

# A Prosecutor's Guide to Character Evidence: When Is Uncharged Possession Evidence Probative of a Defendant's Intent to Distribute?

James DeCleene

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# A PROSECUTOR’S GUIDE TO CHARACTER EVIDENCE: WHEN IS UNCHARGED POSSESSION EVIDENCE PROBATIVE OF A DEFENDANT’S INTENT TO DISTRIBUTE?

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## I. INTRODUCTION

“He intended to do it before, ladies and gentlemen, so he must have  
intended to do it again.”<sup>1</sup>

The quoted language above represents as simple, yet concise, a  
formulation as possible of the forbidden propensity inference<sup>2</sup> barred by

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1. *United States v. Lee*, 724 F.3d 968, 976 (7th Cir. 2013) (quoting *United States v. Miller*, 673 F.3d 688, 699 (7th Cir. 2012)) (internal quotation marks omitted).

Federal Rule of Evidence (FRE) 404(b), also known as the character evidence rule,<sup>3</sup> when used to prove a defendant's intent. Due to the prejudicial nature of this propensity inference,<sup>4</sup> FRE 404(b) has resulted in the highest number of published appellate decisions of any Federal Rule of Evidence.<sup>5</sup> In addition, the rule itself can often be confusing in application and requires jurors to undertake extremely complicated analyses.<sup>6</sup> This confusion arises because the jury is instructed to ignore the propensity inference quoted above and consider the uncharged conduct evidence, any evidence of crimes or other actions of a defendant other than the one for which he or she is currently on trial,<sup>7</sup> only for non-character purposes.<sup>8</sup>

In 2011, an estimated 197,050 persons were sentenced under federal jurisdiction.<sup>9</sup> Of these persons, 94,600 were sentenced for a drug-related crime.<sup>10</sup> As such, there are a multitude of possession offenses that can

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2. See *infra* Figure 1 for a concise interpretation of the character evidence rule and the inferences prohibited by Federal Rule of Evidence (FRE) 404(b).

3. There are three general forms of character evidence used against defendants. Jennifer Y. Schuster, Special Topic in the Law of Evidence, *Uncharged Misconduct Under Rule 404(b): The Admissibility of Inextricably Intertwined Evidence*, 42 U. MIAMI L. REV. 947, 947 (1988). First, a witness may testify as to his or her personal opinion of the defendant. *Id.* Second, a witness may testify about the defendant's reputation. *Id.* Third, evidence can be offered concerning the defendant's past conduct. *Id.*

4. *Id.*

5. 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) ("Rule 404(b) has generated more published opinions than any other subsection of the Federal Rules.").

6. See H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 879 (1982) (noting that using uncharged conduct to show knowledge or lack of mistake ultimately brands the defendant as a person who acquired "criminal sophistication" and that from this brand, the jury naturally infers that the defendant's character trait as a person possessing criminal sophistication continued up until the charged crime). In addition, Professor Uviller recognized the naïveté of legal scholasticism in keeping the character evidence rule by saying, "[E]nunciation of the [character] rule does more to satisfy legal scholasticism than to direct the minds of real jurors. Although jurors seem to digest knotty principles, no one can believe in actual compliance with instructions of this sort." *Id.* at 869.

7. See, e.g., Edward J. Imwinkelried, *Uncharged Misconduct*, 1 CRIM. JUST., Summer 1986, at 6, 7 [hereinafter Imwinkelried, *Uncharged Misconduct*].

8. FED. R. EVID. 105 (announcing that evidence admissible for one purpose but not for another purpose must be restricted by a limiting instruction to its proper scope on request).

9. E. Ann Carson & William J. Sabol, U.S. DEP'T OF JUSTICE, PRISONERS IN 2011, at 6 (2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf>, archived at <http://perma.cc/8ZJH-G6US>.

10. *Id.* at 10.

be used as uncharged conduct evidence in subsequent trials.<sup>11</sup> However, FRE 404(b) prohibits prosecutors from using these convictions as evidence of a defendant's bad character<sup>12</sup> in a subsequent trial when those convictions merely show that the defendant has acted in conformity with his or her previous bad conduct.<sup>13</sup> FRE 404(b)(1)–(2) provide as follows:

(1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses; Notice in a Criminal Case.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.<sup>14</sup>

A multitude of law review articles and other commentaries have handled varying aspects of FRE 404(b).<sup>15</sup>

Essentially, FRE 404(b) is the codification of the common law character evidence rule.<sup>16</sup> Professor Edward J. Imwinkelried<sup>17</sup> has

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11. See Imwinkelried, *Uncharged Misconduct*, *supra* note 7, at 7.

12. For the purposes of this Comment, "character" will be defined as "a concept of a person's psychological bent or frame of mind." *United States v. Beechum*, 582 F.2d 898, 921 (5th Cir. 1978), *cert. denied* 440 U.S. 920 (1979); see Imwinkelried, *supra* note 5, at 578.

13. See FED. R. EVID. 404(b).

14. FED. R. EVID. 404(b)(1)–(2).

15. See, e.g., Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, The Doctrine of Chances*, 40 U. RICH. L. REV. 419 (2006) [hereinafter Imwinkelried, *An Evidentiary Paradox*]; Imwinkelried, *supra* note 5; Imwinkelried, *Uncharged Misconduct*, *supra* note 7; Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547; Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 TEMP. L. REV. 201 (2005); Vivian M. Rodriguez, *Special Topics in the Law of Evidence, The Admissibility of Other Crimes, Wrongs or Acts Under the Intent Provision of Federal Rule of Evidence 404(b): The Weighing of Incremental Probity and Unfair Prejudice*, 48 U. MIAMI L. REV. 451 (1993); Schuster, *supra* note 3; *The Federal Rules of Evidence – Rule 404(b) Other Crimes Evidence: The Need for a Two-Step Analysis*, 71 NW. U. L. REV. 634 (1977) [hereinafter *Rule 404(b) Other Crimes Evidence*].

16. Imwinkelried, *An Evidentiary Paradox*, *supra* note 15, at 421–22.

17. Professor of Law at the University of California, Davis. Edward J. Imwinkelried, U.C. DAVIS SCH. L., <https://law.ucdavis.edu/faculty/imwinkelried/> (last visited May 27, 2015), archived at <https://perma.cc/BML8-TRXE>.

created a chart that concisely demonstrates the character evidence rule and the forbidden propensity inference that it bars.<sup>18</sup>

**Figure 1**

<b>Item of Evidence</b>	<b>Intermediate Inference</b>	<b>Ultimate Inference</b>
The accused's uncharged act.	The accused's subjective, personal character, disposition or propensity.	The accused's conduct in conformity with his or her character on the charged occasion.

As evident from the chart, the forbidden inference that a defendant has acted in conformity with his or her bad character depends on the intermediate inference that the defendant has a propensity for acting in a certain way.<sup>19</sup> FRE 404(b) bars the use of uncharged conduct when used to establish only this propensity, but it allows uncharged conduct to demonstrate any other non-character use.<sup>20</sup> Of course, uncharged conduct evidence admissible under FRE 404(b) is still subject to a FRE 403 balancing test of the evidence's unfair prejudice versus its probative value; a trial court will exclude that evidence where the unfair prejudice, or other consideration, substantially outweighs its probative value.<sup>21</sup>

Part II of this Comment will develop a historical background to FRE 404(b). This background is meant to illustrate several of the concerns surrounding FRE 404(b). First, this Comment will summarize the Court

18. Imwinkelried, *supra* note 5, at 576. When using propensity reasoning, the first step is to infer the defendant's "personal, subjective bad character" from his or her uncharged conduct. Imwinkelried, *An Evidentiary Paradox*, *supra* note 15, at 426–27. This author will use other versions of this chart in order to demonstrate points made both by other commentators and by this author. However, the layout of these figures should be credited to Professor Imwinkelried.

19. See Imwinkelried, *supra* note 5, at 576; *supra* Figure 1.

20. See *infra* Parts II.B–C for a discussion of the legislative history behind FRE 404(b) and the Fifth Circuit Court of Appeals' interpretation of FRE 404(b) shortly after its adoption.

21. FRE 403 provides as follows: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403.

of Appeals of New York's foundational case, *People v. Molineux*.<sup>22</sup> *Molineux* is essential in understanding the dichotomy between the inclusionary/exclusionary approaches<sup>23</sup> to the character evidence rule that evolved out of the common law and how Congress considered these approaches when adopting the Federal Rules of Evidence in 1975.<sup>24</sup> Second, this Comment will undertake an extremely brief inquiry into the legislative history surrounding the adoption of FRE 404(b). That legislative history will show how the inclusionary approach to the character evidence rule took precedence over the exclusionary approach with limited controversy at the time of FRE 404(b)'s adoption. Third, as this Comment concerns itself specifically with uncharged conduct that may or may not be probative of intent, this Comment will discuss the leading federal court of appeals case, *United States v. Beechum*.<sup>25</sup> That case, considered by the Fifth Circuit en banc, provided an extremely thorough and thoughtful analysis to the application of FRE 404(b) in the context of uncharged conduct used to demonstrate a defendant's intent.<sup>26</sup>

Next, Part III of this Comment will break the federal courts of appeals into two distinct camps: those that allow uncharged possession evidence to be probative of a defendant's intent to distribute and those that do not.<sup>27</sup> While the reasons for these differing approaches will be

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22. 61 N.E. 286 (N.Y. 1901).

23. The inclusionary approach asks, "[I]s this evidence relevant otherwise than merely through propensity?" *Rule 404(b) Other Crimes Evidence*, *supra* note 15, at 636 (alteration in original) (quoting Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 1005 (1938)) (internal quotation marks omitted). This inclusionary approach emphasizes admissibility and flexibility; evidence is admissible unless it is solely probative of a defendant's character. *Id.* Likewise, a judge has the flexibility to admit relevant evidence without worrying about pigeonholing the evidence into a limited number of exceptions. *Id.* at 636–37. By contrast, the exclusionary approach asks, "Does this evidence fall within any exception to the rule of exclusion?" *Id.* at 636 (quoting Stone, *supra*, at 1005) (internal quotation marks omitted).

24. See Reed, *supra* note 15, at 202; *infra* Parts II.A–B. It is important to note that every federal circuit court of appeals has interpreted FRE 404(b) as a rule of inclusion. 1 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:30–:31 (rev. ed. 2013). These courts allow uncharged conduct when it is offered for any purpose other than the forbidden propensity inference. *Id.*

25. 582 F.2d 898 (5th Cir. 1978).

26. See *infra* Part II.C for a discussion of the two-step test used by the Fifth Circuit to determine a piece of evidence's probative value on the issue of intent.

27. See, e.g., *United States v. Davis*, 726 F.3d 434, 444 (3d Cir. 2013) (concluding that uncharged possession evidence is never probative of intent to distribute); *United States v. Lee*, 724 F.3d 968, 979 (7th Cir. 2013); *United States v. Santini*, 656 F.3d 1075, 1078 (9th Cir.

considered more fully below, these circuits generally come to different conclusions when answering one key question: Does a defendant who contests his or her guilt for a specific intent crime<sup>28</sup> automatically call that intent into question, making any evidence proving his or her intent probative on that point?<sup>29</sup> This question, and its answers, effectively split the circuits into these two camps. However, even within these two camps, the extent to which uncharged possession evidence is probative of a defendant's intent to distribute differs from situation to situation.<sup>30</sup>

As such, Part IV of this Comment will analyze the different contexts in which uncharged possession evidence is usually offered and will determine whether the defendant's uncharged possession evidence is actually probative of his or her intent to distribute in each context. Specifically, this section will look to see how various factors—including the quantity of the drug possessed, the number of times the defendant has been convicted of drug possession, and whether the defendant has specifically called his or her intent into question—affect a court's determination of the probative value of this uncharged possession evidence. Finally, this author will argue that, while uncharged possession evidence may be probative of a defendant's intent to distribute, such evidence should be inadmissible when the uncharged conduct was a singular incident and dealt with a non-distribution-sized

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2011); *United States v. Haywood*, 280 F.3d 715, 721–22 (6th Cir. 2002) (concluding that uncharged possession evidence is not similar enough to a distribution charge). *But see* *United States v. Logan*, 121 F.3d 1172, 1178 (8th Cir. 1997) (concluding that uncharged possession evidence is probative of intent to distribute because the defendant has controverted the issue of intent); *United States v. Butler*, 102 F.3d 1191, 1196 (11th Cir. 1997) (same); *United States v. Gadison*, 8 F.3d 186, 191–92 (5th Cir. 1993); *United States v. Templeman*, 965 F.2d 617, 619 (8th Cir. 1992) (concluding the same but adding that a defendant's motive and opportunity to distribute may be evidenced by an uncharged possession evidence).

28. The defining line between a specific intent crime and a general intent crime is ambiguous. *See* *Rodriguez*, *supra* note 15, at 460. Generally, specific intent crimes involve a state of mind that is separate from the mental state required in committing the *actus reus* of the crime. *Id.* (citing 1 WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 28, at 202 (1972)); *see also* *Reed*, *supra* note 15, at 222 (noting that specific intent is defined as “a special type of malevolent intent that prosecutors must prove in order to establish the elements of offense”).

