Admitting the Accused’s Criminal History: The Trouble With Rule 404(b)

Thomas J Reed
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I. INTRODUCTION

Federal Rule of Evidence 404(b) is the direct, lineal descendent of a single leading case, People v. Molineux, decided in 1901 by the New York Court of Appeals. Although the current formulation of the rule is slightly different than the formula defined by Judge Werner’s opinion in Molineux, the common law rule and the legislatively-established version start by stating a categorical proposition: evidence of the accused’s specific bad acts, not set out in the indictment, is inadmissible because the rules do not permit the prosecution to put in bad character evidence in its case-in-chief. However, both versions permit the prosecution to prove intermediate issues such as motive, guilty knowledge, criminal intent, absence of mistake or accident, a criminal plan or design, or identity of the accused by circumstantial comparison to the accused’s known bad acts. Both the Molineux rule and the current Federal and Uniform Rule of Evidence 404(b) allow admission of the accused’s criminal history under a narrow, limited series of pigeonhole exceptions to the categorical negative proposition. The truth is that the Federal and Uniform Rules permit admission in the prosecution’s case-in-chief of the accused’s other bad acts in order to prove any relevant intermediate issue in the case, provided that the probative value of evidence of other bad acts is not substantially outweighed by unfair prejudice to the accused, confusion of the issues, or waste of precious judicial trial time. The thesis of this article is that the Molineux formula and Rule 404(b) neither correctly describe what happens in court when the prosecution offers the accused’s other bad acts into evidence, nor significantly limit admissibility of such acts. The rule fails to be predictive of future judicial behavior or a fair statement of the policy behind the rule. It ought to be replaced by an honest rule about admissibility of the criminal history of the accused.

Part II of this article briefly sketches the modern background behind

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1. Professor of Law, Widener University.
2. Molineux, 61 N.E. at 293.
3. See infra notes 26-33 and 69-87 and accompanying text for a discussion of the bad character evidence admissibility under Molineux and the modern versions of Rule 404(b).
4. See infra Parts II and III for general discussions of the practice under the original Molineux rule and its modern descendants.
5. See infra Part IV for a discussion of the application of the current rule.
Federal Rule 404(b). It traverses the codification of the *Molineux* rule by the American law Institute's blue ribbon experts in the 1930's and 40's, and the non-controversial adoption of the American Law Institute's formula as Rule 404(b) in 1973 through 1975.5

Part III records a summary of the major cases construing Rule 404(b) since its adoption in 1975.7 It includes a brief review of state and federal case law made under the rule with an eye to how the courts not only inconsistently apply Rule 404(b) and Rule 403, but also use the rules to covertly aid the admission of the accused's other bad acts, knowing that the jury will use that evidence to conclude circumstantially that the accused committed the crime charged because the accused had a prior criminal history.8

Part IV is an analysis and summary of the present state of the rule that excludes other bad acts evidence in criminal prosecutions.9 This part shows that the rule is applied in two inconsistent ways: first, a traditionalist approach in which the court searches for a convenient pigeonhole that permits proof of other bad acts, balances probative value against prejudice, and reaches a conclusion on the trial judge's actions admitting the bad acts evidence.10 The second approach comes close to changing the rule from an inadmissibility rule to a rule permitting admissibility of the accused's bad acts related to the crime charged in the indictment, unless probative value is outweighed substantially by prejudice, confusion, or waste of time.11

II. BACKGROUND

People v. Molineux12

*Molineux* was a homicide prosecution. Roland Molineux, son of a Civil War hero, was charged with murdering Mrs. Katherine Adams of New York City using cyanide of mercury, a rare poison.13 The perpetrator sent a bottle of Bromo Seltzer, a patent medicine, to Harry Cornish, the Athletic Director of the Knickerbocker Athletic Club, laced with cyanide of mercury.14 Cornish took the medicine home over the Christmas holidays in 1898 and offered it to his landlady, Mrs. Adams, who had a headache. She became deathly ill and died of

6. See infra Part II and accompanying text for a discussion of the modern background of Rule 404(b).

7. See infra Part III and accompanying text for a discussion of the major cases construing Rule 404(b).

8. See infra Part III and accompanying text for a discussion of the development of case law since Rule 404(b)'s adoption.

9. See infra Part IV and accompanying text for an analytical summary of the use of Rule 404(b).

10. See infra note 338 and accompanying text for a discussion of courts' attempts to pigeonhole bad acts evidence into discrete categories.

11. See infra notes 301-307 and accompanying text for a discussion of current judicial approaches to applying Rule 404(b).

12. 61 N.E. 286 (N.Y. 1901).


14. *Id.*
poisoning almost at once.\textsuperscript{15} Earlier that fall, Henry A. Barnet, a resident of the same athletic club house, had received a bottle of patent medicine in the mail. When he had an upset stomach he took some of the powder and became very ill, dying within two weeks from what was originally diagnosed as diphtheria. Barnet had been poisoned by the same rare poison.\textsuperscript{16} Molineux, a chemist, had a motive to kill both individuals: Cornish for crossing him at various club events, and Barnet for trying to win Molineux’s fiancée, Blanche Chesebrough.\textsuperscript{17} At the first trial for the Adams killing, the prosecution introduced a great deal of evidence tending to show that Molineux was (more probably than not) responsible for Barnet’s death.\textsuperscript{18} Molineux was convicted.\textsuperscript{19} His appeal was successful, causing Judge Werner to write a masterpiece opinion explaining why evidence of the Barnet killing was not admissible in the prosecution’s case-in-chief against Molineux in the Adams case.\textsuperscript{20} On retrial, the jury acquitted Molineux after deliberating for less than an hour. None of the facts of the Barnet killing were allowed into evidence at the second trial.\textsuperscript{21}

Judge Werner fashioned a general rule for the admission or exclusion of an accused’s other criminal acts. He first stated that the prosecution could not prove other instances of criminal conduct not charged in the indictment just to show that the accused deserved conviction based on bad character.\textsuperscript{22} However, Judge Werner said that:

Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial.\textsuperscript{23}

Judge Werner’s rule was a general exclusionary rule followed by a limited number of exceptions to the exclusionary rule. Judge Werner did not address the exclusion of other criminal acts evidence based on a balancing of probative value against prejudice to the accused, waste of time, or confusion of the issues.

Judge Alton Parker, in his special concurring opinion, reformulated the rule in a different fashion that has had implications since 1901: “[d]o the facts constituting the other crime actually tend to establish one or several elements of

\begin{itemize}
\item \textsuperscript{15} Id.
\item \textsuperscript{16} Id. at 289-90.
\item \textsuperscript{17} Id. at 288-90.
\item \textsuperscript{18} Molineux, 61 N.E. at 290-93.
\item \textsuperscript{19} Id. at 287.
\item \textsuperscript{20} Id. at 293-310.
\item \textsuperscript{21} This account is derived from \textit{People v. Molineux}, 61 N.E. 286, 290-94 (N.Y. 1901), and from contemporary accounts of the first and second trials in the \textit{New York Times} for Nov. 14, 1899 to Feb.11, 1900 and the \textit{New York Times} and \textit{Brooklyn Daily Eagle} for Oct. 10, 1902 to Nov. 13, 1902.
\item \textsuperscript{22} The court in \textit{Molineux} stated, “The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged.” \textit{Molineux}, 61 N.E. at 293. (citation omitted).
\item \textsuperscript{23} Id. at 294.
\end{itemize}
the crime charged? If so, they may be proved." This version of the rule would allow the prosecution to prove any uncharged misconduct if it established directly or circumstantially an element of any offense listed in the indictment or the identity of the perpetrator. Judge Parker mentioned no extrinsic limitation on proof of uncharged misconduct that tended to prove an element of an offense, such as subjective weighing of probative value against prejudice and confusion of the issues.

Uncharged Criminal Misconduct

Although the term "uncharged misconduct" would not be coined until the 1970's to describe the kind of evidence that was made admissible by Molineux, the case changed courts' perspective on admissibility of the accused's other criminal acts. Nearly all the commentators, except Professor John H. Wigmore, accepted Judge Werner's formation of the rule as defining its limit; henceforth, the rule would be formulated as a general prohibition against proof of other bad acts of the accused unless the other bad act fit one of Judge Werner's pigeon-holes. Much considerable room for debate existed about whether to add another exception to the general rule. Some courts recognized an exception for evidence of flight from authorities as consciousness of guilt.

24. Id. at 314.
25. Id. at 312-16.
27. See, e.g., FRANCIS WHARTON, A TREATISE ON THE LAW OF EVIDENCE IN CRIMINAL ISSUES, §31 (O. N. Hilton rev., 2d ed. 1912) (accepting the Molineux test for admitting evidence of other criminal acts); WILLIAM P. RICHARDSON, OUTLINE OF EVIDENCE §§ 135-44 (1923) (restating Judge Werner's five part-test for the admission of other criminal acts not mentioned in the indictment).
28. The uncharged misconduct rule did not fit Wigmore's complex scheme of proof of fact. First, Wigmore broke up traditional character evidence and placed that portion which directly related to proof of character qua character under the heading of Prospectant Evidence: Evidence of the Doing of a Human Act. He explained how reputational character evidence, as well as specific acts showing a character trait, help to explain future action by the actor in conformity with the proved character trait. Wigmore put the uncharged misconduct rule in the classification of Evidence of Knowledge, Belief or Consciousness under Topic III, Evidence of Mental Capacity. He did so because the relevance of uncharged misconduct evidence is not to prove a character trait of the actor, but to prove the mental state of an actor when that mental state was relevant to a claim or defense. See John H. Wigmore, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 51-80 (2d ed. 1923) (prospectant evidence & character); A POCKET CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW, Rule 30 at 38-40 (prospectant evidence); Rules 59-68 at 77-98 (1910).
29. See supra note 27 for examples of other commentators' treatment of uncharged evidence in a manner contradictory to that proposed by Professor Wigmore.
30. See, e.g., Rowan v. United States, 277 F. 777, 778 (7th Cir. 1921) (affirming jury instruction regarding admissibility as probative of defendant's guilt even though evidence was circumstantial); Campbell v. United States, 221 F. 186, 190 (9th Cir. 1915); Crenshaw v. State, 87 So. 328, 330 (Ala. 1921) (finding jury may make unfavorable inferences regarding any travel by an accused following a crime); Locklear v. State, 87 So. 708, 711 (Ala. App. 1920), certiorari dismissed, 87 So. 712 (Ala. 1921) (finding the state may use defendant's flight following an assault to prove guilt); Burnett v. State, 268 P. 611, 614 (Ariz. 1928) (finding trial court used proper discretion in allowing state to use defendant's
Other courts added a special exception to permit proof of other sexual offenses by persons charged with sex offenses. The courts were divided on the quantum of proof necessary to bring an act of alleged uncharged misconduct before the jury. Most states held that the trial judge had to find clear and convincing evidence establishing the uncharged misconduct before the jury could hear it, while Texas insisted that the trial judge had to find proof beyond a reasonable doubt.

The Uniform Law Commission and Molineux

The American Law Institute accepted a challenge to write an evidence code in the waning days of the Great Depression. Professors Edmund M. Morgan and John M. Maguire of Harvard University Law School were the official reporters for the group of distinguished men who were responsible for the flight from arrest as evidence of guilt); People v. Sotelo, 283 P. 388, 389 (Cal. App. 1929) (finding jury properly based verdict on evidence that the defendant ran from the crime scene); Willingham v. State, 149 S.E. 887, 890 (Ga. 1929) (affirming use of evidence of flight by accused to indicate guilt); State v. Sullivan, 199 P. 647, 650 (Idaho 1921) (allowing state to use defendant's escape as evidence of guilt only where the state can prove the alleged crime); People v. Schwartz, 131 N.E. 806, 807 (Ill. 1921) (finding jury had a right to consider whether defendant's flight indicated guilt); State v. Bige, 193 N.W. 17, 20 (Iowa 1923) (affirming jury instruction on flight, even when accused not charged with the offense); Commonwealth v. Goldberg, 98 N.E. 692, 693 (Mass. 1912) (finding evidence of the defendant's flight "competent and material" to inferring guilt); State v. Scott, 114 A. 159, 161 (Me. 1921) (finding evidence of flight from a crime is merely circumstantial evidence of guilt; therefore, it must be weighed along with other evidence); State v. Lambert, 71 A. 1092, 1093 (Me. 1908) (concluding the fact of an accused flight is admissible evidence to show guilt). See also Gassenheimer v. United States, 26 App. D.C. 432, 444-45 (1906) (holding acts of a defendant who tried to bribe juror after first trial were admissible to show consciousness of guilt); People v. Spaulding, 141 N.E. 196, 202 (Ill. 1923) (allowing evidence of killing accomplice to show consciousness of guilt).

31. See, e.g., Thomas J. Reed, Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases, 21 AM. J. CRIM. LAW 127 (1993).

32. Some jurisdictions required proof of uncharged misconduct be made by clear and convincing evidence, prior to adopting the Uniform Rules of Evidence. See, e.g., People v. Albertson, 145 P.2d. 7, 21-22 (Cal. 1944), overruled in part by People v. Carpenter, 935 P.2d 708, 747 (stating that "we adhere to the preponderance standard and disprove any language suggesting the clear and convincing evidence standard"); People v. Botham, 629 P.2d 589, 602-03 (Colo. 1981) (stating that evidence concerning a prior crime must be shown by a clear and convincing evidence standard); Benson v. State, 395 A.2d 361, 364 (Del. 1978) (holding that evidence of a prior crime must be plain, clear, and conclusive to be admitted); Cross v. State, 386 A.2d 757, 764 (Md. 1978) (requiring evidence of a past crime be clear and convincing in order to be admitted); State v. Billstrom, 149 N.W.2d 281, 285 (Minn. 1967) (stating that evidence of a prior crime does not need to be proved beyond a reasonable doubt, but only must be proved to a clear and convincing standard); State v. Hyde, 136 S.W. 316, 331 (Mo. 1911) (requiring evidence of a past crime be proved to a clear and convincing standard); Tucker v. State, 412 P.2d 970, 972 (Nev. 1966) (holding that before evidence of a collateral crime can be considered for admission, it must be established by plain, clear, and convincing evidence); Wrather v. State, 169 S.W.2d 854, 858 (Tenn. 1943) (holding that evidence of a prior crime can only be admissible if it is clear and convincing).


Code.\textsuperscript{35} Wigmore was a special consultant to the group.\textsuperscript{36}

Chapter Five of the Evidence Code related to the admissibility of character evidence.\textsuperscript{37} Rule 411 was the group's first formulation of the uncharged misconduct rule:

Evidence that a person committed a crime or civil wrong on a specified occasion is inadmissible as tending to prove that he committed a crime or civil wrong on another occasion if, but only if, the evidence is relevant solely as tending to prove his disposition to commit such a crime or civil wrong or to commit crimes or civil wrongs generally.\textsuperscript{38}

This draft rule was a resurrection of Judge Alton Parker's rejected formula in \textit{Molineux}. The commentary, prepared by Maguire, contradicted the forty-year history of the rule as expressed and used by nearly all U.S. jurisdictions.

Maguire based his new evidence rule on two Harvard Law Review articles by Julius Stone, purporting to trace the history of the rule from English precedent to contemporary U.S. practice.\textsuperscript{39}

The law is often assumed to be otherwise than as stated in this Rule. Nothing is more common than to hear the unqualified assertion that if a party is charged with having committed a specified crime or civil wrong, no evidence of the commission by him of another crime or wrong is receivable against him. That is true where the series of inferences on which the relevance of the evidence depends is from the commission of the other wrong to a disposition to commit such a wrong or to commit crimes or torts generally, thence to the commission of the particular wrong. The cases are legion, however, which admit such evidence when offered to prove motive, intent, preparation, plan, or identity. A careful examination of the pertinent cases in England and in the United States will reveal that the great majority of them reflect the doctrine expressed in this Rule.\ldots\textsuperscript{40}

Stone had criticized Judge Werner's opinion and advocated rejection of his opinion as a "spurious rule" in favor of Judge Parker's opinion, which, in Professor's Stone's view, embodied the correct rule that uncharged misconduct evidence could be admitted to prove any issue other than the accused's bad

\textsuperscript{35} Id.
\textsuperscript{36} \textsc{American Law Inst., Code of Evidence (Tentative Draft No. 2, Mar. 19, 1941)} (frontispiece). The group of advisors included Prof. Wilber H. Cherry, University of Minnesota, Prof. Laurence H. Eldredge, University of Pennsylvania, Prof. William G. Hale, University of Southern California, Judge Augustus N. Hand and Judge Learned Hand, U.S. Court of Appeals Second Circuit, Prof. Mason Ladd, University of Iowa, Judge Henry T. Lummus, Supreme Judicial Court of Massachusetts, Prof. Charles T. McCormick, University of Texas, and Charles E. Wyzanski, Jr. of Boson, Massachusetts. \textit{Id.}

\textsuperscript{37} Id.
\textsuperscript{38} Id. at 119.


\textsuperscript{40} See \textsc{American Law Inst., Code of Evidence, supra} note 36, at 119.
Morgan accepted Stone’s view and composed the rule to reflect the inclusionary viewpoint.

The 1942 final edition of the Model Code of Evidence kept the same basic inclusionary formulation of the uncharged misconduct rule. The final edition rule was renumbered 311 and referred back to Rule 306, the general rule on admissibility of character evidence. The commentary was unchanged except for the reference to Rule 306. Also, Morgan’s introductory comments to the 1942 edition of the Model Code reflect that the attempt to revise the uncharged misconduct rule as an inclusionary (rather than an exclusionary rule) had his blessing.

