³

218. *Id.* at 924.

219. *Id.*

220. *Id.* at 925.

221. *Rex v. Horne Tooke*, 25 St. Tr. 1, 27, 455 (1794). For a discussion of the *Rule in Horne Tooke's Case*, see *Reed, Propensity I*, *supra* note 1, at 718. For a discussion of the American common law origins of the plan or design exception, see *id.* at 726. The modern rule, as defined by the New York Court of Appeals in *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286 (1901), is discussed in *Reed, Propensity I*, *supra* note 1, at 733-34.

222. 625 F.2d 887, 888-89 (9th Cir. 1980).

223. See, e.g., *United States v. Means*, 695 F.2d 811, 816-17 (5th Cir. 1983) (earlier similar mail fraud scheme, admitted to show motive, intent and common plan, found so interwoven with later bank fraud scheme as to be inseparable); *United States v. Costa*, 691 F.2d 1358, 1360-61 (11th Cir. 1982) (earlier cocaine deal by defendant admitted as inextricably bound up with later crime).

Finally, in a few cases, courts have employed the interwoven crime exception to deal with special situations, such as that presented in *United States v. Vincent*.²²⁴ After his arrest for making a threat on the President's life and assaulting a federal officer, the defendant was taken to a mental institution. While under observation there, he continued to utter threats against the President. At trial, these threats formulated subsequent to the defendant's arrest were introduced by the government in its case-in-chief, although they did not figure in the indictment. The defendant objected to this evidence on the ground that it was simply proof of his bad character. The Sixth Circuit sustained Vincent's conviction, finding the later threats to be part of a common criminal plan or design and thus relevant under a *res gestae* theory to prove the crime charged.²²⁵ The court expressed reservations about the use of these later threats but held the trial court had not abused its discretion in allowing the testimony.²²⁶ However, because the identity of the accused was not in issue, and because the accused did not deny his intent to make the threats, the accused's later, similar acts do not appear to have been relevant to any issue in the case. The criminal plan or design had been terminated by arrest and confinement at the time the later threats were uttered.

7. Opportunity

Rule 404(b) lists "opportunity" and "absence of mistake or accident" as separate exceptions to the propensity rule. Prior discussion of the intent exception considered the category of "absence of mistake or accident."²²⁷ The notion of a specific exception for extrinsic criminal acts showing opportunity does not seem to have appeared in any pre-Rules works by commentators.²²⁸ The "opportunity" exception to the propensity rule seems to be a way of allowing in-

224. 681 F.2d 462 (6th Cir. 1982).

225. *Id.* at 465. The court said:

We have considered the Rule 404(b) issue carefully and conclude, first, that evidence of Vincent's post-arrest conduct was properly admissible on a *res gestae* theory Vincent's post-arrest statements were "evidence of other crimes closely related in both time and nature to the crime charged," which establish "the common scheme or history of the crime of which the other crimes constitute a part."

Id. (quoting *United States v. McDaniel*, 574 F.2d 1224, 1227 (5th Cir. 1978)).

226. *Id.*

227. See Reed, *Propensity II*, *supra* note 1, at 305-06.

228. See C. WRIGHT & K. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE* § 5241 (1978). Wigmore also described a "capacity" exception for receiving extrinsic criminal act evidence. See J. WIGMORE, *CODE OF EVIDENCE* §§ 386, 400 (3d ed. 1942).

production of extrinsic criminal acts to prove that the accused had the capacity to commit the crime charged.²²⁹ The category of “opportunity” evidence reflecting capacity to commit the crime may include evidence tending to prove the requisite *mens rea* or evidence showing the accused had access to the physical materials needed to commit the crime, such as contraband drugs or weapons.²³⁰ It is thus necessary to limit this exception to evidence that is not admissible under other theories, such as the intent or knowledge exception, or to rebut an allegation of lack of *mens rea*. If the opportunity exception represents anything unique in the Rule 404(b) scheme, it represents the government’s right to prove that a defendant had access to the physical means of committing the crime charged. However, “opportunity” in this sense may simply be another formulation of the criminal plan or design exception.

The recent series of opportunity cases seems to have begun with *United States v. DeJohn*, in which the accused was charged with making and uttering forged endorsements on United States Treasury obligations.²³¹ At trial, the government called a YMCA security guard, who testified he had found DeJohn rifling the mailboxes of persons living at the YMCA. The government also called a city police officer who, after apprehending the accused for an unrelated offense, had found in the defendant’s pocket a United States Treasury check made out to another person.²³² Both incidents proved that DeJohn had access to the physical means of uttering forged Treasury obligations. In its opinion sustaining the defendant’s conviction, the Seventh Circuit asserted in a footnote that normally prohibited evidence of prior criminal behavior, namely mail theft and possession of a stolen United States Treasury check, was relevant to show the defendant’s opportunity to utter forged obligations.²³³

229. See C. WRIGHT & K. GRAHAM, *supra* note 228, at § 5241.

230. See *United States v. Green*, 648 F.2d 587, 591-93 (9th Cir. 1981) (evidence of defendants’ prior association with their victim in manufacturing LSD relevant to show access to LSD components planted by defendants at victim’s laboratory); see also *Government of Virgin Islands v. Joseph*, 685 F.2d 857, 860-61 (3d Cir. 1982) (testimony that defendant’s girlfriend saw a large black gun under defendant’s front seat admissible to show opportunity to commit armed robbery, rape and assault with deadly weapon).

231. 638 F.2d 1048 (7th Cir. 1981).

232. *Id.* at 1051.

233. *Id.* at 1052 n.4. An earlier Seventh Circuit decision, *United States v. McPartlin*, 595 F.2d 1321 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979), gave some support to the view that extrinsic crimes are admissible to prove opportunity. However, the *McPartlin* court sustained the defendant’s conviction for conspiracy to use interstate communications facilities to commit bribery on the ground that the evidence of extrinsic bribe giving was relevant to proving criminal intent. *Id.* at 1343.

The opportunity exception is illustrated in *United States v. Green*.²³⁴ The defendants had been charged in a California criminal action with making LSD. They reached a tentative arrangement with the state concerning leniency in exchange for information. They hired a man named Shepard to spy on Allard, the victim and the state's chief witness, and to plant LSD in a laboratory where Allard worked. The defendants' attempt to frame Allard was discovered, and they were indicted for conspiracy to obstruct justice and to violate Allard's civil rights.²³⁵ Allard was called as a witness in the federal suit and testified that the Greens had made LSD for him in 1971. Shepard (the "spy") and his wife testified concerning the Greens' tableting and marketing of LSD between 1971 and 1973.²³⁶ Although the government proposed the evidence as relevant to show plan, motive and knowledge, the Ninth Circuit thought that the evidence was more properly admissible to show defendants' opportunity, as chemists and former manufacturers of LSD, to organize the frame up of another chemist.²³⁷ The court described the opportunity exception as allowing evidence of criminal capacity, citing *McPartlin* as authority for its position.²³⁸ Following the Ninth Circuit rule which characterizes Rule 404 as inclusionary rather than exclusionary, the court held that the evidence was relevant and admissible unless its prejudice to the defendants outweighed its probative value.²³⁹ Finding that not all of this evidence was so probative as to outweigh its prejudicial effect, the court reversed, instructing the lower court to restrict on retrial the scope of the evidence admitted and to give a proper limiting instruction.²⁴⁰

The decision was significant for its discussion of the opportunity exception. After *Green*, two other courts employed the opportunity exception to admit extrinsic criminal evidence. The Third Circuit held that testimony by an accused's girlfriend that she saw a black gun under the front seat of her boyfriend's car was relevant to show his opportunity to use the gun to commit assault, armed robbery and rape, and that, at worst, admission of the testimony was harmless error.²⁴¹ In a labor racketeering case, the Fourth Circuit affirmed

234. 648 F.2d 587 (9th Cir. 1981).

