Spring 2021

It’s Time to Put Character Back into the Character-Evidence Rule

Steven Goode

Follow this and additional works at: https://scholarship.law.marquette.edu/mulr

Part of the Criminal Law Commons

Repository Citation
Steven Goode, It’s Time to Put Character Back into the Character-Evidence Rule, 104 Marq. L. Rev. 709 (2021).
Available at: https://scholarship.law.marquette.edu/mulr/vol104/iss3/7

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
IT’S TIME TO PUT CHARACTER BACK INTO THE CHARACTER-EVIDENCE RULE

STEVEN GOODE*

Federal Rule of Evidence 404(b), which governs the admissibility of other-acts evidence, is a mess, and recently-promulgated amendments will not fix it. The amendments fail to address the two major problems underlying Rule 404(b). First, the rule is based on a categorical judgment about the relative probative value and unfair prejudice of other-acts evidence when offered as character evidence; that is, to prove the defendant acted in accordance with his or her character. In numerous cases, however, other-acts evidence is highly probative and the rule’s categorical judgment is decidedly wrong. Not surprisingly, courts often admit such evidence, typically by erroneously denying that the evidence is being offered to prove the defendant acted in accordance with his or her character. The second problem exacerbates the first. Although the rule prohibits only character evidence, no one knows what character means. Neither the case law nor the rules define character in any meaningful way. Consequently, we have a body of case law that authorizes the admission of not only high-probative-value other-acts evidence but also precisely the type of low-probative-value other-acts evidence that Rule 404(b) was designed to exclude.

The way to reverse this practice is, paradoxically, to make it easier for courts to admit high-probative-value other-acts evidence. Rule 404(b) should be written and applied in a manner that aligns with its goal of furthering accurate factfinding. This Article suggests two ways of doing this. First, courts must confront the issue they have so long avoided: they must grapple with the meaning of character. By doing so, courts can recognize that some types of high-probative-value other-acts evidence should not be considered character evidence. That will permit them to admit such evidence while acknowledging that it requires a propensity inference. Likewise, evidence of a person’s attitudes or psychological or medical conditions should not be considered character. Second, Rule 404(b) should be amended to provide a true exception for one particular type of other-acts evidence whose probative value is

---

* W. James Kronzer Chair in Trial and Appellate Advocacy, University Distinguished Teaching Professor, University of Texas School of Law. I wish to thank Grace Seidl and Thomas Forster for their invaluable research assistance and my colleagues Graham Strong and Guy Wellborn for their helpful comments. Special thanks go to my former student, Michael Davis. His probing questions about character evidence inspired me to write this article.
categorically greater than its prejudicial effect. Other-acts evidence should be admissible to prove a defendant’s intent unless the defendant agrees not to controvert state of mind.

Providing courts legitimate grounds for admitting such high-probative-value other-acts evidence even when its probative value flows from a propensity inference will mean that courts will no longer have to engage in propensity-inference denial. In time, a new body of case law should emerge that gives prosecutors fewer avenues for arguing that low-probative-value other-acts evidence should be admitted.

I. INTRODUCTION .................................................................711
II. A QUICK OVERVIEW OF THE CHARACTER-EVIDENCE RULE .........719
III. COURTS FAIL TO RECOGNIZE PROPENSITY-BASED INFERENCE ..........723
     A. Intent .............................................................................724
     B. Knowledge .....................................................................730
     C. Plan..............................................................................732
     D. Identity and Modus Operandi .............................................738
     E. Motive ............................................................................744
     F. The Doctrine of Chances ...................................................751
     G. Conclusion .....................................................................759
IV. WHY CHARACTER EVIDENCE HAS TRADITIONALLY BEEN EXCLUDED 760
     A. The Probative Value of Character Evidence .....................760
     B. The Risk of Unfair Prejudice .............................................763
       i. The Danger of Overestimation—Cognitive Error and the Like 764
       ii. The Danger of Overestimation—Round Up the Usual Suspects
            ..................................................................................766
       iii. Nullification ..................................................................767
     C. Unfair Surprise and Waste of Time ....................................767
     D. What Empirical Studies Tell Us .........................................768
     E. Evaluating the Traditional Arguments ..............................770
V. WHAT IS CHARACTER ..................................................................773
     A. Introduction ....................................................................773
     B. The Current State of the Law .............................................775
     C. Grappling with Character ...............................................781
       i. Personal Attributes and Medical or Psychological Conditions
            ..................................................................................781
       ii. Specific Propensity .........................................................787
VI. A TRUE EXCEPTION FOR INTENT .............................................802
VII. CONCLUSION ......................................................................810
I. INTRODUCTION

There is one thing about Federal Rule of Evidence 404(b) on which nearly everyone agrees: it is a mess. It is “slippery and recondite,”1 a “crazy quilt of unprincipled restrictions and exceptions,”2 and of “horrifying complexity.”3 It establishes “standards” rather than a rule.4 And these are some of the nicer things said about it.5 Despite, or more likely because of this, Rule 404(b) is the most litigated evidence rule.6 The Judicial Conference’s Committee on Rules of Practice and Procedure and its Advisory Committee on Evidence Rules recently undertook a multi-year effort to revise Rule 404(b).7 But they wound

4. United States v. Beasley, 809 F.2d 1273, 1278–79 (7th Cir. 1987) (“There are no bright line rules; it is easy to identify polar cases but impossible to draw a line of demarcation. . . . Rules 403 and 404(b) establish standards rather than rules.”).
up producing amendments so trifling that nothing is likely to change. The amendments fail to address the underlying causes of the incoherence that plagues the case law applying Rule 404(b). It is time to do so.

Rule 404(b)(1) prohibits the introduction of evidence of a person’s other crimes, wrongs, or acts if offered to prove the person’s character so that the factfinder might infer that the person acted in accordance with that character on the occasion in question. Put another way, Rule 404(b)(1) excludes other-acts evidence if its probative value requires a character-propensity inference. Rule 404(b)(2) provides, however, that such evidence may be admissible if offered for a different purpose and lists a number of possible appropriate things that other-acts evidence may be offered to prove: “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”

Rule 404(b) is based on a judgment that—when offered for a character-propensity inference—the category of other-acts evidence presents too great a danger of unfair prejudice to warrant its admissibility. Categorically, the probative value of such other-acts evidence is outweighed by the danger of unfair prejudice. Courts often invoke the maxim that people should be tried for what they have done and not for who they are. But like many a bumper sticker, this adage embraces a kernel of truth and spurns nuance: who a person is may sometimes tell us a great deal about what the person has done.

Two underlying problems lie at the root of much of Rule 404(b)’s incoherence. The first is its categorical judgment about the relative probative value and unfair prejudice of other-acts evidence. In many cases, that judgment is markedly wrong: the probative value of other-act character-propensity evidence far outweighs the danger of unfair prejudice. Consider the case of

---

8. The amendments focused on Rule 404(b)’s notice requirement. New paragraph Rule 404(b)(3) requires prosecutors to provide defendants reasonable notice of any other-acts evidence they intend to offer. Memorandum from Hon. David G. Campbell, supra note 7. Previously, defendants had to request such information. Id. Prosecutors must also articulate the permissible purpose for which they seek to offer such evidence and their reasoning. Id. The amendment also modifies Rule 404(b)(1) stylistically, moving the word “other” in front of “crime, wrong, or act” from its former placement in front of “act.” Id. The Committee on Rules of Practice and Procedure’s Report notes that these are not substantive changes. Id.

9. These amendments became effective December 1, 2020. Id.

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

11. Throughout this Article, I use “other-acts evidence” as a shorthand for other crimes, wrongs, and acts.

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

13. See infra Part IV.

14. See, e.g., United States v. Gomez, 763 F.3d 845, 861 (7th Cir. 2014); United States v. Linares, 367 F.3d 941, 945 (D.C. Cir. 2004); United States v. Bradley, 5 F.3d 1317, 1320 (9th Cir. 1993).
Felix Vail. In August 2016, Vail went on trial for a 54-year-old murder. He claimed then, as he did in October 1962, that his wife’s death was a tragic accident, that Mary Horton Vail drowned after accidentally falling from their boat while they were laying trotlines on the Calcasieu River. In 1962, the coroner had declared the death accidental. But publication in late 2012 of a remarkable piece of investigative journalism in the Jackson, Mississippi Clarion-Ledger prompted Calcasieu Parish authorities to reopen the case. Their reexamination of the autopsy report, photos of Ms. Vail’s body, and a contemporaneous sheriff’s report led them to a very different conclusion: Felix Vail had murdered his wife.\textsuperscript{17}

The newspaper story that triggered the reexamination contained far more explosive evidence. The story’s title summarized it nicely—“Gone: One Wife Dead. Two Others Missing.” In 1973, Sharon Hensley, a woman with whom Vail had been living an itinerant existence for several years, disappeared. Vail later told Hensley’s mother that Sharon had gone off with a couple that was planning to sail the world.\textsuperscript{18} Sharon was never heard from again. Ten years later, Vail married seventeen-year-old Annette Craver.\textsuperscript{19} The following year, after she had deeded Vail property she received through an inheritance, Annette also disappeared. Vail told her mother that Annette had decided to go to Mexico; he last saw her when he dropped her off at the bus station.\textsuperscript{20} Like Sharon Hensley, Annette Craver Vail was never heard from again.\textsuperscript{21}


\textsuperscript{16} Although Mary Horton Vail died in Louisiana, Felix Vail was living in Mississippi when Jerry Mitchell, the author of the report, received a phone call asking whether he would be interested in writing about a serial killer living in Mississippi. Mitchell, \textit{Gone}, supra note 15.

\textsuperscript{17} The autopsy report noted large bruises on Ms. Vail’s neck, suggesting that she suffered forceful neck trauma before she entered the water, and other bruises consistent with a struggle. \textit{Id.} More significantly, the report indicated that a scarf around Ms. Vail’s neck extended four inches into her mouth, which suggested pre-submersion traumatic asphyxia. \textit{Id.} The sheriff’s report also raised several questions about the validity of Vail’s story. \textit{Id.} In addition, the newspaper report revealed that Vail’s son Bill mentioned several times that he had overheard his father say that he had killed Ms. Vail. \textit{Id.} Months before the son died in 2009, he memorialized this recollection in an audio recording. \textit{Id.}

\textsuperscript{18} \textit{Id.}

\textsuperscript{19} \textit{Id.}

\textsuperscript{20} \textit{Id.}

\textsuperscript{21} \textit{Id.}
investigation revealed inconsistencies in Vail’s stories about both women’s disappearances.\footnote{Id. (Id.)}

Evidence of Vail’s association with the mysterious disappearances of these two women would lead most people to believe that Mary Horton Vail’s death in 1962 was hardly accidental. But Louisiana, like every other state,\footnote{See 2 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE app. I, Westlaw (database updated December 2020) [hereinafter IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE] (collecting state versions of Fed. R. Evid. 404(b)).} has a rule corresponding to Rule 404(b).\footnote{LA. CODE EVID. ANN. art. 404(B) (2020).} Evidence that Vail killed Hensley and Craver could not, therefore, be used to prove Vail’s violent character so that jurors might infer he acted in accordance with his violent character and killed Mary Horton Vail. The prosecution successfully argued, however, that this evidence was not being offered for a character-propensity inference, and the evidence was admitted. At the close of Vail’s four-day trial, the prosecutor argued to the jury:

How unlucky is this guy? His first wife dies. His second wife-girlfriend disappears off the planet. His third wife disappears from the planet. He is either the most unlucky person born on the planet since Job or it is what it looks like—a killer who learned from his mistakes.\footnote{Mitchell, Gone, supra note 15.}


The evidence of both Sharon Hensley’s and Annette Craver Vail’s disappearance was certainly probative of Vail’s guilt. But it was probative only because it invited the jurors to make an inference about Vail’s character so that they could then conclude he acted in accordance with that character and killed his first wife. Properly applied, therefore, the Louisiana rule would have mandated the exclusion of this highly probative evidence. Understandably loath to do this, both the trial court and the Louisiana Court of Appeals, in a pre-trial opinion, simply denied that this was character-propensity evidence.

---

\footnote{Id. (Id.)}

\footnote{I use here the neutral phrase “association with,” but, as explained later, it would be more precise to say that this would be offered as evidence that Vail murdered the other two women. See in fra text accompanying note 336.}

\footnote{LA. CODE EVID. ANN. art. 404(B) (2020).}

\footnote{Mitchell, Gone, supra note 15.}

They both invoked an increasingly-recognized, but flawed,\textsuperscript{28} theory known as the “doctrine of chances”\textsuperscript{29} to circumvent the rule.

The \textit{Vail} opinion is hardly unique. Any rule that excludes a type of evidence based on a categorical judgment that its probative value is outweighed by its prejudicial effect is bound to butt up against lots of counter-instances. While it is true that other evidence rules are based, at least in part, on a similar judgment,\textsuperscript{30} no other rule attempts to exclude from a jury’s consideration such a broad swath of human conduct.\textsuperscript{31} Consequently, the categorical judgment about other-acts evidence is likely often to be decidedly wrong.\textsuperscript{32} Not surprisingly, when trial courts encounter highly-probative other-acts evidence, they are tempted to admit it. And they frequently heed Oscar Wilde’s advice and yield to the temptation.\textsuperscript{33} Appellate courts often then look to affirm, typically doing so in one of two ways. Sometimes—like the court in \textit{Vail}—they expressly deny that the probative value of the evidence flows from a propensity inference. More commonly, they implicitly deny this by reciting one, two, many, or sometimes all of Rule 404(b)(2)’s laundry list of permissible uses for other-acts evidence with little or no explanation.\textsuperscript{34}

The second underlying cause for Rule 404(b)’s incoherence is more surprising, at least to anyone unversed in the law of evidence. No one knows what “character” means. Rule 404(b) purports to prohibit only character-
propensity evidence; that is, other-acts evidence offered to prove a person’s character to show that the person acted in accordance with that character on a particular occasion. It does not bar noncharacter-propensity evidence.35 Yet the rules of evidence fail to define character. Few courts even attempt to define it; those that do, try half-heartedly at best.36 And despite multiple treatises37 and scores of articles38 that explore the law of character evidence, no viable definition has emerged.39 The recent amendments to Rule 404(b) reveal a similar inattention to character.40 Imagine trying to interpret and apply the income tax law without “income” being defined;41 it could not be done. Yet that is exactly what courts have been doing with the character-evidence rule.