Uniform Rule 55

The Model Code of Evidence was never adopted by any jurisdiction. After World War II, the American Law Institute passed the Model Code of Evidence on to the Committee on Scope and Programs of the National Conference of Commissioners on Uniform State Laws as part of the Committee’s general inquiry into the law of evidence. In 1953, the National Conference of Commissioners on Uniform State Laws issued a somewhat revised edition of the Model Code as the Uniform Rules of Evidence. The 1953 Uniform Rules were adopted by Kansas and were the basis for the 1965 California Evidence Code.

41. See Stone (America), supra note 39 at 1023-30 for a discussion explaining that Stone’s preference for Judge Parker’s view of the uncharged misconduct rule rests on his belief that the points of similarity between the two killings were sufficient to show that Molineux perpetrated the Barnet homicide.

42. AM. LAW INST., MODEL CODE OF EVIDENCE, 196-97 (1942).

43. Id.

44. Id.

45. "The rule as to the exclusion of evidence of other crimes and wrongs when offered to prove the commission of a specified crime or wrong is by Rule 311 put on a sound, sensible basis which has support in innumerable cases though rarely, clearly articulated. Such evidence is made inadmissible only where it is relevant solely as tending to prove a disposition to commit such a crime or wrong or to commit crimes or wrongs generally. If it is relevant for any other purpose, it is admissible. The courts at common law will not admit evidence of a person’s criminal or tortious character as tending to prove his conduct on a specified occasion; a fortiori, they will not admit specific instances of his conduct on other occasions as tending to prove such character. Rule 306 admits evidence of relevant traits of character in civil actions as tending to prove conduct, , with certain exceptions, but it does not permit such character to be proved by evidence of specific instances. This might well be enough without a specific rule. But out of abundance of caution in this instance the Code specifically excludes evidence of a person’s commission of other crimes or torts as tending to prove the commission of the crime or tort charged when the only series of inferences by which the commission of the crime or tort has any probative value is from that commission to a disposition to."

Id. at 33-34 (foreword by Prof. Edmund M. Morgan).

46. 1 BAILEY & TRELLES, supra note 34, at 913.

47. Id.

48. Id.
Model Rule 311 became Uniform Rule 55.\textsuperscript{49} Uniform Rule 55 was essentially the same as Model Rule 411.\textsuperscript{50} It followed the inclusionary theory that uncharged misconduct evidence is admissible unless it merely tends to prove the accused’s bad character. This formula encountered some difficulty in the 1960's when California was considering the adoption of the Uniform Rules for a California Evidence Code. The California Advisory Committee had rejected the general approach to character evidence taken by the 1942 Model Rules and the 1953 Uniform Rules, which both favored admissibility of character evidence. Additionally, section 2053 of the California Code of Civil Procedure and relevant case law held that character evidence was inadmissible in civil actions to prove action in conformity therewith.\textsuperscript{51} The 1965 California Evidence Code had a single section that dealt with admissibility of character evidence in criminal prosecutions and of instances of uncharged misconduct:

\textsection{1101. Evidence of character to prove conduct}

(a) Except as provided in this section and in Sections 1102 and 1103, evidence of a person’s character or a trait of his [or her] character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his [or her] conduct) is inadmissible when offered to prove his [or her] conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident) other than his [or her] disposition to commit such act.

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.\textsuperscript{52}

The Advisory Committee did not address the issue of proof of uncharged misconduct evidence in its commentary. Moreover, the Committee ruled out admissibility of character evidence to prove action in conformity therewith in

\textsuperscript{49} Id. at 193.
\textsuperscript{50} Rule 55 reads as follows:

Rule 55. \textit{Other Crimes or Civil Wrongs.}

Subject to Rule 47 evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed another crime or civil wrong on another specified occasion but, subject to Rules 45 and 48, such evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity.

\textit{Nat'l Conference of Comm'rs on Unif. State Laws, Uniform Rules of Evidence (1953)} in 1 \textit{BAILEY \\& TRELLES, supra note 34, at 193.}

\textsuperscript{51} See, e.g., Vance v. Richardson, 42 Pac. 909, 910 (Cal. 1895) (finding that in assault context evidence of defendant's good character for peace and quiet is inadmissible); Van Horn v. Van Horn, 91 Pac. 260, 261 (Cal. App. 1907) (finding that in divorce for adultery scenario, evidence of defendant's and the nonparty-correspondent's good character was inadmissible); Deevy v. Tassi, 130 P.2d 389, 397 (Cal. 1942) (holding evidence of defendant's bad character for peace and quiet inadmissible on assault charge).

\textsuperscript{52} \textit{CAL. EVID. CODE} § 1101 (West 1966).
civil cases because it thought that character evidence was a poor sort of circumstantial evidence of a person's actions of admitted low probative value.\textsuperscript{53} As a result, Uniform Rule 55 was scheduled for overhaul along with all other character evidence rules.

\textit{Rule 404(b): An Attempt to Bottle Molineux}

The story of the torturous path that the Federal Rules of Evidence followed from 1969 to 1975 is well-known to most readers. Rule 404 was one of the least controversial rules and its legislative history from 1969 to 1975 shows that it went through only two evolutions. The original draft of Rule 404 contained two parts. Part (a) related to the admissibility of character evidence in criminal prosecutions. It was not based on Model Rule 406, although it addressed some of the same topics.\textsuperscript{54} Part (b) addressed the admissibility of other crimes or wrongs and was not limited to criminal prosecutions. Moreover, it was not based on the inclusionary formula of Model Rule 411.\textsuperscript{55} Both sections reflected the changes made by the California Evidence Code to the 1953 Uniform Rules.

In 1972, the Supreme Court sent its proposed Rules of Evidence to Congress for study.\textsuperscript{56} The 1972 draft contained a slightly different version of Rule 404(b):

\begin{quote}
(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. This subdivision does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.\textsuperscript{57}
\end{quote}

\textsuperscript{53} \textit{Id.} at comment.

\textsuperscript{54} As originally drafted in 1971, Rule 404(a) was as follows:

(a) Character Evidence Generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) \textit{Character of Accused}. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) \textit{Character of Victim}. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same;

(3) \textit{Character of Witness}. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

\textsuperscript{1} \textsc{Bailey \& Trelles, supra} note 34, at 32.

\textsuperscript{55} The text read:

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

\textit{Id.} at 32.

\textsuperscript{56} \textit{Id.}

\textsuperscript{57} Communications from the Chief Justice of the United States transmitting the proposed Rules of Evidence of the United States Courts and Magistrates, amendments and further amendments to the Federal Rules of Civil Procedure, and amendments to the Federal Rules of Criminal Procedure which have been adopted by the Supreme Court, pursuant to 28 U.S.C. §§ 2072, 2075, and 18 U.S.C. §§ 3401,
The Advisory Committee’s commentary on this version of the uncharged misconduct rule is much less favorable than the original draft to the admissibility of uncharged misconduct. It acknowledges that such evidence may be admissible to prove some other issue than the bad character of an actor.  

Rule 404(b) was not the focus of public commentary during the lengthy process of public hearings before the House Judiciary Committee and the Senate Judiciary Committee. Professor Edward Cleary, the reporter for the Advisory Committee, mentioned the rule briefly in his 1973 extended written remarks that were introduced before the Special Subcommittee of the House Judiciary Committee on Reform of Criminal Laws. Alvin K. Hellerstein of the Association of the Bar of the City of New York complained about the change from the March 1971 draft to the February 8, 1973 draft. On February 22nd, Judge Henry J. Friendly, Chief Judge of the U.S. Court of Appeals for the Second Circuit, had a prescient comment on the proposed rule:

Rule 404(b)—Character evidence. Does this adopt the “federal rule” allowing evidence of other crimes except when offered only to show the defendant is a bad man, or the rule requiring that these crimes show some particular trait relevant to the charge? The rule seems to walk both sides of the street. It will provide a bountiful source of appeals and possible reversals on a subject where the federal law is now reasonably clear.

Judge Friendly implied that the inclusionary formula of the uncharged misconduct rule was the then-current federal rule. He doubted that Rule 404(b) restated that rule. The change that bothered Judge Friendly showed up on the Committee Print issued June 28, 1973. William S. Cohen also preferred the

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58. The official commentary says that:
Subdivision (b) deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. Consistently [sic] 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. 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(a).

59. Id.

60. Hearings Before the Special Subcommittee on Reform of Federal Criminal Laws of the Committee on the Judiciary, House of Representatives, 93rd Cong. 1st Sess., in 1 BAILEY & TRELLES, supra note 34, at 122.

61. Id. at 122-23. Hellerstein thought that the change from “This subdivision does not exclude the evidence when offered” to “It may, however, be admissible for” somehow changed the sense of the rule.

62. Id. at 263.

63. H.R. 5463, 93rd Cong. (1st Sess. 1973) as amended by the Subcommittee on Criminal Justice House Committee on the Judiciary. Id. at 145.
March 1971 formulation, although he thought the changed wording was unimportant. When the Federal Rules of Evidence were adopted by Congress, the 1971 version of the text of Rule 404(b) was adopted as the rule:

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

The official commentary and the notes from the House and Senate Judiciary Committees do little to explain the potential impact of the rule.

Since 1975, Rule 404(b) has been the most contested Federal Rule of Evidence. It has been cited in 5,603 federal trial and appellate decisions since adoption. No other evidentiary rule comes close to this rule as a breeder of issues for appeals. This litigiousness is exacerbated by the right of federally convicted felons to take an appeal and the subsequent necessity that the

64. Id. at 269.
65. FED. R. EVID. 404(b).
66. The Official Commentary and accompanying comments from the committees read as follows:

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. 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. Slough and Knightly, Other Vices, Other Crimes, 41 Iowa L. Rev. 325 (1956).

Notes of Committee on the Judiciary, House Report No. 93-650. The second sentence of Rule 404(b) as submitted to the Congress began with the words, "This subdivision does not exclude the evidence when offered". The Committee amended this language to read, "[i]t may, however, be admissible," the words used in the 1971 Advisory Committee draft, on the ground that this formulation properly placed greater emphasis on admissibility than did the final Court version.

Notes of Committee on the Judiciary, Senate Report No. 93-1277. This rule provides that evidence of other crimes, wrongs, or acts is not admissible to prove character but may be admissible for other specified purposes such as proof of motive.

Although your committee sees no necessity in amending the rule itself, it anticipates that the use of the discretionary word "may" with respect to the admissibility of evidence of crimes, wrongs, or acts is not intended to confer any arbitrary discretion on the trial judge. Rather, it is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e. prejudice, confusion or waste of time.

BAILEY & TRELLES, supra note 34, at 34.

67. See Edward J. Imwinkelried, The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition, 51 OHIO ST. L.J. 575, 577 (1990) (noting that litigation of 404(b) has generated the most written opinions).

practicing bar faces in finding some plausible grounds for appeal. If the purpose of Rule 404(b) is to clarify and simplify the application of the uncharged misconduct rule, then it has failed. If the purpose of the rule was to raise the criminal defense bar’s consciousness to the substantial negative effect of admitting uncharged misconduct evidence to prove an intermediate issue other than guilt, then the rule appears to be a howling success.

III. UNCHARGED MISCONDUCT SINCE 1975: UNIFORM AND FEDERAL RULES JURISDICTIONS

Forty-one states, the District of Columbia, the Virgin Islands, and Guam have adopted the Federal Rules of Evidence in one form or another. 69 All U.S.

69. Jack B. Weinstein & Margaret A. Berger, Weinstein’s Federal Evidence, 6, at T-1-8 (Joseph M. McLaughlin & Matthew Bender eds., 2d ed. 2005) (explaining that some rules in some states are based on the 1974 Uniform Rules of Evidence, which in turn were based on the Final Draft of the Federal Rules). The following states based their rules of evidence on the final version of the Federal Rules:

Alabama: ALA. R. EVID. 101 to 1103.
Alaska: ALASKA R. EVID. 101 to 1101.
Arizona: ARIZ. R. EVID. 101 to 1103.
Arkansas: ARK CODE ANN. § 16-41-101 to 1104 (Michie 2004);
Colorado: COLO R. EVID. §§ 101 to 1102.
Delaware: DEL. R. EVID. 101 to 1103.
Idaho: IDAHO R. EVID. 101 to 1103.
Indiana: IND. R. EVID. 101 to 1101.
Iowa: IOWA R. EVID. 5.101 to 5.1103.
Kentucky: KY. R. EVID. 101 to 1104.
Louisiana: LA. R. EVID. 101 to 1103.
Maine: ME. R. EVID. 101 to 1102.
Maryland: MD. R. EVID. 5-101 to 5-1008.
Michigan: MICH R. EVID. 101 to 1102.
Minnesota: MINN. R. EVID. 101 to 1101.
Mississippi: MISS. R. EVID. 101 to 1103.
Montana: MONT R. EVID. 100 to 1008.
New Hampshire: N.H. R. EVID. 100 to 106.
New Jersey: N. J. R. EVID. 101 to 1103.
New Mexico: N.M. R. EVID. 11-101 to 11-1102.
North Dakota: N.D. R. EVID. 101 to 1103.
Ohio: OHIO R. EVID. 101 to 1103.
Pennsylvania: PA. R. EVID. 101 to 1008.
federal courts must follow the 1975 Federal Rules of Evidence. These jurisdictions now possess a written rule that ostensibly permits admission of uncharged misconduct evidence for any purpose other than proof of the accused’s bad moral character.

Rule 404(b) makes no sense unless it is considered in conjunction with Rules 404(a) and 403. Rule 404(a) contains a categorical prohibition against admission of evidence showing that the accused in a criminal prosecution is a person of bad moral character. The categorical prohibition is then immediately modified by three stated exceptions. The first permits the accused to offer evidence during the accused’s case-in-chief to prove that the accused is a person of good moral character. Some jurisdictions still have a jury instruction that directs the jury to acquit the accused if the jury finds that the accused is a person of good moral character. Second, when the accused is charged with a crime of violence, the accused is permitted to prove the victim had bad character for violent conduct. If the accused chooses to offer good character evidence, the prosecution may rebut with bad character evidence. Third, the credibility of

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Puerto Rico: 32.3 P.R. LAWS ANN.
Rhode Island: R.I. R. EVID. 101 to 10008.
South Carolina: S.C. R. EVID. 101 to 1103.
Tennessee: TENN. R. EVID. 101 to 1009.
Texas: TEX. R. EVID. 101 to 1009.
Utah: UTAH R. EVID. 101 to 1103.
Vermont: VT. R. EVID. 101 to 1103.
Washington: WASH. R. EVID. 101 to 1103.
West Virginia: W. VA. R. EVID. 101 to 1102.
Wisconsin: WIS. STAT. ANN. §§ 901.01 to 911.02 (West 2004).
Wyoming: WYO. R. EVID. 101 to 1104.

Id.

70. Rule 404(a) provides:

Rule 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of alleged victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

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

72. See, e.g., State v. McDowell, 290 N.W. 65, 69 (Iowa 1940) (reviewing a jury instruction stating that evidence of good moral character bears directly on reasonable doubt).

73. FED. R. EVID. 404(a)(2).

74. Id.
any witness, including the accused, may be attacked by proof of bad character for truthfulness. Rule 404(a) makes no other exceptions.

The courts have consistently construed Rule 404(b) as if it were the Molineux rule, a categorical rule of inadmissibility followed by a string of specific exceptions, despite legislative history indicating that Rule 404(b) is supposed to be a rule that permits introduction of specific instances of uncharged misconduct to prove any issue other than the accused's bad character. To be sure, the federal courts often describe Rule 404(b) as an inclusionary rule, but go on to apply it in the same way that a common law court would have applied the original Molineux rule—a search for one or more exceptions to the rule of inadmissibility that fits the proffered uncharged misconduct. Typically, the courts use the rule originally set forth in Molineux and canonized by Rule 404(b) as a window to permit bad character evidence to be proved against the accused.

Rule 403 is a unique rule. It states that evidence, otherwise admissible, may be excluded if the trial judge, after subjectively balancing probative value against unfair prejudice, confusion of the issues, and waste of time, et cetera, decides that the downside risk of the evidence is much greater than its utility to the case. Evidence commentators are sharply divided on the place of this rule in the hierarchy of evidence law. One school contends that Rule 403 works like a linebacker in football: it may be referred to and employed by the courts only when the front line, the specific rules of evidence, fail to provide for the situation. The other school contends that Rule 403 is really a “triple threat” rule, the fundamental evidence rule that grants the trial judge discretion to exclude evidence deemed admissible under the substantive rules of evidence.

75. FED. R. EVID. 404(a)(3).
76. See supra notes 12-33 and accompanying text for a discussion of the Molineux rule.
77. See supra notes 26-45 and accompanying text for a discussion of courts' handling of uncharged misconduct.
78. Rule 403 provides:
Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.
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.
FED. R. EVID. 403.
80. For a discussion of this school of thought, see for example, Christopher B. Mueller & Laird C. Kirkpatrick, EVIDENCE § 4.9, 172 (3d ed. 2003); ROGER C. PARK ET AL., EVIDENCE LAW: A STUDENT'S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS § 5.04 (2d ed. 1998); WEINSTEIN & BERGER, supra note 69, § 403.02. Judge Weinstein summarizes this viewpoint as follows:
Rule 403 provides that relevant evidence may be excluded under certain circumstances. It is the major rule explicitly recognizing the broad discretionary power of the judge in controlling the introduction of evidence. The rule codifies previous case law.
According to the "triple threat" school, the rule applies to all forms of evidence: direct, circumstantial, testimonial, documentary, real proof, and demonstrations. The one instance in which Rule 403 does not apply is in ruling on the admissibility of convictions pursuant to Rule 609(a)(2). However, the balancing approach of Rule 403 should be used in deciding the admissibility of other types of evidence offered for impeachment. According to that school, every specific decision to admit or to exclude evidence may be evaluated in terms of subjective balancing of probative value and prejudice to the opposition. Without taking sides in this academic debate, trial judges are keenly aware that decisions to admit or to exclude evidence will not be overturned unless an appellate court finds the lower court abused its discretion. Practically, the trial bench uses Rule 403 as the ultimate filter for evidence.