29. *See infra* Parts III.A–B, IV.A.

30. *Compare* *Davis*, 726 F.3d at 444 (concluding that uncharged possession evidence is not probative of intent to distribute in any situation), *and* *Lee*, 724 F.3d at 979–80 (concluding that the marginal probative value of uncharged conduct evidence is next to nothing unless the defendant specifically calls his or her intent into question), *and* *Haywood*, 280 F.3d 715, *and* *Santini*, 656 F.3d 1075, *and* *United States v. Monzon*, 869 F.2d 338 (7th Cir. 1989), *with* *Logan*, 121 F.3d at 1178 (concluding that uncharged possession evidence is probative of intent to distribute), *and* *Butler*, 102 F.3d 1191, *and* *Gadison*, 8 F.3d 186, *and* *Templeman*, 965 F.2d 617.

amount because in those instances the uncharged conduct lacks the heightened probative value it possesses in other instances.<sup>31</sup>

## II. FEDERAL RULE OF EVIDENCE 404(B): A HISTORICAL BACKGROUND<sup>32</sup>

In order to properly analyze FRE 404(b), considerations of its historical context resulting from (1) its common law foundation, (2) its legislative history, and (3) how courts interpreted it immediately after its adoption by Congress in 1975 are of the utmost importance.

### A. Common Law Formulation Under *Molineux*

The current formulation of FRE 404(b), or an ideological approximation of it, can be traced at common law to a single case, *People v. Molineux*.<sup>33</sup> In that case, the defendant was charged with the first-degree murder of Katharine Adams by the use of cyanide poisoning.<sup>34</sup> The prosecution alleged that the defendant had sent a package to Harry S. Cornish that contained a bottle of what appeared to be Bromo Seltzer but was in fact cyanide.<sup>35</sup> Due to Adams having a headache the next morning, it was she, rather than Cornish, who took the cyanide, believing it to be Bromo Seltzer.<sup>36</sup> Shortly thereafter, Adams turned a deep shade of blue, suffered immensely, and died.<sup>37</sup> While Cornish had also taken a taste of the cyanide, the dose he took was not lethal.<sup>38</sup>

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31. See *infra* Part IV.D.

32. This author will begin with the foundational case, *People v. Molineux*, 61 N.E. 286 (N.Y. 1901). However, the character evidence rule has been around for centuries. See, e.g., Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 GA. L. REV. 775, 777 (2013) (noting that the character rule appeared in English courts during the Restoration Period). According to one commentator, early English cases did not specify a rule of exclusion concerning character evidence, contrary to popular belief. Melilli, *supra* note 15, at 1557–59. As a matter of fact, the test at common law preceding *Molineux* was the ordinary test of relevance. See *id.* Accordingly, by the nineteenth century, the character evidence rule had essentially the same characteristics as the inclusionary approach today. *Id.* However, by the mid-nineteenth century the courts had started to shift to the exclusionary approach. *Id.* at 1559; see *infra* Part II.A (discussing the exclusionary rule under *Molineux*).

33. 61 N.E. 286; see also Reed, *supra* note 15, at 202–12.

34. *Molineux*, 61 N.E. at 286–87.

35. *Id.* at 287.

36. *Id.*

37. *Id.*

38. *Id.* at 287–88. Interestingly, the authorities, in investigating Adams's murder, originally suspected Cornish on account of his own past. Randolph N. Jonakait, *People v.*



The *Molineux* court separated the facts into categorical units, starting with those facts that had no relation either to the defendant's handwriting or his uncharged conduct.<sup>39</sup> The chief facts that relied on non-propensity reasoning<sup>40</sup> were that the defendant was proficient in chemistry, had the ingredients to make cyanide, and had the motive to kill Cornish due to some arguments between them.<sup>41</sup> Further, the silver bottle holder that stored the cyanide was purchased only a short distance from the factory where the defendant was employed.<sup>42</sup> The chief facts that relied on propensity reasoning<sup>43</sup> concerned the facts surrounding the death of Henry C. Barnet (Barnet), another member of Cornish and the defendant's athletic club.<sup>44</sup> Barnet was found dead in his room with a box claiming to contain "Kutnow" powder, which actually contained cyanide.<sup>45</sup> The prosecution attributed the

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*Molineux and Other Crime Evidence: One Hundred Years and Counting*, 30 AM. J. CRIM. L. 1, 4 (2002). This past included suspicions that Cornish had broken up Mrs. Rodgers's marriage before he came to live with Mrs. Rodgers and Mrs. Adams. *Id.* at 4 n.11. However, the then-district attorney soon concluded that Cornish was not the killer but the victim:

History shows that [poisoning] is essentially a woman's method of action. Women acted thus in ancient times and following down through the ages we find the same traits of character, the same outcropping of human nature. It is easy to surmise the reason for this trait. Woman's nature is essentially subtle. From deeds of blood and violence she naturally shrinks. What then follows? Her scheming brain begins to work. She turns to poison as the easiest and surest method, because if handled deftly and cleverly it insures less suspicion and less possibility of detection. In the Adams case there may be a man involved, but I think, as I have said before that a woman is at the bottom of it and the prime mover, despite the many suppositions and rumors that Mr. Cornish has an enemy in his own sex.

*Id.* at 4-5 (quoting JANE PEJSA, *THE MOLINEUX AFFAIR*, 125-26 (1983)). However, it appears that the district attorney erred in his gross generalization about women, as Roland Molineux soon became the chief suspect. *See id.* at 5.

39. *Molineux*, 61 N.E. at 288.

40. *See supra* note 18 and accompanying text.

41. *Molineux*, 61 N.E. at 288. Cornish was the superintendent of an athletic club of which the defendant was also a member. *Id.* As a result of this connection, the defendant and Cornish had frequently butted heads over various matters including the conduct of other members and whether Cornish had to obey the defendant's instructions during events the defendant had set up. *Id.* This animosity grew to the point that Cornish allegedly gossiped to prominent members about the defendant's profession, saying that he got his money from making rum, and about the defendant's morality, stating that he kept "a place of questionable repute." *Id.* at 288-89.

42. *Id.* at 289.

43. *See supra* note 18 and accompanying text.

44. *Molineux*, 61 N.E. at 289.

45. *Id.* at 289-90.

defendant's motive for killing Barnett to Barnett's attempts to win over the defendant's fiancée.<sup>46</sup>

After identifying the prosecution's goals in offering the evidence, the *Molineux* court decided the question whether evidence concerning Barnett's death was admissible.<sup>47</sup> The court noted how the common law rule at the time prohibited the state from using uncharged conduct evidence (1) to establish "a foundation for a separate punishment," or (2) to prove the guilt of the crime charged.<sup>48</sup> Further, the court noted the then-existing state of the common law and its general exclusionary nature with respect to uncharged conduct.<sup>49</sup> This general exclusionary character of the common law rule resulted from the proposition that admitting uncharged conduct evidence would raise a presumption of guiltiness—he who committed a crime in the past would be more likely to commit the crime in the present case—rather than the required presumption of innocence.<sup>50</sup>

While acknowledging that most uncharged conduct evidence is inadmissible because it is logically irrelevant when not used to demonstrate a propensity for committing bad acts, the court adopted five general exceptions to that rule: (1) motive, (2) intent, (3) "absence of mistake or accident", (4) a common scheme or plan between two or more crimes, and (5) identity.<sup>51</sup> After noting each of these exceptions, the court systematically refuted the logic behind admitting evidence of the facts surrounding Barnett's death under each of the exceptions.<sup>52</sup> By carefully noting each exception to the rule and then systematically dismantling the alleged admissible purposes of the evidence, this rule, sometimes known as Judge Werner's rule, has been classified as a "general exclusionary rule followed by a limited number of exceptions

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46. *Id.* at 290.

47. *Id.* at 293.

48. *Id.* at 293–94 (noting the universally recognized liberty of an individual to be tried on the crime actually in dispute and that individuals are presumed innocent until proven guilty).

49. *Id.* at 294 ("The general rule is that when a man is put upon trial for one offense he is to be convicted . . . by evidence which shows that he is guilty of that offense alone, and . . . proof of his guilt of one or a score of other offenses . . . is wholly excluded." (quoting *People v. Sharp*, 14 N.E. 319, 343 (N.Y. 1887) (Peckham, J., concurring) (internal quotation marks omitted))).

50. *See id.*

51. *Id.* at 294; *see also* FED. R. EVID. 404(b).

52. *Id.* at 294–304.

to the exclusionary rule.”<sup>53</sup> In addition to Judge Werner’s formulation of the character evidence rule, Judge Alton Parker, in a concurrence, set forth an additional standard that is the basis for today’s character evidence rule: “Do the facts constituting the other crime actually tend to establish one or several elements of the crime charged? If so, they may be proved.”<sup>54</sup>

*B. A Brief Legislative History of Federal Rule of Evidence 404(b)*

With respect to the operative language concerning uncharged conduct evidence, the modern formulation of FRE 404(b) is substantially similar to its text as adopted.<sup>55</sup> As it was adopted, FRE 404(b) read as follows:

(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.<sup>56</sup>

Not including the purely stylistic changes made to FRE 404(b) in 2011,<sup>57</sup> the text of the current rule materially differs from its older formulation only with respect to the requirement that prosecutors give defendants notice in criminal cases before using uncharged conduct evidence against the defendant.<sup>58</sup>

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53. Reed, *supra* note 15, at 203 (noting that while Judge Werner’s rule can be viewed as a “general exclusionary rule,” Judge Werner did not additionally undertake a test equivalent to the Federal Rule of Evidence 403 balancing test weighing the probative value against the threat of unfair prejudice).

54. *Molineux*, 61 N.E. at 314 (Parker, C.J., concurring); *see also* Reed, *supra* note 15, at 242 (“The persons responsible for the rule’s codification in 1972–1975 wanted a rule that followed Judge Parker’s concurring opinion . . .”). Judge Alton Parker’s approach to the character evidence rule was a formulation of the inclusionary rule. *Compare Molineux*, 61 N.E. at 314 (Parker, C.J., concurring), *and* Reed, *supra* note 15, at 242, *with infra* Part II.B. During the codification process of 1972–1975, Congress debated, but ultimately adopted, the inclusionary approach to the character evidence rule. *See infra* Part II.B.

55. *Compare* FED. R. EVID. 404(b), *with Rules of Evidence: Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Fed. Criminal Laws of the H. Comm. on the Judiciary*, 93d Cong. 122–23 (1973) [hereinafter *Hearings*].

56. *Hearings*, *supra* note 55, at 122–23 (using the language of the 1971 Advisory Committee draft that was ultimately adopted even though it was arguing for a change to that language).

57. *See* FED. R. EVID. 404 advisory committee’s note on 2011 amendment.

58. *See id.* FRE 404(b)(2) provides as follows:

Much of the very limited debate surrounding the adoption of FRE 404(b) concerned itself with the proper level of admissibility for uncharged conduct evidence offered for non-character purposes.<sup>59</sup> When the Supreme Court first submitted FRE 404(b) to Congress, the rule read, “This subdivision [FRE 404(b)] does not exclude the evidence when offered” for another, non-character purpose.<sup>60</sup> However, Congress changed the text of FRE 404(b) to read, “It may, however, be admissible” for another, non-character purpose.<sup>61</sup>

While some debate surrounded this change in language,<sup>62</sup> the Committee on the Judiciary believed that this version of the rule placed greater emphasis on the admissibility of uncharged conduct evidence.<sup>63</sup> Because of the use of the word “may,” there was some concern that

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On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

FED. R. EVID. 404(b)(2). While this notice concern was addressed as early as the Criminal Justice Subcommittee hearings in 1973, the prosecution’s obligation to give the defendant notice was not in the 1975 version of the Federal Rules of Evidence. *See Rules of Evidence: Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 93d Cong. 203 (1973) [hereinafter *Criminal Justice*] (letter from Kenneth W. Graham, Jr., Professor of Law).

59. *See, e.g.*, S. REP. NO. 93-1277, at 24–25 (1974); H.R. REP. NO. 93-650, at 7 (1973).

60. H.R. REP. NO. 93-650, at 7.

61. *Id.* This formulation of the rule reflected statements in the 1971 Advisory Committee draft rather than a subsequent amendment because the Committee sought to emphasize the admissibility of uncharged conduct evidence under FRE 404(b). *Id.*

62. *Compare* H.R. REP. NO. 93-650, at 7 (noting that the 1971 Advisory Committee draft emphasized uncharged conduct evidence’s admissibility), *with Criminal Justice, supra* note 58, at 21–22 (letter from Edward W. Cleary, Reporter, to Herbert E. Hoffman, Counsel, Special Subcomm. on Reform of Fed. Criminal Laws, Comm. on the Judiciary). Additionally, some prominent members of the legal profession, chiefly Chief Judge Friendly of the Second Circuit Court of Appeals, questioned the need for an evidence code entirely. *See Hearings, supra* note 55, at 261 (statement of Judge Henry J. Friendly, C.J., U.S. Court of Appeals for the Second Circuit) (“[I]n legal matters, when it is not necessary to do anything, it is necessary to do nothing.”). With respect to FRE 404(b), Judge Friendly had some more specific problems:

Does [FRE 404(b)] 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.