Consider Austin v. State.42 Kimberly Sue Austin was tried for injuring her nineteen-month-old son by injecting him with insulin. Her husband found little Noah convulsing, and Noah soon entered a deep coma. Doctors determined that he had been injected with insulin, to which the defendant had access.43 The prosecution’s theory was that the defendant suffered from Munchausen

36. See infra Part V.A.
38. See, e.g., LEONARD, THE NEW WIGMORE, supra note 37, tbl. of authorities (collecting articles).
39. See infra Part V.B.
40. The new mandatory notice requirement obligates the prosecution to articulate in its notice the “permitted purpose” for which it intends to offer the evidence. See Fed. R. Evid. 404(b)(3). The Advisory Committee Note explains that this means the prosecution must articulate “a non-propensity purpose” for which the evidence is offered. Letter to Hon. Nancy Pelosi & Hon. Michael R. Pence, supra note 7. The Advisory Committee’s draft of the amendment used “non-propensity purpose” in the text. The Committee on Rules of Practice and Procedure substituted “permitted purpose” for “non-propensity purpose” in the text, but did not explain why. Memorandum from Hon. Debra A Livingston, Chair, Advisory Comm. on Evidence Rules, to Hon. David G. Campbell, Chair, Comm. on Rules of Prac. & Proc. (May 30, 2019), https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_-_may_2019_1.pdf [https://perma.cc/LUX2-XS68]; Memorandum from Hon. David G. Campbell, supra note 7. Neither committee, however, acknowledged that Rule 404(b) allows other-acts evidence to be used for some propensity purposes. It bars only character-propensity purposes.
42. 222 S.W.3d 801 (Tex. Ct. App. 2007).
43. Id. at 805. Her father-in-law, who suffered from diabetes and dementia, lived with the defendant and her husband. Id. He relied on other household members, including the defendant, to give him insulin injections. Id.
Syndrome By Proxy (MSBP), which the court referred to as a mental condition that describes a caregiver—often the mother of a young child—who falsifies or induces illness in the child to gain attention and sympathy.\textsuperscript{44} The trial court allowed the prosecution to introduce thousands of pages of Noah’s and his three siblings’ medical records. The records documented an abnormally high number of medical contacts when the children were in the defendant’s care but not when others were caring for them.\textsuperscript{45} Five doctors testified that the defendant’s children were victims of MSBP.\textsuperscript{46} The appellate court rejected the defendant’s Rule 404(b) claim, holding that the MSBP evidence was admissible to prove motive. It helped the jury understand “why this otherwise seemingly caring and devoted mother would intentionally inject her son with unnecessary insulin.”\textsuperscript{47} The court denied that it was propensity evidence.\textsuperscript{48} That is wrong: the MSBP evidence’s probative value requires a propensity inference.\textsuperscript{49}

If we had a better idea of what character means for purposes of Rule 404(b), the court might not have had to deny that this evidence’s probative value flowed from a propensity inference. No one considers epilepsy or schizophrenia a character trait. If MSBP is a disease, like epilepsy or schizophrenia, and not a character trait, the evidence in \textit{Austin} would not run afoul of Rule 404(b). It would be offered for a noncharacter-propensity inference. While this may seem obvious, it wasn’t to the parties in \textit{Austin}. This is likely because other conditions that modern medicine regards as diseases—alcoholism and addiction—are often treated by courts as raising character-evidence issues.\textsuperscript{50} This, too, is done without considering whether these conditions should fall under the heading of character.

More critically, the lack of understanding of what character means extends beyond whether diseases should be considered a form of character. At some point, other-acts evidence and the propensity-inference for which it is offered is so specific that it should not be considered character evidence. Habit

\textsuperscript{44}. \textit{Id.} at 804. Munchausen Syndrome By Proxy is now called Factitious Disorder Imposed on Another (FDIA). AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 325 (5th ed.) [hereinafter DSM]. See \textit{The Act: Jan Peter Meyboom} (Hulu limited series 2019); \textit{Mommy Dead and Dearest} (HBO 2017).

\textsuperscript{45}. \textit{Austin}, 222 S.W.3d at 806.

\textsuperscript{46}. \textit{Id.} at 805–06.

\textsuperscript{47}. \textit{Id.} at 807.

\textsuperscript{48}. \textit{Id.} Rejecting the defendant’s argument that the evidence was “classic conformity evidence,” the court stated, “MSBP describes not appellant’s character but her behavior toward her children.” \textit{Id.} at 808. But that is like saying that a defendant’s proclivity for violence describes only his behavior toward his victims and not his character.

\textsuperscript{49}. See infra Part III.E.

\textsuperscript{50}. See infra notes 435–36.
evidence is admissible even though it is simply a form of highly specific other-acts evidence offered for a propensity inference. Between what every court would consider inadmissible character evidence and admissible habit evidence lies a wide range of other-acts evidence. Courts should explicitly address which of this is character and which is not. And they must do so in a way that furthers the underlying reasons for the character-evidence rule. For purposes of Rule 404(b), character must be viewed as a legal construct. Neither dictionary definitions of character nor the way in which philosophers or psychologists use the term should dictate what evidence law considers character.

This is not just a matter of analytical nicety. Faced with other-acts evidence that defies Rule 404(b)'s underlying categorical judgment about the balance between probative value and unfair prejudice, courts often admit the evidence. They typically deny, without any real analysis, that other-acts evidence is being used for a propensity inference. The consequences of this character-propensity-denial behavior are far reaching. Prosecutors frequently leverage the precedent from these cases to successfully advocate for admitting low-probative-value other-acts evidence that should be excluded under any reasonable reading of Rule 404(b).

The thesis of this Article is that decision-making under Rule 404(b) can be improved only by making it easier for courts to admit high-probative-value other-acts evidence without having to engage in character-propensity denial. I suggest two steps that can be taken. First, courts should develop a notion of what character means for purposes of Rule 404(b). Second, a true exception to Rule 404 should be created for the type of other-acts evidence for which the categorical judgment about probative value and unfair prejudice is most consistently wrong. Other-acts evidence should be admissible to prove a criminal defendant’s intent through a character-propensity inference unless the defendant agrees not to controvert state of mind.51 These two steps would allow courts legitimately to admit a substantial amount of highly-probative other-acts evidence, either because it is not being offered for a character-propensity inference or, if it is, because it is offered to prove intent. This should reduce the pressure on courts to engage in propensity-inference denial. Once courts begin to acknowledge when other-acts evidence actually depends on character-propensity reasoning, they should begin to exclude lower-probative value other-acts evidence. I harbor no illusions that either of these proposals will

51. See infra Part VI. Although Rule 404 applies in both civil and criminal cases, my focus in this Article is on criminal cases. I believe that the categorical balancing of probative value versus unfair prejudice is even more off-kilter in civil cases. In a later article, I will argue that Rule 404 should be amended to authorize the admission of other-acts evidence for a character-propensity purpose in civil cases.
neatly solve the problem. Any interpretation of Rule 404(b) ultimately must be rooted in categorical judgments about the probative value and prejudicial effect of types of other-acts evidence, judgments for which there is no “right” answer. Moreover, whatever categorical judgments are made, there will still be cases where the other-acts evidence defies the categorical judgment. There will always be cases where courts will feel pressure to circumvent the rule. I contend only that my proposals may bring some measure of honest analysis and, ultimately, results more consistent with the purposes for the rule.

Part II provides a brief overview of Rule 404. In Part III, I demonstrate how courts often mistakenly deny that the other-acts evidence they are admitting is probative only through a character-propensity inference. Part IV then explores and evaluates the reasons for the character-evidence rule. Building on this foundation, Parts V and VI present my proposed reforms. Part V assays how character should be defined, and Part VI sets forth my proposed true exception for other-acts evidence offered to prove intent. Part VII provides a brief conclusion.

II. A QUICK OVERVIEW OF THE CHARACTER-EVIDENCE RULE

Rule 404(b) is designed to operate as a specific application of the more general character-evidence rule announced in Rule 404(a). Rule 404(a)(1) codifies the common law’s centuries-old hostility toward using evidence of a person’s character to prove the person behaved in a certain way on a given occasion. It bars evidence of a “person’s character or character trait” if offered for a character-propensity inference—as proof “that on a particular occasion the person acted in accordance with the character or trait.” Rule 404(a)(2) codifies some long-recognized exceptions. Criminal defendants may offer evidence of their good character, and if they do, the prosecution may introduce rebuttal evidence. In a criminal case, evidence of the alleged victim’s character may be offered, usually first by the defendant and then by the prosecution in rebuttal. But proof of character under these exceptions is limited

---

52. I focus here and throughout much of this Article primarily on Federal Rule 404 and federal case law. Most state character-evidence rules are based on either the original or restyled federal rule, and the issues arising in state court cases closely track those arising in federal courts.

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


55. FED. R. EVID. 404(a)(2)(B). A defendant’s ability to offer evidence of an alleged victim’s character is limited by Rule 412, which bars evidence, in cases involving alleged sexual misconduct, of an alleged victim’s other sexual behavior, or sexual predisposition. FED. R. EVID. 412.

56. In homicide prosecutions, the prosecutor may offer evidence of the alleged victim’s peaceable character to rebut any evidence—even noncharacter evidence—that the victim was the first aggressor. FED. R. EVID. 404(a)(2)(C).
to relatively anodyne reputation and opinion testimony.\textsuperscript{57} Specific instances of
case conduct are not admissible to prove character. Finally, Rule 404(a)(3) sanctions
use of evidence of a witness’s character as allowed in Rules 607, 608, and 609,
which govern impeachment. Many aspects of Rule 404(a) are troublesome.
Justice Jackson famously decried the “grotesque structure” of the “archaic”
common-law rules that governed evidence of a criminal defendant’s
character.\textsuperscript{58} A quarter-century later, the Federal Rules of Evidence essentially
codified those rules.\textsuperscript{59} The use of character evidence to impeach witnesses has
likewise been the target of withering criticism.\textsuperscript{60} But this Article puts these
issues to the side and focuses on Rule 404(b).

Rule 404(b)(1) restates Rule 404(a)(1)’s injunction against the use of
character evidence, but in a more particular way. While Rule 404(a)(1)
prohibits all evidence of a person’s character\textsuperscript{61} for a character-propensity\textsuperscript{62}
inference, Rule 404(b)(1) bars a subset of such evidence. It renders
inadmissible evidence of “any other crime, wrong, or act” if offered “to prove
a person’s character in order to show that on a particular occasion the person
acted in accordance with the character.”\textsuperscript{63} Rule 404(b)(2) provides, however,

\textsuperscript{57} FED. R. EVID. 405; see Jennifer S. Hunt & Thomas Lee Budesheim, How Jurors Use and
jurors to such character evidence had very little effect).

\textsuperscript{58} Michelson v. United States, 335 U.S. 469, 486 (1948).

\textsuperscript{59} The only “reform” introduced by the federal rules was allowing character to be proved by
opinion, as well as reputation, testimony. See FED. R. EVID. 405(a).

\textsuperscript{60} See, e.g., MICHAEL J. SAKS & BARBARA A. SPELLMAN, THE PSYCHOLOGICAL
FOUNDATIONS OF EVIDENCE LAW 168 (2016); Richard Friedman, Character Impeachment Evidence:
Psycho-Bayesian [!] Analysis and a Proposed Overhaul, 38 UCLA L. REV. 637 (1991); Robert G.

\textsuperscript{61} Reputations and opinion testimony and evidence of specific acts comprise the three possible
means of proving character. See FED. R. EVID. 405.

\textsuperscript{62} A propensity inference is one that has its basis in the person’s tendency to act in a particular
way over time in a manner that distinguishes the person from people generally. For example, a violent
person tends to act violently over time in a way that most people do not. In contrast, one might say
that a person who is hungry has a propensity to eat, but that does not distinguish that person from other
people generally. For purposes of Rule 404(b), therefore, we would not say that a propensity inference
is required to go from proof that a person was hungry to the conclusion that the person ate. See David
P. Bryden & Roger C. Park, “Other Crimes” Evidence in Sex Offense Cases, 78 MINN. L. REV. 529,
541 n.39 (1994). But see Richard B. Kuhns, The Propensity to Misunderstand the Character of Specific
any distinction between propensity and nonpropensity inferences).

\textsuperscript{63} FED. R. EVID. 404(b)(1). As has often been noted, Rule 404(b)(1) logically is redundant.
\textit{E.g.}, LEONARD, THE NEW WIGMORE, supra note 37, § 4:1; GLEN WEISSENBERGER & JAMES J.
DUANE, WEISSENBERGER’S FEDERAL EVIDENCE § 404.11 (7th ed. 2011) (referring to Rule 404(b)(1)
as “extension” of Rule 404(a)(1)’s exclusionary principle and a “restatement” Rule 405’s limitation on
that such other-acts evidence may be admissible if offered for a different purpose (that is, a noncharacter-propensity purpose), and provides a non-exclusive list of possible permissible uses. Other-acts evidence may be admissible to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”

Rule 404’s general ban on character-propensity evidence and its acceptance of other-acts evidence offered for another purpose reflect a centuries-old common-law approach. This approach has always been rooted in a judgment about the relative probative value and prejudicial effect of this category of evidence. Although evidence of a person’s character, offered to prove the person acted in accordance with that character, is relevant, its probative value tends to be slight. Evidence that a person has a violent or untruthful disposition may tell us something about whether that person acted violently or untruthfully on a particular occasion, but not necessarily very much. Violent people aren’t violent all the time and dishonest people don’t always lie. But such evidence is likely to have a prejudicial effect. For various reasons, jurors may tend to overvalue such evidence or to convict a defendant even if they are not convinced beyond a reasonable doubt that he is guilty of the current charge.

When other-acts evidence is offered for a noncharacter-propensity purpose, however, the probative value increases and categorically tilts the probative value/prejudicial effect balance in favor of admissibility. A few light-hearted examples illustrate how other-acts evidence may prove—without requiring a character-propensity inference—one of the permissible purposes listed in Rule 404(b)(2). Take the first item on the list: motive. One episode of The Untouchables, an old television series about crime-fighting in Chicago during Prohibition, began with Santa Claus being gunned down as he left a boys’

---

64. Fed. R. Evid. 404(b)(2).
66. See, e.g., Wigmore, supra note 5, § 192.
67. See infra Part IV.
orphanage. Santa, it turned out, had the misfortune of witnessing an earlier gangland slaying and was killed so he would not snitch. Suppose the gunman were tried for murdering Santa. The prosecution would certainly be allowed to offer evidence of the earlier killing—not to prove that the defendant was a violent person and so killed Santa, but to show he had a motive for the otherwise inexplicable slaying of Santa Claus. This does not require a character-propensity inference and is undoubtedly highly probative.

Intent is the most commonly invoked item on the Rule 404(b)(2) list. In *Arsenic and Old Lace*, two elderly women kill a series of gentlemen callers by putting arsenic in their elderberry wine. Suppose they were tried for the murder of victim number six. They claim that they did not intend to kill him because they did not know that arsenic was poisonous. Evidence of the previous five deaths would be probative without requiring an inference about the defendants’ character. However innocent their intention when they put arsenic in their first victim’s elderberry wine, by the time they spiked victim number six’s wine, they knew exactly what they were doing. They intended to kill him.

The film *Kind Hearts and Coronets* illustrates how other-acts evidence could be used to show “plan.” The protagonist, who is ninth in line of succession to a dukedom, embarked on a plan to kill the eight individuals with precedence to the title. If tried for the murder of any of them, evidence of the other killings could be used for a noncharacter-propensity purpose. Each of the killings was indispensable to bringing his plan to fruition.

---


69. See, e.g., United States v. Byers, 649 F.3d 197, 206–09 (4th Cir. 2011) (upholding admission in murder prosecution that victim was to be primary witness against defendant in prosecution for another murder); cf. United States v. Watson, 695 F.3d 159, 161 (1st Cir. 2012) (upholding defendant’s conviction for attempting to kill witness with intent to prevent testimony and communication with law enforcement).

70. See infra note 81.

71. *Arsenic and Old Lace* (WARNER BROS. 1944).

72. See, e.g., United States v. Rojas, 81 F. App’x 965, 967 (9th Cir. 2003) (concluding that trial court properly admitted evidence of the defendant’s prior conviction for passing counterfeit currency to show he knew currency was counterfeit); United States v. Calandrella, 605 F.2d 236, 253–54 (6th Cir. 1979) (admitting evidence of prior financial fraud by defendant to show his financial acumen and rebut his claim he was duped in transactions at issue).