Disregarding the suggestion that Rule 404(b) is a legal failure because it brings on too many criminal appeals and is a specious form of reasoning that misapprehends the criminal appellate process, the judicial handling of uncharged misconduct evidence is uneven at best. The past thirty years' experience with Rule 404(b) gives no encouragement to theoretical consistency. Although the list of intermediate issues in Rule 404(b) is by no means exhaustive, the rule's list of nine permissible purposes has had the effect of creating pigeonholes that the prosecution can use to its advantage. Judges have

WEINSTEIN & BERGER, supra note 69, § 403.02.

81. Federal Rule 609(a)(2) reads: "evidence that any witness has been convicted of a crime shall be admitted if it involved dishonestly [sic] or false statement, regardless of the punishment." FED. R. EVID. 609(a)(2).

82. Id.

83. The United States Supreme Court has implied by its holding in Old Chief v. United States, 519 U.S. 172 (1997), that the latter view is the appropriate view. In Old Chief, the United States tried a Native American for unlawful possession of a firearm by a convicted felon. Old Chief, 519 U.S. at 174. Old Chief's attorney offered to stipulate that Old Chief was a person prohibited from possessing a firearm because Old Chief's felony conviction, if disclosed to the jury, would be unfairly prejudicial. Id. at 175. The United States refused to accept the stipulation, and Old Chief was convicted. Id. at 177. The Court held that the proffered stipulation was less prejudicial than the proof of prior conviction and that the trial judge had erred in refusing to mandate the stipulation over prosecutorial objections. Id. at 191-92. The Old Chief opinion specifically addressed the role of Rule 403 in weighing alternative ways of proving the same fact and admonished the trial bench to enforce acceptance of less prejudicial means of proof. Old Chief, 519 U.S. at 184.

84. Every U.S. jurisdiction grants the accused an appeal as a matter of right upon conviction. In order to have anything at all to argue, appellate lawyers representing criminal defendants will often grasp at anything that resembles an error in order to present an argument for reversal. The over-use of Rule 404(b) as the basis for appeals exaggerates the inadequacy of Rule 404(b). See supra notes 67-68 and accompanying text for a discussion of appeals based on Rule 404(b). First, the defendant may have no real issue because the law in his or her case is clear. Second, Rule 404(b) objections usually come with a companion Rule 403 objection that the probative value of the uncharged misconduct greatly exceeds its probative value in that particular instance, which is a much more viable objection than one based on the rule itself. Because Rule 403 calls for a subjective judicial balancing of estimated probative value and estimated unfair innuendo of bad moral character, a judge's subjective decision on the weight of probative value and unfair prejudice may be reversed for abuse of discretion which invites the appellate panel to reweigh the evidence and override the court below.
found the pigeonhole method useful in refusing to admit uncharged misconduct that does not relate to one of the stated subheadings in Rule 404(b). In short, the precursors of the Federal and Uniform rules intended to follow Judge Parker's inclusive rule, but in the field, the judiciary is much happier with Judge Werner's version of the rule, which is a general prohibition followed by specific exceptions.85

Uncharged misconduct evidence may be admissible under a comforting legal theory, i.e., to prove a non-character intermediate issue. However, its real value to the prosecution is the forbidden innuendo: uncharged misconduct proves that the defendant committed other crimes, thereby making it more likely that the defendant committed the crimes charged in the indictment because the defendant has an evil character. The jury will be told not to consider the uncharged misconduct evidence as proof of bad character, but the effect of such an instruction is the same as instructing someone not to think of the blue elephant in the parlor.86

The Federal and Uniform Rules of Evidence have an identical provision, Rule 403, that requires the trial judge to balance probative value of evidence against "unfair prejudice" and certain judicial economy concerns such as confusion of the issues, confusion of the jury, and waste of judicial time.87 It is not clear whether the trial judge may assess uncharged misconduct evidence under Rule 403 without a specific objection to admission of uncharged misconduct evidence based on prejudice outweighing probative value. Assuming defense counsel makes a proper objection on probative value issues, the judge will weigh probative value subjectively against a subjective appraisal of unfair prejudice, confusion, and waste of time. In practice, the trial judge's subjective evaluation of the probative value of uncharged misconduct evidence weighed against prejudice to the accused, confusion of the issues, and confusion of the

85. The appellate decisions that analyze admissibility of uncharged misconduct often start with a general statement that Rule 404(b) is "inclusionary" rather than "exclusionary." See, e.g., Getz v. State, 538 A.2d 726, 730-31 (Del. 1988) (discussing evolution of rule in Delaware which is modeled after the Federal Rules of Evidence). The appellate panel then compares the proffered evidence with the nine pigeonholes written into Rule 404(b) and decides whether to admit or to exclude the uncharged misconduct evidence based on its "fit" with the pigeonholes. See Getz, 538 A.2d at 730-31 (rejecting evidence of other child molestation by the accused because it did not fit any of the nine pigeonholes and refusing to allow prior uncharged sexual misconduct to be admitted to show the lustful disposition of the accused).


87. Rule 403 reads, "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." FED. R. EVID. 403; UNIF. R. EVID. 403.
jury may be more important than Rule 404(b) in predicting the admissibility of uncharged misconduct evidence.

Motive

The accused's motive explains why the accused committed the crime charged. Motive is rarely a stated element of a criminal offense, but the courts have traditionally found that proof of the accused's motive for committing a crime is relevant to the issue of guilt. Two branches of the rule permit admission of uncharged misconduct to prove motive. The first branch permits proof of dissimilar crimes to explain why the accused committed the crime charged. The second branch admits similar crimes to show why the accused committed the crime. It could be collapsed into a general rule permitting proof of criminal intent. The existing case law reflects this fact. For example, in United States v. Stevens, the defendant was charged with using the U.S. mail to submit fraudulent insurance claims for intentionally set fires. The trial court admitted evidence showing Stevens had submitted insurance claims for several fires in the past on the prosecution's offer of proof that the prior fire insurance claims showed motive, intent, guilty knowledge, and lack of accident. Additionally, a small number of cases allow proof of the accused's bad debts to establish motive for a crime against property. A larger number of cases allow proof of the accused's drug habit to establish motive for illegal drug sales or robbery.

89. See, e.g., United States v. Claxton, 276 F.3d 420, 423 (8th Cir. 2002) (permitting evidence in a federal firearms violation case to show that accused's apartment contained unlawful drugs because such evidence was relevant to show his motive for keeping a firearm); United States v. Bogan, 267 F.3d 614, 622 (7th Cir. 2001) (allowing evidence that accused made bootleg wine while in prison to prove motive for accused's assault on corrections officer); United States v. Todd, 920 F.2d 399, 406 (6th Cir. 1990) (admitting evidence showing that the accused made automatic weapons parts and engaged in money laundering to show motive for crime of conspiracy to sell drugs).
90. See, e.g., United States v. Cruz, 326 F.3d 392, 394-95 (3d Cir. 2003) (allowing proof of defendant's parole status to show motive, intent, and method of concealing illegal drug activities); United States v. Holley, 23 F.3d 902, 913 (5th Cir. 1994) (allowing evidence of prior liability to show motive and intent).
91. 303 F.3d 711 (6th Cir. 2002).
92. Stevens, 303 F.3d at 714.
93. Id.
94. See, e.g., United States v. Williams, 264 F.3d 561, 575 (5th Cir. 2001) (allowing evidence that accused had just lost his home in a foreclosure as relevant to prove motive in extortion and bribery case); United States v. Koen, 982 F.2d 1101, 1106 (7th Cir. 1992) (admitting proof of accused's bad debts to show motive to commit offense); United States v. Shriver, 842 F.2d 968, 974 (7th Cir. 1988) (permitting evidence of accused's prior acts in attempts to save failing business to show motive for making false statement to federally-insured bank).
95. See, e.g., United States v. Kadouh, 768 F.2d 20, 21 (1st Cir. 1985) (allowing evidence to show accused had a drug habit as relevant to prove motive for heroin trafficking).
96. See, e.g., United States v. Bitterman, 320 F.3d 723, 727 (7th Cir. 2003) (admitting evidence of accused's drug addiction to show motive for bank robbery). But see, United States v. Madden, 38 F.3d 747, 751-52 (4th Cir. 1994) (holding court erred in admitting evidence that accused used drugs to prove motive for bank robbery).
Miller v. State\textsuperscript{97} is typical of the many cases that permit proof of drug use to establish motive for a crime against property. Miller and two other men were charged with the robbery of an Anchorage, Alaska, jewelry store.\textsuperscript{98} The owner's daughter and two friends provided evidence that identified Dan Finnegan as the tall robber that tied up the owner's daughter.\textsuperscript{99} The two friends identified Randy Ringler as the shorter robber.\textsuperscript{100} Miller, the alleged driver of the getaway car, was charged based on information from one of Miller's friends, Casalichlio, that Miller had given Casalichlio items of jewelry stolen from the Anchorage store.\textsuperscript{101} Miller denied being the third person involved in the robbery.\textsuperscript{102} Casalichlio also testified, over the defense's objections, that he had been involved in a cocaine sales operation with Miller, in which Ringler and Finnegan had been runners.\textsuperscript{103} He also said that Miller was a cocaine user.\textsuperscript{104} The jury handed down a guilty verdict, which was affirmed on appeal by the Alaska Court of Appeals.\textsuperscript{105} The reviewing panel found that Miller's drug use provided a motive for the robbery in that he needed more money to feed his cocaine habit and support his otherwise unsuccessful drug-dealing business.\textsuperscript{106} Despite two previous Alaskan cases that excluded evidence of drug use to prove the motive for commission of a crime,\textsuperscript{107} the Court of Appeals sustained Miller's conviction.\textsuperscript{108} The Court admitted that motive was not a formal issue in the case and that the issue was the identity of the getaway car driver, but found that the cocaine trafficking evidence also proved Miller's plan to get money.\textsuperscript{109}

Knowledge

"Guilty knowledge" may be an element of a number of criminal offenses, but the prosecution must establish guilty knowledge beyond a reasonable doubt in order to prevail. Judges usually admit uncharged misconduct that proves guilty knowledge without much reflection.\textsuperscript{110} "Knowledge" is another

\begin{itemize}
  \item \textsuperscript{97} 866 P.2d 130 (Alaska Ct. App. 1994).
  \item \textsuperscript{98} Miller, 866 P.2d at 132.
  \item \textsuperscript{99} Id. at 131.
  \item \textsuperscript{100} Id.
  \item \textsuperscript{101} Id. at 132.
  \item \textsuperscript{102} Id.
  \item \textsuperscript{103} Miller, 866 P.2d at 132-33.
  \item \textsuperscript{104} Id. at 133.
  \item \textsuperscript{105} Id. at 131.
  \item \textsuperscript{106} Id. at 133-34.
  \item \textsuperscript{107} Gould v. State, 579 P.2d 535, 538 (Alaska 1978); Eubanks v. State, 516 P.2d 726, 729 (Alaska 1973). Both Gould and Eubanks excluded evidence of a drug habit in a crime against property prosecution on the grounds that everyone wants to have more money.
  \item \textsuperscript{108} Miller, 866 P.2d at 134.
  \item \textsuperscript{109} Id.
  \item \textsuperscript{110} See, e.g., United States v. Garcia-Flores, 246 F.3d 451, 454-55 (5th Cir. 2001) (admitting evidence that the truck driver had been charged with transporting marijuana under a forged bill of lading and other instances of same truck driver submitting forged bill of lading to prove knowledge); United States v. Shumway, 112 F.3d 1413, 1419-20 (10th Cir. 1997) (admitting evidence of prior digging at same site for artifacts to show knowledge that defendant was excavating archaeological artifacts);
\end{itemize}
circumstantial way to prove criminal intent, because if the defendant knows what
he or she is doing, then criminal intent to commit a crime follows from that
knowledge. The courts seldom distinguish decisions to admit uncharged
misconduct under the "knowledge" pigeonhole from admission under the
"intent" pigeonhole. 111

An accused may have committed one or more similar criminal acts before
or after the crime charged in the indictment. For example, assume an accused is
charged with possession of stolen property with intent to sell. This crime
requires proof that the accused knew the property was stolen. If the accused
does not know the property was stolen, then the accused is not guilty. The
accused may have received items of stolen property to sell before or after the
specific possession offense set forth in the indictment. The prosecution will be
able to prove the prior instances of possession of stolen property to prove
knowing possession. 112 At the same time, the prosecution will also prove the
accused is a person of bad moral character, which is allegedly contrary to the
general rule that evidence of the accused’s bad character is inadmissible. A
limiting instruction is theoretically available to cure any danger of misuse. 113

In United States v. Aleskerova, 114 the accused was charged with knowing
possession of artworks stolen from the Baku Museum in Azerbaijan and
conspiracy to possess and sell stolen artwork. 115 Aleskerova, her husband Aidyn
Ibragimov, and a man named Jakov Ifraimov, had a series of meetings in 1996
and 1997 with Mr. Koga, a Japanese collector, in both Istanbul and in the United
States. 116 The parties struck a deal for the purchase of eight drawings originally
“liberated” from the Bremen Art Museum in Germany in 1945 by victorious
Russian soldiers and later turned over to the Baku Museum by the Soviet
KGB. 117 The drawings were locked inside a suitcase in a closet in Ifraimov’s

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111. See, e.g., United States v. Watford, 894 F.2d 665, 671 (4th Cir. 1990) (evidence of defendant’s indictment for
altering postal money order admissible to show defendant had previously asked his mother to cash an
altered postal money order); United States v. Moccia, 681 F.2d 61, 63 (1st Cir. 1982) (allowing evi-
dence of previous marijuana possession to prove knowing possession).

112. See, e.g., United States v. Floyd, 343 F.3d 363, 369 (5th Cir. 2003) (admitting evidence that
defendant participated in two prior staged auto accidents to collect insurance proceeds to show defend-
ant knowingly participated in false staged accident described in indictment and to show general
criminal intent); United States v. Lopez, 340 F.3d 169, 172 (3d Cir. 2003) (allowing evidence of prior
conviction for conspiracy to sell cocaine to show criminal intent and to rebut defense of lack of knowl-
dge that defendant possessed heroin).

113. See supra note 86 and accompanying text for a discussion of the shortcomings of limiting
instructions.

114. 300 F.3d 286 (2d Cir. 2002).

115. Aleskerova, 300 F.3d at 292.

116. Id. at 290-91.

117. Id.
Brooklyn apartment to be delivered to Koga.118 Meanwhile, Koga faxed an offer to "sell" the drawings to the Bremen Museum for $6,000,000.119 The museum staff interviewed Koga in Bremen, and Koga convinced them that he had access to the stolen artwork.120 The museum contacted the police, who in turn involved the U.S. Customs Service, in an attempt to apprehend the persons responsible for the theft.121 Museum representatives "agreed" to buy the artwork from Koga and scheduled a meeting with him in New York to make the exchange.122 Meanwhile Ibragimov notified Aleskerova, who had the keys to the suitcase in Ifraimov's apartment, to fly in from Azerbaijan to make the meeting.123 She arrived late for the planned exchange, refused to deliver the suitcase to Koga at his New York hotel, and then left New York.124 She was apprehended shortly after passing through U.S. Customs on October 6, 1997, and was indicted for knowing possession of stolen art work and conspiracy to possess stolen artwork.125 She claimed that she was not aware of the conspiratorial plan and had no knowledge of the fact that the "Bremen drawings" were stolen.126

Aleskerova claimed she had no knowledge that the "Bremen drawings" were stolen property.127 She also claimed she had no knowledge of the conspiracy to extort $6,000,000 from the Bremen Museum.128 At trial, the United States introduced evidence that Aleskerova was stopped by Azerbaijani customs in 1996 with stolen artwork from the Baku Theatre Museum in her possession, under an alleged claim that she was writing a doctoral dissertation about theatre posters.129 This incident was offered to prove that Aleskerova knew what artwork was and thus knew enough about the "Bremen drawings" to know that they were stolen property.130 The U.S. Court of Appeals for the Second Circuit affirmed her conviction, finding that the prior instance of possession of stolen artwork did constitute circumstantial proof that Aleskerova knew the artwork she was handling in New York was stolen.131 This decision was within the scope of orthodox Molineux-based reasoning: the United States had the burden of proof of guilty knowledge and knowing participation in a conspiracy. The accused had been involved in handling stolen art work from another Azerbaijani museum in the recent past and the jury could draw an inference that she knew the art work in the Koga shakedown scheme was stolen because she had

118. Id. at 290.
119. Id. at 290.
120. Aleskerova, 300 F.3d at 290
121. Id.
122. Id.
123. Id.
124. Id. at 291.
125. Aleskerova, 300 F.3d at 292.
126. Id.
127. Id.
128. Id.
129. Id. at 295.
130. Aleskerova, 300 F.3d at 296-97.
131. Id.
previously handled a similar transaction from the same region of the former Soviet Union. In this instance, Aleskerova claimed unknowing, innocent participation in her husband's scheme. Her prior brush with Azerbaijani customs disproved her lack of guile.