*Id.* at 263.

63. H.R. REP. NO. 93-650, at 7.

judges would view FRE 404(b) as a discretionary rule giving them the authority to independently exclude such evidence.<sup>64</sup> However, with respect to uncharged conduct evidence, the legislative history is clear on the point that the rule itself was not meant to give trial judges the discretion to exclude otherwise relevant uncharged conduct.<sup>65</sup> Indeed, in an October 1974 report, the Committee on the Judiciary made clear that the only discretion a court has with respect to uncharged conduct evidence relevant to a non-character purpose is his or her ability to exclude such evidence under FRE 403.<sup>66</sup> When such evidence is relevant under FRE 404(b), a trial judge may exclude the evidence only when its probative value is substantially outweighed by its prejudicial effect or other deleterious concerns such as waste of time or confusion of the issues.<sup>67</sup> This formulation of the character evidence rule reflects Judge Parker's inclusionary rule because it only bars character evidence when that evidence is not relevant to a non-character purpose.<sup>68</sup>

### C. Modern Approach Under *United States v. Beechum*

When a defendant genuinely contests the intent element of a crime, FRE 404(b) provides the prosecution with the opportunity to present evidence of uncharged conduct<sup>69</sup> to prove the defendant's intent.<sup>70</sup> The

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64. *Criminal Justice*, *supra* note 58, at 344.

65. *Id.* at 344 (“Only if the probative value of [uncharged conduct evidence] is substantially outweighed by the danger of unfair prejudice, are they properly excludable.”).

66. S. REP. NO. 93-1277, at 24–25 (1974) (“[T]he discretionary word ‘may’ . . . 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.”).

67. *Id.*; *see also* FED. R. EVID. 403.

68. *See* Milich, *supra* note 32, at 778 (“The history of the ‘other uses’ exception [to the character evidence rule], currently known as Rule 404(b), is one of inexorable expansion, ultimately swallowing all but remnants of the prohibition against character evidence.”); *supra* Part II.A and accompanying text.

69. The court in *Beechum* used the term “extrinsic offense” rather than other terms so as to avoid confusion. *United States v. Beechum*, 582 F.2d 898, 902 n.1 (5th Cir. 1978). This perceived confusion resulted from some courts using the term “prior” or “similar” offenses. *Id.* Both of these terms result in confusion because (1) the term “prior” is unduly restrictive, as uncharged conduct occurring after the charged crime would also be logically equivalent to conduct occurring before the charged crime, and (2) the term “similar” connotes the idea that the other act is similar in nature to the charged act rather than to the purpose for which it is admitted. *Id.* This author chooses to use the term “uncharged conduct” throughout this Comment as it takes into account the concerns elucidated by *Beechum* and is the closest to the prevalent terminology in modern legal literature.

Fifth Circuit case *United States v. Beechum*<sup>71</sup> presents exactly that issue. The facts presented in *Beechum* are relatively straightforward: Orange Jell Beechum (Beechum) was a substitute mail carrier for the Postal Service and was convicted of violating 18 U.S.C. § 1708, theft of U.S. mail, for the unlawful possession of an 1890 silver dollar.<sup>72</sup> The only issue contested at the trial was whether Beechum had intended to return the coin or to keep it.<sup>73</sup> In order to prove Beechum's intent to possess the coin, the government introduced into evidence the fact that when police officers searched Beechum to find the coin, they also found two credit cards.<sup>74</sup> These cards did not belong to Beechum and were not signed; rather, the cards belonged to two people living on one of Beechum's previous mail routes.<sup>75</sup>

Looking at the admissibility of the credit cards with respect to Beechum's intent towards the coin, the court framed the question simply, "[W]hy would Beechum give up the silver dollar if he kept the credit cards?"<sup>76</sup> In answering this question, the court adopted a two-step test<sup>77</sup>: First, the uncharged conduct evidence must be relevant to an issue that is not the defendant's character.<sup>78</sup> Second, under FRE 403, the evidence's risk of unfair prejudice cannot substantially outweigh its probative value.<sup>79</sup> The need for this test resulted from a straightforward

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70. *Id.* at 909 ("But where the defendant testifies to controvert an element of the Government's case, such as intent, to which the [uncharged conduct] is highly relevant, the integrity of the judicial process commands that the defendant be faced with that offense."); see also CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., 22B FEDERAL PRACTICE & PROCEDURE: FEDERAL RULES OF EVIDENCE § 5242, at 153 (2014) (noting that some courts also require the intent to be a material issue in the trial); Barry Tarlow, *RICO Report, The Past as a Predictor: Is Prior Drug Use Probative of Future Distribution?*, 27 CHAMPION 66, 66 (2003).

71. 582 F.2d 898.

72. *Id.* at 903.

73. See *id.* at 910.

74. *Id.* at 903.

75. *Id.*

76. *Id.* at 909.

77. See *Rule 404(b) Other Crimes Evidence*, *supra* note 15, at 636. This test is essentially the same test used by the United States Courts of Appeals today. See *infra* Part III.

78. *Beechum*, 582 F.2d at 911; see also Mellili, *supra* note 15, at 1569 (noting that attempting to offer character evidence for a non-character purpose can be extremely complicated due to the fine metaphysical lines between non-character purposes and character purposes).

79. *Beechum*, 582 F.2d at 911. In limiting this unfair prejudice, a court may use its discretionary powers to assure that the least possible prejudicial effect of the relevant evidence reaches the jury. See *Rule 404(b) Other Crimes Evidence*, *supra* note 15, at 642; see

reading of the un-restyled FRE 404(b).<sup>80</sup> That rule stated, “Evidence of [uncharged conduct] is not admissible to prove the character of a person . . . to show . . . conformity [with that character]. It may, however, be admissible for other purposes, such as . . . intent . . . .”<sup>81</sup> This rule states the principle that uncharged conduct should not be admissible when used only to show the defendant’s deficient character.<sup>82</sup> Further, FRE 404(b) does not make uncharged conduct inadmissible because it is not probative whatsoever.<sup>83</sup> The probative value of the evidence is clear: a man who has a bad character is more likely to commit crimes than someone with a good character.<sup>84</sup> However, uncharged conduct evidence is generally deemed inadmissible when used solely to prove the defendant’s deficient character because the Federal Rules have deemed the threat of unfair prejudice in those cases to substantially outweigh the evidence’s probative value.<sup>85</sup>

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*also* FED. R. EVID. 105 (“If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.”). The Advisory Committee notes following FRE 105 are also particularly important when discussing character evidence. These notes provide that there is a close relationship between FRE 105 and FRE 403. *See* FED. R. EVID. 105, advisory committee’s notes. Often, the admissibility of the evidence may turn on whether the jury has been properly instructed as to the permissible purposes of the evidence. *See* FED. R. EVID. 105, advisory committee’s notes. For an example of a court’s creative use of its discretionary powers, see *United States v. Jackson*, 405 F. Supp. 938, 945 (E.D.N.Y. 1975) (holding that evidence of defendant’s flight from authorities while armed would be inadmissible provided that the defendant stipulate to the fact that he was in the area shortly after a robbery and that he had used a false name).

80. *See Beechum*, 582 F.2d at 910.

81. *Id.* (quoting FED. R. EVID. 404(b)).

82. *Id.*; *see also* FED. R. EVID. 404(b).

83. *See Beechum*, 582 F.2d at 910; *see also, e.g., Michelson v. United States*, 335 U.S. 469, 475–76 (1948) (“[S]uch facts might logically be persuasive that [the defendant] is by propensity a probable perpetrator of the crime.”). The Supreme Court in *Michelson* noted that, while the law does not allow a defendant’s bad acts to be probative of his or her bad character, the law does not presume that the defendant has good character. *Michelson*, 335 U.S. at 475 (citing *Greer v. United States*, 245 U.S. 559 (1918)). In *Greer*, Justice Oliver Wendell Holmes recognized that, in cases where the defendant’s character is not itself an element of the crime, the defendant has the choice of whether to introduce evidence to prove his or her own character and subject that character to attack by the government. *Greer*, 245 U.S. at 559–61. The only presumption regarding the defendant in these cases that even slightly bears on character is that he or she is presumed innocent until proven guilty. *Id.* at 559–60.

84. *Beechum*, 582 F.2d at 910; *see supra* Figure 1.

85. *Beechum*, 582 F.2d at 910. However, commentators have questioned whether FRE 404(b) serves even this basic exclusionary purpose. *See Milich, supra* note 32, at 779 (noting that FRE 404(b) has, over time, excluded an increasingly smaller and smaller subset of uncharged conduct).

With respect to the first step of this two-step analysis in admitting uncharged conduct, the relevance of the uncharged conduct is a function of the uncharged conduct's similarity to the offense charged.<sup>86</sup> While the similarity of the uncharged conduct and the offense charged is crucial to this analysis, the analysis in fact depends on a special type of similarity.<sup>87</sup> This similarity, and hence the relevance of the uncharged conduct, depends on whether the uncharged conduct is probative of the issue in controversy for the offense charged.<sup>88</sup> In *Beechum*, the relevancy of the uncharged conduct, Beechum's possession of the credit cards, depended on whether the defendant in fact had the same intent during both the perpetration of the uncharged conduct and the offense charged.<sup>89</sup>

Further, because the relevancy of the uncharged conduct is conditioned on whether the uncharged conduct was in fact committed and whether the defendant committed the uncharged conduct, the uncharged conduct must be found conditionally relevant under FRE 104(b).<sup>90</sup> This rule requires the trial judge to decide "whether there is

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86. *Beechum*, 582 F.2d at 911.

87. *Id.*

88. *Id.*; see also Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954, 955 (1933) (noting that the term "similar" as applied to the character evidence rule had not been scrutinized, and undertaking that scrutiny). Saying that one fact is similar to another implies that the facts share some common features, but it also implies that the facts do not share every feature; otherwise, they would be identical. See *id.* In addition, similarity should be viewed in the context of "the purpose of the inquiry at hand." *Id.* As such, this author will use the term "similar" throughout this Comment to signify the relationship between the uncharged possession evidence and its purpose, i.e., its ability to prove the defendant's intent. If the uncharged conduct evidence is to be probative of that intent, the intent possessed by the defendant during the uncharged conduct must be the same type of intent as allegedly possessed by the defendant with respect to the charged crime.

89. See *Beechum*, 582 F.2d at 911. The court in *Beechum* noted that this line of reasoning, requiring the uncharged conduct to evidence "the same state of mind" as the offense charged, is only essential in cases where the uncharged conduct is being used to show the defendant's intent. *Id.* at 911 n.15. For example, a prosecutor may show a defendant's financial troubles to establish a motive for robbery by introducing evidence of uncharged conduct where "the defendant had been threatened for nonpayment of a debt incurred in a drug transaction." *Id.* (citing *United States v. Johnson*, 525 F.2d 999, 1006 (2d Cir. 1975)). The importance of this uncharged conduct is how it tends to establish the issue in the present case, the defendant's motive for the robbery, rather than the overall similarity between the two offenses. *Id.*

90. *Id.* at 912-13; see also *Huddleston v. United States*, 485 U.S. 681, 685 (1988) (holding that uncharged conduct evidence must be conditionally relevant). FRE 104(b) provides as follows: "(b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the



sufficient evidence for the jury to find that the defendant in fact committed the [uncharged conduct]” in cases where the uncharged conduct is the conditional fact.<sup>91</sup> This standard establishes a very low threshold for a prosecutor to meet, as it allows the judge to deny the evidence only when he or she decides that no reasonable jury could have found the conditional fact—the defendant’s commission of the uncharged conduct—by a preponderance of the evidence.<sup>92</sup>

Once the prosecution proves that the uncharged conduct is (1) similar to the offense charged with respect to the issue in controversy and (2) conditionally relevant, in that the judge believes the jury could reasonably find that the defendant in fact committed the uncharged conduct, the evidence is deemed relevant and must be weighed against the potential for unfair prejudice.<sup>93</sup> FRE 403 undertakes this weighing by measuring the probative value of a piece of evidence against its potential for unfair prejudice.<sup>94</sup> Courts will admit the evidence unless the potential for unfair prejudice substantially outweighs the probative

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proof be introduced later.” FED. R. EVID. 104(b) (title case omitted). The Advisory Committee Notes to FRE 104(b) provide an apt hypothetical to easily demonstrate conditional admissibility: If a spoken statement is being used to prove that *X* had notice of the statement’s contents, it must also be shown that *X* actually heard the statement. The conditional fact would be the spoken statement. That statement’s relevancy would depend on whether *X* heard the statement. See FED. R. EVID. 104(b), advisory committee’s notes.

91. *Beechum*, 582 F.2d at 913 (citing Edmund M. Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165 (1929)).