235. *Id.* at 589-90.

236. *Id.*

237. *Id.* at 591-92.

238. *Id.* at 592.

239. *Id.* at 591.

240. *Id.* at 593; *see also id.* at 597 (erroneous admission of evidence cited as prime reason for reversing and remanding).

241. *Government of Virgin Islands v. Joseph*, 685 F.2d 857, 860-61 (3d Cir. 1982).

the defendant's conviction, finding no error in the trial court's allowing the government to introduce two extrinsic instances of the defendants' taking payoffs from employers.²⁴² The court below admitted the two transactions on the ground that they showed the defendants' opportunity to commit the crimes charged, although the payoffs had been struck from the indictment.²⁴³ The future course of this exception has not been charted. Because it bears on the availability of the physical means to commit a crime and permits proof of access to those means, it simply may be a spin-off from the criminal enterprise theory which permits proof of a plan or design for continuing criminal activity. The close resemblance of the opportunity exception to the criminal enterprise theory is particularly striking in conspiracy cases.

8. Consciousness of Guilt

Before the adoption of the Federal Rules of Evidence, no case had established an exception to the propensity rule allowing the admission of extrinsic, later criminal acts undertaken by the accused in an attempt to sabotage his or her prosecution, although there was precedent for such use in contemporary state criminal practice.²⁴⁴ In a nineteenth-century federal case, the Supreme Court permitted introduction of a false statement made by the defendant to exculpate himself as an exception to the hearsay rule.²⁴⁵ In 1980, the Ninth Circuit adopted this "admission of guilt by later acts" doctrine and permitted proof of subsequent breach of custody as establishing consciousness of guilt, although the breach of custody constituted a separate crime.²⁴⁶ In a more unusual case, *United States v. Monahan*, the First Circuit upheld admission of an earlier conviction for obstruction of justice in a prosecution for unlawful possession of cocaine with intent to distribute.²⁴⁷ In sustaining the conviction,

242. *United States v. Billups*, 692 F.2d 320, 328-29 (4th Cir. 1982). The Fourth Circuit in *Billups*, in response to the defendant's argument that the payoffs were inadmissible as evidence of opportunity because opportunity had been conceded, held them nevertheless relevant as showing development of a plan or scheme. *Id.* at 328.

243. *Id.* at 328.

244. See McCORMICK, *supra* note 114, at § 190, 451 n.48 (citing *People v. Gambino*, 12 Ill. 2d 29, 145 N.E.2d 42 (1957) in which prisoner's escape from custody for the crime charged was admitted as admission of guilt by conduct).

245. *Wilson v. United States*, 162 U.S. 613, 620-21 (1896) (defendant's false explanation of incriminating circumstances admissible to show admission of guilt).

246. *United States v. Sims*, 617 F.2d 1371, 1378-79 (9th Cir. 1980) (fact that defendant checked out of halfway house prior to bank robbery and never returned admissible as evidence of consciousness of guilt).

247. 633 F.2d 984, 985 (1st Cir. 1980).

the First Circuit noted that the intimidation of witnesses involved in the obstruction of justice case was at the same time evidence that Monahan was conscious of his guilt in the cocaine case.²⁴⁸ Two years later, the First Circuit found the spontaneous utterance made by a defendant after a federally administered lie detector test to be admissible in a bank robbery case on the theory that the utterance proved consciousness of guilt.²⁴⁹ The utterance in question was a threat to kill the witness who identified him.²⁵⁰

These consciousness-of-guilt incidents constitute a clearly criminal act of the accused that is separate from and dissimilar to the crime charged in the indictment. They present a situation that is not uncommon in hearsay cases. Hearsay evidence tending to show the defendant's attempt to tamper with the case against him or her has been admitted on the theory that it constitutes an admission of his or her guilt.²⁵¹ However, because the main effect of admitting these post-act attempts will be to suggest to the jury that the defendant has a propensity for wrongdoing, they will tend to convict the defendant on his or her evil character. The pre-Federal Rules of Evidence criminal cases that dealt with the hearsay exception for such spoliatory acts did not consider the impact of the evidence under the propensity rule.²⁵² The danger in using later acts of tampering to infer a defendant's consciousness of guilt is that the balancing test required by Rule 403 is not an effective limit to the introduction of such acts. The ineffectiveness of Rule 403 arises from the fact that prejudice to the accused and the probative value of the later cover up are equally substantial.

9. Impeachment by Specific Instances of Bad Conduct

Pre-1975 federal case law strictly prohibited the use of a defendant's prior criminal activity to attack the credibility of the defendant as a witness unless that activity had resulted in a conviction.²⁵³ If the defendant took the stand, a majority of circuits permitted the government to cross-examine the defendant on his or her prior in-

248. *Id.*

249. *United States v. Gonsalves*, 668 F.2d 73, 74-75 (1st Cir.), *cert. denied*, 456 U.S. 909 (1982).

250. *Id.* at 74.

251. *See* MCCORMICK, *supra* note 114, § 273 at 660-61 (1972) (description of hearsay exception covering admissions of guilt by conduct).

252. *See, e.g.,* *Wilson v. United States*, 162 U.S. 613, 620-21 (1896); *United States v. Wilkins*, 385 F.2d 465, 472 (4th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968); *Rizzo v. United States*, 304 F.2d 810, 830 (8th Cir. 1962).

253. *Reed, Propensity II*, *supra* note 1, at 320.

stances of bad conduct.²⁵⁴ A minority refused to permit this line of cross-examination.²⁵⁵ If the defendant chose to call character witnesses, the government, under the *Michelson* rule,²⁵⁶ could cross-examine these witnesses on specific instances of the defendant's bad conduct not charged in the indictment for the purpose of ascertaining the basis of their reputation evidence.²⁵⁷ Finally, under the restrictions on impeachment of defendants generated by the *Luck-Gordon*²⁵⁸ rule, a defendant who chose to take the stand could be impeached by evidence of prior conviction for a crime relating to the defendant's ability to tell the truth.²⁵⁹

Two of the new Federal Rules of Evidence cover impeachment of witnesses. Rule 609 incorporates the general rules for admission of previous records of conviction against a defendant who takes the stand.²⁶⁰ Rule 608 sets forth the general standards for admissibility of extraneous criminal acts not resulting in a conviction.²⁶¹

254. *Id.*

255. *Id.*

256. *Michelson v. United States*, 335 U.S. 469, 485 (1948); see Reed, *Propensity II*, *supra* note 1, at 321-22.