On the other hand, People v. Ortiz represents deceptive use of the "knowledge" pigeonhole to get uncharged criminal misconduct before the jury. Prosecutors charged Ortiz with second degree murder arising out of an automobile collision in which a passenger in the car hit by Ortiz's truck was killed. Second degree murder in California requires proof of implied malice, which can include proof of reckless conduct exhibiting a conscious disregard of the lives of others. The prosecution sought to prove this element in two ways. First, several drivers, who were passed by Ortiz's truck when it was speeding down a two-lane highway across the centerline, testified that they were frightened by his driving just before the collision. Second, the prosecution also introduced evidence that Ortiz had been convicted four times for driving under the influence ("DUI") prior to the collision at issue, even though Ortiz was not driving under the influence at the time of the collision. The prosecution offered these prior DUI convictions to show the accused was subjectively aware of the disastrous consequences of operating a motor vehicle on a public highway in a reckless manner, in order to prove Ortiz operated his truck with conscious disregard for the lives of others at the time of the collision. The California Appellate Court approved of the admission of the four DUI convictions to prove implied malice, despite the dissimilarity of the four prior DUI convictions to the facts of the fatal collision, and assumed that if admission was erroneous, it was harmless error.

It is true that the prosecution had to prove implied malice, but four prior DUI convictions did not prove that Ortiz drove his truck with reckless disregard for the safety of others at the time of the collision, nor did it prove that he knew his speeding and erratic driving were potentially disastrous. His fate was sealed

133. Ortiz, 134 Cal. Rptr. 2d at 470.
134. Id. at 471.
135. Id. at 469.
136. Id. at 471.
137. The Ortiz court stated,
We emphasize the word 'knowledge' in the foregoing statutory enumeration because, in seeking admission of the uncharged misconduct evidence at defendant's trial, it was the prosecution's contention that the evidence was relevant because it tended to establish a subjective awareness on the part of defendant of the disastrous consequences that can follow in the wake of recklessly operating a motor vehicle on a public highway. As tending to establish the defendant's knowledge—gained in the course of the prior misconduct—of the natural consequences, dangerous to life, of the reckless operation of a motor vehicle, and of his persistence in that behavior, thus evidencing a conscious disregard for the lives of others on the road. These mental features, of course, comprise the mens rea of implied malice, thereby supporting an accusation of second degree murder.

Id. at 472.
138. Ortiz, 134 Cal. Rptr. 2d at 478.
once the jury found out that Ortiz had four prior DUI convictions, even though he was not under the influence of alcohol at the time of the collision.

**Intent**

"Intent" has two meanings in criminal law. "Specific intent" means a special type of malevolent intent that prosecutors must prove in order to establish the elements of an offense, such as assault with intent to do grievous bodily harm or possession of a controlled substance with intent to sell.\(^\text{139}\) The courts use similar acts of uncharged misconduct to demonstrate specific intent.\(^\text{140}\) Courts presume "General intent" in a prosecution unless the accused is mentally challenged or mentally ill. The prosecution does not need to prove general intent in most criminal prosecutions unless the defendant raises a "no intent" defense to criminal punishment. Those defenses are typically accident or mistake, duress, entrapment, or insanity.

**Specific Intent**

An accused may have committed one or more similar criminal acts before or after the crime charged in the indictment. For example, assume an accused is charged with possession of a controlled substance with intent to sell. The accused may have possessed and sold controlled substances before or after the specific possession offense set forth in the indictment. The prosecution will be able to prove the prior instances of drug possession and sale to show specific intent in its case-in-chief.\(^\text{141}\) The federal courts occasionally admit evidence of later drug sales.\(^\text{142}\)

\(^{139}\) See United States v. Scott, 37 F.3d 1564, 1576 (10th Cir. 1994) (defining specific intent).

\(^{140}\) See, e.g., United States v. Booker, 334 F.3d 406, 412 (5th Cir. 2003) (allowing evidence that defendant possessed large quantity of marijuana six weeks after indictment for conspiracy to possess crack cocaine with intent to sell to show specific intent to distribute); United States v. Hambrick, 299 F.3d 911, 913 (8th Cir. 2002) (allowing evidence of prior escape attempts to prove specific intent to escape federal custody); United States v. Brown, 147 F.3d 477, 483 (6th Cir. 1998) (admitting evidence of other fraudulent actions at telemarketing agencies to show intent to defraud); United States v. Shumway, 112 F.3d 1413, 1419 (10th Cir. 1997) (allowing evidence of prior excavations on federal land for artifacts seven years before offense charged in indictment to show intent to violate Antiquities Act); United States v. Scott, 37 F.3d 1564, 1582 (10th Cir. 1994) (admitting proof of prior failure to file tax return to show intent not to report income); United States v. Adediran, 26 F.3d 61, 64 (8th Cir. 1994) (holding other instances of defendant’s use of false social security numbers admissible to show intent to deceive using false social security number).

\(^{141}\) See, e.g., United States v. Hodge, 354 F.3d 305, 312 (4th Cir. 2003) (allowing evidence of defendant’s prior drug transactions as relevant and necessary to prosecution); United States v. Vega, 285 F.3d 256, 264 (3d Cir. 2002) (allowing evidence of prior drug conspiracy where defendant charged was with conspiracy to distribute and possession with intent to distribute); United States v. Sanchez, 118 F.3d 192, 195-96 (4th Cir. 1997) (allowing evidence of prior drug acts with co-conspirator as well as cocaine found in car shortly before arrest for conspiracy to possess with intent to distribute cocaine); United States v. Mounts, 35 F.3d 1209, 1215 (7th Cir. 1994) (allowing evidence of prior drug convictions); United States v. Maxwell, 34 F.3d 1006, 1009 (11th Cir. 1994) (allowing evidence of uncharged drug offenses as relevant to defendant’s intent to distribute controlled substances).

\(^{142}\) For cases admitting later drug sales transactions to prove intent or knowledge, see United States v. Dickerson, 248 F.3d 1036, 1047 (11th Cir. 2001); United States v. Abreu, 962 F.2d 1425, 1436
In *United States v. Scott*, prosecutors indicted eight defendants for conspiracy to defraud the United States by means of a scheme in which the eight sold trust participation in trusts they had established throughout the United States. The trusts were marketed so that the prospective purchasers of the trusts received access to an unfunded trust account in which they could deposit assets for investment purposes. According to literature used to promote these trusts, the situs of several of the trusts was outside the United States and income received from the trusts was not subject to U.S. income tax, which was a false and misleading statement. As a result, prospective purchasers of "trust units" were induced to buy the participation certificates under false pretenses.

Alex Yung (formerly Glenn Hemsley), one of the eight defendants, objected to the admission of evidence showing his failure to file personal income tax returns from 1980 through 1983 as well as the filing of a U.S. tax lien against his Aurora Financial Consultants trust fund. The U.S. District Court for the District of Kansas admitted Yung's prior tax history because it showed his intent to engage in a system of tax evasion. The U.S. Court of Appeals for the Tenth Circuit affirmed his conviction, agreeing that Yung's prior tax history was relevant to his criminal intent and not overly prejudicial. The Tenth Circuit panel said:

The government presented this evidence under Fed. R. Evid. 404(b), as evidence of other crimes or other acts relevant to a material issue in the case. After a hearing and briefing the district court found that the evidence was relevant to show intent, tax motive, and plan or agreement, and that the evidence was sufficiently related in time and content and had probative value to establish Yung's tax motives. Yung's conduct was indicative of the IBA theory of dropping out of the tax system, and of the existence of a plan or agreement. The court explicitly found that the evidence's probative value outweighed the possibility of unfair prejudice under Fed. R. Evid. 403. We do not find this an abuse of discretion. We agree with the court that the evidence is relevant to Yung's participation in the conspiracy by showing tax motive, a negative attitude toward payment of taxes, and an intent to violate his duty to pay income taxes.

The court's holding was conflated with issues relating to Yung's participation in a conspiratorial scheme to defraud investors. Yung's prior tax history showed that he had the requisite specific intent to defraud the IRS and was admissible under any view of the *Molineux* rule to prove that issue.

(10th Cir. 1992); and United States v. Bibo-Rodriguez, 922 F.2d 1398, 1400 (9th Cir. 1991).

143. 37 F.3d 1564 (10th Cir. 1994).
144. *Scott*, 37 F.3d at 1570.
145. *Id.* at 1571.
146. *Id.*
147. See *id.* at 1572 (stating that the fraud in these transfers is apparent).
148. *Id.* at 1581-82.
149. *Scott*, 37 F.3d at 1582.
150. *Id.*
151. *Id.* (citations omitted).
**Entrapment**

Entrapment is a defense that accuses the law enforcement authorities of originating the crime charged in the indictment against the accused. Entrapment is the criminal equivalent of undue influence. If law enforcement agents beg, plead, importune, or manipulate an unwilling person to commit a crime, the unwilling perpetrator is not guilty. To convict a person claiming entrapment, it helps to produce one or more instances where the accused committed a similar criminal act before or after the offense charged in the indictment. This evidence is circumstantial proof that the accused had a criminal propensity to commit that kind of crime. Dicta in *Sorrells v. United States* provides the common excuse for delving into the accused's bad character in this way, by stating that the entrapment defense calls for a "searching inquiry into [the defendant's] own conduct and predisposition." The prosecution attempts to disprove entrapment by admitting other similar criminal acts by the accused, not in its case-in-chief, but in the rebuttal case after the defendant raises entrapment in the opening statement and by testimony.

*United States v. Crump* shows how the entrapment defense permits the prosecution to introduce evidence of uncharged misconduct. Crump was indicted and convicted of one count of distributing phentermine HCl and two counts of distributing cocaine. He claimed a DEA operative entrapped him into selling drugs. When Feigenbaum, a former Missouri state legislator, was arrested after buying controlled substances from an undercover agent, the politician identified Crump as his normal "source." Crump was also a member of the Missouri House of Representatives. Feigenbaum and Crump, according to the former, had used drugs together when Feigenbaum was a state legislator. Crump had no prior convictions at the time of the alleged offense. The federal government recruited Feigenbaum as an operative with the assignment of making contact and arranging a "buy" from Crump, although Feigenbaum had not spoken to Crump in more than a year. Crump and Feigenbaum had a

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156. 934 F.2d 947 (8th Cir. 1991).

157. See *Crump*, 934 F.2d at 953-55 (discussing admissibility of witness testimony relating to defendant's prior drug distribution under Federal Rule of Evidence 404(b)).

158. *Id.* at 948.

159. *Id.* at 950.

160. *Id.* at 948.

161. *Id.* at 950.

162. *Crump*, 934 F.2d at 948.

163. *Id.*

164. *Id.*

165. *Id.*
meeting in his office, and Crump agreed to find some cocaine for Feigenbaum. The two politicians had at least ten meetings over the next seven weeks. Feigenbaum supplied his handlers with a written statement reciting Crump's admission that he supplied drugs to other people. Feigenbaum did not give the names of the people who had purchased drugs from Crump. Feigenbaum then supplied a recorded telephone conversation between himself and Crump where he urged Crump to buy drugs for him. The DEA followed up this report by providing Feigenbaum with a body wire and sending him back to Crump for more evidence. The planned meeting took place, but Crump refused to sell cocaine to Feigenbaum. Under pressure from Feigenbaum, he did hand over an "upper" to Feigenbaum. At their next meeting, Crump gave cocaine to Feigenbaum. After a series of meetings, Crump furnished more cocaine to Feigenbaum, and the DEA closed in and made the arrest.

Crump's counsel raised entrapment in his opening statement, and the United States then called a woman named Lisa Clark, who testified that she engaged in sex for drugs with Crump four or five times a year from 1986 through 1988 and almost weekly in 1989. Defense counsel objected to her testimony as simple bad character evidence and unfairly prejudicial. The U.S. District Court for the Eastern District of Missouri admitted Clark's testimony and the U.S. Court of Appeals for the Eighth Circuit affirmed. The Eighth Circuit found that Crump offered evidence that he lacked any criminal intent, and by doing so, opened the door for prosecutors to introduce evidence showing that he had a predisposition to commit drug crimes similar to that charged in the indictment. Clark's testimony relating to sex for drugs showed that Crump was predisposed to deal in drugs before Feigenbaum beseeched him for cocaine in 1990. Therefore, the prejudicial effect of Clark's testimony did not outweigh its probative value.

166. Id. at 948-49.
167. Crump, 934 F.2d at 949.
168. Id.
169. Id.
170. Id.
171. Id.
172. Crump, 934 F.2d at 949.
173. Id. The substance was "one tablet of phentermine HCL and four white tablets of a non-controlled substance. Crump also outlined a code which was to be used when the two were discussing drugs. 'Booze' was to be substituted for cocaine, and 'wine coolers' was to be substituted for 'white crosses' which is a type of 'speed.'" Id. at 949.
174. Id.
175. Id.
176. Crump, 934 F.2d at 950, 953.
177. Id. at 950.
178. Id.
179. See id. at 954 (indicating that the government had to prove defendant's predisposition because defendant raised entrapment defense).
180. Id. at 955. The court of appeals stated:

Accordingly, Clark's testimony that Crump had provided her with drugs during their five-
Lack of accident or mistake

Although some criminal statutes punish people for negligence, most statutes punish willful acts. An accused may escape criminal punishment by alleging and suggesting that a criminal act was an accident or a mistake. Once the accused introduces evidence to show that he or she no intent due to accident or mistake, the prosecution may rebut that showing with evidence that the accused committed other similar criminal acts before the crime charged. Those similar criminal acts also show the accused was predisposed to commit crimes and was therefore a bad person. The courts try to cure this defect with a limiting instruction.

year relationship was relevant to the material issue of whether Crump was predisposed to distribute drugs as alleged in the indictment.

Second, Crump's prior bad acts to which Clark testified are similar in kind and reasonably close in time to the drug distribution crimes with which Crump was charged. There is little question that Crump's practice of providing Clark with drugs is substantially akin to the drug distribution crimes alleged in the indictment and we now hold that the two acts are "similar in kind." Crump argues that even if the acts are similar in kind, they were not sufficiently close in time to allow admission of his previous distribution of drugs to Clark. We disagree. Clark testified that from 1986 through April 1989, she was engaged in a sexual relationship with Crump. Clark also testified that Crump would give her drugs on occasions when they had sex. According to Clark's uncontradicted testimony, Crump last provided her with drugs in April 1989. This evidence was not so temporally removed from the acts alleged in the indictment so as to render it inadmissible.

id. at 954. Regarding relative undue prejudice, the court said:

[T]he potential prejudice of the evidence does not substantially outweigh its probative value. Crump argues that Clark's testimony was extremely prejudicial for two reasons. First, Crump contends that Clark's testimony centered on her sexual relationship with Crump. Second, Crump asserts that the unfair prejudice created by Clark's descriptions of her sexual encounters with Crump was compounded by Clark's testimony that at the time of trial she was 24 years old and Crump was 43 years old. We do not deny that the admission of Clark's testimony might well have been prejudicial, especially in light of the nature of Clark and Crump's relationship and the disparity in their ages. Mere prejudice is not enough, however. There must be unfair prejudice that outweighs the probative value of the evidence. Here, the prior acts evidence was highly probative. For a period of five years Clark was close to Crump and gained personal knowledge of his disposition with respect to distributing drugs. This knowledge, as communicated through her testimony, related directly to the acts alleged in the indictment. Consequently, although Clark's testimony may have been prejudicial, its prejudicial effect did not outweigh its probative value.

Crump, 934 F.2d at 955 (citations omitted).

181. See, e.g., United States v. Lane, 323 F.3d 568, 578 (7th Cir. 2003) (stating that district court permitted government to present evidence of defendant's past debts that were unrelated to current charge against him). In Lane, the defendant was charged with making a false statement to a federally-insured financial institution to obtain a loan. Id. at 574. The defendant claimed the errors in his loan application were unintentional. Id. at 577. The United States was permitted to introduce evidence of defendant's outstanding, past-due loans that should have been included in his loan application to disprove accident or mistake. Id. at 578-79. See also United States v. Houser, 929 F.2d 1369, 1373 (9th Cir. 1991) (explaining that the defendant claimed he accidentally wandered into a drug sale transaction and that the government offered evidence of Houser's prior drug transactions to disprove accident).
**THE TROUBLE WITH RULE 404(b)**

*Motive, Knowledge, Intent, Absence of Mistake or Accident*

The federal courts have permitted the prosecution to prove instances of prior drug sales or prior drug possession by a defendant charged with possession with intent to sell a controlled substance or conspiracy to possess a controlled substance with intent to sell. The courts have rationalized this widespread admission of prior drug sales or use as relevant to prove the motive, guilty knowledge, intent, or lack of accidental possession or mistake without differentiating the exact grounds of relevance, as if Rule 404(b) provided a pull-down menu in which one of the menu buttons was "select all of the above." A few non-drug prosecutions have also made use of the "all of the above" selection system to admit prior similar criminal misconduct.

*Plan or Design*

"Plan or design" is vague and amorphous, and is, therefore, very useful to prosecutors because it may serve as a convenient pigeonhole for admission of uncharged misconduct. It includes what lay people would consider a plan or design, a series of conscious steps taken by an accused in order to prepare for a crime and for an escape. Each step in the process helps to establish criminal responsibility for the crime charged. The "plan or design" pigeonhole has been applied to a series of similar uncharged criminal misconduct that shows a distinctive pattern of criminal behavior.