92. See *Beechum*, 582 F.2d at 913.

93. *Id.* at 913; see also Calvin W. Sharpe, *Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof*, 59 NOTRE DAME L. REV. 556, 566 (1984). Sharpe argues that depending on the risk of prejudice, some uncharged conduct should require a higher level of proof in terms of FRE 104(b). See Sharpe, *supra*, at 566–67. Despite the now-conventional approach to FRE 104(b), see *Huddleston*, 485 U.S. at 689–90 (holding that the standard of proof for conditionally relevant facts is whether a reasonable jury could find the fact by a preponderance of the evidence), Sharpe discussed differing situations where uncharged conduct poses a heightened risk of unfair prejudice. Sharpe, *supra*, at 566–67. In general, there are two types of “high risk” evidence, crimes that are inherently egregious, such as murder, or crimes that are extremely similar to the crime charged. *Id.* For a more recent discussion of changing the standards of proof for conditionally relevant facts, see Jason Tortora, Note, *Reconsidering the Standards of Admission for Prior Bad Acts Evidence in Light of Research on False Memories and Witness Preparation*, 40 FORDHAM URB. L.J. 1493 (2013) (arguing for courts to adopt the standard of proof purveyed by *Huddleston* because of the risks associated with witness interviewing and preparation).

94. *Beechum*, 582 F.2d at 913; see also Melilli, *supra* note 15, at 1555 (noting that admission is not automatic because (1) notice must be given ahead of time, (2) the uncharged conduct must satisfy FRE 104(b)’s conditional admissibility requirements, (3) the evidence must have a valid non-character purpose, and (4) the judge must undertake an FRE 403 balancing test).

value.<sup>95</sup> Further, in undertaking this balancing test, courts must determine whether the evidence is unfairly prejudicial by using a “commonsense assessment of all the circumstances surrounding the [uncharged conduct].”<sup>96</sup>

In applying this commonsense assessment, courts consider whether there are other ways to prove the issue and whether other facts available could have the same effectiveness in proving the contested issue.<sup>97</sup> As such, the probative value, which is weighed against the unfair prejudice, is the marginal probative value of the evidence as determined by comparing these other means of proving the issue in controversy.<sup>98</sup> Along the same line, *Beechum* reasoned that in two situations the marginal probative value of the uncharged conduct would be substantially diminished and almost certainly require its exclusion: situations where the government already has a strong case on the issue in controversy and situations where the defendant has not contested the issue.<sup>99</sup> However, while *Beechum* acknowledged that this marginal probative value would be negligible in situations where the defendant has not contested the issue, *Beechum* did not answer the question whether merely pleading not guilty puts a defendant’s intent at issue when the crime requires a specific intent.<sup>100</sup>

Applying this two-step test to *Beechum*’s uncharged conduct, the *Beechum* court held that *Beechum*’s intent with respect to his possession of the credit cards was admissible to prove his intent to possess the silver

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95. See FED. R. EVID. 403; see also *Beechum*, 582 F.2d at 913.

96. *Beechum*, 582 F.2d at 914.

97. See *id.*

98. *Id.*; see also Rodriguez, *supra* note 15, at 455 (describing this marginal probative value as “incremental probity”). This author uses the term “marginal probative value” to denote the differences between the probativeness of evidence under FRE 401 and FRE 403. Under FRE 401, the probative value of the evidence is generally considered to be whether the evidence has “any tendency to make a fact more or less probable than it would be without the evidence.” FED. R. EVID. 401. By contrast, the probative value of the evidence under FRE 403 can be raised or lowered by a number of factors including the extent to which the evidence establishes a fact at issue and whether other evidence establishes that same fact. See *Beechum*, 582 F.2d at 914; David A. Sonenshein, *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts*, 45 CREIGHTON L. REV. 215, 232 (2011).

99. *Beechum*, 582 F.2d at 914.

100. *Id.* at 914–15; see also WRIGHT & GRAHAM, *supra* note 70, § 5242, at 151 (noting that intent is an ultimate issue in the case); *infra* Part IV.A (arguing that courts should require intent to be a material issue at trial before allowing uncharged conduct evidence to demonstrate the defendant’s intent).

coin.<sup>101</sup> First, as the issue in controversy centered on whether Beechum's intent was lawful, evidence that diminished or increased the likelihood that Beechum lawfully possessed the silver dollar would be relevant towards that issue.<sup>102</sup> Second, in determining whether the risk of unfair prejudice substantially outweighs the probative value, the court determined that the evidence's marginal probative value approached its general probative value.<sup>103</sup> This extremely high marginal probative value resulted from several factors: (1) the defendant had clearly called the question of his intent into controversy from the beginning of the trial by conceding every other point;<sup>104</sup> (2) principles of justice required the admission of evidence when the defendant offered exculpatory evidence on the same point;<sup>105</sup> (3) Beechum's possession of the credit cards directly related to the plausibility of his story;<sup>106</sup> (4) all the other evidence that the government could show with respect to the defendant's intent was contested and did not create a strong case;<sup>107</sup> (5) Beechum possessed the credit cards at the exact moment when he possessed the silver dollar.<sup>108</sup> As such, the court found the evidence both relevant towards Beechum's intent and probative of that intent.<sup>109</sup>

The Fifth Circuit Court of Appeals' decision in *Beechum* paved the way for the courts deciding the admissibility of uncharged conduct evidence with respect to drug possession.<sup>110</sup>

### III. CIRCUIT SPLIT ANALYSIS

Despite *Beechum*'s in-depth analysis of the inner workings of FRE 404(b),<sup>111</sup> several of the federal courts of appeals have split over whether

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101. *Beechum*, 582 F.2d at 918.

102. *See Beechum*, 582 F.2d at 916; *see also* FED. R. EVID. 401.

103. *Beechum*, 582 F.2d at 916.

104. *Id.*

105. *Id.* These principles of justice are that a defendant waives his Fifth Amendment privilege against self-incrimination on cross-examination when he or she offers exculpatory evidence because the defendant has called that issue into question and the jury has a right to every man's evidence. *Id.*

106. *Id.*

107. *Id.* at 917.

108. *Id.* Because this possession occurred simultaneously, Beechum's possession of the credit cards would "constantly remind him of the wrongfulness of their possession. In effect, Beechum's state of mind with respect to the credit cards continued through his arrest." *Id.*

109. *See id.*

110. *See infra* note 116 and accompanying text.

111. *See Beechum*, 582 F.2d 898.

uncharged possession evidence may be probative of a person's intent to distribute drugs.<sup>112</sup> Making this inquiry, the circuits generally follow a four-part test:<sup>113</sup>

- (1) the evidence [must be] directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged;
- (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter at issue;
- (3) the evidence is sufficient to support a jury finding that the defendant committed the other act; and
- (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.<sup>114</sup>

While some circuits have laid out the test slightly differently, not explicitly stating that the uncharged conduct has to itself be proven or adding a requirement that limiting instructions be given when requested,<sup>115</sup> this test merely serves to establish the two inquiries laid out in *Beechum*: (1) The proponent of the evidence must have a non-propensity purpose for offering the uncharged conduct, and (2) after a non-propensity purpose has been established, the evidence must meet

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112. See *United States v. Davis*, 726 F.3d 434 (3d Cir. 2013); *United States v. Lee*, 724 F.3d 968 (7th Cir. 2013); *United States v. Santini*, 656 F.3d 1075 (9th Cir. 2011); *United States v. Haywood*, 280 F.3d 715 (6th Cir. 2002); *United States v. Ono*, 918 F.2d 1462 (9th Cir. 1990); *United States v. Monzon*, 869 F.2d 338 (7th Cir. 1989), for analyses concluding that prior possession is not probative of intent. But see *United States v. Logan*, 121 F.3d 1172 (8th Cir. 1997); *United States v. Butler*, 102 F.3d 1191 (11th Cir. 1997); *United States v. Gadison*, 8 F.3d 186 (5th Cir. 1993); *United States v. Templeman*, 965 F.2d 617 (8th Cir. 1992), for analyses concluding that prior possession is probative of intent. One other commentator has briefly discussed the issue of whether prior drug use is probative of a defendant's intent to distribute. See Tarlow, *supra* note 70. However, that article, while addressing the circuit split as it existed in 2003, did not focus on scrutinizing the probative value of uncharged possession evidence in different scenarios. Compare Tarlow, *supra* note 70, at 67–71, with *infra* Part IV. Further, since that article was published, the Third and Seventh Circuits have recently weighed in on the circuit split. See *Davis*, 726 F.3d 434; *Lee*, 724 F.3d 968. In particular, the Seventh Circuit's analysis in *Lee* is especially important to this author's overview of the circuit split, as the Seventh Circuit directly confronted a situation where the defendant claimed an innocent bystander defense. See *Lee*, 724 F.3d at 976; *infra* Part IV.A.

113. See, e.g., *Davis*, 726 F.3d at 441; *Lee*, 724 F.3d at 975; *Santini*, 656 F.3d at 1077–78; *Haywood*, 280 F.3d at 719–20; *Monzon*, 869 F.2d at 344.

114. *Lee*, 724 F.3d at 975.

115. See *Davis*, 726 F.3d at 441. For an extensive recitation of the tests invoked by each circuit in determining whether uncharged conduct evidence is probative of intent, see Sonenshein, *supra* note 98, at 224 n.67 (collecting cases and laying out the general four- or three-part test for every circuit).

all the other relevance requirements imposed on any other piece of evidence.<sup>116</sup>

A. *Circuits That Exclude Uncharged Possession Evidence to Show Intent to Distribute*

Recently, the Third Circuit Court of Appeals and the Seventh Circuit Court of Appeals revisited this circuit split and have further driven a wedge between the circuits.<sup>117</sup> In applying the four-prong test above,<sup>118</sup> courts that have excluded prior possession evidence have done so for several reasons: (1) the defendants' intents were not at issue;<sup>119</sup> (2) even assuming that the uncharged conduct was relevant toward a permissible end, logic dictated that the prosecution was merely making a propensity argument;<sup>120</sup> (3) the intent to possess drugs and the intent to distribute drugs were sufficiently dissimilar.<sup>121</sup>

The Seventh Circuit Court of Appeals has been particularly outspoken about ensuring that the defendant has actually placed his or her intent at issue when considering whether to admit uncharged possession evidence.<sup>122</sup> In making this determination in *United States v. Lee*,<sup>123</sup> the Seventh Circuit noted that a defendant who claims he or she is innocent, and thereby forces the government to prove his or her

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116. *Davis*, 726 F.3d at 441 (“All this really means is that such evidence must have a nonpropensity purpose and satisfy the same relevancy requirements as any other evidence.”).

117. *Davis*, 726 F.3d 434; *Lee*, 724 F.3d 968; *see also supra* Part II.B.

118. *See supra* text accompanying note 114.

119. *Lee*, 724 F.3d at 976 (noting that judges evaluating FRE 404(b) evidence should “consider first the extent to which a defendant has genuinely placed at issue the specific matter that the evidence is being offered to establish”); *see also* *United States v. Monzon*, 869 F.2d 338, 344 (7th Cir. 1989) (noting that even where the crime charged is a specific intent crime, thereby putting intent squarely at issue, the evidence must meet other relevancy requirements before it can be admitted).

120. *Lee*, 724 F.3d at 976–77; *United States v. Santini*, 656 F.3d 1075, 1078 (9th Cir. 2011) (noting that the uncharged conduct was for “simple possession” and therefore not similar enough to the charged offense to be probative); *Monzon*, 869 F.2d at 344 (noting that the marijuana butts were classic character evidence “designed to show that the defendant had a bad character and acted in conformity therewith” and was not similar enough to the charged offense to be probative).

121. *Davis*, 726 F.3d at 444; *see Monzon*, 869 F.2d at 344 (noting the dissimilar natures between uncharged possession evidence and intent to distribute).

122. *See Lee*, 724 F.3d at 976; *United States v. Miller*, 673 F.3d 688, 696–97 (7th Cir. 2012) (holding that a prior drug dealing conviction in 2000 is not indicative of an intent to distribute nearly eight years later when the defendant claims to have been an innocent bystander).

123. 724 F.3d 968.

specific intent, should not be considered to have opened the door to whatever uncharged conduct evidence the prosecution desires to have admitted.<sup>124</sup>

The Seventh Circuit found a crucial distinction between a defendant who raises an innocent bystander defense and one who claims that he or she was going to use the drugs for a different, albeit still illegal, purpose.<sup>125</sup> The distinction between these two situations is that where a defendant actively puts intent at issue by claiming not to have intended to use the drugs for a specific purpose, the defendant has actively made the evidence more probative on the point of intent.<sup>126</sup> Unlike where the defendant actively puts intent at issue, a defendant claiming to be an innocent bystander only formally puts intent into question by challenging his guilt for the crime charged.<sup>127</sup> This innocent bystander defense would not have raised “particular questions—about what he knew, what his purpose was, and whether his proximity to the [drugs] was inadvertent—that his prior [drug] conviction might help the jury to answer.”<sup>128</sup>

In addition to questioning whether intent is in dispute, courts finding uncharged possession evidence inadmissible have considered the chain of logic leading from the uncharged conduct to the permissible inference of intent and decided whether propensity reasoning is involved.<sup>129</sup> Despite FRE 404(b)'s bar on propensity reasoning regarding the defendant's character, there is always a danger that jurors will use uncharged conduct for this reasoning even where instructed otherwise.<sup>130</sup> Some courts, like the Third Circuit in *United States v.*

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124. *Id.* at 976; *see also* *United States v. Beechum*, 582 F.2d 898, 909 (5th Cir. 1978).