257. Reed, *Propensity II*, *supra* note 1, at 321-22.

258. *Gordon v. United States*, 383 F.2d 936 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1829 (1968); *Luck v. United States*, 348 F.2d 763 (D.C. Cir. 1965).

259. Reed, *Propensity II*, *supra* note 1, at 320-21.

260. FED. R. EVID. 609(a) provides that:

(a) *General rule.* For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Subsection (b) limits the use of prior convictions more than ten years old to impeach a witness and requires the court to make a specific finding that the probative value of the conviction outweighs its prejudice as regards credibility. The proponent is required to give notice to the adverse party if it desires to use such a conviction. Subsection (c) precludes the use of any prior crime for impeachment of a witness if the witness has been pardoned, or the conviction annulled. Juvenile adjudications ordinarily are excluded for purposes of impeachment by subsection (d) unless (1) the witness is not the accused, (2) the case is criminal, and (3) the offense on which the juvenile conviction is based would have been admissible as an impeaching conviction, and justice requires the admission of the impeaching juvenile conviction. A criminal conviction on appeal may also be used to impeach according to subsection (e).

261. FED. R. EVID. 608(b) provides:

(b) *Specific instances of conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting his 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 or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) untruthfulness of another

Rule 609 incorporates most of the safeguards set out in the *Luck-Gordon* rule.²⁶² The testifying defendant's previous record of conviction is not automatically admissible. Courts have developed requirements for determining the admissibility of a defendant/witness's prior convictions for purposes of attacking his credibility. The trial judge must give due consideration to the length of time since conviction, the nature of the crime evidenced by the prior conviction and its similarity to the crime charged.²⁶³ Moreover, the defendant is protected from surprise introduction of very stale criminal convictions. Rule 609(b) requires the government to notify the defendant prior to trial if it intends to impeach the defendant by convictions more than ten years old.²⁶⁴ In any event, Rule 609(a) requires that the court make an explicit finding that the prior conviction's probative value outweighs its prejudice to the accused.²⁶⁵

Rule 608, on the other hand, does not offer so comprehensive a set of safeguards with respect to prior bad acts not constituting convictions. Rule 608(b) did retain the prior federal rule prohibiting extrinsic evidence of prior instances of misconduct not resulting in conviction, but the rule permits the government to cross-examine freely a criminal defendant or that defendant's character witnesses about prior acts of misconduct relating to the defendant's character for truthfulness or untruthfulness.²⁶⁶ Because Rule 608(b) does not contain any standard limiting admissibility of evidence of the defendant's extrinsic criminal activity, so long as that activity relates to credibility, such evidence is subject only to the Rule 403 balancing test. Consequently, Rule 608(b) may have a greater chilling effect on the defendant's defense than Rule 609. Rule 608 also offers the government a means of bypassing the stricter standards of Rule 609 for admissibility of prior convictions.

witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self incrimination when examined with respect to matters which relate only to credibility.

The advisory committee notes to Rule 608(b) indicate that the court should find that the evidence is corroborative of truthfulness or untruthfulness and that its prejudice does not outweigh its probative value. FED. R. EVID. 608 advisory committee note.

262. See Reed, *Propensity II*, *supra* note 1, at 321 & n.157.

263. For a judicious explanation of the probative value and prejudice considerations taken into account by an appellate court on two convictions for a similar offense: sodomy, see *United States v. Beahm*, 664 F.2d 414, 417-19 (4th Cir. 1981).

264. For a summary of FED. R. EVID. 609(b), see *supra* note 260.

265. For the text of FED. R. EVID. 609(a), see *supra* note 260.

266. For the text of Rule 608(b), see *supra* note 261.

Federal decisions since the adoption of Rule 608 show too much diversity to form a general pattern. For example, in *United States v. Benedetto*, the defendant was charged with soliciting bribes in connection with his duties as meat inspector.²⁶⁷ In its case-in-chief, the government introduced the testimony of two witnesses from whom Benedetto had solicited bribes. The two witnesses were meat sellers located outside the venue of the trial court, and the acts of bribery had not been included in Benedetto's indictment. Benedetto later took the stand and denied taking bribes. The Second Circuit affirmed Benedetto's conviction, finding the similar bribe solicitations admissible to impeach his credibility as a witness and perhaps also as evidence of a continuing plan.²⁶⁸ The court also noted that the government had introduced the prior bribes in its case-in-chief as anticipatory impeachment evidence.²⁶⁹ The court expressed certain misgivings on this point but did not consider it controlling, given the general context.²⁷⁰ No other circuits thus far have authorized anticipatory impeachment of the defendant.

The problem posed by cross-examination of the defendant concerning prior, similar criminal acts not amounting to conviction has not been solved by case law under Rule 608(b). The few recent federal decisions relative to impeachment of defense character witnesses hold to the *Michelson* rule and allow the prosecution, on cross-examination of defendant's reputation witnesses concerning the basis of their opinion, to question them about instances of the defendant's prior misconduct.²⁷¹ It may be too soon to condemn Rule 608(b) for allowing the government to introduce evidence of similar criminal conduct without the safeguards required by Rule 609 or Rule 404. However, the cases indicate that federal courts will be lenient in allowing the introduction of evidence of prior misconduct on cross-examination of a criminal defendant or the

267. 571 F.2d 1246, 1247 (2d Cir. 1978).

268. *Id.* at 1249-51.

269. *Id.* at 1250.

270. *Id.*

271. *E.g.*, *United States v. Bermudez*, 526 F.2d 89, 95 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976). However, in *United States v. Pintar*, 630 F.2d 1270, 1283-84 (8th Cir. 1980), the court held that the government could not, on redirect, inquire into the basis of its own witness's belief that the defendant was untrustworthy, in an attempt to rehabilitate the witness after defense counsel had shown the prosecution witness's bias and prejudice against the defendant, if that inquiry led to giving other, similar criminal acts of the defendant. *Cf. United States v. Holladay*, 566 F.2d 1018, 1019-20 (5th Cir.) (government witness allowed to testify on redirect that prior testimony was inconsistent because defendant intimidated witness to lie at trial), *cert. denied*, 439 U.S. 831 (1978).

defendant's character witnesses.²⁷² Although one may argue that admission of a previous conviction should be scrutinized more strictly than admission of a prior arrest or prior instance of criminal misconduct, the prejudicial effect may be considered nearly equivalent in both cases.