74. See, e.g., United States v. Gurrola, 898 F.3d 524, 530–31 (5th Cir. 2018) (defendant wanted to murder victim in Mexico and so had victim’s father murdered to lure victim to return to Mexico for his funeral, and when that did not work, had victim’s sister murdered to again lure victim there).
Anyone who has seen *Home Alone*\(^{75}\) understands the use of other-acts evidence to prove identity. Marv and Harry, our young hero’s foils, are burglars. After completing one burglary, Marv asks Harry why he once again stuffed a cloth into a sink drain and left the water running: “Harry, it’s our calling card. All the great ones leave their mark. We’re the Wet Bandits.” Later when they are arrested, a cop says to them, “Nice move. Always leaving the water running. Now we know each and every house you’ve hit.”\(^{76}\) Courts routinely allow such “calling card” or “signature”\(^{77}\) evidence—proof that a defendant committed other crimes in a distinctive manner—to identify the defendant as the person who committed the charged crime, which was executed in the same distinctive manner.

These are easy cases. In each one, the other-acts evidence is probative without requiring a character-propensity inference.\(^{78}\) To be sure, in each the evidence also reflects on the defendant’s character and so poses a danger of unfair prejudice. In the first three examples, for instance, the jury might infer the defendants were violent people and so committed the charged murder. The defendants certainly could ask the court to exclude the evidence under Rule 403 on the grounds that the legitimate probative value of evidence is substantially outweighed by the danger of unfair prejudice. But the point here is that if the evidence is probative without requiring a character-propensity inference, Rule 404(b)(1)’s prohibition is inapplicable. The problem, as the next Part demonstrates, is that, contrary to the rule, courts often admit other-acts evidence when its probative value flows only from such an inference.

III. COURTS FAIL TO RECOGNIZE PROPENSITY-BASED INFERENCES

Rule 404(b)(2)’s laundry list of permissible uses for other-acts evidence supplies courts with an easy way to avoid scrutinizing how the evidence is probative. Rather than asking whether the evidence’s probative value flows only through a character-propensity inference, courts often merely point to one or more of the listed permissible uses and state that Rule 404(b) authorizes its

---

75. *Home Alone* (Hughes Entertainment 1990).
76. Id.
77. See, e.g., Cristini v. McKee, 526 F.3d 888, 896 (6th Cir. 2008) (noting that in closing statement, prosecutor made numerous remarks regarding prior instances in which defendant hit victims in or extinguished cigarettes on victim’s face and then argued, “That’s his trademark, that’s his calling card. He may as well have left a calling card saying this was done by James Cristini”).
78. Contrary to what is often argued, using modus operandi to prove identity may require a propensity inference, but not necessarily a character-propensity inference. *See infra* Part III.D.
admission.\textsuperscript{79} Sometimes courts address the matter in more detail and strenuously maintain that the evidence is probative without any character-propensity inference, even though careful analysis shows that such an inference is required. Typically, they then perform a Rule 403 balancing to determine whether the danger that the jury will use the evidence for an impermissible character-propensity inference substantially outweighs the probative value of the evidence for its permissible purpose.\textsuperscript{80} But this Rule 403 balancing is hopelessly skewed because courts consider the (unrecognized) character-propensity-based inference as proper, rather than improper, and so place it on the probative-value side of the scale and not on the unfair-prejudice side. In this Part, using some of the more commonly invoked permissible purposes listed in Rule 404(b)(2), I first demonstrate how courts frequently and mistakenly deny that the probative value of other-acts evidence depends on a character-propensity inference. I then analyze the doctrine of chances, an increasingly popular means that courts use to deny—again, erroneously—that a propensity inference is at work.

A. Intent

Of the permissible purposes for other-acts evidence listed in Rule 404(b), intent is far and away the most frequently invoked,\textsuperscript{81} primarily because it is so

\textsuperscript{79} See Capra & Richter, supra note 34, at 778 (describing the careless manner in which courts “routinely admit” such evidence, thereby “threatening to undermine the bedrock ban on character evidence”).

\textsuperscript{80} Each circuit court of appeals—except the Seventh—has either a two-, three-, or four-part test to evaluate other-acts evidence admissibility questions. Almost all include a Rule 403 balancing component. See STEVEN GOODE & OLIN GUY WELLBORN III, COURTROOM HANDBOOK ON FEDERAL EVIDENCE 294–96 (2020) (compiling tests). Most of these tests are meaningless at best. They do nothing but remind courts to apply all relevant evidence rules. See, e.g., United States v. Benford, 875 F.3d 1007, 1012 (10th Cir. 2017). Some tests are sometimes misleading. For example, in instructing trial courts that the other-acts evidence must be relevant (hardly a necessary reminder), the Fourth Circuit states “the more similar the prior act is (in terms of physical similarity or mental state) to the act being proved, the more relevant it becomes.” United States v. Cowden, 882 F.3d 464, 472 (4th Cir. 2018) (quoting United States v. Johnson, 617 F.3d 286, 296 (4th Cir. 2010)). While similarity between the other act and the charged crime is sometimes important, other times it is irrelevant. A defendant may commit arson to destroy proof of an earlier crime. It doesn’t matter whether the earlier crime is similar to arson; it still provides the motive. See United States v. Gomez, 763 F.3d 845, 854 (7th Cir. 2014) (noting that need for similarity may be diminished or nonexistent depending on purpose for which other-acts evidence is offered).

\textsuperscript{81} 22B WRIGHT & GRAHAM, supra note 6, § 5242, at 152. Professors Saltzburg, Martin, and Capra devote more than forty pages of their federal evidence manual to annotating cases invoking the intent “exception” to Rule 404(b), far more than they devote to their case annotations involving any of the other permissible uses. 2 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL § 404.03[2] (11th ed. 2015). Professor Imwinkelried notes
often an element of the crime with which a defendant is charged.\textsuperscript{82} Other-acts evidence may tend to prove intent in innumerable ways.\textsuperscript{83} As in \textit{Arsenic and Old Lace}, it may tend to show the defendant’s knowledge of something (the fatal effect of ingesting arsenic), which in turn tends to prove intent.\textsuperscript{84} Or, other-acts evidence may show the defendant had a motive to act. In \textit{The Untouchables}, this would tend to show the defendant intended to kill Santa. In other cases, the motive may be used to rebut any claim that the defendant did not intend the result (“the machine gun fired accidentally”).\textsuperscript{85} Such cases typically involve a legitimate, nonpropensity use of other-acts evidence. Other-acts evidence, however, is frequently used to prove intent in a way that requires a propensity inference.\textsuperscript{86} Drug prosecutions offer numerous examples; indeed, courts and commentators commonly note how routinely other-acts evidence is admitted to show intent in drug cases.\textsuperscript{87}

\begin{footnotesize}
\textsuperscript{82} \textit{Id. at 872, 881–82 (7th Cir. 2012) (upholding admission of evidence that defendant requested fees be paid in manner that violated anti-structuring law to prove defendant knew her conduct was illegal and so intended to defraud government).}
\textsuperscript{83} \textit{Id. at 449; see, e.g., Huckabee v. State, 785 S.W.2d 223, 225–26 (Ark. Ct. App. 1990) (holding evidence of defendant’s previous assaultive conduct toward wife was admissible to disprove defendant’s claim that charged shooting of wife was accidental).}
\textsuperscript{84} \textit{Id. at 34, at 806 (noting that intent “has been one of the most abused ‘proper purposes’ under existing precedent”); David A. Sonenshein, \textit{The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts}, 45 CREIGHTON L. REV. 215, 218 (2011); Edward J. Imwinkelried, \textit{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 STATE L.J. 575, 583–84 (1990); United States v. Henry, 848 F.3d 1, 9 (1st Cir. 2017) (noting that “in many cases, impermissible propensity reasoning lurks as one of the links in the logical chain of relevance”).}
\textsuperscript{85} \textit{Id. at 24, § 5:22 (“It would be fair to generalize that the courts are very liberal in admitting evidence of prior drug transactions for this purpose.”); Morris, \textit{supra} note 5, at 190 (“evidence of prior drug activity pours in unexamined” to prove intent); United States v. Gomez, 763 F.3d 845, 853 (7th Cir. 2014) (“Especially in drug cases like this one, other-act evidence is too often admitted almost automatically, without consideration of the ‘legitimacy of the purpose for which the evidence is to be used and the need for it.’” (quoting United States v. Miller, 673 F.3d 688, 692 (7th Cir. 2012))). This may by a by-product of the dominance of drug cases in the federal criminal docket. Drug offenders comprise nearly 30% of all defendants in criminal cases. U.S. District Courts—Criminal Defendants Commenced, by Offense, During the 12-Monthly Periods Ending March 31, 2013 Through 2017, in \textit{CASELOAD STATISTICS}}
\end{footnotesize}
United States v. Banks, for example, was a simple, run-of-the-mill drug case. Banks was charged with conspiracy to possess with intent to distribute cocaine. He was arrested after he and his coconspirator attempted to buy two kilograms of cocaine for $42,000 from an undercover agent. During the purchase, Banks inspected the cocaine and said, “I can work with that.” At trial, the court allowed the prosecution to introduce evidence of Banks’s ten-year-old conviction for marijuana possession to prove his knowledge of the conspiracy’s existence and his intent to join it. The court of appeals affirmed. In the space of a single paragraph, the court quoted circuit precedent that approved use of prior drug convictions to prove knowledge and intent, observed that Banks’s prior conviction was neither too remote nor too dissimilar, and declared that he had failed to show how he had been prejudiced by its admission. The court never tried to explain how this evidence was relevant without a propensity inference. Nor could it. Banks’s prior conviction for marijuana possession tended to prove his knowledge of or intent to join a
conspiracy to distribute cocaine only through a propensity inference. Drug cases like Banks are all too common.

But propensity-only use of other-acts evidence to prove intent goes well beyond drug cases. One of the best-known intent cases is United States v. Beechum. Postal authorities suspected that Beechum, a substitute letter carrier, was stealing items from the mail. They planted in a mailbox on his route an envelope containing a silver dollar, $16 in currency, and a greeting card. A postal inspector watched Beechum retrieve mail from the mailbox. Later that day, Beechum turned in the retrieved mail to the postal station. It contained the planted envelope, which authorities discovered had been opened and resealed. The silver dollar and currency were missing. Beechum was stopped as he left the station; a frisk revealed he had the silver dollar. In addition, the postal inspectors found in Beechum’s wallet two credit cards—not issued to him—that had been mailed ten months earlier to two different addresses on routes that Beechum serviced. At his trial for unlawfully possessing the silver dollar, Beechum claimed that he had found it in the

---

93. Compare id., with Holmes v. Slay, 895 F.3d 993 (8th Cir. 2018) (a section 1983 action). Holmes claimed the defendant police officers had conspired to deprive him of his civil rights and that he had been maliciously prosecuted and falsely imprisoned. Holmes, 895 F.3d at 997. In 2006, Holmes had been convicted of drug possession. Id. at 996. The police officers claimed they received a tip that drug dealing was occurring in a particular house and found Holmes there, in possession of drugs. Id. at 998. Holmes contended that he had been visiting the house and knew nothing of the drug activity. Id. At his criminal trial, the prosecution was permitted to offer evidence that Holmes had been convicted of drug trafficking in 1996. Id. at 999. The Eighth Circuit cursorily affirmed the admission of this evidence. United States v. Holmes, 231 F. App’x. 535, 536 (8th Cir. 2007). Subsequently, however, the officers who arrested Holmes were investigated for repeated misconduct. Holmes, 895 F.3d at 996. One was prosecuted; the other resigned. Id. Holmes’s conviction was vacated under 28 U.S.C. § 2255 because the officers had “been discredited,” and the prosecution chose not to retry him. Id. at 997. In Holmes’s section 1983 action, the jury found for Holmes. Id. The officers appealed, claiming that the trial court erred by refusing to admit evidence of Holmes’s 1996 drug trafficking conviction. Id. at 997, 999. They argued that his claim against them was predicated on his contention that he did not possess drugs and was unaware of drug activity in the house when the officers arrested him. Id. at 999. Citing Rule 404(b), the Eighth Circuit rejected this argument. Id. The officers’ “reasoning supports the admission of this evidence for just the type of propensity purpose that Rule 404(b) prohibits, i.e., to show that because Holmes sold drugs in the past, he had the propensity to do so again.” Id. The Eighth Circuit thus found Holmes’s conviction could be used against him in a criminal prosecution to prove that he possessed the drugs, but that the exact same evidence could not be used against him in a civil case to prove the exact same thing.

94. E.g., United States v. Shelledy, 961 F.3d 1014, 1021–23 (8th Cir. 2020); United States v. Jones, 930 F.3d 366, 373–75 (5th Cir. 2019); United States v. Macedo, 406 F.3d 778, 792–93 (7th Cir. 2005).

95. 582 F.2d 898 (5th Cir. 1978). Beechum has been cited by courts more than 200 times.

96. Id. at 903–04.

97. Id. at 903.
mailbox and had intended to give it to his supervisor, but could not find him. To prove Beechum’s intent to possess the silver dollar unlawfully, the prosecution introduced evidence about the credit cards they found in Beechum’s wallet.
The court of appeals, sitting en banc, affirmed Beechum’s conviction. The other-acts evidence, ruled the court, was relevant “to an issue other than propensity because it lessens the likelihood that the defendant committed the charged offense with innocent intent.” While most people would likely agree that Beechum’s apparent theft of the credit cards made it more likely that he intended to steal the silver dollar, the question, as the court itself recognized, is whether it does so without a propensity inference. The court’s discussion consisted largely of repeating that the evidence was probative without carefully examining how: “That Beechum possessed the credit cards with illicit intent diminishes the likelihood that at the same moment he intended to turn in the silver dollar.” This, said the court, sufficed to establish a nonpropensity use of the evidence. Later, the court elaborated. The force of the stolen-credit-cards evidence was demonstrated by what Beechum would have had to have avowed to rebut it: “He would have been forced to argue that his state of mind was schizoid—that he intended at the same time to relinquish the coin but to keep the cards.” Apart from the remarkable assertion that one would have to be “schizoid” to harbor two different mental states at the same time—has this court never heard of a love-hate relationship?—the court simply failed to recognize the inferential process it was endorsing. Because Beechum stole the credit cards, he was the type of person who steals. Therefore, he intended to steal the silver dollar. That is propensity reasoning, pure and simple.

United States v. Thomas demonstrates that little has changed in the Fifth Circuit in the last forty years. Thomas was charged with overbilling the New Orleans Traffic Court for accounting services he provided. He sometimes billed for more than twenty-four hours of work performed in a single day, for

98. Id. at 905.
99. Id.
100. Id. at 918.
101. Id. at 913.
102. Id. at 916 (noting that under Rule 404(b), evidence must be “relevant to an issue other than propensity”).
103. Id.
104. Id.
105. Id. at 917.
106. This did not go unnoticed. Judge Goldberg criticized the majority on this very ground. Id. at 920–21 (Goldberg, J., dissenting).
107. 847 F.3d 193 (5th Cir. 2017).
services he did not provide, and at hourly rates exceeding those in his contract. He also backdated transactions to cover-up his fraud. The indictment covered overbilling from late 2008 to 2011, totaling between $600,000 and $800,000. At trial, the court allowed the prosecutor to introduce evidence that from 2006 to October 2008—a period not embraced by the indictment—Thomas submitted inflated and duplicate invoices to the Traffic Court. The indictment covered overbilling from late 2008 to 2011, totaling between $600,000 and $800,000. At trial, the court allowed the prosecutor to introduce evidence that from 2006 to October 2008—a period not embraced by the indictment—Thomas submitted inflated and duplicate invoices to the Traffic Court. The Fifth Circuit rejected Thomas’s claim that this violated Rule 404(b): “[T]he evidence was relevant to an issue other than Thomas’s character as it ‘lessen[ed] the likelihood that [Thomas] committed the charged offense with innocent intent.’” The court did not bother to explain how. As in Beechum, however, the inferential chain required propensity reasoning: Thomas fraudulently overbilled before; therefore, he fraudulently overbilled this time. Beechum and Thomas are hardly outliers; such cases are numerous. On some occasions, courts have even allowed other-acts evidence to prove intent where intent was not an element of the required proof.