125. *Lee*, 724 F.3d at 976.

126. *Id.*

127. *Id.*

128. *Id.* at 979.

129. *Id.* at 976–77 (noting that “the court must consider the chain of logic by which the jury is being asked to glean the defendant's knowledge, intent, etc. from proof of his prior misdeeds”) (citing *United States v. Miller*, 673 F.3d 688, 697–98); *see* *United States v. Haywood*, 280 F.3d 715, 723 (6th Cir. 2002) (reasoning that Haywood's uncharged possession of crack cocaine branded him as a criminal and unfairly prejudiced him in the eyes of the jury); *United States v. Monzon*, 869 F.2d 338, 344 (7th Cir. 1989) (noting that the marijuana was classic character evidence).

130. *United States v. Davis*, 726 F.3d 434, 444 (3d Cir. 2013); *see also* *Monzon*, 869 F.2d at 344 (noting the evidence as only proving that the defendant was a bad man with bad character); Uviller, *supra* note 6, at 879 (noting that the natural inference of uncharged conduct evidence is that the defendant has bad character).

*Davis*,<sup>131</sup> have held that uncharged possession evidence is always inadmissible because using that evidence will necessarily involve propensity reasoning.<sup>132</sup> Other courts, like the Seventh Circuit in *Lee*, have held uncharged possession evidence inadmissible but have failed to say that it is always inadmissible.<sup>133</sup>

Further, courts barring uncharged possession evidence to demonstrate intent to distribute have denied the probative value of such evidence.<sup>134</sup> While these courts have found that other drug-related uncharged conduct evidence may be probative of intent to distribute,<sup>135</sup> these courts have denied that a “possession conviction impl[ies] an intent to distribute.”<sup>136</sup> Indeed, these courts have held that uncharged possession evidence is “of a wholly different order than acts involving the distribution of a controlled substance. One activity involved the

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131. *Davis*, 726 F.3d 434.

132. *Davis*, 726 F.3d at 445; *Haywood*, 280 F.3d at 721 (noting that a small amount of a drug used for personal use on one occasion is not probative of intent to distribute the same drug several months later); see also *United States v. Santini*, 656 F.3d 1075, 1078 (9th Cir. 2011) (noting similar); *Monzon*, 869 F.2d at 344 (“[T]he evidence must be directed toward establishing a matter in issue other than the defendant’s propensity to commit the crime charged.”).

133. *Lee*, 724 F.3d at 982 (holding that innocent-bystander defenses do not automatically open the door to uncharged conduct evidence but that in cases where the defendant specifically puts his or her intent at issue the uncharged conduct is more likely to be probative of a defendant’s intent to distribute).

134. *Id.* at 979 (“[I]t is not obvious how the prior [possession] conviction would shed light on Lee’s intent.”); *Haywood*, 280 F.3d at 721 (criticizing other circuits for failing to recognize that possessing a drug requires a completely different intent than intending to distribute that drug); *Monzon*, 869 F.2d at 344 (noting that the evidence must be similar and close in time to the charged offense to be relevant).

135. In *United States v. Lopez*, 340 F.3d 169 (3d Cir. 2003), the Third Circuit held that a prior conviction resulting from a conspiracy to distribute charge was probative of the defendant’s claim that he was an innocent bystander. See *id.* at 172, 174. Similarly, the Third Circuit reasoned in *United States v. Givan*, 320 F.3d 452 (3d Cir. 2003) that a conviction for distribution of cocaine was admissible in a trial for heroin distribution. *Id.* at 461. However, the Third Circuit viewed these cases as “the outer bounds of admissibility under Rule 404(b)” and distinguished these cases on the rationale that drug dealers will have more knowledge of drugs in general than someone who has merely possessed the drugs previously. *Davis*, 726 F.3d at 444. Along similar reasoning, other circuits have suggested that uncharged distribution evidence, as opposed to uncharged possession evidence, would be probative of a defendant’s intent to distribute. *Haywood*, 280 F.3d at 721 (noting that drug possession is an entirely different offense than drug distribution because of the quantities involved) (citing *United States v. Ono*, 918 F.2d 1462, 1465 (9th Cir. 1990)); *Monzon*, 869 F.2d at 344 (“This is not a case where the evidence sought to be introduced is so similar to the crime charged—for example, another act of distribution of cocaine for which the Defendant was not charged—that the relevance is clear.”).

136. *Davis*, 726 F.3d at 444; see also *Haywood*, 280 F.3d at 721; *Ono*, 918 F.2d at 1465.

personal abuse of narcotics. The other usually involves the ‘implementation of a commercial activity for profit.’<sup>137</sup> Because these courts conclude that uncharged possession evidence is not probative of a defendant’s intent to distribute, they hold that allowing uncharged possession evidence would completely undermine FRE 404(b)’s prohibition on propensity reasoning because any crime could be admissible under a similar reasoning.<sup>138</sup>

As such, courts excluding uncharged possession evidence do so for three reasons. First, there is a question as to whether the defendant has actively placed his or her intent into dispute.<sup>139</sup> Second, these courts are wary of hidden propensity rationales.<sup>140</sup> Third, the intent behind possessing a drug is intrinsically different from the intent to distribute that drug.<sup>141</sup>

*B. Circuits That Admit Uncharged Possession Evidence to Show Intent to Distribute*

Courts that have allowed uncharged possession evidence to prove intent to distribute have relied on two main rationales: (1) By pleading not guilty to an intent to distribute offense, the defendant has put his or her intent at issue to the extent that the probative value of the uncharged possession evidence will likely outweigh its prejudicial effect,<sup>142</sup> and (2) uncharged possession evidence is independently probative of a defendant’s intent to distribute drugs.<sup>143</sup>

First, courts finding uncharged possession evidence admissible to show a defendant’s intent to distribute reason that the defendant has

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137. *Davis*, 726 F.3d at 444 (citation omitted) (quoting *Ono*, 918 F.2d at 1465); see also *Haywood*, 280 F.3d at 721 (quoting *Ono*, 918 F.2d at 1465).

138. *Davis*, 726 F.3d at 444 (“A rule allowing [uncharged possession evidence to establish intent to distribute] would eviscerate almost entirely the character evidence rule.” (quoting DAVID P. LEONARD, *THE NEW WIGMORE: EVIDENCE OF OTHER MISCONDUCT AND SIMILAR EVENTS* § 7.5.2(d) (2009))).

139. *Lee*, 724 F.3d at 976; *United States v. Miller*, 673 F.3d 688, 697 (7th Cir. 2012); see *infra* Part IV.A (arguing that only material issues should warrant the introduction of uncharged conduct evidence to prove intent).

140. See *Lee*, 724 F.3d at 976–77; *Haywood*, 280 F.3d at 723; *Miller*, 673 F.3d at 697–98.

141. *Davis*, 726 F.3d at 444; *Haywood*, 280 F.3d at 721; *Ono*, 918 F.2d at 1465.

142. See *United States v. Logan*, 121 F.3d 1172, 1178 (8th Cir. 1997); *United States v. Butler*, 102 F.3d 1191, 1195–96 (11th Cir. 1997); *United States v. Gadison*, 8 F.3d 186, 192 (5th Cir. 1993); *United States v. Templeman*, 965 F.2d 617, 619 (8th Cir. 1992).

143. See *Templeman*, 965 F.2d at 619; see also *Haywood*, 280 F.3d at 726 (Gibson, J. dissenting) (arguing that medium-sized amounts of drugs in possession cases may indeed be independently probative of a defendant’s intent to distribute).



placed his or her intent at issue, thereby raising the probative value of the uncharged conduct.<sup>144</sup> These courts have determined that, in cases where the defendant has put his intent at issue by pleading not guilty to an intent to distribute charge, uncharged possession evidence is relevant to prove intent to distribute even in a “subsequent, unrelated prosecution for the distribution of drugs.”<sup>145</sup> Further, these courts do not require the defendant to raise a defense based on lack of knowledge or lack of intent.<sup>146</sup> As such, these courts summarily determine that uncharged possession evidence is probative of someone’s intent to distribute.<sup>147</sup>

Second, while these courts have all determined that uncharged possession evidence is probative on the issue of intent to distribute,<sup>148</sup> only one of them has affirmatively spelled out how uncharged possession evidence is probative on intent even where a defendant has not specifically called into question his intent to distribute.<sup>149</sup> Judge Gibson noted in dissent in *United States v. Haywood*<sup>150</sup> that evidence of possession tends to show that the person carrying that drug has a familiarity with the trade itself that would support the inference that he or she intended to distribute it.<sup>151</sup> This inference can be drawn because a defendant has both the motive and opportunity to distribute drugs as a result of his possession of the drug.<sup>152</sup> First, the defendant has a motive “to finance his own use of the drug and to assure himself of a ready supply.”<sup>153</sup> Second, the defendant would have the opportunity to distribute the drug because evidence of his possession, if that possession

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144. See *Logan*, 121 F.3d at 1178; *Butler*, 102 F.3d at 1195–96; *Gadison*, 8 F.3d at 192.

145. *Butler*, 102 F.3d at 1195–96; see also *Logan*, 121 F.3d at 1178; *Gadison*, 8 F.3d at 192.

146. *Logan*, 121 F.3d at 1178; *Gadison*, 8 F.3d at 192 (“[I]n a conspiracy case the mere entry of a not guilty plea raises the issue of intent sufficiently to justify the admissibility of [uncharged conduct] evidence.” (quoting *United States v. Prati*, 861 F.2d 82, 86 (5th Cir. 1988)) (internal quotation marks omitted)).

147. See *Logan*, 121 F.3d at 1178; *Butler*, 102 F.3d at 1195–96; *Gadison*, 8 F.3d at 192.

148. See *Logan*, 121 F.3d at 1178; *Butler*, 102 F.3d at 1195–96; *Gadison*, 8 F.3d at 192.

149. See *United States v. Templeman*, 965 F.2d 617, 619 (8th Cir. 1992); see also *United States v. Haywood*, 280 F.3d 715, 726 (6th Cir. 2002) (Gibson, J. dissenting).

150. *Haywood*, 280 F.3d at 726 (Gibson, J. dissenting).

151. *Id.* at 726 (“Evidence that a defendant carries a certain kind of drug with him suggests a degree of involvement in the trade that tends to support an inference of intent to distribute that drug at another time.”).

152. See *Templeman*, 965 F.2d at 619; see also *Haywood*, 280 F.3d at 726 (Gibson, J. dissenting).

153. See sources cited *supra* note 152.

were placed in the context of usage with others, shows that he or she had available clientele.<sup>154</sup>

As such, courts favoring the admissibility of uncharged possession evidence reason that (1) the defendant has by necessity put his or her intent at issue<sup>155</sup> and (2) uncharged possession evidence is independently probative of a defendant's intent to distribute that drug due to his or her implicit connections with the drug world.<sup>156</sup>

#### IV. POSSIBLE RATIONALES TO FIND UNCHARGED POSSESSION EVIDENCE PROBATIVE OF INTENT TO DISTRIBUTE

Despite the fact that some courts of appeals have questioned whether uncharged possession evidence can ever be probative of a defendant's intent to distribute a drug,<sup>157</sup> there is certainly enough debate surrounding the issue to merit an analysis into the probative value of such evidence in several different contexts.<sup>158</sup> In general, whether uncharged conduct evidence is probative on the defendant's intent depends on the context in which the evidence has been offered.<sup>159</sup> As such, in order to thoroughly analyze whether such evidence is in fact probative of intent, this author will separate the question according to key factual differences: (1) whether the defendant has specifically called his or her intent into question, (2) whether the uncharged possession evidence dealt with distribution-sized quantities, (3) whether the defendant had possessed drugs on several prior occasions, and (4) whether the uncharged possession evidence dealt with a quantity of the drug not contrary to personal use and was a singular instance of the defendant's possession of such a drug. In order to analyze these differing factual scenarios, several hypothetical situations may serve to illustrate when uncharged possession evidence may be probative on the issue of intent.

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154. See sources cited *supra* note 152.

155. See *United States v. Logan*, 121 F.3d 1172, 1178 (8th Cir. 1997); *United States v. Butler*, 102 F.3d 1191, 1195–96 (11th Cir. 1997); *United States v. Gadison*, 8 F.3d 186, 192 (5th Cir. 1993).

156. See sources cited *supra* note 152.

157. See, e.g., *United States v. Davis*, 726 F.3d 434, 444 (3d Cir. 2013) (“A prior conviction for possessing drugs by no means suggests that the defendant intends to distribute them in the future.”).

158. See, e.g., *Tarlow*, *supra* note 70.

159. See *LEONARD*, *supra* note 138, § 7.5 (noting that, where the probative value of the evidence is minimal, uncharged conduct evidence should readily be excluded, especially when the risk of unfair prejudice is high).