B. Inclusionary Rule v. Exclusionary Rule

The somewhat ambiguous formulation of Rule 404(b) left open the question of whether the federal propensity rule should be treated as an inclusionary rule authorizing the admission of extrinsic criminal acts unless the sole reason for their admission is to prove the defendant's propensity to commit the crime charged. The advisory committee comments indicate the drafters' apparent intent that the rule be treated as inclusionary,²⁷³ as does the House Judiciary Committee report.²⁷⁴ Prior federal practice had split into a majority and minority position. The majority of the circuits had held the rule to be an exclusionary rule, permitting no introduction of extrinsic criminal acts of the defendant unless the extrinsic act was offered under one of the exceptions to the propensity rule.²⁷⁵ A minority of circuits had begun to treat the propensity rule as inclusionary

272. Several factors suggest this result: first, the rule itself has no procedural safeguards, other than the court's discretion and the fact that the prior bad acts must be offered to prove the lack of credibility of the witness attacked; second, the rule does not really reach the *Michelson* situation in which the basis for a reputation witness's opinion concerning the defendant's good character is examined. Rule 404(a) (1) permits the accused to offer evidence of good character and allows the prosecution to rebut the same. Rule 404(b) read in conjunction with Rule 404(a) (1) seems to authorize admission of prior instances of bad conduct in cross-examination of defense character witnesses under the "knowledge" exception to the propensity rule.

273. The committee stated:

Subdivision(b) deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. Consistently with that rule, evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition. In this situation the rule does not require that the evidence be excluded. No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under rule 403.

FED. R. EVID. 404 advisory committee note.

274. H.R. REP. No. 650, 93d Cong., 2d Sess., (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051.

275. Reed, *propensity II*, *supra* note 1, at 304 n.38.

before 1975.²⁷⁶ The more prestigious commentators consistently had favored an inclusionary relevance rule, one that would allow admission of extrinsic criminal acts of the accused for any purpose other than to prove that the actor acted in conformity with his or her criminal character.²⁷⁷ The difference of opinion resulted from distinct views about the ends of the criminal justice process. The inclusionary rule, favored by Dean Wigmore in his earliest writing, presented the prosecutorial point of view: it emphasized the logical relationship between the accused's bad character and later or earlier acts in conformity with that bad character.²⁷⁸ The exclusionary rule represented the defendant's point of view, a view ostensibly faithful to the constitutional due process safeguards of the fifth and sixth amendments that guarantee a fair trial to each criminal defendant. The exclusionary approach was rooted also in the fundamental American notion that persons are incarcerated for committing criminal acts, not as a consequence of their evil dispositions.

Rule 404(b) has been the occasion for several circuits to change from an exclusionary viewpoint to an inclusionary viewpoint with respect to other criminal act evidence.²⁷⁹ Before 1978, the Fifth Circuit applied strict principles in determining the admissibility of extrinsic criminal acts in criminal trials. First, the act had to come within one of the classical exceptions to the propensity rule. Second,

276. *Id.* at 304 n.39.

277. See MCCORMICK, *supra* note 114, § 190 at 452-53:

There is an important consideration in the practice as to the admission of evidence of other crimes which is little discussed in the opinions. This is the question of rule versus discretion. Most of the opinions ignore the problem and proceed on the assumption that the decision turns solely upon the ascertainment and application of a rule. If the situation fits one of the classes wherein the evidence has been recognized as having independent relevancy, then the evidence is received, otherwise not. This mechanical way of handling these questions has the advantage of calling on the judge for a minimum of personal judgment. But problems of lessening the dangers of prejudice without too much sacrifice of relevant evidence can seldom if ever be satisfactorily solved by mechanical rules. And so here there is danger that if the judges, trial and appellate, content themselves with merely determining whether the particular evidence of other crimes does or does not fit in one of the approved classes, they may lose sight of the underlying policy of protecting the accused against unfair prejudice. The policy may evaporate through the interstices of classification.

Id. See generally Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 1034-36 (1938).

278. See 1 J. WIGMORE, EVIDENCE § 305 at 620 (2d ed. 1923) for an unadulterated statement of the author's preference for admissibility of character evidence.

279. Since 1975, the First, Fourth, Fifth, Ninth, Tenth and Eleventh Circuits have accepted an inclusionary formula for extrinsic criminal acts. See *infra* notes 285-92.

the extrinsic act had to be essentially similar to the crime charged. Third, the act had to be established by clear and convincing evidence.²⁸⁰ In *United States v. Beechum*, the Fifth Circuit abandoned its earlier position and adopted a two-step rule for the admission of extrinsic criminal acts.²⁸¹ Under *Beechum*, the trial court first must determine that a proffered extrinsic crime or wrong is relevant to an issue other than the defendant's character. Then the court must find that the probative value of the extrinsic evidence substantially outweighs the prejudice it might cause to the defendant and that the other requirements of Rule 403 are met.²⁸² The Fifth Circuit also required that in the event the government offered to introduce an offense as evidence of intent, some similarity must be shown between the intent required to commit the extrinsic offense and the intent required to commit the offense charged.²⁸³ Since *Beechum*, the Fifth Circuit consistently has used this inclusionary test for admitting extrinsic criminal acts.²⁸⁴ The Eleventh Circuit inherited the *Beechum* rule and has followed it in deriving a test for admission of a defendant's extrinsic criminal acts.²⁸⁵

280. *United States v. Broadway*, 477 F.2d 991, 994-95 (5th Cir. 1973). The original *Broadway* test required that the physical elements of the extrinsic offense include the essential physical elements of the offense charged. Second, the government was required to prove each of the physical elements of the extrinsic offense by plain, clear and conclusive evidence. *Id.* In a later decision, *United States v. San Martin*, 505 F.2d 918, 921 (5th Cir. 1974), "conclusive" was changed to "convincing."

281. 582 F.2d 898 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979).

282. *Id.* at 911. The court was influenced by a student note which had appeared in the Northwestern University Law Review. *See Note, Rule 404(b) Other Crimes Evidence: The Need for a Two Step Analysis*, 71 NW. U.L. REV. 636 (1976). 582 F.2d at 911.

283. 582 F.2d at 911. The court stated: "It is crucial to distinguish the use of extrinsic offense evidence to prove issues other than intent. In other contexts different standards apply" *Id.* at 911 n.15. The court went on to elaborate a complete theory of the propensity rule covering most of the common exceptions to the exclusionary version of the rule, showing its standards for admission or rejection of other crimes under each traditional exception. *Id.* at 911-12, 912 n.15.

284. *See, e.g., United States v. Clemons*, 676 F.2d 122, 123 (5th Cir. 1982); *United States v. Guerrero*, 650 F.2d 728, 733 (5th Cir. 1981); *United States v. Satterfield*, 644 F.2d 1092, 1094 (5th Cir. 1981).