108. Id. at 197–98.
109. Id. at 207.
110. Id. at 207–08 (quoting United States v. Smith, 804 F.3d 724, 735 (5th Cir. 2015)) (alteration in original).
111. E.g., United States v. Asher, 910 F.3d 854, 860–63 (6th Cir. 2018) (stating both that defendant jailer’s past assault of inmate could be used to prove his specific intent in assaulting current inmate-victim and that it could not permissibly be used to prove he committed charged assault); United States v. Boone, 828 F.3d 705, 711 (8th Cir. 2016) (holding admissible in defendant police officer’s trial for use of unreasonable force on arrestee evidence that he used unreasonable force on another arrestee four years before; “[b]y testifying that he did not intend to hurt Hill or kick him in the head, but was instead trying to assist his fellow officers in securing Hill, Boone placed his state of mind squarely at issue and rendered evidence of his prior use of unreasonable force probative of his intent, knowledge, motive, and absence of mistake in his use of force against Hill”); United States v. Geddes, 844 F.3d 983, 987–90 (8th Cir. 2017) (allowing defendant’s former girlfriend to testify that he assaulted and threatened to kill her to prove that he intended to force another woman to engage in prostitution); United States v. Smith, 804 F.3d 724, 735–36 (5th Cir. 2015) (holding admissible evidence that defendant discussed soliciting another bribe to prove defendant had intent to commit charged bribery); United States v. Gellene, 182 F.3d 578, 594–96 (7th Cir. 1999) (holding admissible evidence that defendant attorney had misrepresented his status as member of bar on multiple occasions to prove he made false statements to bankruptcy court with fraudulent intent).
112. In Pride v. State, 473 So. 2d 576 (Ala. Crim. App. 1984), for example, the prosecution presented evidence that the defendant committed a violent sexual assault. Because the defendant claimed that the victim had consented, the court allowed the prosecution to introduce evidence that the defendant had committed a previous violent rape to prove his “intent to commit rape . . . and negate his defense of consent.” Id. at 578. Under Alabama law, a person is guilty of rape in the first degree if he “engages in sexual intercourse . . . by forcible compulsion.” Ala. Code § 13A-6-61(a)(1)(2021). Similarly, in Rubio v. State, 607 S.W.2d 498 (Tex. Crim. App. 1980), the defendant was accused of aggravated rape. The victim testified the defendant raped her at gunpoint. Id. at 499. The defendant claimed she consented and that he used neither force nor threats. Id. The court said that the defendant
B. Knowledge

Knowledge is an element of many crimes. In such cases, other-acts evidence often tends to prove it without requiring an inference about propensity. For example, in United States v. Whitney,\textsuperscript{113} the defendant was convicted of knowingly making a false statement to a firearms dealer while attempting to buy a firearm.\textsuperscript{114} In filling out the required ATF Form 4473, which asked whether he was under a court order restraining him from harassing a child or an intimate partner, he answered, “No.”\textsuperscript{115} The prosecution was permitted to offer evidence that, three weeks before he filled out the form, he had been arrested for violating such a protective order.\textsuperscript{116} Clearly, this tended to prove his knowledge of the protective order—and that he knowingly made a false statement about it—without a propensity inference.\textsuperscript{117}

Other-acts evidence may also be used without a propensity inference to establish knowledge, which then provides circumstantial proof of another material element. For example, proof of a defendant’s knowledge may tend to prove the defendant’s intent.\textsuperscript{118} Likewise, evidence that a defendant knew how to do something unusual, such as disarm a sophisticated alarm system, may help identify the defendant as a perpetrator of a crime that required such skill.\textsuperscript{119}

The use of other-acts evidence to prove knowledge in other cases, however, is far more problematic. Consider United States v. Moran.\textsuperscript{120} The defendant was tried for being a felon in possession of a firearm.\textsuperscript{121} Moran was driving his girlfriend’s SUV when he was stopped by a police officer. When the officer thereby disputed his intent to act without the victim’s consent and affirmed the trial court’s decision to admit evidence that the defendant violently sexually assaulted another woman. \textit{Id.} at 499–502. At the time, Texas defined rape as “sexual intercourse with a female . . . without the female’s consent.” \textsc{tex. penal code ann.} § 21.02 (West 1974) (repealed); see Katharine K. Baker, \textit{Once a Rapist? Motivational Evidence and Relevancy in Rape Law}, 110 \textit{harv. l. rev.} 563, 621–22 (1997).
\textsuperscript{113} 524 F.3d 134 (1st Cir. 2008).
\textsuperscript{114} \textit{Id.} at 135; 18 U.S.C. § 922(a)(6).
\textsuperscript{115} Whitney, 524 F.3d at 136.
\textsuperscript{116} \textit{Id.} at 137–42.
\textsuperscript{117} See also United States v. Uzenski, 434 F.3d 690, 710 (4th Cir. 2006) (upholding, in defendant’s prosecution for possession of pipe bomb, evidence of defendant’s prior attempts to make pipe bombs as proof that defendant knew he was making a “destructive device”).
\textsuperscript{118} See \textit{supra} note 83 and accompanying text.
\textsuperscript{119} See, e.g., United States v. Barrett, 539 F.2d 244, 247–48 (1st Cir. 1976) (upholding admission of evidence of defendant’s previous disarming of an alarm system to identify him as participant in charged museum theft, which involved neutralizing museum’s alarm system); United States v. Walters, 351 F.3d 159, 165–68 (5th Cir. 2003) (admitting chapter of book defendant owned that detailed how to construct explosives to prove defendant knew how to construct explosive device).
\textsuperscript{120} 503 F.3d 1135 (10th Cir. 2007).
\textsuperscript{121} \textit{Id.} at 1139; 18 U.S.C. § 922(g)(1).
reached the car, he saw the butt of a rifle stock sticking out of an unzipped rifle case on the back seat. In response to the officer’s queries, Moran stated that the rifle belonged to his girlfriend, it was loaded, and he always had a rifle in his vehicle. At trial, Moran disputed neither that he had a previous felony conviction nor that there was a firearm in the car he was driving. He claimed only that he did not know that the rifle was in the car. To prove that Moran knowingly possessed the rifle, the prosecution introduced evidence that Moran had been convicted of being a felon in possession of a firearm more than ten years before. The appellate court approved: “the fact that Mr. Moran knowingly possessed a firearm in the past supports the inference that he had the same knowledge in the context of the charged offense.” At one point, the court acknowledged this required “a kind of propensity inference,” but simply asserted that this was not impermissible character evidence. Moran is not at all like Whitney, where the prior act demonstrated that the defendant had knowledge of the very thing he claimed not to know. Moran’s prior conviction for knowingly possessing a firearm in no way provided him knowledge that, more than ten years later, a rifle would be in the back seat of a car he was driving. To the extent it proved his knowledge, it was only through the type of “once a knowing possessor, always a knowing possessor” inference that Rule 404(b) purportedly forbids. Like Banks, Beechum, and Thomas, Moran is no aberration.

122. Moran, 503 F.3d at 1139.
123. Id. at 1139, 1144.
124. Id. at 1144.
125. Id.
126. Id.
127. Id. at 1145 (“We acknowledge that the use of Mr. Moran’s prior conviction to prove knowledge involves a kind of propensity inference (i.e., because he knowingly possessed a firearm in the past, he knowingly possessed the firearm in the present case). But the inference is specific and does not require a jury to first draw the forbidden general inference of bad character or criminal disposition; rather, it rests on a logic of improbability that recognizes that a prior act involving the same knowledge decreases the likelihood that the defendant lacked the requisite knowledge in committing the charged offense”). The court may have been arguing that the doctrine of chances applies here. It cited United States v. Queen, 132 F.3d 991, 996 (4th Cir. 1997), which explicitly referenced the doctrine. But the doctrine of chances purports to demonstrate that other acts evidence may be probative without a propensity inference. As shown infra in Part III.F, this is a flawed argument.


129. See, e.g., United States v. Warren, 951 F.3d 946, 950 (8th Cir. 2020) (upholding admission of evidence that defendant had gun while committing robbery in 2010 to prove he knowingly and
C. Plan

While intent or knowledge is often an element of a charged crime, plan typically is not. Plan may sometimes be an element of a crime. For example, the Hobbs Act, 18 U.S.C. § 1951(a), provides that the target criminal conduct must be done “in furtherance of a plan or purpose to do anything in violation of this section.”

Evidence that the police found in the defendant’s apartment, a sketch of a bank’s interior and a timeline for robbing the bank, would tend to prove that the defendant robbed the bank without requiring any inference about the defendant’s character. Similarly, other-acts evidence may be probative without a propensity inference when the commission of the other act is an integral part of a larger scheme. *Kind Hearts and Coronets* provides a fanciful such example; real-life cases tend more toward the prosaic. For instance, in a trial for burglarizing a post office, the prosecution was permitted to prove that the defendant had, a few hours earlier, stolen a cutting torch that he used to intentionally possessed gun in relation to drug trafficking crime); United States v. Ricard, 922 F.3d 639, 652–54 (5th Cir. 2019) (upholding admission of involvement in subsequent Medicare kickback scheme to prove that defendant knowingly and willfully participated in earlier scheme); United States v. Benford, 875 F.3d 1007, 1012 (10th Cir. 2017) (relying on *Moran* and referring to it as “often-cited”); United States v. Trent, 767 F.3d 1046, 1048–50 (10th Cir. 2014) (upholding admission of defendant’s prior felon-in-possession conviction to prove that defendant, and not other occupants of car, knowingly possessed gun foundwedged behind arm rest in back seat); United States v. Brown, 398 F. App’x 915, 916 (4th Cir. 2010) (admitting two prior felon-in-possession convictions to prove knowing possession). See generally David P. Leonard, *The Use of Uncharged Misconduct Evidence to Prove Knowledge*, 81 Neb. L. Rev. 115, 136–60 (2002); Thomas J. Reed, *Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of Evidence*, 53 U. Cin. L. Rev. 113, 127–34 (1984).

130. While intent or knowledge is often an element of a charged crime, plan typically is not. Other-acts evidence offered under Rule 404(b) to prove plan, therefore, is usually introduced to prove state of mind, identity, or the performance of a criminal act. In some instances, the noncharacter-propensity chain of reasoning is apparent; in others, far less so. More than a century ago, Wigmore articulated the justification for allowing evidence of a plan. Someone who plans to do something is likely to do that thing. Evidence that the police found in the defendant’s apartment, a sketch of a bank’s interior and a timeline for robbing the bank, would tend to prove that the defendant robbed the bank without requiring any inference about the defendant’s character. Similarly, other-acts evidence may be probative without a propensity inference when the commission of the other act is an integral part of a larger scheme. *Kind Hearts and Coronets* provides a fanciful such example; real-life cases tend more toward the prosaic. For instance, in a trial for burglarizing a post office, the prosecution was permitted to prove that the defendant had, a few hours earlier, stolen a cutting torch that he used to

131. See supra note 34, § 5252 (collecting cases).


135. See supra text accompanying notes 73–74.
commit the charged burglary. In all these examples, the other-acts evidence is probative because it tends to prove the defendant had a plan to commit the very crime charged.

But courts read Rule 404(b) as sanctioning plan evidence in numerous situations where the “plan” consists of the defendant’s having committed the same type of crime on other occasions. While these other acts may reveal a tendency to commit that type of crime, they don’t tend to show a plan to commit the very crime charged. Sometimes, the charged and other crimes share substantial similarities; other times, less so. Commentators categorize these cases in various ways: “linked methodology,” “unlinked plan,” “spurious plan,” and “template” or “repeated choice” model. Many commentators criticize the way courts have employed plan, decrying its “protean” quality and warning that courts invoke it as a “magic incantation” to admit other-acts evidence for a propensity purpose. A look at a few cases illustrates why plan is so troublesome and why, ultimately, the failure to define “character” confounds any attempt to bring coherence to the character-evidence rule.

136. Lewis v. United States, 771 F.2d 454, 455 (10th Cir. 1985) (admitting evidence that defendant stole cutting torch and oxygen bottles, which defendant used in committing charged burglary several hours later); see also United States v. Gurrola, 898 F.3d 524, 530–31 (5th Cir. 2018) (defendant wanted to murder victim in Mexico and so had victim’s father murdered to lure victim to return to Mexico for his funeral, and when that did not work, had victim’s sister murdered there to again lure victim there).

137. See MUELLER & KIRKPATRICK, supra note 34, § 4:35.


139. LEONARD, THE NEW WIGMORE, supra note 37, § 9.2.2; see Bryden & Park, supra note 62, at 547.


141. Imwinkelried, Contextual Construction, supra note 138, at 1013.

142. Park & Bryden, supra note 140, at 177.

143. Imwinkelried, Contextual Construction, supra note 138, at 1008.

144. See, e.g., RICHARD O. LEMPERT, SAMUEL R. GROSS, JAMES S. LIEBMAN, JOHN H. BLUME, STEPHAN LANDSMAN & FREDRIC I. LEDERER, A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES 367 (5th ed. 2014) (“most elastic and bewildering category of nonpropensity uses of other-acts evidence”); 22B WRIGHT & GRAHAM, supra note 6, § 5244, at 163 (noting that some commentators treat plan as a “dumping ground”); Bloom, supra note 1, at 1132 (“If Rule 404 permitted evidence based only on repetition, the bar on character would dip toward nothing.”); Reed, supra note 6, at 227 (“vague and amorphous”).
State v. Roth\textsuperscript{145} is a modern-day “brides in the bath” case.\textsuperscript{146} Roth’s fourth wife, a single mother who married him after a short courtship, died in 1991.\textsuperscript{147} Roth said she accidentally fell off an inflatable raft; the prosecution said he murdered her.\textsuperscript{148} Soon after they were married, Roth had purchased life insurance in his wife’s name and, upon her death, collected nearly $400,000.\textsuperscript{149} Without objection, the prosecution offered evidence about two of Roth’s other relationships.\textsuperscript{150} Six years before his fourth wife died, Roth met another single mother.\textsuperscript{151} After a short courtship, he married her.\textsuperscript{152} He promptly convinced her to name him as beneficiary of a life insurance policy she already had and tried to persuade her to procure another one.\textsuperscript{153} She left him after three months.\textsuperscript{154} The following year, Roth struck up a relationship with another single mother, who soon moved in with him.\textsuperscript{155} But their relationship ended soon after he suggested she buy some life insurance and she informed him that she was uninsurable because she had been diagnosed with cancer.\textsuperscript{156} Over Roth’s objection, the prosecution introduced evidence about one other relationship.\textsuperscript{157} In 1981, Roth married his second wife.\textsuperscript{158} You guessed it: she was a single mother whom he married after a brief courtship.\textsuperscript{159} Twenty days after a $100,000 life insurance policy on her life went into effect, she died from

\begin{thebibliography}{99}
  \bibitem{147} Roth, 881 P.2d at 271, 272.
  \bibitem{148} \textit{Id.} at 271.
  \bibitem{149} \textit{Id.}
  \bibitem{150} \textit{Id.} at 272.
  \bibitem{151} \textit{Id.}
  \bibitem{152} \textit{Id.}
  \bibitem{153} \textit{Id.}
  \bibitem{154} \textit{Id.}
  \bibitem{155} \textit{Id.}
  \bibitem{156} \textit{Id.}
  \bibitem{157} \textit{Id.}
  \bibitem{158} \textit{Id.}
  \bibitem{159} \textit{Id.}
\end{thebibliography}
a 300-foot fall. The Washington Court of Appeals upheld the admission of this evidence. The court acknowledged that the other acts here did not form part of a single transaction. The question, therefore, was whether the evidence tended to show that “the defendant planned to commit a series of crimes, including the specific crime being tried,” or whether it merely tended to show that he committed two or more crimes that happened to be of a similar nature. Not surprisingly, the court found that the other-acts evidence tended to prove that Roth had an “overarching plan to marry, insure, and murder women in order to obtain large insurance recoveries.”