*United States v. Billups* is a good example of admissibility of uncharged misconduct using the "plan or design" pigeonhole. Billups, an International Vice-President of the International Longshoremen's Association ("ILA"), allegedly took advantage of his position at the Port of Norfolk to extort payoffs

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182. See, e.g., United States v. Hodge, 354 F.3d 305, 312 (4th Cir. 2004) (stating that evidence of other drug transactions admissible to prove knowledge and intent); United States v. Knox, 301 F.3d 616, 620 (7th Cir. 2002) (noting that the trial court did not err in admitting evidence of other drug transactions to show knowledge or intent); United States v. Russell, 109 F.3d 1503, 1507 (10th Cir. 1997) (finding that evidence of other drug transactions was admissible to show intent, knowledge, and motive to join conspiracy); United States v. Washington, 969 F.2d 1073, 1081 (D.C. Cir. 1992) (stating that evidence of prior drug transactions was admissible to prove knowledge, intent, and plan); United States v. Parziale, 947 F.2d 123, 128-29 (5th Cir. 1991) (noting that evidence of arrest for prior drug transaction was admissible to prove intent and knowledge); United States v. Haynes, 881 F.2d 586, 589 (8th Cir. 1989) (holding that evidence that defendant operated a "weed house" in 1970's and 1980's was admissible to show knowledge, intent, and common scheme).

183. See, e.g., United States v. Stevens, 303 F.3d 711, 715-16 (6th Cir. 2002) (affirming that evidence of prior fires where defendant collected insurance proceeds admissible to show motive, intent, and knowledge); United States v. Bowie, 232 F.3d 923, 926, 930 (D.C. Cir. 2000) (noting that prior possession of counterfeit currency shows knowledge and intent); United States v. Jackson, 845 F.2d 880, 884 (9th Cir. 1988) (admitting prior false claims to show knowledge and intent to make false claim in subsequent prosecution).

184. See, e.g., United States v. Gold Unlimited, Inc., 177 F.3d 472, 488-89 (6th Cir. 1999) (affirming district court's admission of corporate defendant's other Ponzi pyramid schemes to show plan to defraud); United States v. LeBaron, 156 F.3d 621, 625-26 (5th Cir. 1998) (admitting evidence of prior bad act to show plan).

185. 692 F.2d 320 (4th Cir. 1982).
He was charged with multiple violations of the Hobbs Act and the Travel Act for extorting funds to settle a claim against a shipper, and criminal Taft-Hartley Act violations for extortionate furnishing of stevedores to another company. The U.S. District Court for the Eastern District of Virginia permitted the government to introduce uncharged extortionate acts to show the accused's plan or design to shake down employers. The U.S. Court of Appeals for the Fourth Circuit affirmed Billups's conviction.

"Plan or design" also includes, by way of much judicial precedent since 1975, a series of similar criminal acts that portray a pattern of related criminal conduct so interconnected with proof of the crime charged that the story of the other crimes must be told to the jury so that they can understand the facts supporting the crime charged. This is generally labeled the "interwoven crimes" rule. Interwoven crimes are not extrinsic offenses, even if the accused was not charged with committing the interwoven crime. Therefore, a number of U.S. Courts of Appeals have adopted a broad admissibility rule for "interwoven crimes" that bypasses the usual procedural safeguards required before

186. Billups, 692 F.2d at 322-23.
187. Id. at 323.
188. Id. at 328.
189. Id. at 322. The Fourth Circuit stated:

If the government's other evidence was to be believed, it presented a pattern of transactions between Billups and Montella, and the challenged evidence was clearly relevant to show the development of a common plan or scheme. Billups' argument focuses on the word "opportunity" in the limiting instruction. While the fact of his ILA office provides evidence of "opportunity" to take money from employers for union favors, thus diminishing the need for further proof on that point, the instruction as a whole clearly contemplates consideration of the $500 payment in light of the entire series of transactions. We believe, therefore, that the district court did not abuse its discretion in admitting this testimony.

Marano's testimony regarding his payment to Billups of $1,000 on August 1, 1977, was likewise admissible. Marano testified that this payment was to partially satisfy his $10,000 "debt" to Billups, and was plainly relevant to complete the picture of a "common plan or scheme." The evidence was relevant and probative, and the limiting instruction to the jury, while not as complete as it should have been, clearly stated to the jury that it "cannot find him guilty" for the August 1 transaction.

190. The "interwoven crimes" rule is an exception to the character evidence rule. See, e.g., United States v. Brennan, 798 F.2d 581, 589-90 (2d Cir. 1986) (explaining that evidence of other acts of accepting bribes to fix cases was admissible in trial of judge charged with fixing cases in order to help jury understand the story of crime charged); United States v. Means, 695 F.2d 811, 817 (5th Cir. 1983) (stating that prior solicitation for payoff from bank was inextricably intertwined with solicitation of payoff for which accused was standing trial). A number of federal courts have concluded that "interwoven crimes" are not subject to Rule 404(b) scrutiny and may be admitted as part of the story of the crime as if no innuendo of bad character arose from the crimes committed along the way to committing the major crime. See, e.g., United States v. Lane, 323 F.3d 568, 580 (7th Cir. 2003) (analyzing the admission of evidence using an "intricately related" doctrine). The theory is that because Rule 404(b) applies only to evidence of a defendant's "other crimes, wrongs, or acts," it creates a dichotomy between crimes or acts that constitute the charged crime and crimes or acts that do not. Fed. R. Evid. 404(b) (emphasis added). See United States v. Lipford, 203 F.3d 259, 268 (4th Cir. 2000) (finding that evidence of acts intrinsic to crime charged are admissible if not presented to show defendant's bad character).
uncharged conduct is admitted.\textsuperscript{191}

\textit{United States v. Adediran}\textsuperscript{192} is a good example of the “interwoven crime” rule in action. The accused was charged with using a false social security number to open an account at MailBoxes, Etc. in St. Louis, Missouri.\textsuperscript{193} He then used the same false social security number to open bank accounts at several St. Louis banks, listing his mailing address as MailBoxes, Etc.\textsuperscript{194} A bank officer saw the address, made a complaint to the St. Louis Police Department, and Adediran was arrested.\textsuperscript{195} He posted bail and disappeared.\textsuperscript{196} Later, an individual answering the accused’s description used a false social security number to open a bank account in Rockford, Illinois.\textsuperscript{197} That individual deposited checks drawn on the St. Louis banks.\textsuperscript{198} At the trial relating to the St. Louis incident, the District Court for the Eastern District of Missouri permitted proof of the later Rockford incident because it was an interwoven offense.\textsuperscript{199} The Eighth Circuit has taken the position that evidence proving an interwoven offense does not fall under Rule 404(b) because it does not relate to another separate crime.\textsuperscript{200} The reviewing court agreed that the Rockford incident might be an interwoven offense and also validated the admission under Rule 404(b) without stating any pigeonhole that would permit the admission of the later Rockford incident.\textsuperscript{201}

The “interwoven offense” rule permits proof of other distinct criminal acts that the accused committed as a prelude or an encore to the crime charged in the indictment. Because the “interwoven offense” is not subject to Rule 404(b), it absolves the government from giving the accused prior notice of intent to use the evidence at trial. It also permits proof criminal acts committed before or after

\textsuperscript{191} See, e.g., Lipford, 203 F.3d at 268 (admitting evidence of acts intrinsic to crime charged if not presented to show defendant’s bad character). The Seventh Circuit in Lane stated:

The primary issue, therefore, is whether the government’s introduction of Lane’s outstanding debts and other financial obligations was correctly treated as direct or inextricably intertwined evidence, and therefore outside the scope of Rule 404(b), or whether should it have been treated as character evidence. Rule 404(b) is inapplicable where the “bad acts” alleged are really direct evidence of an essential part of the crime charged. Similarly, cases applying the “intricately related” doctrine have recognized that evidence concerning the chronological unfolding of events that led to an indictment, or other circumstances surrounding the crime, is not evidence of “other acts” within the meaning of Rule 404(b). Although inextricably related evidence does not have to satisfy 404(b), it still must satisfy the balancing test of Rule 403.

\textit{Lane}, 323 F.3d at 579-80 (citations omitted).

\textsuperscript{192} 26 F.3d 61 (8th Cir. 1994).
\textsuperscript{193} Adediran, 26 F.3d at 62.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} Id.
\textsuperscript{197} Id.
\textsuperscript{198} Adediran, 26 F.3d at 62-63.
\textsuperscript{199} See id. at 63 (stating that the trial court did not object to the government’s use of evidence relating to both the St. Louis and the Rockford incidents).
\textsuperscript{200} Id.
\textsuperscript{201} Id. (opting to discuss Rule 404(b)’s requirements but recognizing that facts may suggest crimes are so intertwined that 404(b) is not in issue).
the crime charged in the indictment under the lax standard of *Huddleston v. United States*. As such, it is essentially a general rule of admission for similar acts showing bad criminal character that are chronologically related to the crime charged in the indictment as a sequence of events. True, the interwoven offense may be accompanied by a limiting instruction telling the jury not to use the similar crimes to infer that the defendant is a person of bad moral character, provided that defense counsel demands the court to give such an instruction. That, at least, makes the record appear to be innocent of legal error.

*United States v. Pharis* illustrates how the "interwoven crime" rule shields criminal activity that constitutes separate, uncharged misconduct from Rule 404(b). The three defendants were charged with mail fraud, using the mails to send fraudulent inflated consulting bills to insurance companies. The three defendants or their employees manually inflated their consulting bills to show more hours spent on the consultation than were actually the case. In 1994, one of the three defendants, a computer programmer, developed a computer program to inflate hourly time by a factor of 1.15. The United States took an interlocutory appeal from a motion in limine ruling, which excluded evidence related to the pre-1994 manual scheme, on the ground that the "manual" inflation consisted of a separate crime barred by the statute of limitations, and was not admissible as uncharged misconduct under Rule 404(b). The U.S. Court of Appeals for the Third Circuit disagreed with the trial judge in the U.S. District Court for the Eastern District of Pennsylvania, finding that the "manual" and "computer" fraudulent billing scheme constituted one interwoven offense. Despite the fact that the pre-1994 acts could not be prosecuted as separate crimes, the reviewing court found that Rule 404(b) did not apply to the earlier crimes because they were interwoven parts of the fraudulent scheme.

202. 485 U.S. 681 (1988). *Huddleston* holds that uncharged misconduct evidence is admissible if the trial judge finds that the jury could find that the proffered uncharged misconduct occurred and was committed by the accused by a preponderance of the evidence. No advance ruling on the burden of proof is required in federal practice. *Huddleston*, 485 U.S. at 682, 685.

203. See, e.g., United States v. Mastrangelo, 172 F.3d 288, 295 (3d Cir. 1999) (explaining that trial judge must provide limiting instruction); United States v. Perkins, 94 F.3d 429, 434 (8th Cir. 1996) (noting that trial judge should provide limiting instructions); United States v. Pipola, 83 F.3d 556, 566 (2d Cir. 1996) (stating that trial judge provided limiting instructions upon defense counsel's request); United States v. Merriweather, 78 F.3d 1070, 1077 (6th Cir. 1996) (stating that trial judge should provide limiting instructions); United States v. Manso-Portes, 867 F.2d 422, 424 (7th Cir. 1989) (noting that district court provided limiting instruction to consider evidence of uncharged misconduct on issues of knowledge and intent).

204. 298 F.3d 228 (3d Cir. 2002).

205. See *Pharis*, 298 F.3d at 233-34 (stating that district court found two different schemes at issue).

206. Id. at 231.

207. Id.

208. Id.

209. Id. at 231-33 (discussing defendant's motion and district court's ruling).

210. *Pharis*, 298 F.3d at 234, 240 (noting that district court erred in finding that manual and computer schemes constituted different schemes but lacked jurisdiction to hear appeal).

211. Id. at 234. The Third Circuit stated:
Then there are conspiratorial plans. In federal criminal practice, two or more offenders who cooperate are likely to be indicted as conspirators. The prosecution has to prove that the offenders agreed to commit a crime and one or more overt acts in furtherance of the conspiratorial plan or design. This permits federal prosecutors to introduce similar and dissimilar criminal actions of one or several conspirators during the life of the conspiracy to show the conspiratorial plan or design. The courts routinely approve introduction of the conspirators' other criminal acts. Inevitably, the probative value of these criminal acts is found to exceed prejudice to the conspirators, using the same analogy to partnership law that permitted the Supreme Court to find that the admissions of one conspirator would be admissible against all other conspirators, without knowledge or authorization.

*United States v. Passarella* represents an orthodox use of the conspiratorial plan exception. Passarella was indicted and convicted in the U.S. District Court for the Middle District of Tennessee on five counts of conspiracy to sell or exchange counterfeit obligations of the United States. The indictment charged that "Monty Hudson traded counterfeit obligations to Passarella for pharmaceutical drugs, and that Hugh White and Jimmy Hamm obtained.

Once the District Court concluded that the manually altered bills were not properly part of the charged scheme, it applied Rule 404(b), finding that the evidence of the manually changed bills constituted prior bad acts that should be excluded from evidence. Again, the District Court was mistaken. Once certain fraudulent conduct is properly included as part of the charged scheme, Rule 404(b) poses no obstacle because evidence that is part of the charged crime does not fall under Rule 404(b).

Id.

212. 18 U.S.C. § 371 states:
If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

213. See, e.g., Lipford, 203 F.3d at 268 (explaining conspirator's shooting of police officer during execution of search warrant admissible to "complete the story with respect to scope of the conspiracy"); United States v. Moosey, 735 F.2d 633, 635 (1st Cir. 1984) (finding defendant's prior similar drug delivery acts admissible to demonstrate his participation in ongoing drug distribution conspiracy); United States v. Means, 695 F.2d 811, 817 (5th Cir. 1983) (admitting similar unindicted payoff to defendants to show common plan).

214. See, e.g., United States v. Johnson, 28 F.3d 1487, 1499 (8th Cir. 1994) (admitting evidence of accused's engagement in drug trafficking outside alleged conspiratorial life to prove intent, knowledge, or absence of mistake); United States v. Isabel, 945 F.2d 1193, 1200 (1st Cir. 1991) (explaining the introduction of paycheck scheme evidence in case for drug-related conspiracy as probative of understanding the defendant's motive, knowledge, and intent); United States v. Porter, 821 F.2d 968, 978 (4th Cir. 1987) (finding no abuse of discretion in lower court's decision to allow government to present evidence of drug transactions for which defendant was not indicted); United States v. Renteria, 625 F.2d 1279, 1281 (5th Cir. 1980) (holding the evidence of cocaine introduced at trial but not referred to in indictment was proper under Rule 404(b)).


216. 788 F.2d 377 (6th Cir. 1986).

counterfeit obligations from Passarella in exchange for genuine currency. Passarella was also charged with conspiring to distribute Schedule II controlled substances with Monty Hudson. The overt act in furtherance of the conspiracy consisted of an exchange of counterfeit money for drugs between Passarella and Hudson.

During trial, the government introduced two distinct types of criminal conduct not charged in the indictment. The government recovered a quantity of counterfeit bills and illegal drugs from Monty Hudson's trailer. The possession of counterfeit money and the possession of controlled substances arguably constituted separate crimes not alleged as overt acts of the conspiracy. The trial court admitted the evidence, which was validated on appeal by the U.S. Court of Appeals for the Sixth Circuit.

The Sixth Circuit explained that "the evidence of drugs and counterfeit obligations seized from Monty Hudson's U-Haul trailer was relevant to the existence of the conspiracy charged in the indictment as well as Passarella's participation in that conspiracy." The court continued, that "the evidence seized from the U-Haul trailer was therefore admissible as being relevant to any common contraband activity which the evidence showed to have involved Passarella, Hudson, and others." The court added, "this evidence was admissible to corroborate the testimony of Don Parsons, a former confederate of Passarella's who testified on behalf of the government about the drug-related and counterfeit activities of Passarella, Hudson, White, and Hamm."

The second type of evidence the government offered indicated that unindicted co-conspirators had passed counterfeit money in furtherance of the conspiratorial design. This evidence was also held admissible to show the nature and extent of the conspiratorial enterprise.

218. Id. at 382.
219. Id.
220. Id.
221. Id.
222. Passarella, 788 F.2d at 382
223. Id. at 382-83.
224. Id. at 382.
225. Id.
226. Id.
227. Passarella, 788 F.2d at 383.
228. Id. at 382-83. The court stated:
For similar reasons, we believe that the testimony concerning crimes committed by others was properly admitted over Passarella's objection. Specifically, Passarella objected to the testimony of Don Parsons and Hugh White concerning their admitted activities in passing counterfeit currency in Oklahoma, Texas and Arkansas. Although Passarella was not shown to have specifically participated in these particular criminal activities, our review of the record convinces us that this evidence was relevant to the background and the nature of the conspiracy charged in the indictment. Thus, Parsons testified that just before coming to live with Passarella, he had been arrested in Arkansas on forgery charges. He further testified that sometime thereafter Hugh White was arrested in Oklahoma for passing counterfeit currency. Hugh White likewise testified about his arrest in Oklahoma for passing counterfeit currency and also about how he later conferred with Passarella concerning the counterfeiting
United States v. Watford illustrates the potential misuse of the conspiratorial plan pigeonhole to put uncharged misconduct before a jury. A group of inmates in the Parchman, Mississippi State Penitentiary worked out a scheme to make money. The inmates had outside confederates in Baltimore who bought $1.00 and $5.00 U.S. Postal Service money orders and sent them to the prisoners to be "professionally altered" to read $500 to $700. The inmates put ads in homosexual magazines claiming to be wealthy homosexuals wrongfully imprisoned. If anyone responded to the ad, an inmate would tell that person he needed money to bribe a judge to get out of prison. The "victim" was directed to cash several money orders and deliver the money to a third person on the outside acting for the inmate. Watford, the alleged ringleader, and two others, Gant and Williams, were charged with and convicted of conspiracy to commit mail fraud, several counts of mail fraud, and two counts of interstate transportation of stolen property. Williams was convicted of one count of conspiracy, two counts of mail fraud, and two counts of interstate transportation of stolen property.