285. *United States v. Dothard*, 666 F.2d 498, 501 (11th Cir. 1982). The court asserted, following *Beechum*:

The prerequisites to the admissibility of extrinsic act evidence under rule 404(b) calls [sic] for a two-step analysis: (1) the extrinsic act evidence must be relevant to an issue other than the defendant's character, and (2) the evidence must possess probative value that is not substantially outweighed by the danger it presents of "unfair prejudice, confusion of the issues, or misleading the jury, by considerations of undue delay, waste of time or needless presentation of cumulative evidence." *United States v. Guerrero*, 650 F.2d 728, 733 (5th Cir. 1981) (citing *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979)); *see Fed. R. Evid.* 403

666 F.2d at 501.

Thus, the First,²⁸⁶ Second,²⁸⁷ Fourth,²⁸⁸ Fifth,²⁸⁹ Ninth,²⁹⁰ Tenth²⁹¹

286. See *United States v. Moccia*, 681 F.2d 61, 63 (1st Cir. 1982). The court's essay on the propensity rule is worth repeating here:

This rule codifies the common law doctrine forbidding the prosecution from asking the jury to infer from the fact that the defendant has committed a bad act in the past, that he has a bad character and therefore is more likely to have committed the bad act now charged. Although this "propensity evidence" is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance Where the evidence has some "special" probative value, however—where, for example, it is relevant to something other than mere "character" or "propensity"—it may be admitted. The trial judge then must weigh the special relevance against the prejudicial risk, taking into account the likely hostile jury reaction that underlies the common law rule.

Id. (citations omitted).

287. See, e.g., *United States v. D'Auria*, 672 F.2d 1085 (2d Cir. 1982); *United States v. Margiotta*, 662 F.2d 131 (2d Cir. 1981).

288. See *United States v. Johnson*, 634 F.2d 735, 737 (4th Cir. 1980). The court said:

The first sentence of Rule 404(b) brings forward the traditional rule that extrinsic acts evidence is inadmissible solely to prove that defendant is a bad character and therefore, likely to have committed the crime charged. Extrinsic acts evidence, however, may be admissible for other purposes including those listed in Rule 404(b). The Rule's list is merely illustrative, not exclusive.

Rule 404(b) of course commits to trial judge discretion the determination whether extrinsic act evidence shall be admitted under its second sentence. In exercising that discretion the judge first must determine if the proffered evidence is relevant to an issue other than the accused's character. If so, then the trial judge must balance the evidence's probative value against the dangers of undue prejudice aroused by this form of evidence. . . .

Id. (citations omitted).

289. See, e.g., *United States v. Guerrero*, 650 F.2d 728, 733 (5th Cir. 1981); *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979).

290. See, e.g., *United States v. Diggs*, 649 F.2d 731, 737 (9th Cir. 1981); *United States v. Sangrey*, 586 F.2d 1312, 1314 (9th Cir. 1978). The *Diggs* court summed up the Ninth Circuit propensity rule as follows:

This circuit has adopted the position that Rule 404(b) is an inclusionary rule—i.e., evidence of other crimes is inadmissible under this rule only when it proves nothing but the defendant's criminal propensities. Rule 403 permits the introduction of relevant evidence of other crimes to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, and predisposition in entrapment cases, so long as its probative value is not outweighed by its prejudicial effect. The district court is accorded wide discretion in deciding whether to admit such evidence.

649 F.2d at 737 (citations omitted).

291. *United States v. Tisdale*, 647 F.2d 91, 93 (10th Cir. 1981); *United States v. Nolan*, 551 F.2d 266, 270-71 (10th Cir. 1977). The *Nolan* court outlined its standards for admission of extrinsic acts in the following language:

The general rule is that evidence of illegal activities other than those charged is ordinarily inadmissible. There are, however, several well-recognized exceptions to the rule, including receipt of such evidence in order to prove motive, opportunity, identity, absence of mistake or accident.

We note that Rule 404(b) *supra* is not exclusionary in the sense of the above rule of our Court. Rather, it would allow the admission of uncharged illegal acts unless

and Eleventh²⁹² Circuits have in one way or another adopted the view that Rule 404(b) is an inclusionary rule permitting introduction of extrinsic criminal acts to establish a relevant point other than the defendant's propensity for committing crimes. Judicial statements of the rule run from the elaborate considerations of common law character rules in *United States v. Moccia*²⁹³ to the tart statement by the Ninth Circuit in *United States v. Diggs* that "this circuit has adopted the position that Rule 404(b) is an inclusionary rule—i.e., evidence of other crimes is inadmissible under this rule only when it proves nothing but the defendant's criminal disposition."²⁹⁴ The practical effect of these judicial declarations as to the scope of the propensity rule is that any extrinsic criminal act of the accused relevant to something besides the defendant's evil tendencies is admissible, subject, however, to the balancing test of Rule 403.

Despite this change in the views of the majority of the federal court of appeals, the District of Columbia,²⁹⁵ Seventh²⁹⁶ and Eighth

the only purpose for their admission is to prove the criminal disposition of the defendant. We hold that under either rule, however, the evidence of Nolan's prior conviction is admissible.

551 F.2d at 271 (citations omitted).

292. See *supra* note 285.

293. 681 F.2d 61, 63 (1st Cir. 1982); see *supra* note 286.

294. 649 F.2d 731, 737 (9th Cir. 1981); see *supra* note 290.

295. *United States v. Foskey*, 636 F.2d 517, 523-24 (D.C. Cir. 1980); *United States v. Day*, 591 F.2d 861, 870-71 (D.C. Cir. 1978); *United States v. James*, 555 F.2d 992, 998-99 (D.C. Cir. 1977). The *Foskey* court summed up the circuit's viewpoint as follows: It is fundamental to American jurisprudence that "a defendant must be tried for what he did, not for who he is." That precept is, as the Fifth Circuit noted in *Myers*, "[a] concomitant of the presumption of innocence." . . . Therefore, evidence of a defendant's prior "bad acts" is excluded when its sole tendency is to prove that the defendant is a person of bad character and thus predisposed to commit the crime for which he is on trial. Despite the inherently damaging nature of bad acts evidence, it may be admissible to show a material issue in the case such as motive, opportunity, intent, identity, or absence of mistake or accident. Unless the Government can establish the relevancy of the evidence to some such issue in the criminal trial, the evidence must be excluded.

636 F.2d at 523 (citations omitted). The court went on to suggest that the Advisory Committee's notes on Rule 404, borrowing from McCormick's language relative to no mechanical solution, do not legislate automatic admissibility of extrinsic bad acts of the accused. *Id.* The D.C. Circuit thus comes closer to capturing Dean McCormick's original point of view than do the "inclusionary rule" circuits.