Hypothetical 1: *A* drives *B*'s car. A police officer stops *A* and subsequently finds a distribution-sized quantity of cocaine in the trunk of the car. *A* protests his or her guilt at trial, claiming to have been an innocent bystander. In response to *A*'s innocent bystander claim, the prosecutor offers uncharged possession evidence to demonstrate that *A* in fact had the intent to distribute the drugs found in the vehicle. This uncharged possession evidence shows that *A* had previously possessed a personal-sized amount of cocaine.

Hypothetical 2: Same as Hypothetical 1, except *A* does not claim to be an innocent bystander. Instead, *A* claims to have intended to use the cocaine for his or her own personal use.

Hypothetical 3: Same as Hypothetical 1, except *A*'s previous possession was for a distribution-sized amount of cocaine.

Hypothetical 4: Same as Hypothetical 1, except *A* had previously been found in possession of distribution-sized quantities of cocaine on twelve separate occasions, also while driving someone else's automobile. In addition, the prosecutor seeks to offer all twelve instances of *A*'s uncharged possession evidence to demonstrate *A*'s intent to distribute the drugs found in his or her trunk on this occasion.

*A. The Defendant Has Specifically Called His or Her Intent Into Question*

Because intent is always at issue in a formalistic sense when a defendant is on trial for a specific intent crime,<sup>160</sup> courts should require that intent be a material issue in a case before allowing uncharged conduct evidence to prove that element of the crime. In *Beechum*,<sup>161</sup> the Fifth Circuit developed a two-step test to determine whether uncharged conduct is admissible.<sup>162</sup> The first step of this test asks whether the evidence is relevant to an issue other than character, and the second step asks whether the uncharged conduct's unfair prejudice substantially outweighs its marginal probative value.<sup>163</sup> When undertaking the second step of the test, FRE 403's balancing test, the risk of unfair prejudice is that the jury will decide the case on a basis other than the facts before it.<sup>164</sup> In addition, the evidence's marginal probative value depends on

160. WRIGHT & GRAHAM, *supra* note 70, § 5242, at 151.

161. 582 F.2d 898 (5th Cir. 1978).

162. *Id.* at 911; *see supra* Part II.C.

163. *Beechum*, 582 F.2d at 911.

164. *Rule 404(b) Other Crimes Evidence*, *supra* note 15, at 635. Significantly, the jury

the extent to which the proposition the evidence tends to prove is actually in controversy and whether the evidence makes that proposition more or less likely.<sup>165</sup>

However, in spite of this deceptively simple-looking analysis, this analysis becomes much more esoteric when using uncharged conduct to prove intent because intent is often an “ultimate issue in the case.”<sup>166</sup> Because intent is an element of many crimes,<sup>167</sup> a defendant’s uncharged conduct would be relevant to prove his or her intent if it had “any tendency to make [the defendant’s intent] more or less probable.”<sup>168</sup> As a result, some courts have added the requirement that intent be a material issue in the case on top of relevancy.<sup>169</sup> For example, Hypothetical 1 and Hypothetical 2 highlight the difference between cases where intent is, or is not, a material issue. In Hypothetical 1, the defendant is claiming to have been an innocent bystander because the defendant does not concede ownership or control of the illegal

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may convict the defendant because of his deficient character and a presumption that he needs to be punished. *Id.* Further, the jury may simply give too much weight to the evidence. *Id.* For example, evidence that has no bearing on the crime committed yet tends to prove that the defendant “smoked, drank[,] and was born out of wedlock” may be sufficient to warrant an appellate court’s reversal. *Id.* at 635 n.4 (citing *United States v. Bledsoe*, 531 F.2d 888, 891 (8th Cir. 1976)).

165. See, e.g., *Beechum*, 582 F.2d at 916 (noting that the defendant had clearly called his intent into question by conceding every other element of the offense).

166. WRIGHT & GRAHAM, *supra* note 70, § 5242, at 151. Obviously, intent is an ultimate issue when determining a defendant’s guilt for the crime “possession with intent to distribute.” See, e.g., *United States v. Davis*, 726 F.3d 434, 447 (3rd Cir. 2013).

167. LEONARD, *supra* note 138, § 7.1–2.2.

168. FED. R. EVID. 401. The full text of FRE 401 is as follows: “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”

169. *United States v. Fierson*, 419 F.2d 1020, 1023 (7th Cir. 1969) (“[I]t is necessary that willfulness and intent be more than merely formal issues in the sense that the defendant is entitled to an instruction thereon.”) (citing *United States v. Magee*, 261 F.2d 609 (7th Cir. 1958)); see also WRIGHT & GRAHAM, *supra* note 70, § 5242, at 153. Where courts have held that intent must be a material issue at trial, stipulating to the issue of intent would most likely remove it from the case; however, testimony from the defendant denying his or her intent would put it at issue. See WRIGHT & GRAHAM, *supra* note 70, § 5242, at 153. One commentator in particular has argued that the admission of uncharged conduct evidence often serves purposes contrary to public policy. See *Uviller*, *supra* note 6, at 882. This commentator proposes that the admission of uncharged conduct is often extremely prejudicial to the criminal defendant despite the tenuous link between veracity in the present case and uncharged conduct showing bad character. See *id.* Further, this commentator suggests that the sorting of uncharged conduct into admissible or inadmissible evidence is often a sham and that the admission of uncharged conduct threatens the criminal defendant’s constitutional right to present evidence in his or her own defense. See *id.*

substance; however, in Hypothetical 2, the defendant is directly putting intent at issue by claiming to have intended to use the cocaine for personal use rather than for distribution. As such, by placing intent at issue, the defendant is forcing the prosecution to prove that issue.

Despite the disagreement among the federal courts of appeals,<sup>170</sup> whenever intent is not a material issue at trial, uncharged conduct evidence should be deemed too prejudicial under a FRE 403 balancing test. This conclusion rests on the premise that, where the defendant has not actively placed his or her intent at issue, the marginal probative value evidence will be extremely limited.<sup>171</sup> Even though a specific intent crime implies that the actor's state of mind cannot be inferred from the *actus reus*,<sup>172</sup> this fact should not raise the evidence's marginal probative value merely because a defendant who denies his or her guilt has forced the government to prove every element of the offense.<sup>173</sup> If the government's obligation to prove the intent element of a crime would be all it took for the proverbial floodgates to open, FRE 404(b) would cease to have any meaningful effect in cases where intent is an

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170. Compare *United States v. Lee*, 724 F.3d 968, 976 (7th Cir. 2013) (holding that a defendant only formally puts intent at issue when claiming an innocent bystander defense), and *United States v. Haywood*, 280 F.3d 715 (6th Cir. 2002), and *United States v. Santini*, 656 F.3d 1075 (9th Cir. 2011), and *United States v. Monzon*, 869 F.2d 338 (7th Cir. 1989), with *United States v. Logan*, 121 F.3d 1172, 1178 (8th Cir. 1997) (holding that even where a defendant does not raise a defense based on lack of knowledge, uncharged possession evidence is probative of a defendant's intent), and *United States v. Butler*, 102 F.3d 1191 (11th Cir. 1997), and *United States v. Gadison*, 8 F.3d 186 (5th Cir. 1993), and *United States v. Templeman*, 965 F.2d 617 (8th Cir. 1992). Courts that routinely admit uncharged conduct because the charged crime is a specific intent crime reason that a defendant's "specific intent . . . cannot be inferred from the act." *Rodriguez*, *supra* note 15, at 461. As a result, the need for the evidence would strengthen its incremental probative value when undertaking an FRE 403 balancing test. *Id.* at 461–62. However, some courts have reasoned that, where specific intent can be inferred from the surrounding circumstances, the uncharged conduct should not be admissible. See *United States v. Shackelford*, 738 F.2d 776, 781 (7th Cir. 1984); see also *Rodriguez*, *supra* note 15, at 462.

171. See *Lee*, 724 F.3d at 976 (citing *United States v. Miller*, 673 F.3d 688, 696 (7th Cir. 2012)).

172. *Rodriguez*, *supra* note 15, at 461–62 (noting that some courts conclude that the marginal probative value of a piece of evidence is heightened because there is a greater need for uncharged conduct evidence).

173. See *Lee*, 724 F.3d at 979. But see *Logan*, 121 F.3d at 1178 (holding that even where a defendant does not raise a defense based on lack of knowledge, uncharged possession evidence is probative of a defendant's intent); *Butler*, 102 F.3d at 1195–96; *Gadison*, 8 F.3d at 192; *Templeman*, 965 F.2d at 619.

element of the crime.<sup>174</sup> Finally, admitting uncharged conduct evidence whenever the charged crime is a specific intent crime would ignore the purposes of the character evidence rule.<sup>175</sup> There are several policy reasons for keeping the character evidence rule: First, the character evidence rule instructs jurors to not punish the defendant because of his or her past actions;<sup>176</sup> second, psychological studies suggest that, once the jury determines a defendant's character, it is likely to determine that the defendant acted in accordance with that character;<sup>177</sup> third, there is little confidence that character is an accurate predictor of conduct.<sup>178</sup>

### B. Distribution-Sized Quantities

When the uncharged possession evidence deals with a for-distribution quantity of the drug, the evidence is likely inadmissible because such evidence relies on propensity reasoning.<sup>179</sup> The uncharged possession evidence's marginal probative value in Hypothetical 3 also depends on the extent to which the uncharged possession evidence tends to make the defendant's intent in the present case more or less probable.<sup>180</sup> Of course, the evidence would be relevant under a character theory of reasoning.<sup>181</sup> However, this type of reasoning,

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174. *Lee*, 724 F.3d at 979 (reasoning that the government's obligation to prove intent should not open the door to FRE 404(b) evidence).

175. See Imwinkelried, *supra* note 5, at 580–82; see also Milich, *supra* note 32, at 781–84 (discussing the justifications for the character evidence rule). For example, commentators have questioned the extent to which jurors are able to exclude the propensity inference when making a deliberation:

In a murder case the jurors' reaction to a prior theft conviction would differ from their reaction to a prior murder conviction. With respect to both, however, it seems certain that the stimulus information—the evidence about his prior criminal activity—would play a “central” role in the impressions formed of the defendant.

Robert G. Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 NOTRE DAME LAW. 758, 776 (1975).

176. See Imwinkelried, *supra* note 5, at 580–82.

177. See *id.*

178. See *id.*

179. See *supra* Part I.

180. See *United States v. Beechum*, 582 F.2d 898, 914 n.18 (5th Cir. 1978) (noting that evidence aside from the uncharged conduct may decrease the evidence's tendency to make a fact more or less probable).

181. See *infra* Figure 2. Commentators have also noted that trait theory has had a resurgence in that “highly particularized character traits” are considered to be predictive of behavior with a reasonable degree of certainty. See Imwinkelried, *An Evidentiary Paradox*, *supra* note 15, at 423 (citing Susan Marlene Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 515–17 (1991)). But see David P.

pictured in Figure 2 below, is forbidden under FRE 404(b) because it argues that the defendant has acted in conformity with his or her bad character.<sup>182</sup>

**Figure 2**

Item of Evidence	Intermediate Inference	Ultimate Inference
The defendant's uncharged possession of distribution-sized quantities of cocaine.	The defendant's bad character.	The defendant acted in conformity with his bad character on this occasion.

Therefore, in order for this uncharged possession evidence to be probative of intent, it must be relevant without undertaking character reasoning.<sup>183</sup> The Sixth Circuit in *United States v. Haywood*<sup>184</sup> considered whether uncharged possession evidence possessed independent probative value.<sup>185</sup> In that case, the court hinged its holding on a substantial-similarity test.<sup>186</sup> Under this substantial-

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Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 28 (1986).

The extreme assumption that global, highly generalized traits are omnipresent causal entities and can be inferred readily from almost any indicators, and that they determine just about everything that is important, need not be replaced with the equally extreme (and indefensible) assumption that people do not behave in organized, patterned and potentially predictable ways in given domains, or that the "situation" — whatever it is — accounts for nearly everything.

Leonard, *supra*, at 28 (quoting Walter Mischel, *Alternatives in the Pursuit of the Predictability and Consistency of Persons: Stable Data that Yield Unstable Interpretations*, 51 J. PERSONALITY 578, 580 (1983)).

182. See FED. R. EVID. 404(b).

183. See *id.*

184. 280 F.3d 715 (6th Cir. 2002).

185. *Id.* at 721–22.