During the conspiracy trial in the U.S. District Court for the District of Maryland, the government offered evidence that, in 1984, Williams had sent "raised" money orders to his mother to cash on his behalf. This incident was outside the conspiracy dates alleged in the indictment and was not in furtherance of the conspiracy. Nevertheless, the court admitted the indictment and the admission was validated by the Fourth Circuit. The trial court had given a limiting instruction that the 1984 passing of "raised" money orders were admissible only against Williams, and not the other conspirators. The court stated:

Rule 404(b) provides that evidence of prior bad acts is not admissible to prove conduct in

charges. Plainly, this evidence was probative of both an ongoing relationship between the coconspirators and Passarella's "knowledgeable participation" in the conspiracy.

Id. at 383.

229. 894 F.2d 665 (4th Cir. 1990).
231. Id. at 667.
232. Id.
233. Id.
234. Id.
235. Watford, 894 F.2d at 667.
236. Id.
237. Id.
238. Id. at 671.
239. See id. (approving lower court's admission of evidence despite defendant's objections to the date and relation of evidence to the conspiracy).
240. Watford, 894 F.2d 671-72.
241. Id. at 671.
242. Id. The court stated:
Identity

The prosecution in *Molineux* offered allegedly similar criminal conduct to prove that the accused committed the murder of Mrs. Adams. Since 1975, a number of cases have turned on the same issue. For the court to admit the evidence, the identity of the perpetrator of a crime must be otherwise unknown. Second, the accused must have committed similar criminal acts. The prosecution may offer instances of similar acts to show the accused committed the act charged. Once the court admits similar acts, the jury may, as in *Molineux's* case, find that the accused also committed the crime charged. Some courts demand that the manner and means of perpetrating the known criminal acts and the unknown crime charged in the indictment be so unique and individualized as to be "a signature" of the perpetrator. The courts also allow uncharged misconduct to prove identity when they find that the characteristics of the crime permit an inference of a defendant's pattern of behavior. To be accurate, courts sometimes only admit uncharged misconduct if it is particularly distinctive when offered to prove the perpetrator's identity. The jury will learn by this means that the accused is a person of bad character.

*United States v. Shumway* is the best recent example of an orthodox use of the "identity" pigeonhole by a federal court. Shumway was charged in the U.S. District Court for the District of Utah with three counts of violating the Archeological Resources Protection Act and damaging U.S. property. In conformity therewith, but is admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." This court has held that Rule 404(b) is an inclusive rule that allows admission of evidence of other acts relevant to an issue at trial except that which proves only criminal disposition. Whether to admit evidence under Rule 404(b) is within the discretion of the district court ... and, here, the district court did not abuse its discretion. It was properly admitted under Rule 404(b) to show Williams' knowledge of the scheme and to show the existence of a common plan or scheme.

Id. (citations omitted).

243. See, e.g., United States v. Mack, 258 F.3d 548, 554 (6th Cir. 2001) (approving lower court's admission of evidence of later bank robbery to show identity via modus operandi); United States v. Guerrero, 169 F.3d 933, 942 (5th Cir. 1999) (admitting evidence of other bank robberies perpetrated by accused because crimes had a signature quality); United States v. Quinn, 18 F.3d 1461, 1466 (9th Cir. 1994) (allowing evidence of another robbery to show identity through significant similarity); United States v. Hudson, 884 F.2d 1016, 1021 (7th Cir. 1989) (noting current act as having sufficient commonality with prior acts to qualify as modus operandi).


245. See, e.g., United States v. Ingraham, 832 F.2d 229, 232-35 (1st Cir. 1987) (allowing evidence that accused wrote threatening letters and made threatening phone calls in order to illustrate a distinctive pattern of conduct); United States v. Brennan, 798 F.2d 581, 590 (2d Cir. 1986) (finding no abuse of discretion by lower court in allowing evidence of other crimes to establish a pattern of racketeering activity).

246. See, e.g., United States v. Carroll, 207 F.3d 465, 470 (8th Cir. 2000) (rejecting evidence of another robbery because of the generic nature of the crimes and the span of ten years that passed between them).

247. 112 F.3d 1413 (10th Cir. 1997).

1991, police apprehended Shumway with artifacts from two Anasazi Native American archeological sites, Dop-Ki Cave and Horse Rock Ruin.\textsuperscript{250} Both sites were located on federal reservations.\textsuperscript{251} Earlier that year, Shumway made contact with Miller and Ruhl, a helicopter pilot, and convinced them to fly him around the four corners part of Arizona to look for potential Native American archeological sites from which they could harvest high priced archeological finds for sale by \textquote{pot holing} the site.\textsuperscript{252} Shumway directed his confederates to the two sites where they found intact human burials, which they dug up for sale.\textsuperscript{253} Miller testified at trial that based on the directions Shumway gave and his detailed knowledge of the site, Shumway seemed to have been there previously.\textsuperscript{254}

The government then offered evidence, including Shumway's former testimony in another criminal prosecution, which showed he had \textquote{pot holed} the Horse Creek site in 1984 using a helicopter to locate the site from the air.\textsuperscript{255} Shumway had filed a motion \textit{in limine} to exclude the evidence relating to his 1984 unlawful archeological activities.\textsuperscript{256} The district court denied the motion and overruled Shumway's objections at trial.\textsuperscript{257}

The Tenth Circuit agreed that Shumway's prior, similar criminal activities were admissible.\textsuperscript{258} First, the court ruled that Shumway's archeological techniques were so distinctive and unusual that they amounted to a \textquote{signature} that identified the perpetrator.\textsuperscript{259} Because Shumway denied that he had been at Horse Rock at the time of the offense described in the indictment, the Court allowed the 1984 archeological activities evidence to establish the identity of the accused.\textsuperscript{260}

\begin{table}[h]
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249. \textit{See} Shumway, 112 F.3d at 1417 (noting defendant was charged with damaging property under 18 U.S.C. § 1361 (2003)).
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250. \textit{Shumway}, 112 F.3d at 1417.
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251. \textit{Id.}
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252. \textit{Id.}
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254. \textit{Id.} at 1418.
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255. \textit{Shumway}, 112 F.3d at 1418.
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256. \textit{Id.}
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257. \textit{Id.}
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258. \textit{Id.} at 1421.
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259. \textit{Id.} at 1420-21.
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260. \textit{Shumway}, 112 F.3d at 1420. The court stated:
\begin{quote}
We have held that to prove identity, evidence of prior illegal acts need not be identical to the crime charged, so long as, based on a \textquote{totality of the comparison}, the acts share enough elements to constitute a \textquote{signature quality}.
\end{quote}
Elements relevant to a \textquote{signature quality} determination include the following: geographic location, the unusual quality of the crime, the skill necessary to commit the acts, or use of a distinctive device.

These enumerated elements relevant to a \textquote{signature quality} determination are not inclusive. Furthermore, the weight to be given to any one element and the number of elements necessary to constitute a \textquote{signature} are highly dependent on the elements' uniqueness in the context of a particular case. In other words, a few highly unique factors may constitute a \textquote{signature}, while a number of lesser unique factors \textquote{although insufficient to generate a strong inference of identity if considered separately, may be of significant probative value
\end{tabular}
\end{table}
United States v. Mack demonstrates the misuse of the identity pigeonhole to permit the prosecution to introduce the defendant's criminal behavior. Mack pled guilty in state court to a bank robbery that he committed after the nine bank robberies in his federal indictment. The guilty plea and the facts describing the bank robbery were admitted by the U.S. District Court for the Southern District of Ohio to prove that Mack was the perpetrator of the nine robberies. Nothing in the commission of these robberies was particularly distinctive: the perpetrator was an athletic African-American, about six feet in height, who wore a ski mask and leaped over the counter to get money from the teller's cash drawer, then jumped back to the bank floor and made his escape. The reviewing court admitted that the modus operandi of the robberies did not constitute a unique and unusual way to commit these robberies. However, the Sixth Circuit affirmed Mack's conviction, finding characteristic similarities between the seven crimes supporting the trial judge's discretionary admission of the conviction to show the accused's identity.

In Shumway, the accused had been the perpetrator of a "pot hole" incident at one of the two sites nine years before the offense stated in the indictment. The use of a helicopter to locate pre-historic Native American archeological sites, a quick landing, followed by a "pot hole" digging operation for relics was unique and distinctive. Shumway denied being the perpetrator of the second "pot hole" expedition, despite the testimony of the helicopter pilots involved in the operation. The Tenth Circuit explained that the distinctive similarities between the crime Shumway admitted committing in 1986 and the 1991 adventure at the same site would permit a circumstantial inference that the same person committed both crimes.

However, nothing unique or distinctive was apparent about the bank robbery committed by Mack to which he pled guilty. Mack committed that bank robbery wearing bulky clothes and a ski mask and leapt over the counter to get the money out of the cash drawer. The nine robberies in his federal indictment involved an armed bank robbery committed by an African-American wearing a

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Id. (citations omitted).

261. 258 F.3d 548 (6th Cir. 2001).
262. Mack, 258 F.3d at 551.
263. Id. at 553.
264. Id. at 553-54.
265. Id.
266. Id. at 553-54. The court found that these similarities constituted a "signature" that permitted proof of the later bank robbery to establish the identity of the perpetrator. Mack, 258 F.3d at 554. The court also held that the probative value of the later bank robbery was not greatly outweighed by prejudice to the accused. Id. at 555.
267. Shumway, 112 F.3d at 1418.
268. Id. at 1420.
269. Id. at 1419.
270. Id.
271. Mack, 258 F.3d at 553-54.
ski mask who was agile enough to leap over the counter to get the pay-off. The *modus operandi* followed by Mack in his later bank robbery was so commonplace and typical of most bank robberies that it could not permit a circumstantial inference that Mack was the perpetrator. The later robbery should not have been admitted.

*Other Issues*

The courts are sharply divided on the burden of proof required as a condition to admission of uncharged misconduct. On one end of the spectrum, some jurisdictions such as Delaware require that prosecutors must prove all acts of uncharged misconduct by clear and convincing evidence. On the other end, the current federal burden of proof for the introduction of uncharged misconduct evidence is a showing that it would be possible for the jury to find, more probable than not, that the accused committed the uncharged misconduct. Other jurisdictions demand proof by a preponderance of evidence before admitting uncharged misconduct evidence. A jurisdiction that demands a higher quantum of preliminary foundation proof before admitting uncharged misconduct may very well admit every kind and type of uncharged misconduct provided that prosecutors supply a greater degree of certainty about the occurrence of the event.

*Sex Offenses*

Courts routinely admit uncharged sexual misconduct evidence under Rule 404(b) to show a plan or design to commit deviant sex acts. For example, courts routinely admit prior sexual assaults on children by an accused child molester to show the accused's plan or design to attack children. In stranger rape

272. *Id.*


274. See, e.g., *Huddleston*, 485 U.S. at 689 (holding lower court does not have to make preliminary finding that government has proved other act by a preponderance of the evidence).


276. See, e.g., United States v. Meacham, 115 F.3d 1488, 1494 (10th Cir. 1997) (admitting evidence that defendant molested his daughters thirty years earlier to show plan or design); United States v. Hadley, 918 F.2d 848, 851 (9th Cir. 1990) (validating lower court’s admission of evidence stating that similarity in “space and practice” existed between previous act of molestation occurring nearly ten years prior and offense being charged); United States v. Davis, 47 M.J. 707, 711 (N-M. Ct. Crim. App. 1997) (allowing evidence of prior molestation outside of the five-year statute of limitations to show defendant’s plan of parental conditioning of victim from a young age); United States v. Munoz, 32 M.J. 359, 364 (C.M.A. 1991) (rejecting defendant’s objection of remoteness to admission of uncharged conduct occurring at least twelve years earlier); Tull v. State, 119 S.W.3d 525, 525 (Ark. App. 2003) (finding no error in admitting testimony regarding event occurring thirty years earlier to show methods, proclivity, and plan); People v. Branch, 109 Cal. Rptr. 2d 870, 879 (Cal. Ct. App. 2001) (noting defendant’s failure to show he was unfairly prejudiced by inclusion of evidence of uncharged offenses); State v. Phillips, 845 P.2d 1211, 1214-15 (Idaho 1993) (approving district court’s admission of testimony on uncharged sexual misconduct to show a common plan or scheme). But see People v. Sabin, 614 N.W.2d 888, 895 (Mich. 2000) (ruling no abuse of discretion by lower court in permitting evidence of
prosecutions, the accused’s prior sexual assaults are admissible to show the accused’s identity. The United States Congress adopted two evidence rules in 1992 that permit proof of the prior sexual behavior of the accused in a sex crime prosecution. A handful of states, following federal precedent, have adopted specific exceptions to Rule 404(a) that presume the admissibility of sex offenders’ prior criminal histories in the prosecution’s case-in-chief. A similar rule existed at common law in a number of states prior to the Federal and Uniform Rules. Although most evidence commentators saw no need for a specific sex offender exception to Rule 404(a), public sentiment existed to manipulate the rules of evidence to obtain more convictions against sex offenders.

*People v. Falsetta* shows how the codified “lustful disposition” rule works in practice. Falsetta was charged in California state court with one count of forcible oral copulation. According to the case report, the accused picked up his victim from the street by offering her a ride to a local convenience store, then announced “[w]e’re on a date,” and drove to a parking lot where the accused forced the victim to have oral sex with him after pounding her with his fists. At trial, the prosecution offered evidence that the accused committed rape twice before. First, the accused had pounced on a jogger in 1985 and had raped her. The accused pled guilty to this charge and was sentenced. In 1987, the accused allegedly tried to pick up a woman on her way to work. When she

other sexual abuse at trial).


278. FED R. EVID. 413, 415.

279. See, e.g., CAL. EVID. CODE. § 1108(a) (2004) (stating “[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352”).

280. 986 P.2d 182 (Cal. 1999).


282. *id.* at 184.

283. *id.* at 185.

284. *id.*

285. *id.*

286. *Falsetta*, 986 P.2d at 185.
refused to get in his car, he followed her, jumped out from behind some bushes to knock her down, and forced her to have oral sex with him.\textsuperscript{287} He then genitally raped her.\textsuperscript{288} Neither prior attack was relevant to the traditional pigeonholes in California Evidence Code section 1101(b), the equivalent of Rule 404(b) of the Federal Rules of Evidence.\textsuperscript{289} The accused argued that admission of these unrelated acts of sexual misconduct were a violation of due process of law.\textsuperscript{290} The California Supreme Court disagreed and affirmed his conviction.\textsuperscript{291} The Court stated:

Available legislative history indicates section 1108 was intended in sex offense cases to relax the evidentiary restraints section 1101, subdivision (a), imposed, to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility. In this regard, section 1108 implicitly abrogates prior decisions of this court indicating that "propensity" evidence is per se unduly prejudicial to the defense.\textsuperscript{292}

The Court held that the admission of the other offenses was proper to show the accused's predisposition to commit similar sex crimes, thereby rejecting the accused's argument that admission of other sexual misconduct would be a denial of due process of law.\textsuperscript{293}

\textit{United States v. Sioux,}\textsuperscript{294} a federal sexual assault prosecution for an offense occurring on an Indian reservation, shows how Rule 413 has reversed the presumptive inadmissibility of criminal history in a sexual assault prosecution. Sioux was charged with a February 2001 sexual assault on an underage victim on the reservation.\textsuperscript{295} The government produced evidence that the accused committed a sexual assault in May 2001, after the offense charged in the indictment.\textsuperscript{296} Sioux objected to admissibility under Rule 404(b) but the evidence was offered under Rule 413.\textsuperscript{297} The U.S. District Court for the District of Montana admitted evidence showing the unconnected sexual assault and the accused was convicted.\textsuperscript{298} The U.S. Court of Appeals for the Ninth Circuit affirmed the court below, finding that Rule 413 reversed the presumption against admission of unrelated, uncharged misconduct in sex offender cases.\textsuperscript{299} Likewise, the court held that uncharged sexual misconduct occurring before or after the

\textsuperscript{287} Id.
\textsuperscript{288} Id.
\textsuperscript{289} Id. at 186.
\textsuperscript{290} Id.
\textsuperscript{291} Falsetta, 986 P.2d at 195.
\textsuperscript{292} Id. at 186.
\textsuperscript{293} Id. at 190.
\textsuperscript{294} 362 F.3d 1241 (9th Cir. 2004).
\textsuperscript{295} Sioux, 362 F.3d at 1242-43.
\textsuperscript{296} Id. at 1243.
\textsuperscript{297} Id.
\textsuperscript{298} Id. at 1243-44.
\textsuperscript{299} Id. at 1247.
offense charged in the indictment is equally admissible.\textsuperscript{300}

After this exhaustive review, one comes away with the perception that despite the rhetorical genuflection to Rule 404(b)'s "inclusive" nature, the courts are much more comfortable with a review of uncharged misconduct to see if it "fits" within the five traditional \textit{Molineux} categories. The handful of cases that attempt to expand the specific instances of relevance contained in Rule 404(b) do not indicate that the judiciary views Rule 404(b) as a general rule of admissibility.