296. The leading Seventh Circuit case on the propensity rule remains *United States v. Fierson*, 419 F.2d 1020, 1022 (7th Cir. 1969), decided before the adoption of the Federal Rules of Evidence. See *supra* note 46. Although the propensity rule has come up since *Fierson*, the last case to pass on it, *United States v. DeJohn*, 638 F.2d 1048, 1052 (7th Cir. 1981), gave a very confusing formula for evaluating the admissibility of two extrinsic criminal acts of the accused. First, it set out in the text an extremely loose formulation of the rule. Then, in a footnote, it failed to apply the *Fierson* rule, reaffirmed in *United*

Circuits²⁹⁷ continue to look upon Rule 404(b) as embodying the traditional exclusionary rule with its more or less explicit list of identifiable exceptions. For example, the test ultimately adopted by the Eighth Circuit in *United States v. Frederickson*²⁹⁸ for admission of other criminal acts contains the following requirements:

- (1) a material issue on which other crimes evidence may be admissible must have been raised;
- (2) the proffered evidence must be relevant to that issue;
- (3) the evidence of the other crimes must be clear and convincing; and
- (4) on such issues as intent, knowledge, or plan, the other crimes evidence must relate to wrongdoing similar in kind and be reasonably close in time to the crimes charged at trial.²⁹⁹

In these three circuits, the judiciary is especially concerned with the impact of extrinsic criminal act evidence on the criminal trial process itself. While not raising the propensity rule to the level of a statement of procedural due process of law guaranteed by the fifth amendment, these circuits have shown concern for the rights of the accused to be tried for the precise offense charged.³⁰⁰ The Third Circuit seems to have opted for an inclusionary approach.³⁰¹ However, the most important Third Circuit decision, *United States v. Long*, is more concerned with the effect of Rule 403 than with Rule 404(b): it dwells on the tendency of trial courts to be lenient

States v. Feinberg, 535 F.2d 1004 (7th Cir.), *cert. denied*, 429 U.S. 929 (1976) after the adoption of the Federal Rules of Evidence, saying the *Fierson* rule did not apply to the case at bar because the extrinsic acts were introduced to show the opportunity of the defendant to commit the crime charged, rather than to show his knowledge or intent. *DeJohn*, 638 F.2d at 1052 n.4

297. *United States v. Frederickson*, 601 F.2d 1358, 1365 (8th Cir. 1979).

298. *Id.*

299. *Id.* at 1365. These requirements resemble pre-Federal Rules of Evidence criteria adopted by the Seventh Circuit. See *United States v. Fierson*, 419 F.2d 1020 (7th Cir. 1969).

300. This commentary is particularly true of the District of Columbia Circuit. In *United States v. DeLoach*, 654 F.2d 763, 764-65, 767 (D.C. Cir. 1980), the court was confronted with evidence showing that co-defendant Holland, charged with filling out spurious work certificates for Iranian immigrants, had falsified work certificates for other aliens in the past. The court was concerned with the fact that Holland claimed his errors were inadvertent and not part of a scheme involving co-defendant DeLoach as "broker." The court examined carefully the government's need for this kind of evidence and finally decided that with respect to proving intent and rebutting a claim of honest mistake, the great necessity for the prior acts of the accused outweighed their obvious prejudice. *Id.* at 767-70.

301. See *United States v. Long*, 574 F.2d 761 (3d Cir.), *cert. denied*, 439 U.S. 985 (1978). The court stated: "The draftsmen of Rule 404(b) intended it to be construed as one of 'inclusion' and not 'exclusion.'" *Id.* at 766.

in weighing probative value against prejudicial effect.³⁰² Finally, the Sixth Circuit has not yet indicated its position on the propensity rule.³⁰³ In *United States v. Ring*, decided before the adoption of the Federal Rules of Evidence, the Sixth Circuit appeared to authorize an inclusionary rule.³⁰⁴ Later cases such as *United States v. Reed* indicate the Sixth Circuit may apply other procedural requirements akin to those adopted in *Frederickson*.³⁰⁵

Despite the confusion among the circuits as to the course to be charted for admission of criminal defendants' extrinsic bad acts, a certain consensus does exist among the circuits concerning this type of evidence.

(1) All circuits accept the proposition that extrinsic criminal acts of the accused relevant only to demonstrate the evil character of the accused are inadmissible.³⁰⁶

(2) The circuits agree that in order to demonstrate criminal intent by means of extrinsic acts of the accused, the government must show that intent is a real issue either because there is a statutory requirement of some form of specific intent, or because the defense has denied criminal intent through claims of entrapment, excusable mistake or lack of requisite knowledge. Further, the extrinsic criminal act offered to show intent must have entailed criminal intent essentially similar to that required by the crime charged.³⁰⁷

(3) The circuits are in accord that overt acts constituting part of a criminal plan or enterprise are not separate crimes and should not be excluded by Rule 404(b), even if the acts are not included in the indictment. This holds true both for conspiracy cases³⁰⁸ and for one-person criminal enterprises involving no conspiracy.³⁰⁹

(4) The circuits substantially agree that the accused's extrinsic criminal acts may be used for the purpose of circumstantial identification of the accused as perpetrator of the crime charged if identity of the accused is a material issue and provided the extrinsic

302. The *Long* court was most concerned with requiring that the trial court make express findings under rule 403 relative to probative value as compared to prejudice *Id.*

303. See, e.g., *United States v. Reed*, 647 F.2d 678, 686-87 (6th Cir. 1981).

304. 513 F.2d 1001, 1004-05 (6th Cir. 1975). *Ring* was decided before the adoption of Rule 404(b), but it supports the Sixth Circuit's requirement that bad act evidence must be substantially similar and near in time to the crime charged in the indictment to show motive, intent or another exception to the propensity rule.

305. 647 F.2d 678, 686 (6th Cir. 1981).

306. See *supra* notes 273-92 and accompanying text.

307. See *supra* notes 44-138 and accompanying text.

308. See *supra* notes 139-57 and accompanying text.

309. See *supra* notes 158-67 and accompanying text and notes 209-226 and accompanying text.

criminal acts are so similar as to method of commission that they constitute the “signature” of the accused.³¹⁰

(5) The few circuits that have passed on the question do not exclude evidence of criminal acts not mentioned in the indictment and which gave the accused physical access to the materials used to perpetrate the crime that was charged.³¹¹

(6) If the defendant takes the stand in his or her own behalf, the defendant’s credibility is at issue and he or she may be cross-examined on specific instances of prior conduct relevant to showing the defendant’s untrustworthiness. Cross-examination of the defendant may cover prior convictions, prior arrests or prior bad acts, subject always to judicial weighing of probative value against prejudice to the accused.³¹²

(7) If the defendant calls character witnesses to present reputation evidence, the government may cross-examine the character witnesses on the basis for their evidence. Cross-examination may include inquiry into specific extrinsic criminal activity of the accused.³¹³

In summary, the circuits differ on the quantum of proof required to establish the existence of an extrinsic criminal act and upon the characterization of Rule 404(b) as inclusionary or exclusionary. They generally agree, nevertheless, that extrinsic criminal acts of an accused may be offered to prove intent, plan or design and identity of the accused and to impeach a witness’s veracity, subject to the limitations provided by Rule 403.