186. *Id.* (noting that the district court had inferred the defendant's intent from the quantity involved in an uncharged offense, and reversing that court's decision); see also Stone, *supra* note 88, at 955–56 (noting that in criminal cases "similarity" between the uncharged conduct evidence and the charged crime will generally occur when the uncharged conduct constitutes the same crime as the charged crime, but also noting that this identity of the crimes is not essential). See *supra* note 88 and accompanying text for a discussion of the term "similarity" as it is used throughout this Comment.

similarity test, the court required the government to show that the defendant intended to distribute the uncharged possession evidence at issue, 1.3 grams of crack cocaine.<sup>187</sup> By requiring a substantial similarity between the uncharged possession evidence and the charged crime, the court sought to check the evidence's relevancy toward a non-character use.<sup>188</sup> Because the government did not offer any evidence showing that 1.3 grams of crack cocaine was inconsistent with personal use or that the defendant had intended to distribute the 1.3 grams of crack cocaine,<sup>189</sup> the court held that the uncharged possession evidence was not probative of the defendant's intent to distribute.<sup>190</sup>

**Figure 3**

<b>Item of Evidence</b>	<b>Intermediate Inference</b>	<b>Ultimate Inference</b>
The defendant's uncharged possession of distribution-sized quantities of cocaine.	The defendant intended to distribute the uncharged possession evidence.	The defendant had the intent to distribute cocaine on this occasion.

Under this reasoning, since the uncharged possession evidence in *Haywood* was only inadmissible because the government failed to show that the defendant had intended to distribute the uncharged possession evidence, then uncharged possession evidence that demonstrates the defendant's intent to distribute must be logically probative of his intent to distribute the drugs involved in the charged crime.<sup>191</sup> However, this reasoning rests on the premise that the evidence was only inadmissible because the uncharged possession evidence was not similar enough to the charged crime. Scrutinizing this premise, it is unclear from the Sixth Circuit's opinion in *Haywood* how a distribution-sized quantity of the

187. *Haywood*, 280 F.3d at 721–22.

188. *Id.* at 721–22; *see infra* Figure 3.

189. *Haywood*, 280 F.3d at 722.

190. *Id.*

191. *See id.* at 721–22 (holding that the government needs to prove a substantial similarity between uncharged possession evidence and the defendant's intent to distribute in the charged crime).



drug would support the inference of the defendant's intent without resorting to the forbidden propensity inference.<sup>192</sup>

Despite the majority's lack of reasoning as to why distribution-sized quantities of drugs would be probative of a defendant's intent to distribute, Circuit Judge Gibson, writing in dissent, noted a rationale for situations where both the charged crime and the uncharged possession evidence are of distribution-sized quantities: "Evidence that a defendant carries a certain kind of drug with him suggests a degree of involvement in the trade that tends to support an inference of intent to distribute that drug at another time."<sup>193</sup> Following this reasoning, in order to support the inference of the defendant's involvement in the drug trade, the uncharged possession evidence must be of a sufficient quantity to be undoubtedly a for-distribution size, or the defendant's intent with respect to the uncharged possession evidence must be independently proven through circumstantial evidence.<sup>194</sup> However, as the Seventh Circuit noted in *United States v. Lee*,<sup>195</sup> this reasoning essentially comes to the conclusion that "[the defendant] intended to do it before, . . . so he [or she] must have intended to do it again."<sup>196</sup> This conclusion is really just propensity reasoning in disguise because it is impossible to get from the inference that the defendant intended to distribute the uncharged possession evidence to the conclusion that the defendant had

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192. *See id.*

193. *Id.* at 726 (Gibson, J., dissenting) (citing *United States v. Templeman*, 965 F.2d 617, 619 (8th Cir. 1992)). The inference drawn generally about the defendant's intent to distribute from the defendant's possession of the drug is much stronger when the defendant possessed a for-distribution amount of the drug. *See id.* at 721–22 (noting that possession of 1.3 grams of crack cocaine was not substantially similar to the charged crime of possession with intent to distribute).

194. *Id.* The court in *Haywood* noted that circumstantial evidence may be offered with respect towards intent such as showing that the drugs were allotted into separate bags and weighed the same amount. *Id.* at 722. This author seeks to analyze whether a distribution-sized quantity of drugs is probative of a defendant's intent for a charged crime. This author does not seek to determine whether the threat of unfair prejudice would outweigh the probative value in these situations. However, other commentators have posited that it would. Sonenshein, *supra* note 98, at 217 (noting that the threat of unfair prejudice is greatest in situations where the uncharged conduct evidence is extremely similar to the charged crime). Interestingly, this similarity between the uncharged possession evidence of for-distribution quantities of cocaine and the charged crime, possession with intent to distribute, simultaneously makes the evidence more probative and extremely prejudicial. *See id.*

195. 724 F.3d 968 (7th Cir. 2013).

196. *Id.* at 976 (quoting *United States v. Miller*, 673 F.3d 688, 699 (7th Cir. 2012)).

the intent to distribute drugs on this occasion without invoking some propensity rationale.<sup>197</sup>

**Figure 4**

<b>Item of Evidence</b>	<b>First Inference</b>	<b>Second Inference</b>	<b>Ultimate Inference</b>
The defendant's uncharged possession evidence of distribution-sized quantities of cocaine.	The defendant intended to distribute the uncharged possession evidence.	The defendant's behavior forms an unchanging pattern, i.e., the defendant has a bad character.	The defendant had the intent to distribute cocaine on this occasion.

Further, even supposing that there is a propensity-free chain of reasoning, the marginal probative value of the uncharged possession evidence would be heavily discounted. In Hypothetical 3 above, the defendant had previously possessed a distribution-sized amount of cocaine and claimed at trial to have been an innocent bystander.<sup>198</sup> As such, the uncharged possession evidence's marginal probative value is diminished in two senses. First, the defendant is not actively contesting the intent element of the crime by claiming to have possessed the drugs for a less culpable purpose.<sup>199</sup> Instead, the defendant is claiming to have been wholly innocent of the crime.<sup>200</sup> As such, the defendant's intent is only formalistically at issue and is not a material issue.<sup>201</sup> Second, there

197. See *infra* Figure 4. Additionally, other commentators have pointed out the illogic behind admitting uncharged possession evidence on the point of intent. See Sonenshein, *supra* note 98, at 218 (quoting Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 191–92 (1998)).

198. See *supra* Part IV.

199. See *Lee*, 724 F.3d at 979 (“Lee did not pursue the type of defense which would have raised particular questions—about what he knew, what his purpose was, and whether his proximity to the cocaine was inadvertent—that his prior cocaine conviction might help the jury to answer.”); see also *supra* Part IV.A for a discussion of how calling intent into question raises the evidence's marginal probative value.

200. See *supra* Part IV for the facts of the hypothetical.

201. See *Lee*, 724 F.3d at 979.

is already evidence tending to prove that whoever possessed the drugs had the intent to distribute those drugs. That evidence is the presence of a distribution-sized quantity of cocaine, which is the basis for the charged crime.<sup>202</sup> Because there is no propensity-free chain of reasoning to conclude that uncharged possession evidence is probative of a defendant's intent to distribute and because the marginal probative value in Hypothetical 3 would be heavily discounted, such evidence should not be deemed admissible.<sup>203</sup>

### C. Doctrine of Chances

The doctrine of chances is a non-character theory of admissibility that is distinguishable from propensity reasoning in a crucial way. Under the doctrine of chances, the ultimate inference is not that the defendant acted in conformity with his or her character.<sup>204</sup> Rather, the doctrine of chances reasons that it is unlikely that the accused's motive was innocent when he or she had been party to several similar incidents.<sup>205</sup>

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202. The quantity of the drugs being of a for-distribution size leads to the inference that the defendant is generally involved in the drug trade. *See supra* notes 191, 194 and accompanying text. However, that inference necessarily relies on propensity reasoning. *See supra* notes 196–97 and accompanying text.

203. *See United States v. Beechum*, 582 F.2d 898, 916–17 (5th Cir. 1978) (acknowledging a high probative value because of a lack of evidence not in contention among other factors).

204. *See Imwinkelried, supra* note 5, at 595; *see also Imwinkelried, An Evidentiary Paradox, supra* note 15, at 446–53 (arguing that the basis for the doctrine of chances is statistical and that eliminating random chance as a possibility to explain every outcome leaves a jury with rationales other than propensity reasoning).

205. *See, e.g., Wright & Graham, supra* note 70, § 5242, at 152; Imwinkelried, *supra* note 5, at 595; Melilli, *supra* note 15, at 1564 (“The doctrine is premised on the improbability of multiple coincidences.”); *infra* Figure 5. “[W]hen the evidence shows that [the defendant] has made similar ‘mistakes’ before, our doubts grow. It is the improbability of these fortuities rather than any inference as to the character of the accused that supports the belief in guilt.” WRIGHT & GRAHAM, *supra* note 70, § 5242, at 152. It is important to note that the doctrine of chances reasoning does not result in the ultimate conclusion that all of the uncharged conduct evidence was the result of a defendant's *actus reus* or *mens rea*. Imwinkelried, *An Evidentiary Paradox, supra* note 15, at 437. “At most, all that the doctrine establishes is that one or some of the incidents were probably the product of an *actus reus* or *mens rea*.” *Id.* at 438.

Figure 5

Item of Evidence	Intermediate Inference	Ultimate Inference
The accused's uncharged acts.	The objective improbability of the accused's innocent involvement in so many incidents.	The <i>mens rea</i> .

For example, in Hypothetical 4 above, where the defendant had been found with distribution-sized quantities of cocaine in *B*'s car on twelve separate occasions,<sup>206</sup> the prosecutor would seek to argue that it was unlikely that one person could find himself or herself innocently in possession of distribution-sized quantities of cocaine on so many different occasions.<sup>207</sup>

The leading case on the doctrine of chances is *United States v. Woods*.<sup>208</sup> In that case, Martha L. Woods was found guilty of murdering her eight-month-old foster son, Paul Woods.<sup>209</sup> The court of appeals noted the "bizarre series of events" that took place surrounding Paul's death.<sup>210</sup> On five separate occasions, two of which occurred on the same

206. See *supra* Part IV.

207. See Imwinkelried, *supra* note 5, at 594. Dean Wigmore posited the following hypothetical:

Thus, if A while hunting with B hears the bullet from B's gun whistling past his head, he is willing to accept B's bad aim or B's accidental tripping as a conceivable explanation; but if shortly afterwards the same thing happens again, and if on the third occasion A receives B's bullet in his body, the immediate inference (*i.e.* as a probability, perhaps not a certainty) is that B shot at A deliberately; because the chances of an inadvertent shooting on three successive similar occasions are extremely small; or (to put it in another way) because inadvertence or accident is only an abnormal or occasional explanation for the discharge of a gun at a given object, and therefore the recurrence of a similar result (*i.e.* discharge towards the same object, A) excludes the fair possibility of such an abnormal cause and points out the cause as probably a more natural and usual one, *i.e.* a deliberate discharge at A.

LEONARD, *supra* note 138, § 7.3.2.

208. 484 F.2d 127 (4th Cir. 1973).

209. *Id.* at 128–29.

210. *Id.* at 129.

day, Paul needed resuscitation after having been found blue from a lack of oxygen.<sup>211</sup> On each of these occasions, Paul was in Martha's custody.<sup>212</sup> On the fifth occasion, Paul slipped into a coma and died about a month later.<sup>213</sup> In order to prove that Paul's asphyxiation was not accidental, the government introduced evidence that Martha had control of nine children who together had at least twenty such episodes of breathing difficulties.<sup>214</sup> Seven of these children died from breathing complications.<sup>215</sup> Because of the remote possibility that so many children in Martha's care would suffer and die from apparently the same cause of death without Martha's wrongdoing, the court held that Martha's conviction for murder should be affirmed.<sup>216</sup>

Unlike in *Woods*, where the court used the doctrine of chances to prove Martha's *actus reus*,<sup>217</sup> a court using the doctrine of chances to prove the defendant's intent would be using that doctrine to prove the defendant's *mens rea*.<sup>218</sup> As such, the inference sought to be established by the prosecutor using the doctrine of chances would be that there was an extremely small possibility that the defendant possessed an innocent *mens rea* while committing the *actus reus* of the crime.<sup>219</sup>

In Hypothetical 4 above, it is likely that the uncharged possession evidence would be probative of the defendant's intent to distribute. The evidence that the defendant has been found with distribution-sized quantities of cocaine on twelve separate instances makes it extremely

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211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 130.

215. *Id.*

216. *Id.* at 135.

217. *See id.* at 135–36.

218. *See supra* Figure 4. The court would be inferring the defendant's intent from the defendant's unlikely innocent involvement in a series of acts. The reasoning in *Beechum* represents a line of reasoning used by the doctrine of chances. *See* United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978). As David P. Leonard described it, Beechum's possession of the credit cards was unlawful and occurred simultaneously with his possession of the coin. LEONARD, *supra* note 138, § 7.3.2. Because the credit cards in Beechum's possession were mailed to the recipients months ahead of time, *Beechum*, 582 F.2d at 903, Beechum's possession of these cards supports the inference that he intended to keep the credit cards. LEONARD, *supra* note 138, § 7.3.2. As Beechum intended to keep the credit cards, it was unlikely that Beechum simultaneously intended to return the stolen coin. *Beechum*, 582 F.2d at 909.