\textbf{Uncharged Misconduct Since 1975: Common Law States}

Connecticut, Georgia, Illinois, Massachusetts, Missouri, New York, and Virginia have not adopted the Uniform Rules of Evidence. These states retain the original \textit{Molineux} rule formula that is stated as a categorical rule of inadmissibility and followed by a short list of judicially-recognized exceptions to the rule.\textsuperscript{301} Ample case law from these jurisdictions permits the introduction of

\begin{quote}
\textsuperscript{300} \textit{Sioux}, 362 F.3d at 1245. The court stated:

We find the language of Rule 413 unmistakably pellucid. It sanctions the admissibility of "evidence of the defendant's commission of another offense . . . of sexual assault. Used as it is here, the word "another" refers to "an additional one of the same kind: one more" or to "one of a set or group of unspecified or indefinite things" that has not already been contemplated. Sioux's alleged sexual assault of J.R.S. [victim of similar sexual assault] is plainly "of a kind" with his assault of H.H. [victim is current case]; it is beyond serious dispute that such misconduct is part of the same "set or group" of acts declared relevant by Congress and made admissible on that basis.

\textit{Id.} (citations omitted).

The court further stated that "Sioux's challenge hinges on assigning a temporal limitation to the word "another" — in particular, precedence. Yet, "another" contains no inherent chronological limitation, and to the extent the word is used in a necessarily temporal context, its most natural usage actually signifies subsequence." \textit{Id.}

\textsuperscript{301} The most current restatement of the \textit{Molineux} rule for each of these jurisdictions is as follows:

Connecticut:

The rules governing the admissibility of evidence of a criminal defendant's prior misconduct are well established. Although evidence of prior unconnected crimes is inadmissible to demonstrate the defendant's bad character or to suggest that the defendant has a propensity for criminal behavior . . . such evidence may be admissible for other purposes, such as "to prove knowledge, intent, motive, and common scheme or design, if the trial court determines, in the exercise of judicial discretion, that the probative value of the evidence outweighs its prejudicial tendency."

\textit{State v. Morowitz}, 512 A.2d 175, 177 (Conn. 1986) (citations omitted).

Georgia:

\textit{See GA. CODE ANN.} § 24-2-2 (1995) (stating that "[t]he general character of the parties and especially their conduct in other transactions are irrelevant matter unless the nature of the action involves such character and renders necessary or proper the investigation of such conduct."); see also \textit{Bacon v. State}, 71 S.E.2d 615, 616-17 (Ga. 1952) (stating "[i]t is a fundamental principle in our system of jurisprudence, intended to protect the individual who is charged with a crime, and to insure him of a fair and impartial trial before an unbiased jury, that the general character of the defendant and his conduct in other transactions is irrelevant unless the defendant chooses to put
his character in issue."). However, exceptions to the rule have developed over the years so that now there are times that evidence of other crimes committed by the defendant can be admitted for limited purposes.

"Before evidence of independent crimes is admissible two conditions must be satisfied. First, there must be evidence that the defendant was in fact the perpetrator of the independent crime. Second, there must be sufficient similarity or connection between the independent crime and the offense charged, that proof of the former tends to prove the latter."


"Once the identity of the accused as the perpetrator of the offense separate and distinct from the one for which he is on trial has been proven, testimony concerning the independent crime may be admitted for the purpose of showing identity, motive, plan, scheme, bent of mind, and course of conduct."

Hamilton v. State, 235 S.E.2d 515, 517 (Ga. 1977) (citations omitted). "The only separate crimes which are admissible are those that are either similar or logically connected to the crime for which defendant is being tried." State v. Johnson, 272 S.E.2d 321, 322 (Ga. 1980) (emphasis added).

Illinois:

Evidence of other crimes is not usually admitted to show propensity, i.e. to show...committed the crime charged. People v. Donoho, 788 N.E.2d 707, 714 (Ill. 2003). This type of evidence is considered...currently charged with. Donoho, 788 N.E.2d at 714. Nevertheless, courts allow...outweigh its probative value. Id. at 714-15. See also People v. Stanbridge, 810 N.E.2d 88, 93 (Ill. App. 2004) (citing Donoho, 788 N.E.2d at 714-15).

Massachusetts:

See, e.g., Commonwealth v. Barrett, 641 N.E.2d 1302, 1306 (Mass. 1994) (stating that evidence of a defendant’s prior or subsequent bad acts is inadmissible to demonstrate bad character or propensity to commit the crime charged). However, such evidence “may be admissible, if relevant, to show a common scheme or course of conduct, a pattern of operation, absence of accident or mistake, intent, or motive.” Barrett, 641 N.E.2d at 1306. To be admissible, “evidence of uncharged conduct must actually be related in time, place, and/or form to the charges being tried. To be admissible, “evidence of uncharged [...] relevant and probative.” Commonwealth v. Walker, 812 N.E.2d 262, 277 (Mass. 2004) (citing P.J. LIACOS, M.S. BRODIN, & M. AVERY, MASSACHUSETTS EVIDENCE § 4.4.6. 155 [sic] (7th ed. 1999).

Missouri:

As a general rule, “evidence of prior uncharged misconduct is inadmissible for the purpose of showing the propensity of the defendant to commit such crimes.” State v. Bernard, 849 S.W.2d 10, 13 (Mo. 1993). “When not properly related and logically relevant to the crime at issue, the introduction of other crimes evidence violates the defendant’s right to be tried only for the offense for which he is charged.” State v. Clover, 924 S.W.2d 853, 855 (Mo. 1996). If, however, evidence of prior misconduct is both logically and legally relevant to prove the charged crime, it is admissible. Clover, 924 S.W.2d at 855. Evidence is logically relevant if it has some legitimate tendency to establish directly the accused’s guilt of the charges for which he is on trial. Id. Evidence is legally relevant if its probative value outweighs its prejudicial effect. Id. Evidence of prior uncharged misconduct generally has a legitimate tendency to prove the specific crime charged when it tends to establish motive, intent, the absence of mistake or accident, a common scheme or plan, or the identity of the person charged with the commission of the crime on trial. Id. This list of exceptions is not exhaustive. Bernard, 849 S.W.2d at 13. See also State v. Barriner, 34 S.W.3d 139, 144-45 (Mo. 2000) (holding that evidence was admitted erroneously due to its prejudicial nature) (citing Bernard, 849 S.W.2d at 13 and Clover, 924 S.W.2d at 855).

New York:

“Despite its age, the Molineux rule has never become calcified or brittle — its progeny have
uncharged misconduct to prove motive, knowledge, specific intent, general intent when challenged by the defendant, plan or design, or identity of the accused. At times, the courts in these states have construed activity that generally would be uncharged criminal misconduct in other states as not subject to the uncharged misconduct rule, because the common law state’s penal laws does not forbid that conduct. However, the common law states generally refuse to admit uncharged misconduct evidence if it does not fit within the classic five Molineux exceptions.

IV. AN ANALYTIC SUMMARY OF THE USE OF RULE 404(b)

The uncharged misconduct rule has been codified as Rule 404(b) of the Federal and Uniform Rules of Evidence. The persons responsible for the rule’s codification in 1972-1975 wanted a rule that followed Judge Parker’s concurring opinion, a rule that permitted prosecutors to offer uncharged misconduct evidence in criminal prosecutions for any purpose other than proving the

seen to that. Although many cases have fallen within the five general Molineux exceptions under which prior crime evidence may be admitted, we have made it clear, as the prosecution correctly points out, that the list is merely illustrative and not exhaustive.”

People v. Rojas, 760 N.E.2d 1265, 1268 (N.Y. 2001). See People v. Alvino, 519 N.E.2d 808, 812 (N.Y. 1987) (noting that “[e]vidence of similar uncharged crimes has probative value, but as a general rule it is excluded for policy reasons because it may induce the jury to base a finding of guilt on collateral matters or to convict the defendant of his past.”) (citations omitted); People v. Vails, 372 N.E.2d 320, 322 (N.Y. 1977) (noting that as a general rule evidence of unconnected, uncharged criminal conduct is inadmissible if offered solely to for the purpose of raising an inference that a defendant is of a criminal disposition); see also supra Part II for cases supporting the five exceptions to the Molineux rule.

302. See, e.g., State v. Cator, 781 A.2d 285, 295 (Conn. 2001) (allowing prior drug dealing to be introduced to show motive for murder); State v. Taylor, 687 A.2d 489, 500 (Conn. 1996) (admitting evidence of gang membership to establish a motive for homicide).


304. See, e.g., State v. Gilyard, 979 S.W.2d 138, 140-43 (Mo. 1998) (admitting evidence of prior similar sexual assault to show intent when defendant claimed consent); State v. Kaiser, 139 S.W.3d 545, 558 (Mo. Ct. App. 2004) (allowing evidence of prior abuse of nursing home patient to show absence of accident or mistake in failure to report abuse).

305. See, e.g., State v. Ellis, 852 A.2d 676, 693 (Conn. 2004) (refusing to admit evidence of other instances of inappropriate touching of young women by softball coach because not sufficiently similar to those acts charged in the indictment to prove a common plan); State v. Morowitz, 512 A.2d 175, 177 (Conn. 1986) (allowing evidence of prior similar sexual assault on a female patient because it tended to establish a common design or plan to assault sedated female patients); Gilyard, 979 S.W.2d at 140-41 (allowing evidence of similar prior sexual assault to be introduced to show consistent pattern of sexual assaults); State v. Simms, 131 S.W.3d 811, 817 (Mo. Ct. App. W.D. 2004) (holding evidence of other misbranding of cattle, that had already been sold, admissible to show plan or design of cattle theft).

306. See, e.g., State v. Naasz, 142 S.W.3d 869, 878 (Mo. Ct. App. S.D. 2004) (holding that cross-dressing is not a crime in Missouri and is not subject to the uncharged misconduct rule).

307. Id. (finding that cross-dressing does not qualify for the exclusion). In Naasz the accused was a cross-dresser and claimed that evidence of his cross-dressing was inadmissible uncharged misconduct in an incest case. Id.
accused's bad moral character. Despite their intentions, courts have used the rule as if it were Judge Werner's version of the rule, a categorical exclusionary rule followed by a limited number of judicially-recognized exceptions. The difference between the two versions is significant because Judge Werner's version of the rule presumes the inadmissibility of uncharged misconduct and allows only well-recognized exceptions to the general prohibition. Judge Parker's rule presumes the admissibility of uncharged misconduct, except when offered solely for the reason of proving the accused's bad character.

While the federal courts and some state courts give lip service to Judge Parker's inclusionary rule, they apply Rule 404(b) as if Judge Werner's rule controlled the results. No matter what version of the rule the courts employ, once a "fit" is found, the court proceeds immediately to weigh the probative value of uncharged misconduct evidence against prejudice to the accused, confusion of the issues, confusion of the jury, and waste of time. If the court finds that the claimed prejudice, waste of time, and confusion of the issues substantially outweighs the asserted probative value of the uncharged misconduct evidence, then the court will exclude the uncharged misconduct evidence. If not, then the court will admit the uncharged misconduct evidence.

The jurisprudential issue underlying the Molineux rule has not been faced by the courts. Does the uncharged misconduct rule hide a judicially-countenanced assault on the traditional understanding of the constitutionally-protected Anglo-American criminal trial? Does uncharged misconduct evidence somehow undo the foundation of a criminal prosecution under prevailing United States law? In the first Molineux trial, District Attorney Osborne was able to get the facts of the Barnet homicide before the jury, and the jury found Molineux guilty of first degree murder. In the second Molineux trial, Osborne could not admit any evidence about the Barnet killing and Molineux was acquitted. These differing outcomes demonstrate the powerful impact of uncharged misconduct evidence on the jury. Uncharged misconduct evidence persuades the jury that the accused should be found guilty. The jury will reason from the proved act of uncharged misconduct that it is more likely that the accused committed the crime charged because the accused was predisposed to commit that type of criminal act. The court, to be sure, cautions the jury against doing so, but very few commentators believe that such instructions really curb the jury's common-sense use of uncharged misconduct.

308. See supra notes 37-38 and accompanying text for a discussion of the resurrection of Judge Parker's formulation.
309. See supra Section II for a discussion of Judge Parker's opinion in Molineux.
312. See Krulewitch v. United States, 336 U.S. 440, 453 (1949) (stating "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.") (citation omitted); see also Sarah Tanford & Michele Cox, The Effects of Impeachment and Limiting Instructions on Individual and Group Decision Making, 12 LAW & HUM. BEHAV. 477, 494 (1988) (presenting research which examines the effects of evidence introduced to impeach a defendant in a civil trial and concluding that the results demonstrate that impeachment evidence "can affect jurors' decisions in legally forbidden ways"); Roselle L. Wissler & Michael J. Saks,
Because state and federal courts freely admit uncharged misconduct evidence, and juries use it for a purpose that the courts do not officially condone, is the uncharged misconduct rule a dishonest rule that hides the actual impact of evidence of other crimes? If that is the case, then shouldn't the judiciary—as well as academics—revisit the basis for the rule? Further, does the admission of uncharged misconduct evidence make the criminal jury trial so fundamentally unfair that the accused loses the constitutionally guaranteed protection of a trial on the merits of guilt?

The U.S. Supreme Court has developed a way of looking at the concept of fundamental fairness. The Court told the public that courts should determine fundamental fairness of a criminal trial by historical practice. Criminal prosecutions have been based on the theory that the prosecution must prove the identity of the accused, the date, time, and place of the prohibited act, and the defining elements of the crime charged in the indictment.

No common law indictment required the prosecution to prove that the accused was a person predisposed to commit the acts described in the indictment. The accused's criminal acts not described in the indictment are irrelevant to any element directly, and only indirectly when uncharged criminal acts circumstantially proved an element of the case. The judiciary's consistent historical practice from early on up until Molineux was to restrict the admission of uncharged misconduct evidence to a relatively few specific exceptions, which the judiciary believed had to be made to allow the prosecution to prove some intermediate issue in the prosecution by circumstantial evidence. Judge Werner's Molineux opinion brought together the well-recognized intermediate issues for which prosecutors could offer uncharged criminal acts and formulated a general rule excluding uncharged misconduct unless the misconduct fit one of the pigeonholes identified in the Molineux majority opinion. But Werner's opinion conceded the admissibility of uncharged misconduct if it was relevant to prove motive, intent, guilty knowledge, plan or design, or identity of the perpetrator.

In fact, most modern judges believe that evidence of predisposition to criminal acts is somehow very unfair to the accused. To support this conclu-

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On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt, 9 LAW & HUM. BEHAV. 37, 47 (1985) (concluding that "the presentation of the defendant's criminal record does not affect the defendant's credibility, but does increase the likelihood of conviction, and that a judge's limiting instructions do not appear to correct that error").


314. See, e.g., McKinney v. Rees, 993 F.2d 1378, 1379 (9th Cir. 1993) (concerning a habeas corpus case in which the accused complained that he did not receive a constitutionally fair trial). According to McKinney, the California trial court admitted evidence that the defendant possessed a Gerber and a Tekna double-edged hunting knife that could have caused the wounds that killed his mother. Id. at 1381-82. The murder weapon was never identified nor found by law enforcement officials. Id. at 1381. The Ninth Circuit granted habeas on the ground that the "knife" evidence was evidence of other criminal uncharged misconduct that only served to show the jury that the accused was fascinated with knives and had no other probative value at all. Id. at 1383-84. In reaching its decision, the court said:

Previously we have held that "[o]nly if there are no permissible inferences the jury may draw from the evidence can its admission violate due process." Because drawing propensity infer-
sion, courts cite three allegedly unique principles behind the U.S. criminal trial:

(a) The accused is presumed innocent until proved guilty beyond a reasonable doubt. Traditional rhetoric condemns admission of uncharged misconduct evidence because it prejudices the accused and brands the accused as "presumed guilty."

(b) Our criminal justice system is adversarial rather than inquisitorial, and admission of uncharged misconduct would change the system into an inquisitorial one; and

ences from "other acts" evidence of character is impermissible under an historically grounded rule of Anglo-American jurisprudence, the knife evidence meets the strict test we established in Jammal. There are no permissible inferences the jury could have drawn from the character evidence discussed above. The admission of this evidence, therefore, could have violated due process. We must now consider whether, under the facts of this case considered as a whole, the admission of irrelevant character evidence did violate due process. Thus, we address the question left unanswered in Estelle: When does the use of character evidence to show propensity constitute a violation of the Due Process Clause?

Id. at 1384 (citations omitted).

315. See Taylor v. Kentucky, 436 U.S. 478, 483 (1978) (asserting that the presumption of innocence is a principle of "undoubted law, axiomatic and elementary") (citation omitted). Taylor states:

It is now generally recognized that the "presumption of innocence" is an inaccurate, shorthand description of the right of the accused to "remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion; i.e., to say in this case, as in any other, that the opponent of a claim or charge is presumed not to be guilty is to say in another form that the proponent of the claim or charge must evidence it." The principal inaccuracy is the fact that it is not technically a "presumption" — a mandatory inference drawn from a fact in evidence. Instead, it is better characterized as an "assumption" that is indulged in the absence of contrary evidence.