Compare Roth to United States v. Kravchuk. Kravchuk was convicted of stealing money from an automatic teller machine (ATM) in a convenience store. The government called his co-participants to testify not only about that theft but also about two earlier uncharged crimes they committed with Kravchuk. Six months before, they removed an ATM from a mall; five months later, they unsuccessfully attempted to remove an ATM from a different convenience store. The Tenth Circuit held that the trial court properly admitted this evidence under Rule 404(b) as proof of Kravchuk’s plan. The incidents all involved ATMs and the same participants and occurred within a six-month period. “These similarities show that Kravchuk had plainly

160. Id.
161. Id. at 275.
162. Id. at 276.
163. Id. (quoting State v. Lough, 853 P.2d 920, 928 (Wash. Ct. App. 1993), aff’d, 889 P.2d 487 (1995) (emphasis in original)). The court disapprovingly noted that another division of the Washington Court of Appeals took a more restrictive approach to admitting “plan” evidence, limiting it to cases in which a common scheme or plan is actually an element of the crime charged. Id. at 276 n.6 (citing State v. Stanton, 845 P.2d 1365, 1370 (Wash. Ct. App. 1993)).
164. Id. at 277. The court also stated that the planning Roth devoted to the earlier wife’s death—especially his selection of a remote location and preparation of a credible explanation for her death—would be useful in accomplishing the charged crime. Id. at 276–77. It did not bother to explain, however, how Roth needed the prior episode to teach him of the value of using a remote location to stage an accidental death or having a credible story at hand; he seemed to know how to do this the first time. Likewise, Professor Sullivan argues that evidence that a defendant, charged with drowning his wife, had previously drowned another wife should be admissible to prove the husband possessed the knowledge needed to successfully drown his victim. Sean P. Sullivan, Probative Inference From Phenomenal Coincidence: Demystifying the Doctrine of Chances, 14 LAW, PROBABILITY & RISK 27, 42–43 (2015). Is drowning another person in a bathtub really so complicated that it takes several efforts to learn how to do it? But see FATAL ATTRACTION (PARAMOUNT PICTURES 1987).
165. 335 F.3d 1147 (10th Cir. 2003).
166. Id. at 1151–52.
167. Id. at 1156.
168. Id. at 1152, 1156.
169. Id. at 1156.
170. Id.
developed a plan and stable team of co-participants to burglarize ATM machines.  

Finally, consider United States v. Riepe, in which the defendant was charged with attempted enticement of a minor. This required the government to prove that he intended to entice MB, a fifteen-year-old, to engage in illegal sexual activity. The prosecution proved that MB did not know the defendant. When she received a letter from him, she showed it to her parents, who went to the police. Posing as MB, an agent of the state’s Internet Crimes Against Children Task Force began exchanging text messages with Riepe. These ultimately included discussions about having sex and plans to meet. Riepe was arrested at the intended rendezvous location. The prosecution also offered other-acts evidence from two seventeen-year-olds about their experiences with Riepe the year before. One testified that Riepe approached her several times while she was working as a cashier at a local grocery and tried to converse with her. Little came of this. She told her boss about Riepe and filed a complaint with the police. A few weeks later, she saw him outside her high school and called the police. The other witness testified that she received a friend request from Riepe on a social network site. She accepted the request, but when Riepe sent her a message she realized that he was considerably older and told him not to contact her. Riepe showed up at one of her high school football games, appeared once at her high school, and called her twice. Her parents contacted the police about Riepe. Neither witness testified about further contacts with Riepe or claimed that he made any sexual overtures.  

171. Id.  
172. 858 F.3d 552 (8th Cir. 2017).  
173. Id. at 559; see 18 U.S.C.A. § 2422.  
174. Riepe, 858 F.3d at 555.  
175. Id.  
176. Id.  
177. Id. at 555–58.  
178. Id. at 558.  
179. Id.  
180. Id.  
181. Id.  
182. Id.  
183. Id.  
184. Id.  
185. Id.  
186. Id.  
187. Id. at 560.
evidence of Riepe’s plan to contact MB with the intent to persuade her to engage in sexual activity.\footnote{188} 

The other-acts evidence of plan admitted in these three cases vary dramatically in their probative value. In one, and perhaps in two, the evidence’s probative force flows only through a propensity inference; in one, and perhaps two, the required inference is a character-propensity one. It is possible to construct a plausible nonpropensity chain of inferences that tends to prove guilt in the Roth case, and to do so in a way that does not effectively gut the character-evidence rule. Roth is but a small step from the uncontroversial hypothetical with which I began this Part—evidence that the defendant had a sketch of a bank’s interior and a timeline for robbing the bank as proof that he robbed that particular bank. Suppose Roth had kept a diary in which he described a plan to find and court a down-on-her-luck, single mother, marry her, buy insurance on her life, and kill her. That would certainly be admissible if he were later charged with murder and the alleged victim was a single mother whom he had married and whose life he had insured. Although his diary plan did not target a particular individual, his plan was specific and would tend to establish his guilt without a propensity inference. The evidence of Roth’s prior conduct can be viewed as proving that he continued to harbor such a plan in mind; i.e., as the equivalent of his memorializing a plan in his diary. In that sense, therefore, its probative value does not require a propensity inference.\footnote{189}

A similar argument can be made about the Kravchuk case. But the logic is more attenuated and presents a more significant threat to the character-evidence rule. Evidence that he had twice before tried to remove (once successfully) an ATM could tend to prove that he continued to harbor a plan to steal ATMs. Unlike Roth’s plan, however, Kravchuk’s plan was not terribly specific. It was not directed at a particular target, and while his previous efforts might manifest a plan to pilfer money by physically removing an ATM, that was not what he was charged with doing. He apparently made no attempt to remove the ATM; he just broke into it and took the money.\footnote{190} The probative value of the Kravchuk other-acts evidence, therefore, flows more directly from a propensity inference. He burglarized ATMs twice previously; therefore, he burglarized this ATM. Acceptance of the nonpropensity reasoning would effectively authorize the widespread admission of a defendant’s previous efforts to commit the same

\footnote{188} \textit{Id.} The court said this evidence was “unquestionably relevant to his planning, his knowledge, and his preparation for his later contact” with MB. \textit{Id.}

\footnote{189} See \textsc{Leonard, The New Wigmore, supra} note 37, § 9.2.2. Of course, evidence of his prior conduct would also support a propensity-based chain of reasoning: he married and killed before for financial gain; therefore, he again married and killed for financial gain. But that would simply trigger a Rule 403 inquiry.

\footnote{190} United States v. Kravchuk, 335 F.3d 1147, 1152 (10th Cir. 2003).
type of crime for which he stands trial. That is precisely why so many commentators and even some courts have decried the liberality with which courts invoke “plan” as a means to admissibility under Rule 404(b).

*Riepe* stands as an extreme example of this, although other candidates abound. Indeed, it is hard even to see the basis for the court’s conclusion that the defendant’s contacts with the two other high school girls—creepy as they may have been—tend to prove he had a plan to entice minors into illegal sexual activity. The other contacts were quite limited and devoid of any sexual references. This was propensity evidence, pure and simple: proof that because the defendant had acted improperly toward two female teenagers before, he did it this time. If anything, the court reasoned backward, inferring from the defendant’s express sexual intentions in the charged case the conclusion that he approached the other teenagers intending to entice them into a sexual relationship.

Rule 404(b) does not, however, bar all propensity evidence; it bars only character-propensity evidence. These cases, therefore, illustrate the importance of understanding what should be considered character under Rule 404(b) and what should not. Whatever the law of evidence means by character, it should not include Roth’s practice of courting single mothers, marrying them, and convincing them to buy life insurance and name him as beneficiary. Likewise, if Rule 404(b)’s ban on other-acts evidence to prove character-propensity is to have any meaning at all, the defendant’s prior actions in *Riepe* must be viewed as describing character. *Kravchuk* falls between these two. I will come back to it after discussing further the meaning of character in Part V.

**D. Identity and Modus Operandi**

Identity may be proved in many ways under Rule 404(b). Other-acts evidence that tends to show that a person had a motive to commit a particular

---

191. *E.g.*, State v. Verde, 296 P.3d 673, 682–84 (Utah 2013). *Compare* People v. Tassell, 679 P.2d 1, 5 (Cal. 1984) (criticizing plan as often “really nothing but the bestowing of a respectable label on a disreputable basis for admissibility—the defendant’s disposition”), with People v. Ewoldt, 867 P.2d 757, 769 (Cal. 1994) (overruling *Tassell* to extent that it limited plan to instances where other acts and charged crime were part of single, continuing conception or plot).

192. *See*, e.g., Lamar v. Steele, 693 F.2d 559, 560–61 (5th Cir. 1982) (allowing plaintiff, a prison writ writer who claimed defendant prison official asked other inmates to assault or kill him, to introduce evidence that defendant asked a different inmate to kill another writ writer); Benefiel v. State, 578 N.E.2d 338, 346–47 (Ind. 1991) (upholding, in rape and murder trial, evidence that defendant had raped two women six and eight years before charged crime); Atkisson v. State, 640 So. 2d 33, 34–36 (Ala. Crim. App. 1993) (admitting evidence that, seven or eight years before charged sexual abuse of daughter, defendant had sexually abused stepdaughter).

193. *See infra* Part V.C.ii.
crime helps identify the person as the perpetrator. Similarly, other acts proof that demonstrates a person possessed a particular skill or knowledge critical to completing a crime may demonstrate the person’s involvement. The paradigmatic proof of identity flows from what is commonly called “modus operandi” evidence—proof that the defendant committed other crimes in the same distinctive way in which the charged crime was committed. Courts refer to such other acts evidence as equivalent to establishing a defendant’s “calling card,” “signature,” “handiwork,” or “fingerprint.” What courts and commentators rarely do is explain precisely how modus operandi evidence is probative without violating the character-evidence rule. Most either

194. See, e.g., United States v. Schiller, 264 F. App’x 44, 44–45 (2d Cir. 2008) (holding that trial court properly admitted evidence that defendant previously purchased large amounts of cocaine, which he could not afford, to prove his motive to commit charged embezzlement and identity as perpetrator); United States v. Talley, 164 F.3d 989, 999–1000 (6th Cir. 1999) (upholding admission, in trial of deputy sheriff for soliciting murder of FBI agent and informant, of prior crimes defendant had committed that informant had reported and that FBI agent was investigating); United States v. Turpin, 707 F.2d 332, 334–36 (8th Cir. 1983) (upholding admission of evidence that defendant, charged with attempting to derail train, had killed victim and placed body in car and parked car on railroad tracks in attempt to conceal cause of victim’s death).

195. See, e.g., United States v. Shumway, 112 F.3d 1413, 1419–21 (10th Cir. 1997) (upholding admission of evidence that defendant had illegally excavated artifacts at same site seven years earlier); United States v. Trenkler, 61 F.3d 45, 52–56 (1st Cir. 1995) (holding that evidence that defendant had previously made similar bomb was properly admitted to prove he built bomb used in charged offense). It may also help prove identity in other ways. See, e.g., United States v. Cox, 963 F.3d 915, 923–25 (9th Cir. 2020) (using other messages sent by defendant to prove her identity as person who sent, using alias, messages at issue because other messages linked defendant to alias).

196. LEONARD, THE NEW WIGMORE, supra note 37, § 13.1 (identity has become “virtually synonymous with modus operandi”). United States v. Jett, 908 F.3d 252, 259 (7th Cir. 2018) provides a recent example. Two defendants robbed three local cash-and-check stores while wearing 1970’s-themed disguises. Id. As the court described it: “The heavier man was dressed as funk legend Rick James, with a braided, beaded wig and flashy sunglasses; the thinner man was dressed, seemingly, as Youngblood Priest from the 1972 hit film Super Fly, with a long-haired wig, mustache, and oversized sunglasses of his own. Both men wore bright orange construction vests.” Id. at 261.


198. E.g., United States v. Carroll, 207 F.3d 465, 468 (8th Cir. 2000); Shumway, 112 F.3d at 1419; United States v. LeCompte, 99 F.3d 274, 278 (8th Cir. 1996); United States v. Smallis, 752 F.3d 1227, 1234 (10th Cir. 2014).

199. E.g., United States v. Martínez-Mercado, 919 F.3d 91, 102 (1st Cir. 2019); United States v. Phaknikone, 605 F.3d 1099, 1108 (11th Cir. 2010); United States v. Silva, 580 F.2d 144, 147 (5th Cir. 1978).

simply assert that modus operandi evidence is not propensity evidence\textsuperscript{201} or apparently assume that it is so obvious that they do not even have to explain why it is admissible under Rule 404(b).\textsuperscript{202} The few who do explore this issue express different views. Professors Bloom and Imwinkelried both contend that modus operandi evidence does not require a propensity inference. Each argues that it is probative instead because of the unlikelihood that anyone else would commit a crime in the same distinctive manner.\textsuperscript{203} This latter observation is undoubtedly correct. It is unlikely that two different people would employ the same, very distinctive technique to commit a particular type of crime.\textsuperscript{204} Think of \textit{Home Alone}. How likely is it that some other burglar stuffed a cloth into his victim’s sink drain and left the water running? But Bloom and Imwinkelried both fail to ask the critical question: If it is unlikely that someone else would commit a crime in that distinctive manner, what makes it likely that the defendant would?