219. *See* WRIGHT & GRAHAM, *supra* note 70, § 5242, at 152 (“It is the improbability of these fortuities rather than any inference as to the character of the accused that supports the belief in guilt.”); Imwinkelried, *supra* note 5, at 595.

unlikely that he or she would have innocently possessed the drugs on all twelve occasions because the average person will likely never be found with distribution-sized quantities of a drug unless he or she intended to distribute those drugs.<sup>220</sup> Thus, the uncharged possession evidence would be probative of the defendant's intent to distribute because this evidence would decrease the likelihood that each of the twelve separate possessions were innocent; therefore, the probability that the defendant innocently possessed the cocaine on this occasion would also decrease.<sup>221</sup>

#### *D. Personal-Sized Quantities and a Singular Instance*

In circuits that require intent to be a material issue at trial,<sup>222</sup> uncharged possession evidence is not probative of a defendant's intent to distribute when that evidence was not a for-distribution quantity. As demonstrated above, there are several situations where uncharged possession evidence may be probative of a defendant's intent to distribute.<sup>223</sup> Despite these situations, the question of whether uncharged possession evidence is probative of a defendant's intent to distribute still needs to be answered when none of the above factors are present. As of yet, no court has answered this question in the affirmative. In finding uncharged possession evidence probative of a defendant's intent to distribute, some courts have done so because

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220. See WRIGHT & GRAHAM, *supra* note 70, § 5242, at 152; Imwinkelried, *supra* note 5, at 595. Whether the doctrine of chances will provide a non-character inference as to intent depends on the complexity of the uncharged conduct and on the number of the acts. WRIGHT & GRAHAM, *supra* note 70, § 5242, at 153–55. Where the act is of more complexity, even a single act may be sufficient to support the inference that it was unlikely that the defendant had such an event happen twice. See *State v. Johns*, 725 P.2d 312, 324 (Or. 1986). In that case, the defendant had shot his wife. *Id.* at 313. He claimed that the shooting was accidental. *Id.* However, six years before that incident, he had also attempted to kill his previous wife. *Id.* at 315. The court held that due to the substantial similarities between the charged crime and the uncharged conduct, the uncharged conduct was probative of the defendant's intent to murder his wife. *Id.* at 321. In both cases, the defendant had previously loaded a gun, was not intoxicated, entered spouse's premises (in both cases the marriage was disintegrating), called the police, and threatened suicide. *Id.* at 325.

221. See FED. R. EVID. 401 (noting that a piece of evidence is probative of a fact that has any tendency to increase or decrease the probability that the fact exists).

222. See *United States v. Lee*, 724 F.3d 968, 979 (7th Cir. 2013); *United States v. Haywood*, 280 F.3d 715, 720 (6th Cir. 2002).

223. See *supra* Parts IV.A, C (discussing how the quantity of the drug possessed, the number of prior possessions under similar circumstances, and the defendant's affirmative defense to his or her intent all affect the probative value of uncharged possession evidence rendering it more or less likely to be admissible under FRE 403's balancing test).

possession with intent to distribute is a specific intent crime.<sup>224</sup> As such, under those courts' reasoning, uncharged possession evidence's probative value would by necessity be increased because the defendant's mental state cannot be inferred from the *actus reus* itself.<sup>225</sup>

However, as there are differing opinions amongst the circuits on whether a specific intent crime automatically raises the uncharged possession evidence's probative value,<sup>226</sup> the question of whether uncharged possession evidence is probative of a defendant's intent to distribute should be answered assuming that uncharged possession evidence does not receive additional marginal probative value simply because possession with intent to distribute is a specific-intent crime. After surveying the case law, it is obvious that, without assuming an increased marginal probative value, courts have not found uncharged possession evidence probative of a defendant's intent to distribute.<sup>227</sup> In addition, when the charged crime is a specific intent offense, courts raising the evidence's probative value have not considered the probative value that the evidence would have on its own.<sup>228</sup>

Further, it is important to distinguish someone's motive or opportunity to distribute drugs as opposed to his or her intent to distribute drugs. This distinction is essential because there is support in the case law for the proposition that uncharged possession evidence may be probative of a defendant's motive or opportunity to distribute drugs.<sup>229</sup> For example, in *United States v. Templeman*,<sup>230</sup> the court reasoned that personal possession of cocaine may be probative of the

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224. See *United States v. Logan*, 121 F.3d 1172, 1178 (8th Cir. 1997); *United States v. Butler*, 102 F.3d 1191, 1196 (11th Cir. 1997); *United States v. Gadison*, 8 F.3d 186, 192 (5th Cir. 1993); see also *WRIGHT & GRAHAM*, *supra* note 70, § 5242, at 153; *supra* Part IV.A (noting how some courts hold that the marginal probative value increases when the offense is a specific intent crime).

225. See *WRIGHT & GRAHAM*, *supra* note 70, § 5242 at 153; *supra* Part IV.A (coming to a contrary conclusion but acknowledging the split in authority).

226. See *supra* Part IV.A.

227. *United States v. Davis*, 726 F.3d 434, 444 (3d Cir. 2013) ("Possession and distribution are distinct acts—far more people use drugs than sell them—and these acts have different purposes and risks."); *Lee*, 724 F.3d at 979 (holding that possession with intent to distribute may later be probative of a defendant's intent but that straight possession may not); see also *Haywood*, 280 F.3d 715; *United States v. Santini*, 656 F.3d 1075 (9th Cir. 2011); *United States v. Monzon*, 869 F.2d 338 (7th Cir. 1989).

228. See *Logan*, 121 F.3d at 1177; *Butler*, 102 F.3d 1191; *Gadison*, 8 F.3d at 192; *United States v. Templeman*, 965 F.2d 617 (8th Cir. 1992).

229. See *Templeman*, 965 F.2d at 619.

230. 965 F.2d 617.

defendant's motive to distribute because he or she would be able "to finance his [or her] own use of the drug and [would] assure himself [or herself] of a ready supply."<sup>231</sup> Additionally, a defendant may have the opportunity to distribute because he or she will likely know people to sell to if he or she uses the drug with others.<sup>232</sup> Circuit Judge Gibson from the Sixth Circuit noted in dissent that possession of a drug suggests "involvement in the [drug] trade that tends to support an inference of intent to distribute that drug at another time."<sup>233</sup>

While uncharged possession evidence may be probative of a defendant's opportunity or motive to distribute drugs,<sup>234</sup> it is likely not probative of his or her intent to distribute drugs when the uncharged possession evidence was in a personal-use amount,<sup>235</sup> the defendant has not called intent specifically into question,<sup>236</sup> and the prosecution cannot use the doctrine of chances to objectively reason that it was unlikely that the defendant innocently committed the *actus reus*.<sup>237</sup> This conclusion rests on the proposition that there are key distinctions between possession of a drug and distribution of that drug. As the Third Circuit noted in *United States v. Davis*,<sup>238</sup>

A prior conviction for possessing drugs by no means suggests that the defendant intends to distribute them in the future. "Acts related to the personal use of a controlled substance are of a wholly different order than acts involving the distribution of a controlled substance. One activity involves the personal abuse of narcotics." The other usually involves the "implementation of a commercial activity for profit."<sup>239</sup>

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231. *Id.* at 619.

232. *Id.* at 619.

233. *United States v. Haywood*, 280 F.3d 715, 726 (6th Cir. 2002) (Gibson, J., dissenting) (citing *Templeman*, 965 F.2d at 619).

234. *See Templeman*, 965 F.2d at 619.

235. *See supra* Part IV.B (arguing that distribution-sized quantities of a drug may be probative of the defendant's intent to distribute that drug on a later occasion because the larger quantity supports a much stronger inference that the defendant was involved with the drug trade in general).

236. *See supra* Part IV.A (arguing that courts should require intent to be a material issue at trial in order for uncharged possession evidence's marginal probative value to increase).

237. *See supra* Part IV.C.

238. 726 F.3d 434 (3d Cir. 2013).

239. *Id.* at 444 (citation omitted) (quoting *United States v. Ono*, 918 F.2d 1462, 1465 (9th Cir. 1990)).



It seems like a rather large leap to go from someone's personal abuse of narcotics to that same person conspiring to sell great quantities of that same substance for his or her own profit. In addition to the differing nature of the crimes,<sup>240</sup> the penalties imposed on a perpetrator are different in both cases—suggesting that someone who may not mind breaking the law to personally abuse narcotics may be deterred by the greater penalties associated with distribution of that same drug.<sup>241</sup>

Using the rationales described throughout Part IV of this Comment, it is unlikely that the uncharged possession evidence in Hypothetical 1 would have enough probative value to pass an FRE 403 balancing test. Without (1) the assumption that a specific intent crime raises the uncharged possession evidence's marginal probative value, (2) the substantial similarity between the uncharged possession evidence and the charged crime demonstrated by a for-distribution amount of the drug, or (3) the defendant's numerous other incidents, there is no rationale, other than propensity reasoning, to find uncharged possession evidence probative of a defendant's intent to distribute.<sup>242</sup>

**Figure 6**

<b>Item of Evidence</b>	<b>Intermediate Inference</b>	<b>Ultimate Inference</b>
The defendant's uncharged possession of cocaine.	The defendant has a bad character because he has possessed cocaine.	The defendant had the intent to distribute cocaine on this occasion.

240. *Davis*, 726 F.3d at 444 (noting that drug possession requires an inherently separate frame of mind than does intent to distribute).

241. See BRIAN T. YEH, CONGRESSIONAL RESEARCH SERV., RL30722, DRUG OFFENSES: MAXIMUM FINES AND TERMS OF IMPRISONMENT FOR VIOLATION OF THE FEDERAL CONTROLLED SUBSTANCES ACT AND RELATED LAWS (2012) (laying out the different levels of punishments for drug possession offenses and distribution offenses). Depending on the drug, offenses for distribution may land a perpetrator with a life imprisonment. See *id.* However, simple possession is punished by a maximum sentence of three years. See *id.* at 8.

242. See Imwinkelried, *supra* note 5, at 576; see also *infra* Figure 6. Note how Figure 6 is the same as Figure 1 by analogy.

## V. CONCLUSION

Determining whether uncharged possession evidence is probative of a defendant's *mens rea* is one of the more complicated issues involved in a criminal trial.<sup>243</sup> Overzealous inclusion of such evidence threatens to undo the entire character evidence rule.<sup>244</sup> With respect to the issue of whether a defendant's uncharged possession evidence is probative of his or her intent to distribute a drug, the United States Courts of Appeals have come to varying conclusions.<sup>245</sup> The largest difference between the circuits involved in this circuit split arises over whether a specific intent crime automatically raises uncharged possession evidence's marginal probative value because intent is automatically at issue in the trial.<sup>246</sup> With respect to this issue, courts should require that, before uncharged possession evidence is admissible to prove intent, intent be a material issue at trial. This requirement ensures that the purposes behind the character evidence rule are still given effect.<sup>247</sup>

In construing these purposes, keeping an eye on the historical context in which FRE 404(b) was adopted is of the utmost importance. The Fifth Circuit in *United States v. Beechum*<sup>248</sup> wrote an outstanding opinion on the issue of intent with respect to the character evidence rule. This opinion is the basis for the courts of appeals' tests in determining the admissibility of character evidence to prove intent.<sup>249</sup> Applying this test to uncharged possession evidence, courts should find uncharged possession evidence probative of a defendant's intent to distribute in limited situations. These situations lend the evidence heightened marginal probative power.

Finally, due to the limited probative value of evidence tending to prove a point that is not at issue,<sup>250</sup> uncharged possession evidence is not likely probative of a defendant's intent to distribute where the evidence is of a personal-use amount and the defendant is involved in only a

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243. See LEONARD, *supra* note 138, § 7.1-.2.1.

244. WRIGHT & GRAHAM, *supra* note 70, § 5242, at 152-53 ("[T]he routine use of this exception [of admitting uncharged conduct to demonstrate intent] could easily destroy the [character evidence] rule.").

245. See *supra* Part III.

246. See *supra* Part IV.A.

247. See Imwinkelried, *supra* note 5, at 580-82.

248. 582 F.2d 898 (5th Cir. 1978).

249. See *supra* Part III (noting how the tests developed by the courts of appeals are essentially the *Beechum* test).

250. *Beechum*, 582 F.2d at 916.

single instance. The intent involved in both crimes is inherently different. In one crime, a person is personally abusing a prohibited substance.<sup>251</sup> In the other crime, a person is marketing a drug as a commodity for his or her own personal, financial gain.<sup>252</sup> As a result, admitting such evidence against a defendant really just argues that the defendant is a bad man and should be punished as such. It would seem that, despite FRE 404(b)'s inclusionary nature, uncharged possession evidence for personal-sized quantities of a drug falls within "a small and shrinking subset" of evidence not admissible as an exception to the character evidence rule.<sup>253</sup>

JAMES DECLEENE\*

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251. *United States v. Davis*, 726 F.3d 434, 444 (3d Cir. 2013) (citing *United States v. Ono*, 918 F.2d 1462, 1465 (9th Cir. 1990)).

252. *Id.*

253. *See Milich, supra* note 32, at 779 ("Although the rule still keeps out completely unrelated evidence of an accused's bad character, the many broad exceptions have reduced what is 'completely unrelated' to a small and shrinking subset of the whole.").

\* J.D., Marquette University Law School.