Taylor, 436 U.S. at 483 n.12 (citations omitted).

316. The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.

C. MCCORMICK, EVIDENCE § 321, pp. 681-682 (1st ed. 1954); see also 9 J. WIGMORE, EVIDENCE § 2497 (3rd ed. 1940) (stating that the rule of persuasion in criminal cases, originating at the end of the 1700's, is beyond a reasonable doubt). Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does "reflect a profound judgment about the way in which law should be enforced and justice administered." Duncan v. Louisiana, 391 U.S. 145, 155 (1968).

317. This thesis has been very ably argued by Professor Edward J. Imwinkelried. See generally Edward J. Imwinkelried, Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot, 22 FORDHAM URB. L.J. 285 (1985) (arguing that one probative danger is the risk of prejudice).

318. Admission of coerced confessions may distort the truth-seeking function of the trial upon which the majority focuses. More importantly, however, the use of coerced confessions, whether true or false, is forbidden because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system — a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.
(c) adverse character evidence is "overpersuasive", prejudicial because the jury would be inclined to weigh prior criminal history more heavily than it ought to be weighed.\textsuperscript{319}

These objections to admissibility do not withstand scrutiny. First, the prosecution is required to prove that the accused is guilty beyond a reasonable doubt. Under Rule 404(b), prosecutors may offer uncharged misconduct evidence to prove the accused's identity or any relevant element of the offense charged. A revised rule that removed presumptive inadmissibility would not change that. The presumption of innocence does not disappear until the jury has received all the evidence in the case. The trial judge may direct a verdict for the accused if the prosecution fails to prove its case beyond a reasonable doubt, even if the case is based on uncharged misconduct. It is no more antithetical to the presumption of innocence than laboratory reports, ballistics results, or photographs of the crime scene. Second, characterizing the U.S. criminal trial process as adversarial rather than inquisitorial says nothing about what type of proof an adversary may offer to make a case. No U.S. jurisdiction proposes to try the accused \textit{ex parte} with proof of the elements resting solely on depositions taken before an examining magistrate. The third objection is equally meaningless rhetoric: if uncharged misconduct evidence is highly persuasive, then its probative value must be high as well, and the system of proof can absorb a high degree of prejudice to the accused associated with highly probative evidence of guilt.

The commonly asserted reasons for excluding uncharged misconduct evidence simply do not support judicial exclusion. In fact, the only acceptable reason for excluding uncharged misconduct evidence is a determination that the probative value of the uncharged misconduct evidence is substantially outweighed by prejudice to the accused, confusion of the issues, and waste of time. That is, the general reason for excluding any kind of evidence is embodied in Federal and Uniform Rule 403.

Return to \textit{People v. Molineux}\textsuperscript{320} for a moment to see how this analysis works when applied to an actual case. Roland Molineux was tried for the murder of Katherine J. Adams.\textsuperscript{321} The prosecution had to prove that Molineux was the perpetrator of the poisoning.\textsuperscript{322} Direct evidence from eye-witnesses showed that Molineux had asked about renting a mail box at a local private letter box company.\textsuperscript{323} Direct forensic medical evidence showed that the victim died from

\begin{thebibliography}{99}
\bibitem{319} Michelson, 335 U.S. at 475-76; see also, IMWINKELRIED, supra note 26.
\bibitem{320} 61 N.E. 286 (N.Y. 1901).
\bibitem{321} Molineux, 61 N.E. at 287.
\bibitem{322} \textit{Id.}
\bibitem{323} \textit{Id.} at 288.
\end{thebibliography}
cyanide of mercury poisoning, a chemical that Molineux knew how to make and had the opportunity to make in his Newark chemistry lab. Direct evidence showed that the poison arrived at Cornish's office by mail in what appeared to be a free sample of patent medicine. Direct evidence showed that Molineux disliked Cornish and wanted to remove him from his position as the Knickerbocker Athletic Club's athletic director. The prosecution had established the motive for killing Cornish, the manner and means of the homicide that accidentally took Katherine Adams's life rather than the intended victim, and Molineux's opportunity to make the rare poison in the patent medicine bottle.

This evidence failed to carry the burden of proof that Molineux was the perpetrator of the Adams killing. If Molineux had committed a similar crime, using the same manner and means to take another person's life, then admission of the facts of that homicide would increase the probability that Molineux committed the Adams homicide. The facts of the death of Henry Barnet were strikingly similar to those of the death of Katherine J. Adams. Barnet died of cyanide of mercury poisoning received in a free sample of patent medicine. His symptoms resembled the symptoms of diphtheria. He died a lingering death from poison. Molineux was his rival for the affection of a woman named Blanche Chesebrough.

In 1983, author Jane Pejsa published a true crime book describing the Molineux case. She had in her possession Blanche Chesebrough's uncompleted memoirs and quoted from her memoirs extensively. If Blanche's memoirs are credible, she was in love with Barnet but did not want to marry him because he was poor, just as she was. Direct evidence showed that Molineux had rented a mailbox at a private letter service where he received patent medicine samples prior to Barnet's death. The prosecution could not prove that Molineux murdered Barnet beyond a reasonable doubt, but it could prove it was more probable than not that Molineux poisoned Barnet using the patent medicine sample. To do this, the prosecution needed to get Barnet's hearsay statement into the record showing that Barnet became ill after taking Kutnow Powder from a patent medicine sample received in the mail. The New York Court of Appeals held that Barnet's statement was inadmissible, and the chain of

324. Id.
325. Id. at 289.
326. Molineux, 61 N.E. at 289.
327. Id.
328. Id.
329. Id.
330. Id. at 290-91.
332. Id. at 239-400.
333. Id. at 81-82.
335. Id. at 290.
336. Id.
direct and circumstantial proof showing that Molineux poisoned Barnet was broken.\footnote{Id. at 303-04.} The court’s holding made the evidence showing that Molineux killed Barnet of little or no probative value because the prosecution could not prove Molineux murdered Barnet. Consequently, any reference to the Barnet killing was prejudicial to Molineux without any redeeming probative value whatsoever. Under a revised uncharged misconduct rule, the Barnet killing would be inadmissible for the same reason.

Although the Court of Appeals correctly reversed Molineux’s conviction, its rationale for doing so led to a rule about uncharged misconduct evidence that was logically fallacious and unduly restrictive. Uncharged misconduct evidence showing a predisposition to commit crimes of the type charged in the indictment is both relevant to, and probative of, the guilt of the accused. It ought not to be excluded unless the probative power of the uncharged misconduct evidence is so low that prejudice to the accused substantially outweighs that probative value. Federal and Uniform Rule 404(b) froze the Molineux rule in its misshapen form and the result is the chaos described in this article.

The courts repeatedly insist that Federal and Uniform Rule 404(b) is an “inclusive” rule that admits uncharged misconduct whenever the misconduct is offered to prove a non-character issue and the probative value of the uncharged misconduct evidence is not substantially outweighed by unfair prejudice to the accused. However, these same courts usually admit uncharged misconduct evidence under one of the Molineux pigeonholes canonized by Rule 404(b). The structure of the rule that begins with a categorical statement of inadmissibility followed by a list of examples of exceptions to the categorical statement of inadmissibility dictates a search through the well-recognized Molineux pigeonholes to find a “fit” before selecting a new ground of relevance other than bad character. The plain truth is that Judge Werner’s formulation of Molineux still dominates the admissibility of uncharged misconduct in the Uniform and Federal Rules jurisdictions. About all that Rule 404(b) added was a suggestion that other undiscovered Molineux pigeonholes might lurk in the sordid past of future persons accused of crimes.

At the same time, prosecutors know that if the jury hears about the prior, similar criminal acts of the accused, then it will be predisposed to find the accused guilty of the same kind of crime. The prosecution must overcome the rhetorical reasons for maintaining a categorical exclusionary rule for evidence of the accused’s criminal history as cited above. The prosecution usually succeeds in overcoming the rhetorical opposition to uncharged misconduct evidence by pointing out a safe Molineux pigeonhole exception or exceptions that permit the prosecution to put on uncharged misconduct evidence.\footnote{See, e.g., Katharine K. Baker, Once A Rapist? Motivational Evidence and Relevancy in Rape Law, 110 Harv. L. Rev. 563, 569 (1997) (noting that the Rules Advisory Committee rejected Rule 413 because it believed that evidence of uncharged sexual misconduct could be proved under Rule 404(b)).}

Someone who was unfamiliar with the way in which a legal rule structure is
fabricated might jump to the conclusion that courts admit uncharged misconduct in a backhanded, under-the-table way that conceals the real agenda of the criminal justice system. That view might lead an uninformed person to conclude that a judicial conspiracy exists to convict the accused on the basis of bad character while seeming to prohibit conviction on account of bad character.

Pragmatically, one might say that the job gets done using the present rules system. First, courts generally admit uncharged misconduct evidence unless the trial judge finds the evidence to be grossly unfair and prejudicial to the accused. Second, the appellate courts can always look over the trial judge’s shoulder and reweigh probative value and prejudice resulting from admission of uncharged misconduct evidence and reverse egregious cases of judicial indiscretion.

However, the entire performance is disingenuous because it obscures reality. The practical rule about uncharged misconduct is that uncharged misconduct evidence is generally admissible unless the evidence is either unreliable or excessively prejudicial to the accused. That is the version of the rule appearing in Judge Parker’s concurring opinion in *Molineux*, in the original draft of the Model Rules of Evidence, and alluded to by Judge Friendly in his testimony before the House Judiciary Committee.

During the debate on adoption of the Federal Rules of Evidence, Judge Friendly was the only commentator who suggested that there were any major problems with Rule 404(b). The problems with the rule on uncharged misconduct are not problems that can be solved by tweaking the current formula to improve its efficiency. Rather, the problem is systemic and structural: back in 1901, Judge Werner said that the uncharged misconduct rule was an exception to the general rule that forbade proof of the bad character of the defendant in a criminal prosecution when the defendant had not made an issue out of his or her good character. The *Molineux* opinion started the bench and bar off on a pathway that was bound to end in confusion and endless complications. Judge Werner tried to confine the potential damage to a simple check-list of specific exceptions to the character evidence rule substantiated by case law, which had permitted the admissibility of uncharged misconduct to prove an intermediate issue, accepting the innuendo of the accused’s bad character as a necessary consequence of the obligation to prove malice, intent, plan or design, or similar exceptions. This attempt was bound to fail because the necessity to prove some other issue not included in Werner’s list challenged the ingenuity of prosecutors and the flexibility of judges. The common law growth of the number of recognized exceptions to the uncharged misconduct rule from 1901 to 1975 shows that the rule was well on its way to being the counterpart of the hearsay rule. Like the hearsay rule, the first clause of the rule was a categorical denial of

admissibility, followed by an ever-increasing number of exceptions deemed necessary to prove a case, and not terribly prejudicial to the rights of the accused to a fair trial. No one seems to have thought that this was absurd. After twenty-six years of experience with the Federal Rules of Evidence, no one seems to think that Rule 404(b)—a rule that froze the uncharged misconduct rule into a form that invited testing its limits, a rule that was cited in more than 5,000 cases—absurd. The better rule would be to acknowledge that the criminal predisposition of the accused is relevant to guilt, just as it is to punishment.

A Proposal for Change

One of the definitions of insanity is to repeatedly try the same actions over and over again with the expectation that the results will be different the next time. The uncharged misconduct rule has been invoked thousands of times to exclude the criminal history of the accused without success. Rule 404(b) and its companion character evidence rules are unworkable, absurd, and do not reflect the actual practice in federal criminal prosecutions. Only lawyers would tolerate such a mess. Of course, the best defenders of the status quo will quickly point out that competent trial lawyers and competent judges thoroughly understand the present rules, and any attempt to revise the character evidence rules would be fraught with unanticipated concerns about prejudice, violation of the presumption of innocence, and burden of proof rules.

The plain truth is that bad character evidence in the form of prior bad acts of the accused is generally admissible, unless the probative value of the prior bad acts of the accused is substantially outweighed by "unfair prejudice" and the usual issues of judicial economy. Once prior bad acts of the accused are introduced in evidence and handed over to the jury for review, the realistic prosecutor, defense counsel, and trial judge know that the jury will use that bad character evidence to reason that the accused is a person of bad character or predisposition, and ought to be convicted of the present offense because of his prior history. The usual limiting instruction certainly makes the cold-type record look better to a reviewing court, but the efficacy of such an instruction has been questioned by professors and judges for decades.4 It is another example of repeating the same act and expecting different results.

It is time to admit that in the real world of the criminal prosecutions, the

340. See, e.g., Bruton v. United States, 391 U.S. 123, 129 (1968) (calling the limiting instruction's power an "unmitigated fiction") (quoting Krulewitch, 336 U.S. at 453); United States v. Crowder, 87 F.3d 1405, 1415 (D.C. Cir. 1996) (noting that "the ability of a limiting instruction to overcome the prejudicial effects of bad acts evidence can be . . . an 'unmitigated fiction'") (quoting Krulewitch, 336 U.S. at 453). See also Tanford & Cox, supra note 312, at 483-86 (analyzing the effect of a limiting instruction on members of a jury); Sarah Tanford & Michele Cox, Decision Processes in Civil Cases: The Impact of Impeachment Evidence on Liability and Credibility Judgments, 2 SOC. BEHAV. 165, 173-78 (1987) (finding that jurors used impeachment evidence for liability purposes despite judicial limiting instructions); Wissler & Saks, supra note 312, at 43-47 (concluding that evidence of prior convictions affects verdicts despite limiting instruction); Sharon Wolf & David A. Montgomery, Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgment of Mock Jurors, 7 J. APPLIED SOC. PSYCHOL., 216, 216-18 (1977) (concluding that a limiting instruction actually increases biasing effects).
prosecutor will be able to prove relevant specific instances of the accused's uncharged misconduct by employing the "magic words" vocabulary of Rule 404(b) to frame some intermediate issue in the case, unless the trial judge believes that the probative value of other uncharged misconduct is substantially outweighed by prejudice to the accused, waste of time, or confusion of the jury. By dispensing with the magic words approach, the rule becomes honest rather than dishonest and sane rather than perpetuating insanity. Evidence showing the accused committed other uncharged misconduct is normally admissible unless the evidence is irrelevant, or in the discretion of the trial judge, the uncharged misconduct evidence has low probative value, high prejudice, or would tend to confuse the jury waste time or confuse the issues in the case. That is precisely the kind of synthetic rule that Judge Friendly believed to be the current federal standard in 1973.

Indeed, the tide may already have turned. In 1994, Congress passed Rules 413, 414, and 415, which permit prosecutors to admit an accused's past sexual criminal history when charging him or her with sexual misconduct in criminal and civil cases.341 Although opposed by most commentators and by the Advisory Committee to the U.S. Supreme Court and damned because no empirical evidence has been discovered showing that sex criminals have a higher recidivism rate than other kinds of criminals,342 a few commentators have

advocated expanding the admission of criminal history to cases involving domestic violence.343 These rules are realistic restatements of what actually takes place in the court room. The prior sexual misconduct of persons charged with sex crimes generally does come into evidence in the guilt phase of a trial in most jurisdictions.344 The jury may consider the prior sexual misconduct of the accused in determining guilt in a sex crime case. When it does, it generally finds the...
accused is guilty of the offense charged. The trial judge may limit the admissibility of the accused's prior sex crime history by employing the balancing test built into Rule 403. Despite dire warnings from commentators, the criminal sex history rules have not deprived the accused of a fair trial.

The courts need to do away with the *Molineux* pigeonhole approach to uncharged misconduct evidence. The uncharged misconduct rule is better stated as follows:

*A specific instance of uncharged misconduct of the accused is admissible if it is relevant to an issue in the case, unless the probative value of the uncharged misconduct is substantially outweighed by prejudice to the accused, confusion of the issues, or waste of time.*

This restatement combines the actual practices of the courts when applying current Rule 404(b) and Rule 403 to admissibility of uncharged misconduct. The restatement also shifts the focus away from a categorical negative proposition followed by exceptions that have swallowed up the negative prohibition, thus making the categorical negative proposition logically fallacious. The proposed restatement accurately describes what is done in court and is a better expression of the law than the *Molineux* rule. The prosecution would still be barred from proving the facts of Henry A. Barnet's death in the *Molineux* case, but the bench, bar, and public would have a better understanding of the interplay of uncharged misconduct evidence and proof of guilt in criminal prosecutions under the proposed restatement.

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345. See, e.g., United States v. Withorn, 204 F.3d 790, 796 (8th Cir. 2000) (allowing jury to hear testimony of defendant's cousin that defendant had forcibly raped her in the past); United States v. Castillo, 140 F.3d 874, 881 (10th Cir. 1998) (allowing evidence of defendant's other acts of child molestation to be admitted into evidence); United States v. Enjady, 134 F.3d 1427, 1430-34 (10th Cir. 1998), *cert denied*, 525 U.S. 887 (1998) (allowing evidence of similar crimes to be admitted and defendant ultimately convicted of aggravated sexual abuse); United States v. Eagle, 137 F.3d 1011, 1014-16 (8th Cir. 1998) (allowing evidence of defendant's prior carnal knowledge conviction to be admitted and heard by jury where defendant was ultimately convicted of aggravated sexual abuse of a child).

346. See, e.g., *Withorn*, 204 F.3d at 794 (applying the "balancing test" of Rule 403, to determine whether to admit evidence under Rules 413 and 414 of the Federal Rules of Evidence, which call for the exclusion of evidence where the probative value is substantially outweighed by its potential for unfair prejudice).