One possibility is that modus operandi can be viewed as a particularized version of plan evidence. From proof that a defendant committed other crimes in a highly distinctive manner a juror might infer the defendant continued to

\begin{itemize}
\item \textsuperscript{201} E.g., United States v. Brewer, 915 F.3d 408, 415 (7th Cir. 2019) (modus-operandi evidence “supplied propensity-free reasoning” to prove identity); United States v. Kornegay, 641 F. App’x 79, 84 (2d Cir. 2016) (“[T]he government used [the modus operandi evidence] to prove identity, . . . not propensity.”); United States v. Vasquez, 635 F.3d 889, 893 (7th Cir. 2011) (“The evidence was not used to show propensity, but rather to show modus operandi.”); United States v. Mathis, 264 F.3d 321, 329 n.2 (3d Cir. 2001) (“[T]o distinguish [modus-operandi evidence] from impermissible conclusions based on propensity or bad character, however, the admissibility of such evidence critically depends on the degree to which the ‘manner’ employed is ‘unusual and distinctive.’” (quoting 1 MCCORMICK ON EVIDENCE 662–63 (John W. Strong ed., 5th ed. 1999))).
\item \textsuperscript{202} See, e.g., MUELLER & KIRKPATRICK, supra note 34, § 4:36; MCCORMICK ON EVIDENCE, supra note 201, § 190; WEINSTEIN’S EVIDENCE, supra note 200, § 404.22[5][c]; WEISSENBERGER & DUANE, supra note 63, § 404.17.
\item \textsuperscript{203} Bloom, supra note 1, at 1138; Imwinkelried, \textit{Contextual Construction}, supra note 138, at 1029–30. Imwinkelried’s position is a bit ambiguous. He says that “it is easy to discern a noncharacter theory because it is objectively unlikely that any one else would employ such a distinctive methodology.” Imwinkelried, \textit{Contextual Construction}, supra note 138, at 1030. Thus he concludes that this does not involve “any inference as to the accused’s personal character.” \textit{Id.} This obscures whether he is arguing that propensity reasoning is not involved or only that character-propensity reasoning is not involved. Because his argument is based on someone else’s behavior—the objective unlikelihood that someone else would act in a similar manner—it does not draw a distinction based on whether the defendant’s actions are character- or noncharacter-based. So, it is fair to infer that he is arguing that the evidence is probative without resort to propensity reasoning.
\item \textsuperscript{204} A copycat criminal is, of course, a possibility. But that simply goes to the probative strength of the evidence—just how unlikely it is that someone else would have committed this crime in the same distinctive manner—and not to the inferential process that generates the evidence’s probative force.
\end{itemize}
harbor such a plan and then executed the plan on the occasion in question.\textsuperscript{205} As discussed above, this is a plausible nonpropensity-based chain of reasoning.\textsuperscript{206} Sometimes, however, this nonpropensity argument will not work. In \textit{Home Alone}, for example, the distinctive feature may not have been part of the plan. It certainly was not the means by which Marv and Harry committed their burglaries. Harry may have stuffed the sink drain only when the spirit moved him.\textsuperscript{207} A more consistently satisfying answer is modus operandi evidence operates through a propensity inference—that Marv and Harry are acting in a manner consistent with their previous conduct. Professors Lempert\textsuperscript{208} and Leonard\textsuperscript{209} agree that modus operandi evidence requires a propensity inference but contend that it is not an inadmissible character-propensity inference.\textsuperscript{210} Just as Roth’s repeated conduct in courting single mothers, marrying them, convincing them to buy life insurance, and naming himself as beneficiary hardly seems to describe a character trait,\textsuperscript{211} the practice of stuffing a cloth into a sink drain and leaving the water running does not seem to fit within any reasonable definition of character.\textsuperscript{212} Reaching this conclusion, however, requires an understanding of what character means for purposes of Rule 404(b). The failure of the cases and literature to discuss the meaning of character, however, results in modus operandi evidence being liberally admitted

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{205} Cf. \textsc{Weissenberg} & \textsc{Duane}, \textit{supra} note 63, \S 404.17 (noting courts often confuse modus operandi and plan).
\item \textsuperscript{206} \textit{See supra} text accompanying notes 132–34, 189.
\item \textsuperscript{207} Although this diminishes the chance that stuffing the drain and leaving the water running was part of any plan, it would still tend to link Marv and Harry to all the local burglaries in which the water had been left running. \textit{See supra} text accompanying notes 75–77.
\item \textsuperscript{208} \textsc{Lempert}, \textsc{Gross}, \textsc{Liebman}, \textsc{Blume}, \textsc{Landsman} & \textsc{Lederer}, \textit{supra} note 144, at 368–69, 384–86.
\item \textsuperscript{209} \textsc{Leonard}, \textsc{The New Wigmore}, \textit{supra} note 37, \S 13.2.
\item \textsuperscript{210} \textit{See also} \textsc{Park} & \textsc{Bryden}, \textit{supra} note 140, at 178–79. Leonard reaches his conclusion, in part, based on his arguably narrow view of what character means. \textit{Id.} \S 9.2.1; \textit{see infra} Part V.A.
\item \textsuperscript{211} \textit{See supra} text accompanying notes 132–34, 189.
\item \textsuperscript{212} \textit{See infra} Part V.C.ii.
\end{enumerate}
\end{footnotesize}
at trial\footnote{213} despite appellate courts’ repeated exhortations\footnote{214} that there must be a “high degree of similarity”\footnote{215} or “numerous and striking similarities”\footnote{216} between the other crimes and the charged offense and that the similarities must be “distinctive”\footnote{217} or “idiosyncratic.”\footnote{218}

\textit{Lane v. State},\footnote{219} a Texas capital murder case, illustrates how loosely these requirements are sometimes applied. The victim was eight-years old; she had been kidnapped, sexually assaulted, and strangled.\footnote{220} The prosecution possessed neither eyewitnesses nor physical evidence that implicated Lane.\footnote{221} Its primary evidence was the defendant’s confession, but he attacked its voluntariness and accuracy.\footnote{222} To shore up its case, the prosecution offered evidence that Lane had confessed to the kidnapping, rape, and murder of another young girl.\footnote{223} It presented to the trial judge a chart highlighting all the similarities between the two crimes, which the appellate court reproduced.\footnote{224} The prosecution had a substantial hurdle to overcome. Lane was on trial for murdering a girl in Texas in 1980; the other murder occurred ten years later, in

\begin{footnotesize}
\begin{enumerate}
\item[213.] Sometimes appellate courts hold the trial courts erred; sometimes they affirm. \textit{Compare}, \textit{e.g.}, United States v. Carroll, 207 F.3d 465, 467–70 (8th Cir. 2000) (holding that trial court erred in admitting evidence that defendant committed bank robbery ten years before where only commonalities with charged robbery were that in both perpetrator wore a nylon mask, carried a gun, and jumped over the counter to put the bank’s money in a bag), \textit{and} United States v. Carrillo, 981 F.2d 772, 775 (5th Cir. 1993) (holding that trial erred in admitting error of other drug sales to show identity where charged sale was merely “a typical drug sale in a drug-ridden urban neighborhood where such transactions are commonplace”), \textit{with} United States v. Vance, 764 F.3d 667, 669–71 (7th Cir. 2014) (upholding admission of three restaurant robberies to prove defendant’s identity in two charged bank robberies; perpetrators wore ski masks in both charged and extrinsic robberies, defendant brandished .44 caliber revolver in all restaurant robberies as did perpetrator in one of two bank robberies, and defendant rushed counter to get money in two of three restaurant robberies, as did perpetrator in both bank robberies), \textit{and} United States v. Robinson, 687 F.2d 359, 360–61 (11th Cir. 1982) (affirming, in trial for transporting stolen table silver, admission as modus operandi evidence that defendant had served as fence for other silver burglars).
\item[214.] \textit{See} cases cited at 1 IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, \textit{supra} note 24, §§ 3:11–3:12.
\item[215.] \textit{E.g.}, United States v. Trenkler, 61 F.3d 45, 52–53 (1st Cir. 1995).
\item[216.] \textit{E.g.}, United States v. Anifowoshe, 307 F.3d 643, 647 (7th Cir. 2002).
\item[217.] \textit{E.g.}, United States v. Smalls, 752 F.3d 1227, 1238 (10th Cir. 2014).
\item[218.] \textit{E.g.}, United States v. Smith, 103 F.3d 600, 603 (7th Cir. 1996).
\item[219.] 933 S.W.2d 504 (Tex. Crim. App. 1996).
\item[220.] \textit{Id.} at 507.
\item[221.] \textit{Id.} at 518.
\item[222.] Texas allows defendants to relitigate the voluntariness of their confessions before the jury. \textit{See} TEX. CODE CRIM. PROC. ANN. art. 38.22, § 6 (West 2019).
\item[223.] Lane confessed to the Texas murder only after confessing to the Kansas murder. \textit{Lane}, 933 S.W.2d at 510.
\item[224.] \textit{Id.} at 517.
\end{enumerate}
\end{footnotesize}
The prosecution sought to paper over these temporal and locational gaps by highlighting a slew of unexceptional similarities. Both crimes involved the murder of a young girl by a stranger;226 in both, the victim was abducted from a public area near her home and physically relocated; the defendant lived or worked near both abduction sites; both victims were physically and sexually assaulted and strangled, and their bodies were “dumped”; and the defendant did not act alone.227 Only at the bottom of the chart were two interesting similarities raised. In both instances, the defendant participated in the search for the victim and claimed a “trophy”—the girl’s underwear.228 After dutifully repeating that to prove identity in a nonpropensity manner “an extraneous offense must be so similar to the offense charged that the offenses are marked as the accused’s handiwork,”229 the court quickly upheld the trial court’s decision to admit this evidence.230 Its analysis was perfunctory, consisting largely of agreeing that the State’s chart accurately displayed the similarities between the two crimes.231 Most of these similarities, however, were hardly unique: removing a young girl from some “public area” near her home, abducting, sexually assaulting and killing her, and “dumping” her body is hardly a distinctive manner of committing a kidnapping, sexual assault, and murder of a young girl. The only distinctive items on the list were that Lane participated in the search for both girls’ bodies and that he claimed a “trophy” from each crime.

This does not come remotely close to proving Lane’s guilt through a nonpropensity theory. Suppose Lane had not been suspected of the Texas killing. Evidence that he sexually assaulted and murdered a nine-year-old girl in Kansas ten years later would hardly point to him as the Texas killer. There was nothing particularly distinctive about the manner in which Lane committed the Kansas crime that would lead someone to conclude that it is unlikely that anyone else could have committed the Texas crime. Indeed, Texas police learned about the only distinctive points of similarity—the participation in the search and taking the victim’s underwear—after Lane confessed to the Texas killing. The Kansas crime may have confirmed Lane’s guilt, but it did not lead

225. Id. at 506, 508.
226. The prosecution’s chart stretched this into five points of similarity. Id. at 517.
227. But in the charged crime, Lane had two accomplices, while in the Kansas murder he had only one, and that person had no connection to the Texas killing. Id. at 510, 520.
228. Id. at 517.
229. Id. at 519.
230. Id.
231. Id. (“[T]he mode of committing the offenses and the circumstances surrounding the offenses are sufficiently similar for the extraneous offense to be relevant to the issue of identity. Those similarities are accurately addressed in the State’s chart depicted above, and we need not repeat them here.”).
the Texas police to Lane. Nor can the use of this other crime to prove Lane’s guilt be salvaged by resort to a plan theory. Evidence that Lane had a plan to kill a young girl in Kansas in 1990 does not tend to prove he had a plan to kill a young girl in Texas ten years before. This evidence has probative value only through a propensity inference; the only question is whether it is a character-propensity inference. And like the Kravchuk case, this requires an inquiry into what we mean by character. Kravchuk raises the character question in terms of the level of specificity of the conduct. Lane poses a different issue about the nature of character. In the punishment phase of his case, the prosecution presented evidence that he possessed multiple sexual disorders, including pervasive and chronic pedophilia, and that he hoarded female underwear. Is the evidence, then, that Lane claimed his victim’s underwear as a trophy in both cases evidence that he acted in accordance with his character? This issue—the relationship of mental illness and character—arises with greater frequency in motive cases.

E. Motive

The meaning of motive is generally understood: “an emotion or state of mind that prompts a person to act in a particular way; an incentive for certain volitional activity.” As it is itself rarely an element of a charge, motive is typically used circumstantially to prove identity, state of mind, or the actus reus. Other-acts evidence may demonstrate motive in one of several different ways. Most frequently, as in the Santa Claus murder example above, the other act provides the motive for the defendant to commit the charged crime.

232. See supra text accompanying notes 165–71.
233. Lane, 933 S.W.2d at 507–08.
234. 22B GRAHAM, supra note 34, § 5248 (quoting JOHN HENRY WIGMORE, THE SCIENCE OF JUDICIAL PROOF § 57 (3d ed. 1937)); see also M. C. Slough & J. William Knightly, OTHER VICES, OTHER CRIMES, 41 IOWA L. REV. 325, 328 (1956) (“Motive may be defined as an inducement or state of feeling that impels and tempts the mind to indulge in a criminal act.”); State v. Torres, 812 N.W.2d 213, 223 (Neb. 2012) (“[M]otive is defined more specifically as that which leads or tempts the mind to indulge in a criminal act.”); People v. Molineux, 61 N.E. 286, 296 (N.Y. 1901) (“the moving power which impels to action for a definite result”); MUELLER & KIRKPATRICK, supra note 34, § 4:32 (including among the “archetypal motives that seem inherent in the human condition” greed, personal animosity, anger, desire for revenge, amorous or sexual desires, jealousy, acting out consequences of drug addiction, cover up another crime, political views, and ethnic, racial, gender biases).
235. Motive is an element, however, in bias crimes. See infra note 465.
236. Leonard, Character and Motive, supra note 6, at 447; see supra notes 84, 193, 194.
237. See supra text accompanying notes 68.
238. E.g., United States v. LaFond, 783 F.3d 1216, 1219 (11th Cir. 2015) (upholding admission of defendants’ membership in white supremacist gang as providing motive for racially-charged murder); United States v. Earls, 704 F.3d 466, 470–72 (7th Cir. 2012) (admitting evidence that
Rather than providing the motive to commit the charged crime, however, the other-acts evidence may manifest a pre-existing motive to commit a crime against a particular person or property. Suppose Victim is shot dead. Evidence that Defendant had previously assaulted Victim on a number of occasions would be reflective of Defendant’s animosity toward Victim. This evidence could therefore be used to prove Defendant’s identity as the person who killed Victim. Or, if Defendant admitted shooting Victim, but claimed the shooting was accidental, the prior assaults could be used to prove his state of mind. Neither of these requires a character-propensity inference; in each, the probative value hinges on the nature of Defendant’s relationship to Victim.

Defendant may otherwise be the most peaceable of persons, but something about his relationship with Victim—perhaps jealousy, anger, or fear—impels him to act uncharacteristically toward Victim.

defendant faced three felony charges to establish motive for committing charged crime of obtaining fraudulent passport and fleeing abroad); United States v. Talley, 164 F.3d 989, 1000 (6th Cir. 1999) (upholding admission, in defendant’s trial for soliciting murder of informant and FBI agent, that informant had recorded defendant discussing crimes he had committed and provided this to FBI agent).

239. See, e.g., United States v. Berckmann, 971 F.3d 999, 1002 (9th Cir. 2020) (upholding admission of evidence of other assaults on victim as proof of defendant’s animosity toward her and intent to assault her); United States v. Williston, 862 F.3d 1023, 1034–36 (10th Cir. 2017) (holding admissible defendant’s previous violent acts against child-murder victim as establishing animosity toward victim, hence motive to kill); United States v. Howard, 692 F.3d 697, 702–06 (7th Cir. 2012) (holding that evidence of defendant’s alternating acts of assaults on ex-girlfriend and attempts to reconcile manifested defendant’s obsession with her tended to prove defendant committed charged solicitation of murder).

240. LEMPERT, GROSS, LIEBMAN, BLUME, LANDSMAN & LEDERER, supra note 144, at 366, dispute this, claiming that “there is little to distinguish” this reasoning “from the forbidden inference that defendant had a propensity to attack the victim.” But Lempert and his co-authors here use propensity in much too broad a sense, much as Professor Kuhns did. See supra note 612. Rule 404(b) prohibits an inference that a defendant acted violently toward a particular person because the defendant is generally a violent person. It does not prohibit an inference that a defendant acted violently toward a particular person because the defendant hates that person.

241. Cf. FED. R. EVID. 412(b)(2)(B) (creating exception to inadmissibility in sex-offense cases of victim’s prior sexual behavior for instances of sexual behavior towards defendant offered to prove consent; note that this exception does not require forbidden propensity-based inference about victim that lies at core of Rule 412).

242. See, e.g., THE SUSPECT (UNIVERSAL PICTURES 1944). People who unquestionably have a violent character may nevertheless act tenderly toward certain people. Marlon Brando’s Don Corleone, see THE GODFATHER (PARAMOUNT PICTURES 1972), and James Gandolfini’s Tony Soprano, see THE SOPRANOS (HBO), spring to mind.