III. THE CONSTITUTIONAL RIGHT TO MAKE A MEANINGFUL DEFENSE AND RULE 404(B)

A. *The Right to Present a Meaningful Defense*

The revolutionary era constitutions of Pennsylvania, Delaware, North Carolina, New York, Vermont, Massachusetts, New Hampshire and Virginia all contained similar declarations concerning the rights of the accused at criminal trials.³¹⁴ Article 8 of the Virginia Declaration of Rights of 1776 is a fair specimen of these provisions:

310. See *supra* notes 177-203 and accompanying text.

311. See *supra* notes 168-75 and accompanying text.

312. See *supra* notes 254-72 and accompanying text.

313. See *supra* text accompanying note 271.

314. See Reed, *Propensity I*, *supra* note 1, at 721.

That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself, that no man be deprived of his liberty except by the law of the land, or judgment of his peers.³¹⁵

These declarations of rights of the accused were derived from the English Bill of Rights, the Treason Act of 1695 and statements contained in colonial charters.³¹⁶ The same provisions found their way into the fifth and sixth amendments to the United States Constitution.³¹⁷ In the early case of *United States v. Mills*, the Supreme

315. *Va. Declaration of Rights*, art. 8 (1776), reprinted in 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 235 (1971).

316. The historical origins of article 8 of the Virginia Declaration of Rights are not entirely clear. The 1641 Massachusetts Bay Colony Body of Liberties contained some of the same rights. See *Massachusetts Body of Liberties* (1641), reprinted in 1 B. SCHWARTZ, *supra* note 315, at 71, 74-77. Article 111 of the Carolina Charter of 1669, drawn by John Locke, protected trial by jury. See *Carolina Charter* (1669), reprinted in 1 B. SCHWARTZ, *supra* note 315, at 123. Chapter XVIII of the West Jersey Colony Charter of 1677 included a requirement of "notice" to persons accused of crimes concerning the courts where they were to appear and the persons bringing the suit, and Chapter XXII guaranteed jury trial rights in criminal trials. See *West Jersey Colony Charter* (1677), reprinted in 1 B. SCHWARTZ, *supra* note 315, at 127, 129. The "Laws Agreed Upon in England," which form a part of the Pennsylvania Frame of Government of 1682 guaranteed to colonists trial by jury in Sec. VIII, and Art. VI guaranteed defendants in all cases notice of the actions and the right to plead their case, either pro se "or, if unable, by their friends." See *Pennsylvania Frame of Government* (1682), reprinted in 1 B. SCHWARTZ, *supra* note 315, at 140, 141. The Pennsylvania Charter of Privileges of 1701 went further and, in Art. V, also guaranteed the right to produce witnesses and to be represented by counsel as well. See *Pennsylvania Charter of Privileges* (1701), reprinted in 1 B. SCHWARTZ, *supra* note 315, at 173. New York's 1683 Charter of Libertyes and Priviledges [sic] also guaranteed parties in criminal trials the right to a jury trial. See *Charter of Libertyes and Priviledges* (1683), reprinted in 1 B. SCHWARTZ, *supra* note 315, at 166. These charter provisions that preceded the Treason Act of 1695 support the argument in favor of an independent foundation for American claims to a right to be given notice of the crimes charged in advance of trial, to be confronted with the witnesses accusing one of wrong, to be tried by a jury of peers and to have the right to counsel at trial.

317. U.S. CONST. amend. V reads as follows:

No persons shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

U.S. CONST. amend. VI states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and

Court noted that an indictment must state the charges against a defendant in federal court "with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged."³¹⁸ In a long series of cases dealing with the application of state-created rules of evidence in federal criminal prosecutions, the Supreme Court indicated its unwillingness to constrict the federal common law of criminal evidence either by state-imposed restrictions or by the strait-jacket of common law rules of evidence as they existed in 1789.³¹⁹

In its cases dealing with the right to a jury trial in criminal contempt cases, the Supreme Court has required that indirect contempt of court be treated much as if it were a criminal act and that the accused receive important procedural safeguards, including rights to notice, hearing, and representation by counsel.³²⁰ The Court expressly has required judges to advise the alleged contemnor of the charges against him.³²¹

Since the early 1960's, the Supreme Court has steadily built into state criminal proceedings a constitutional right to make a meaningful defense. It began with *Gideon v. Wainwright*, which established that the fourteenth amendment due process clause requires that the state provide counsel for indigent felony defendants.³²² The court's rationale was that this standard, based on the sixth amendment guarantee of right to counsel, is fundamental to fair process.³²³ Later cases developed this right to a meaningful defense. *Mapp v. Ohio* applied to the states, through the fourteenth amendment due process clause, the protection of the fourth amendment against unreasonable searches and seizures.³²⁴ *Miranda v. Arizona* grafted

public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

318. 32 U.S. (7 Pet.) 138, 142 (1833).

319. See, e.g., *Rosen v. United States*, 245 U.S. 467, 470-72 (1918) (no error to allow felon to testify although felons could not testify in 1789); *Benson v. United States*, 146 U.S. 324, 333-37 (1892) (change in common law prohibition of testimony by co-defendant upheld); *Logan v. United States*, 144 U.S. 263, 299-302 (1891) (court refused to apply common law prohibition of testimony by felon); *United States v. Reid*, 53 U.S. (12 How.) 361, 366 (1851) (state rules relating to incompetency of witnesses are not applicable to federal criminal trials).

320. See *In re Oliver*, 333 U.S. 257 (1948); *Cooke v. United States*, 267 U.S. 517 (1925).

321. *Cooke v. United States*, 267 U.S. 517, 537 (1925).

322. 372 U.S. 335 (1963); see also *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (extending same protection to any petty offense for which anyone may be imprisoned).

323. 372 U.S. at 339-45.

324. 367 U.S. 643 (1961). Prior federal practice had applied an exclusionary sanction

the federal coerced confession rule onto state criminal proceedings and set forth specific warnings to be given to the accused prior to custodial interrogation.³²⁵ *Pointer v. Texas* extended the sixth amendment right to be confronted by prosecution witnesses to state court proceedings and gave the defense a constitutional right to cross examine state witnesses.³²⁶ *Washington v. Texas* held that state-created incompetency rules did not prevail over the defendant's sixth amendment right to have compulsory process for obtaining witnesses in his favor.³²⁷ *Chambers v. Mississippi* determined that state-created hearsay rules could not prevail against the sixth amendment right to a meaningful defense and helped to articulate the scope of the sixth amendment as a vehicle for protection of the accused from Star Chamber-type inquisitorial proceedings.³²⁸

More than thirty years ago, the Supreme Court determined as a matter of fundamental due process of law that a state criminal conviction could not stand if the accused were convicted on facts which were at material variance from those charged in the indictment or information.³²⁹ The problem posed by extrinsic criminal act evidence introduced by the government at trial is that it tends to convict the defendant for crimes other than those alleged in the indictment. As a consequence, the fundamental fairness of the criminal trial process is impaired seriously. At a minimum, the sixth amendment requires notice to the defendant in advance of trial that the government intends to inquire into extrinsic criminal activity of the defendant. That notice should specify the instances to be

to evidence obtained by unreasonable search and seizure. *Weeks v. United States*, 232 U.S. 383 (1914). In *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949), the fourth amendment was made applicable to the states through the due process clause of the fourteenth amendment, but the exclusionary rule was not extended to state criminal trials at that time. *Mapp* extended the exclusionary rule sanction to unlawful searches and seizures under state law.