243. Strangely, courts sometimes fail to realize that other acts directed at the same person may manifest a feeling toward that person and not require a propensity inference. In United States v. Henthorn, 864 F.3d 1241, 1255 (10th Cir. 2017), discussed infra text accompanying notes 551–65, the court could have easily held admissible defendant’s previous attempt to kill his victim as it tended to establish his animosity toward her. Cf. TEX. CODE CRIM. PROC. ANN. art. 38.37(b) (West 2019).
A much more problematic use of other-acts evidence to prove motive arises when the other acts tend to manifest a motive generally to commit a type of crime. Traditionally, this has arisen most frequently in child abuse cases. Many courts have admitted evidence that the defendant abused other children to show the defendant’s “depraved sexual instinct” or “lustful disposition.” Numerous critics have rightly observed that these courts were simply sanctioning character-propensity evidence. The defendant’s other acts showed that the defendant had a desire (motive) to act in a particular way. But the source of that desire (motive) arose solely from the defendant’s enduring make-up. That is exactly the type of character-propensity inference Rule 404(b) forbids. In response, the federal system and many states have addressed the issue more directly by enacting provisions that create express exceptions to the character-evidence rule in such cases. But in jurisdictions that have not codified such exceptions, courts still endorse the use of this type of evidence.

Subtler problems arise in connection with other uses of other-acts evidence to manifest motive. Judge Posner struggled with this issue in United States v. (providing that when defendant is tried for enumerated assaultive crimes against minors, evidence of defendant’s other assaultive acts against child-victim are admissible “[n]otwithstanding Rules 404 and 405”).

244. Leonard, Character and Motive, supra note 6, at 490–97; Bryden & Park, supra note 62, at 543–44; Office of Legal Policy, Report, supra note 2, at 723–24.


249. See Lannan v. State, 600 N.E.2d 1334, 1335 (Ind. 1992) (noting that approximately twenty states have judicially created such exceptions); see also United States v. Bartunek, 969 F.3d 860, 862–63 (8th Cir. 2020) (holding that evidence that defendant possessed photographs of four life-sized dolls —replicas of very young children and altered to include a rubber nodule that appeared to be a penis— was admissible to show defendant’s motive for possessing child pornography); United States v. Roux, 715 F.3d 1019, 1025 (7th Cir. 2013) (admitting, in defendant’s trial for coercing a minor to produce sexually explicit images, evidence defendant had sexually abused victim’s two sisters to prove defendant’s motive); United States v. Sebolt, 460 F.3d 910, 918 (7th Cir. 2006) (admitting, in defendant’s trial for child pornography crimes, evidence that defendant had sexually assaulted a young male to prove defendant’s motive). It is not clear why the government in Roux and Sebolt offered the evidence under Rule 404(b) and not under Rule 414. Both defendants were prosecuted under 18 U.S.C. § 2251, which falls within the definition of child molestation under Rule 414(d)(2)(B).
Cunningham. Cunningham, a nurse, stood trial for tampering with syringes that contained Demerol, a powerful painkiller. She was one of five nurses who had access to the locked cabinet in which the hospital stored the syringes. In some instances, the Demerol was replaced with a saline solution. The trial court allowed the jury to hear about Cunningham’s prior entanglement with Demerol. Four years before, she had been addicted to Demerol and stolen some from another hospital. Her nurse’s license was suspended, and when it was reinstated subject to her agreeing to undergo periodic drug testing, she falsified some of her drug test results. The Seventh Circuit held that the evidence was properly admitted. Judge Posner acknowledged that evidence of Cunningham’s previous theft of Demerol would violate Rule 404(b) if offered merely to prove she was likely to have again stolen Demerol. But he ruled that it was admissible for another purpose: to prove Cunningham’s motive to commit the crime. “Being a Demerol addict gave Cunningham a motive to tamper with the Demerol-filled syringes.” Posner, however, recognized the problematic nature of this proof and labored hard to distinguish what he called “propensity” evidence from “motive” evidence and to delineate when they did and did not “overlap.” Because Cunningham was addicted to consuming Demerol, not to stealing it, propensity and motive did not overlap here. He cited two cases to support this proposition—one in which the defendant’s heroin addiction was used to show his motive for a robbery, the other where the defendant’s sexual fetish supplied the motive for his stealing women’s underwear. Therefore, Posner found, Rule 404(b) did not bar the prosecution’s other-acts evidence. This is an unremarkable conclusion, particularly as it pertains to the use of addiction

250. 103 F.3d 553 (7th Cir. 1996).
251. Id. at 555.
252. Id.
253. Id.
254. Id. at 557.
255. Id. at 555.
256. Id. at 556. The court did not permit the jury to hear that Cunningham had been convicted of stealing the Demerol.
257. Id. at 557.
258. Id.
259. Id. at 556.
260. Id. at 557.
261. Id. at 556.
262. Id. at 556–57.
to show a financial motive to steal. Courts are quick to allow such evidence, with only a few dissenting.

But it is Posner’s dicta that pose more fundamental questions. Having decided that propensity and motive did not overlap here, he explored when they do:

[“Propensity” evidence and “motive” evidence] overlap when the crime is motivated by a taste for engaging in that crime or a compulsion to engage in it (an “addiction”), rather than by a desire for pecuniary gain or for some other advantage to which the crime is instrumental in the sense that it would not be committed if the advantage could be obtained as easily by a lawful route. Posner offers sex crimes as “a particularly clear example.” A person’s history as a child molester manifests the person’s “taste for sexually molesting children,” which provides the person’s motive for committing a particular act of child molestation. After noting that Rule 414 now authorizes admission of such evidence without regard to Rule 404(b), he added that the same analysis would apply to a “firebug”—someone “who commits arson not for insurance proceeds or revenge or to eliminate a competitor, but for the sheer joy of watching a fire.” In an arson trial, evidence that a defendant had set other fires would be admissible as motive evidence under Rule 404(b). It would show

---

265. See United States v. Madden, 38 F.3d 747, 751 (4th Cir. 1994) (agreeing with “obvious proposition” that drug use is probative to prove bank robbery); United States v. Kadouh, 768 F.2d 20, 21–22 (1st Cir. 1985) (treating cocaine addiction as character, but admissible to prove motive); United States v. LaFlam, 369 F.3d 153 (2d Cir. 2004); United States v. Miranda, 986 F.2d 1283, 1285 (9th Cir. 1993); United States v. Saniti, 604 F.2d 603 (9th Cir. 1979).

266. See State v. Mazowski, 766 A.2d 1176, 1180 (N.J. Super. Ct. App. Div. 2001). Some courts require an additional showing of a defendant’s financial need before admitting addiction-to-prove-motive evidence. E.g., Madden, 38 F.3d at 751–52; Leger v. Commonwealth, 400 S.W.3d 745, 751 (Ky. 2013). One commentator has recently argued that Posner’s reasoning ignores its underlying propensity-based assumption that addicts have a propensity to acquire drugs. Michael Davis, Note, Addiction, Criminalization, and Character Evidence, 96 Tex. L. Rev. 619, 633 (2018) (arguing that the “motive theory does not work without the defendant’s propensity to purchase narcotics, which is, of course, criminal”).

267. Cunningham, 103 F.3d at 556.

268. Id.

269. Id.

270. Id. Posner phrases his argument in terms of using the motive to enable law enforcement or factfinders to distinguish the child molester from another possible suspect. Id. While this may make this argument superficially more convincing, the Rule 404(b) question is not whether the evidence is probative, it is how it is probative. If its probative value flows only from a character-propensity inference, it is inadmissible under Rule 404(b).

271. Id.
she has a “taste” for setting fires, which would tend to prove she had a motive to commit the charged offense. Posner acknowledged that propensity and motive overlap here but only in the following way. Instead of using the other fire-setting evidence as proof of motive, the jury might use it as propensity evidence; that is, as the basis for inferring the defendant’s “habitual criminality.” This, said Posner, means that trial courts should be careful in admitting such other-acts evidence. But this, he pointed out, is a Rule 403, not a Rule 404(b), problem. In other words, trial courts should balance the probative value of the nonpropensity-motive inference against the danger that the jury would impermissibly use the evidence for a propensity-habitual-criminal inference.

The problem with this analysis is that the motive inference is pure propensity. A child molester has a “taste” for molesting children because that is what it means to be a child molester. A firebug has a “taste” for setting fires because that is what firebugs do. Taken to its logical conclusion, Posner’s nonpropensity-motive argument could be used to circumvent Rule 404(b) in all sorts of cases. In the trial of a serial killer for the death of one victim, the prosecution could offer evidence of other killings to show the defendant’s “taste” for killing. What else explains why someone would be a serial killer? Similarly, in a sexual assault case, the prosecution could offer evidence of other sexual assaults to show the defendant’s motive—say, his need to exert power over women—to commit this sexual assault.

Ever the good law-and-economist, Posner distinguishes the use of other crimes that are motivated by financial or other gain extrinsic to the desire simply to commit the crime. Therefore, in a shoplifting trial, the defendant’s previous shoplifting convictions could not be used to prove the defendant’s motive to shoplift. In Posner’s mind, people steal for financial reasons; “taste,” hence motive, is not implicated. But this betrays a rather limited view of human psychology. Recall the case of movie star Winona Ryder. In 2002, she was convicted of shoplifting more than $5,500 worth of designer goods from a Beverly Hills store. She clearly did not need the money, and this was not

272. Id.
273. Id. at 557.
274. See Baker, supra note 112, at 597–612 (discussing various motives for sexual assaults).
275. Professor Baker urges that courts do exactly this. Id. at 618–20.
277. According to her filmography on the IMDb website, at this point in her career Ryder was appearing in one or two feature films per year plus a smattering of television shows. Winona Ryder, Actress, IMDb, https://m.imdb.com/name/nm0000213/filmotype/actress/ref_=sm_nmf_1
her first shoplifting episode.  

Whatever the underlying psychological forces, Ryder seemed to have a “taste” for shoplifting. And she is not alone. Lots of criminals embark on thefts or robbery not simply for financial gain. There are, after all, lots of less risky ways of acquiring property. The thrill of committing the crime or the need to act out anti-authoritarian impulses may provide the dominant impulse. Extraordinarily wealthy people who commit white-collar financial crimes are likely acting out of more complicated motivations than simple pecuniary gain. They already have more money than they can possibly spend.

Posner’s nonpropensity argument for other-acts evidence that is used to show a defendant’s “taste” for committing, and thus motive to commit, the charged crime misses the mark. What it does, however, is demonstrate the need to define character. Is being an addict, arsonist, or compulsive shoplifter or suffering from Munchausen Syndrome By Proxy a character trait? If not, such evidence is admissible even though it requires a propensity inference; Rule 404 bars only character-propensity reasoning. If these are character traits, however, Posner’s analysis collapses.

[https://perma.cc/B85P-SAUD]. She had already been twice nominated for an Academy Award for Best Actress (Little Women (leading role) and Age of Innocence (supporting role)). Winona Ryder, Awards, IMDb, https://www.imdb.com/name/nm0000213/awards?ref_=nm_nmd_awd [perma.cc/QWE9-RWC7].


279. See Carlos Blanco, Jon Grant, Nancy M. Petry, H. Blair Simpson, Analucia Alegria, Shang-Min Liu & Deborah Hasin, Prevalence and Correlates of Shoplifting in the United States: Results From the National Epidemiologic Survey on Alcohol and Related Conditions (NESARC), 165 AM. J. PSYCH. 905 (2008) (noting that shoplifting is associated with substantial rates of comorbid disorders, psychosocial impairment, and mental health service use).


F. The Doctrine of Chances

Let’s return to the case of Felix Vail. To prove that Vail murdered his wife in 1962, the prosecution wanted to introduce evidence that two other women with whom Vail had been intimately involved had disappeared and presumably died at Vail’s hand. But these disappearances occurred in 1973 and 1984—eleven and twenty-two years after the charged crime. Therefore, the prosecution could not argue that they showed knowledge—that they somehow taught Vail how to kill a companion and get away with it—or that he had a plan back in 1962. And without any idea how Vail allegedly killed the other two women, the prosecution could hardly argue Vail had a signature method of committing these crimes. So, the prosecution seized on Vail’s claim that Mary Horton Vail’s death was an accident and argued the evidence was admissible to prove “absence of mistake or accident.” But the prosecution had to show how this did not involve a character-propensity inference: Vail killed two other women; therefore, he was a murderer; therefore, he killed his wife. To circumvent a propensity chain of inferences, the prosecution relied on the doctrine of chances.

The doctrine, which traces its origins to Wigmore’s early writing and the famous Brides in the Bath case, is enjoying a renaissance. Courts and many commentators tout it as a means of using other-acts evidence without requiring a propensity inference. The Reporter to the Advisory Committee on

---

282. Strangely, the prosecutor seemed to make this illogical argument in his closing statement. See supra text accompanying note 26.

283. State v. Vail, 150 So. 3d 576, 580 (La. Ct. App. 2014), cert. denied, 176 So. 3d 401 (La. 2015). Absence of mistake or accident is the last item in Louisiana’s nonexclusive list of other purposes for which other-acts evidence may be admitted. LA. CODE EVID. ANN. art. 404(B) (2020).

284. WIGMORE, supra note 5, §§ 242, 302.


286. A Westlaw search of all states and all federal cases databases with the terms “‘doctrine of chances’ /p Wigmore” produced 7 cases before 1950; 9 from 1950–1975; 50 from 1975–2000; and 75 from 2000 through December 15, 2020.


Evidence Rules\textsuperscript{289} and the Committee itself\textsuperscript{290} seem to agree. Wigmore explained the theory in an oft-cited passage:

> The argument here is purely from the point of view of the doctrine of chances,—the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all. . . . [T]he mind applies this rough and instinctive process of reasoning, namely, that an unusual and abnormal element might perhaps be present in one instance, but the oftener similar instances occur with similar results, the less likely is the abnormal element likely to be the true explanation of them.\textsuperscript{291}

Many years later, in \textit{United States v. York},\textsuperscript{292} the Seventh Circuit explained its use of the doctrine in more vivid terms. York owned a failing bar named the Just Friends Lounge.\textsuperscript{293} His partner, who lived in an apartment over the bar, died when two explosions rocked the bar.\textsuperscript{294} York’s attempt to collect on insurance policies he had taken out on the bar’s assets and his partner’s life ultimately led to criminal charges of attempted insurance fraud.\textsuperscript{295} Although the prosecution amassed substantial evidence of York’s guilt,\textsuperscript{296} it also offered

\begin{itemize}
\item \textsuperscript{289} Capra & Richter, \textit{supra} note 34, at 807–08.
\item \textsuperscript{290} The Advisory Committee was a bit enigmatic on the doctrine of chances in connection with its recent proposal to amend Rule 404(b). Explaining its decision to reject a proposal to require courts to find a nonpropensity chain of inferences before admitting other-acts evidence, the Committee wrote, “[A]n attempt to require the court to establish the probative value of a bad act by a chain of inferences that did not involve propensity would add substantial complexity, while ignoring that in some cases, a bad act is legitimately offered for a proper purpose but is nonetheless bound up with a propensity inference—an example would be use of the well-known ‘doctrine of chances’ to prove the unlikelihood that two unusual acts could have both been accidental.” Memorandum from Hon. Debra A Livingston to Hon. David G. Campbell, \textit{supra} note 40. One possible interpretation of this language is that the Committee means to endorse the doctrine of chances even though it involves a propensity inference. Another possibility is that the Committee believes that the doctrine generates a valid nonpropensity inference but that the jury is also likely to draw a propensity inference as well. Either way, it appears that the Committee approves of courts using the doctrine of chances.
\item \textsuperscript{291} Wigmore, \textit{supra} note 5, \S 302, at 390.
\item \textsuperscript{292} 933 F.2d 1343 (7th Cir. 1991).
\item \textsuperscript{293} \textit{Id.} at 1345.
\item \textsuperscript{294} \textit{Id.}
\item \textsuperscript{295} \textit{Id.} at 1345–47.
\item \textsuperscript{296} York had been heavily in debt when he procured the insurance and lied to his insurance agent. \textit{Id.} at 1345. His partner told others that they were planning to torch the building. \textit{Id.} at 1346. Although ordinarily open seven days a week, the bar was closed the night of the explosion, and the partner had sent her daughter away that night. \textit{Id.} The prosecution also produced ample evidence that arson was involved and of York’s post-event behavior, including attempts to tamper with his children’s testimony and a confession he made to a cellmate. \textit{Id.} at 1345–48.
\end{itemize}
evidence that York had murdered his wife three years before. Her decomposing body had been found in a creek, a bullet hole in her head. Two weeks before, she had informed York she was divorcing him. She had a life insurance policy, with a double-indemnity clause, and York was the beneficiary. He collected the proceeds, apparently without difficulty; he was not charged with killing his wife. York argued evidence of his wife’s death was inadmissible under Rule 404(b). Rejecting York’s claim, the Seventh Circuit explained:

The man who wins the lottery once is envied; the one who wins it twice is investigated. It is not every day that one’s wife is murdered; it is more uncommon still that the murder occurs after the wife says she wants a divorce; and more unusual still that the jilted husband collects on a life insurance policy with a double-indemnity provision. That the same individual should later collect on exactly the same sort of policy after the grisly death of a business partner who owed him money raises eyebrows; the odds of the same individual reaping the benefits, within the space of three years, of two grisly murders of people he had reason to be hostile toward seem incredibly low, certainly low enough to support an inference that the windfalls were the product of design rather than the vagaries of chance. This inference is purely objective, and has nothing to do with a subjective assessment of York’s character.