325. 384 U.S. 436 (1966). *Miranda* broadened the earlier holding in *Escobedo v. Illinois*, 378 U.S. 478 (1964), which had required the police to refrain from questioning an accused when in custody, after he had demanded to speak with his lawyer. *Miranda* stood for the proposition that before the police can take a statement from any accused, they must give him certain specific warnings: that he has a right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any further interrogation. 384 U.S. at 478-79.

326. 380 U.S. 400 (1965) (excluded testimony taken from a witness at preliminary hearing when defendant not represented by counsel).

327. 388 U.S. 14 (1967). For the state's responsibility to produce out-of-state witnesses for cross examination and confrontation, see *Mancusi v. Stubbs*, 408 U.S. 204 (1972) and *Barber v. Page*, 390 U.S. 719 (1968).

328. 410 U.S. 284 (1973).

329. *Cole v. Arkansas*, 333 U.S. 196 (1948).

brought up by date and time and the proof of extrinsic crimes that will be introduced. Rule 609 concerning impeachment of witnesses already imposes this notice requirement in the case of prior convictions dating from more than ten years. That requirement applies vis-a-vis the defendant if the defendant takes the stand.³³⁰

B. Constitutional Limitations on the Use of Extrinsic Criminal Acts

The sixth amendment right to a fair defense includes a guarantee that the accused will be informed of the nature of the charges pending against him or her.³³¹ It also guarantees that presentation at trial of proof at variance with the crime charged is tantamount to acquittal.³³² Therefore, because the effect of extrinsic criminal activity offered by the government to establish criminal intent or identity of the accused may be to convict the defendant because of a crime not charged in the indictment, the sixth amendment requires fair notice to the accused of the government's intention to introduce evidence of that activity. For example, concealment of overt acts which form the nexus of the criminal enterprise attributed to the accused in a conspiracy (or nonconspiracy) case is an ambush laid by the prosecution for the inept or unwary defense counsel. Consequently, when extrinsic or non-extrinsic criminal acts of the accused not alleged in the indictment are to be used by the government in its case-in-chief, the sixth amendment requires that due notice be given of these acts so that the defendant may take these uncharged crimes into account in preparing a defense. Federal practice does not now require such preliminary notice. Current practice, therefore, falls short of the sixth amendment guarantee.

If courts require that the government give due notice of its intent to use prior criminal act evidence at trial, defense counsel should raise a motion *in limine* to suppress such evidence on the ground that its prejudice to the accused exceeds its probative value. In considering whether to suppress evidence of the accused's *extrinsic* criminal acts, courts should consider the following factors:

- (1) The date on which the extrinsic criminal act occurred, as it relates to the date of the crime charged in the indictment. Criminal activity carried out subsequent to the crime charged provides a very weak logical demonstration of intent or identity. Prior or contemporaneous criminal activity provides more reliable proof of intent or identity.

330. FED. R. EVID. 609(b); *see supra* note 260.

331. *See supra* note 318 and accompanying text.

332. *Id.*; *see also supra* text accompanying note 329.

(2) The lapse of time since commission of the extrinsic act. The more remote the act is from the crimes charged in the indictment, the weaker the evidence of intent or identity it provides.

(3) The method of proof of the extrinsic crime. Records of conviction and admissions of the defendant make the strongest proof of extrinsic criminal acts. Statements by co-perpetrators are the weakest proof of such activities.

(4) The quantum of proof establishing all the elements of the extrinsic criminal act. If all the elements are the object of a conviction or of a defendant's admission, then the extrinsic criminal act is well-established. If the government can prove the criminal act or wrong only by statements of accomplices whose cooperation has been secured by explicit or implied promises of favorable treatment, the quantum of proof is correspondingly low.

(5) The degree of similarity between the extrinsic criminal act and the crime charged. The greater the similarity, the greater the tendency of the extrinsic criminal act to demonstrate intent or identity (and concomitantly the greater the tendency of the extrinsic crime to form the basis for a jury's impermissible inference that the accused is guilty of the crime charged because he or she is disposed to commit crimes of that ilk).

In deciding whether to allow or exclude proof of *intrinsic* criminal acts of the accused, either as unindicted overt acts of a conspiracy or as unindicted offenses committed by the defendant as part of his or her criminal enterprise, courts should consider the following factors:

(1) The date on which the alleged intrinsic act was committed. If it was committed outside the dates alleged in the indictment for the conspiracy, or before or after the dates of the offenses charged in the indictment, the evidence normally should be excluded.

(2) The method of proof of the unindicted intrinsic act.

(3) The quantum of proof of the unindicted intrinsic act.

If the government is using extrinsic criminal activity of the accused in response to a defense of entrapment or insanity, the court should apply the same standards of evaluation as it does when such acts are used as ordinary proof of intent or identity.

If the government intends to impeach the defendant or the defendant's character witnesses with prior, contemporaneous or subsequent criminal acts under rule 608(b), the court should follow the suggested guidelines for determining the probative value of extrinsic criminal acts. At the same time it should pay special attention to the question of similarity between the impeaching offense and the crime charged, because the prejudice to the accused arising from a similar extrinsic criminal act often is much greater than the pro-

bative value of such an offense with respect to the accused's veracity.

Finally, when the government wishes to introduce into evidence criminal acts not alleged in the indictment, courts should consider whether the government has demonstrated a real and substantial necessity for using such extrinsic or intrinsic criminal acts, just as they do when making preliminary rulings. If the evidence is sought only for its prejudicial impact and is cumulative on a point the government has established already by other means, then the evidence should not be admitted.

IV. CONCLUSION

Rule 404(b) of the Federal Rules of Evidence permits the introduction of specific instances of conduct of an accused to prove an issue other than the propensity of the accused to commit crimes. Under the standard doctrine of multiple admissibility, if an act of the accused proves an element such as motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, and also tends to show the accused's disposition to commit crime, it is admissible under Rule 404(b). Thus, the discretionary balancing test of Rule 403 is the only check on the admission of extrinsic and intrinsic criminal acts of the accused not listed in the indictment. If courts are to find an adequate solution to the dilemma, they must apply principled guidelines when weighing the probative value of the extrinsic or intrinsic criminal act against the prejudice it would cause to the accused.

Rule 404(b) read in conjunction with Rule 403 does not currently provide sufficient procedural safeguards to the accused in federal criminal trials, unless defense counsel happens to be both alert and extremely competent. Because the government is not required to notify the defendant of its intention to use extrinsic or intrinsic criminal acts as proof of an issue listed under rule 404(b), nor to notify the defendant in advance of trial of its intention to impeach the defendant by such unindicted criminal acts, the defendant is denied notice of the charges on which he or she is tried, notice to which the sixth amendment entitles him or her. This serious oversight in the regulation of prior criminal act evidence under Rules 404(b) and 608(b) can be cured only by requiring the government to give notice to the accused prior to trial that it intends to use such evidence. This requirement would permit a motion *in limine* and a preliminary hearing to determine whether the probative value of the proffered evidence of extrinsic criminal acts is greater than the prejudice it would cause to the accused.