This explanation is hardly persuasive. To the contrary, it almost screams that propensity inferences are at work. If the insurance “windfalls were the product of design rather than the vagaries of chance,” whose evil design was it? Had the Seventh Circuit answered this obvious question, it would scarcely have been able to say that this had “nothing to do with a subjective assessment” of York’s character. Likewise, Wigmore’s analysis begs the question: Why do multiple instances of the same result eliminate the element of innocent intent? The

297. Id. at 1348.
298. Id. at 1347.
299. Id.
300. Id. at 1345–46. York may have tried to include a double-indemnity clause in the insurance on his partner’s life, but the evidence on this was ambiguous. Id.
301. Id. at 1346–47. The prosecution was able to muster a fair amount of evidence implicating York in his wife’s death. Id. at 1347–48.
302. Id. at 1349.
303. Id. at 1350 (citation omitted). Other courts use colorful language in attempting to explain how the doctrine of chances does not involve a propensity inference. See, e.g., De La Paz v. State, 279 S.W.3d 336, 348, (Tex. Crim. App. 2009) (“As Auric Goldfinger, the infamous James Bond villain, said, ‘Once is happenstance. Twice is coincidence. The third time it’s enemy action.’”).
answer should be clear—because the common thread running through these
multiple instances is a malevolent actor.  

At least Wigmore promoted the doctrine of chances only as a means of
demonstrating a defendant’s state of mind. Courts, however, have frequently
allowed prosecutors to use it to prove a defendant did the charged act. Probably the most dramatic example of this is United States v. Woods. Woods was charged with murdering her infant, foster son Paul. He died after suffering a series of cyanotic episodes while in the defendant's care. The prosecution’s forensic pathologist testified that he was 75% certain that Paul had been smothered. He conceded, however, that there was a 25% chance that Paul died from natural causes. Left unsupplemented, this testimony would have inevitably led to a judgment of acquittal. But the prosecution had more evidence. It proved that over twenty-four years, nine children (including Paul) whom Woods had custody of or access to had suffered at least twenty cyanotic episodes. Like Paul, six of the other children died. This was more than sufficient to convince the jury, and the Fourth Circuit affirmed. The court’s

304. Bloom, supra note 1, at 1144.
305. See, e.g., State v. Vail, 150 So. 3d 576, 586 (La. App. 2014), cert. denied, 176 So. 3d 401 (La. 2015) (to prove murder); People v. Mardlin, 790 N.W.2d 607, 610–19 (Mich. 2010) (to prove arson); State v. Verde, 296 P.3d 673, 685–86 (Utah 2012) (to prove sexual assault). In his most recent article promoting the doctrine of chances, Professor Imwinkelried curiously contends that it was used by prosecutors in Bill Cosby’s sexual assault prosecution to prove “identity.” Edward J. Imwinkelried, The Evidentiary Issue Crystalized By the Cosby and Weinstein Scandals: The Propriety of Admitting Testimony About An Accused’s Uncharged Misconduct Under the Doctrine of Objective Chances to Prove Identity, 48 SW. L. REV. 1, 6 (2019) [hereinafter Imwinkelried, Cosby and Weinstein]. But identity was not an issue in that prosecution. Cosby did not deny that he had sex with his accuser. His defense was that it was consensual. The prosecution sought admission of its other-acts evidence “to demonstrate a common scheme, plan, or design” and “absence of mistake or accident.” Commonwealth’s Motion to Introduce Evidence of 19 Prior Bad Acts of Defendant at 2–3, Commonwealth v. Cosby, No. CP-46-CR-0003932-2016, 2018 WL 1626647 (Pa. Commw. Ct. Jan. 18, 2018). The prosecution also claimed the evidence was admissible under the doctrine of chances “to negate the presence of any non-criminal intent and, concomitantly, to establish an absence of mistake.” Id. at 3.
306. 484 F.2d 127 (4th Cir. 1973). A child suffering a cyanotic episode turns blue, principally around the lips, from lack of oxygen. Id. at 129.
307. Id. at 130.
308. Id.
309. Id. Three were Woods’s natural-born children; two were adopted children; one was a niece, one a nephew; and two were the children of friends. Id.
310. Id. at 130–32.
311. Perhaps surprisingly, the jury’s deliberations took two days. VINCENT DI MAIO & RON FRANSCHELL, MORGUE: A LIFE IN DEATH 81 (2016). This may have been because the prosecution offered “no real evidence of any motive.” Woods, 484 F.2d at 132. Vincent DiMaio, the forensic
opinion, while not expressly referring to the “doctrine of chances,” relied on the Brides in the Bath case and used language echoing Wigmore’s:

[W]e think that the evidence would prove that a crime had been committed because of the remoteness of the possibility that so many infants in the care and custody of defendant would suffer cyanotic episodes and respiratory difficulties if they were not induced by the defendant’s wrongdoing, and at the same time, would prove the identity of defendant as the wrongdoer.312

But as powerful as this other-acts evidence may have been, its use required a propensity inference.313

For nearly thirty years, Professor Edward Imwinkelried has been the most stalwart proponent of the doctrine of chances. In a series of articles314 and his well-known treatise,315 he has vigorously urged that the doctrine of chances can be deployed without requiring a propensity inference. Imwinkelried sketches two possible chains of inferences—one involving propensity, the other not—that might lead from the other-acts evidence to the defendant’s guilt. From the defendant’s other acts, the jury might draw an inference about the defendant’s “personal, subjective bad character” from which it might then infer that the defendant acted in accordance with that bad character and committed the charged offense.316 This is the forbidden character-propensity inference. But, Imwinkelried says, if a defendant “has been involved in such incidents more frequently than the typical, innocent person,”317 the jury may draw a

---

312. Woods, 484 F.2d at 135.
313. Such other-acts evidence, however, may sometimes be misleading. See A Fish Called Wanda (Metro-Goldwyn-Mayer 1988), in which a dog-loving would-be murderer, to his horror, unintentionally kills three small dogs in his successive attempts to kill the dogs’ owner.
316. Imwinkelried, Cosby and Weinstein, supra note 305, at 11; Imwinkelried, Need to Refine, supra note 314, at 859.
317. Imwinkelried, Need to Refine, supra note 314, at 863.
From the other acts, the jury may infer “the objective improbability of so many accidents befalling the defendant or the defendant becoming innocently enmeshed in suspicious circumstances so frequently.” From this, the jury may infer that “one or some” of the incidents were not accidents.

The clue that Imwinkelried is glossing over the propensity inference lies in this statement of what the jury may infer from the other-acts evidence. Juries are not asked to determine whether the defendant is guilty with regard to “one or some” of the incidents. They are asked to decide whether the defendant committed the charged offense. A major underpinning of the character-evidence rule is the fear that jurors will convict a defendant for what she has done in the past rather than what she is presently charged with. Imwinkelried’s formulation invites jurors to do just that.

More fundamentally, Imwinkelried conflates two different questions. The first is whether the repeated occurrence of similar other acts can give rise—without propensity reasoning—to an inference that the other acts were not all accidents. The second question is quite different: whether the repeated other acts tend to prove—without propensity reasoning—that the defendant committed the charged offense. The answer to the first question is yes; the second, no. For example, a jury could conclude, without propensity reasoning,

318. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, supra note 24, § 5:28; Imwinkelried, Evidentiary Paradox, supra note 314, at 438.
320. Imwinkelried, Evidentiary Paradox, supra note 314, at 437; Imwinkelried, Need to Refine, supra note 314, at 865; Imwinkelried, Cosby and Weinstein, supra note 305, at 12 (“[O]ne or some of the events involve an actus reus and criminal agency.”).
321. See infra Part IV.B.
322. To be fair, Imwinkelried is not the original source of the “one or some” language. The Brides in the Bath court used that exact language. R. v. Smith [1915] 11 Cr. App. R. 229, 84 L.J.K.B. 2153.
323. Imwinkelried has proposed jury instructions to reduce the danger that a jury would indulge in impermissible character-propensity reasoning, but these highlight, rather than alleviate, the problem. He poses a hypothetical case in which a police officer stops the defendant’s car and finds cocaine in the trunk. Imwinkelried, Need to Refine, supra note 314, at 876–78. The defendant denies knowing cocaine was there. Id. at 876. In the defendant’s trial for possession of the cocaine, the prosecution then offers evidence that the same thing happened a year before. Id. at 877. Imwinkelried’s proposed instruction has the judge telling jurors that they should use their common sense and decide whether it is likely that this “would happen to an innocent person twice.” Id. at 878. If not, the instruction continues, the jurors “may conclude that on one or both of those occasions the defendant had the intent to possess the cocaine.” Id. (emphasis added).
that at least some of the seventeen\textsuperscript{324} cyanotic episodes suffered by the eight children (other than the infant Paul) in Woods’s care were not natural occurrences. But this other-acts evidence is being offered to prove that Woods murdered Paul, and the propensity inference is apparent. The defendant murdered at least some of the other children, and so she murdered Paul. Imwinkelried’s efforts to circumvent this inference are a bit hazy. Although he claims to have “largely rebutted” arguments that the doctrine of chances involves propensity reasoning,\textsuperscript{325} he actually has responded only to a flaw in one critic’s arguments.\textsuperscript{326} Professor Sean Sullivan has put the best gloss on Imwinkelried’s argument. Admitting evidence of the other acts allows the jury to reason that it is objectively implausible that all the cyanotic episodes and deaths were accidental. If it is unlikely that all were accidental, then it is more likely that Woods is responsible for one or more of them. And that makes it more likely that she is responsible for Paul’s cyanotic episode and death.\textsuperscript{327}

The problem is that the other acts tend to prove Woods’s guilt only if Woods actually is responsible for at least some of the other cyanotic episodes and deaths. Suppose it turned out that all the other cyanotic episodes and deaths actually resulted from natural causes. How would the fact that Woods had been extremely unlucky tend to prove that she murdered Paul?\textsuperscript{328}

\textsuperscript{324} The alleged murder victim, Paul, suffered three of the twenty total cyanotic episodes mentioned by the Woods court. \textit{Woods}, 484 F.2d at 129.


\textsuperscript{326} In support of this rebuttal claim, Imwinkelried cites to one of his earlier articles. \textit{Id.} at 12 n.78. In the earlier article, Imwinkelried, \textit{Evidentiary Paradox}, supra note 314, at 443–48, he criticized Professor Morris’s claim that the doctrine of chances assumes that if at least one of the other acts is intentional, all must be intentional. Morris, \textit{supra} note 5, at 201–02. Imwinkelried is right and Morris is wrong about this. The doctrine of chances would still work, for example, if one of the seventeen cyanotic episodes in \textit{Woods} had been the result of natural causes. It just means that the factfinder would be inferring Woods’s guilt from evidence that she caused only sixteen other cyanotic episodes. That still involves a propensity inference. Imwinkelried also argues that this propensity inference posits “an intermediate inference of the accused’s constant, unchanged bad character” that is inconsistent with the idea of free will. Imwinkelried, \textit{Need to Refine}, supra note 314, at 868. But that is a straw-man argument. No critic of the doctrine of chances denies the notion of free will or contends that a person of bad character always acts badly. Woods may have been occasionally—or even frequently—quite sweet to her children.

\textsuperscript{327} See Sullivan, \textit{supra} note 164, at 34. Professor Sullivan also seems to find Imwinkelried’s analysis a bit obscure. \textit{Id.} (noting that Imwinkelried’s reasoning “appears to be as follows”).

\textsuperscript{328} In 1999, British solicitor Sally Clark was convicted of murdering her two children. \textit{Gene Find Casts Doubt on Double “Cot Death” Murders}, \textit{GUARDIAN} (July 15, 2001, 6:45 PM), https://www.theguardian.com/uk/2001/jul/15/johnsweeney.theobserver [https://perma.cc/WA4H-BGEJ]. One died at eleven weeks of age; the other, at eight weeks. \textit{Id.} She insisted that both children died naturally. \textit{Id.} The Crown called an eminent British pediatrician to testify that the odds of a child suffering an innocent “cot death” was 1/8,543. \textit{Id.} The odds of two consecutive cot deaths, he testified,
Imwinkelried, it is “the objective improbability of so many accidents befalling the defendant” that gives rise to what he says is the objective, nonpropensity inference of defendant’s guilt. If she was unlucky so many times before, she must be guilty this time. But that’s absurd. It is like saying that if someone, using a pair of good, unloaded dice, rolled six consecutive sevens—a $1/46,656$ likelihood—it would be highly likely that he would roll a seven on the next toss.

Unfortunately, the widespread acceptance of the doctrine of chances means that courts are applying it in ever more tenuous situations. Consider a recent habeas case, Miller v. Baldwin. The defendant had been convicted in a single trial of murdering his two wives five years apart. Like the women in Felix Vail’s life, Miller’s wives had disappeared “under similarly suspicious circumstances.” Miller claimed that the two murder charges were improperly joined. The trial court had agreed to join them only after determining that, because of the doctrine of chances, if the cases were tried separately, evidence of the first wife’s disappearance would be admissible in defendant’s trial for murdering the second, and vice versa. The Ninth Circuit approved:

> It is a permissible inference, referred to as the “doctrine of chances,” to consider two otherwise independent events that, taken together, are unlikely to be coincidental. That differs from the inference covered by the character evidence rule, which prohibits inferring a defendant’s guilt based on an evil character trait.

Two years later, Manchester University researchers discovered a gene linked to cot death. Id. Two years later, Manchester University researchers discovered a gene linked to cot death. Id. Clark’s conviction was subsequently overturned. Clare Dyer, Sally Clark Freed After Appeal Court Quashes Her Convictions, 326 BRIT. MED. J. 304 (Feb. 8, 2003), https://www.bmj.com/content/bmj/326/7384/304.1.full.pdf?casa_token=Jrs1jaYrd90AAAAA:rsFXZ4jz6iwXni1cywJzSeHjfxoSrSnilkKijUDg2BGxeUuT3S5LR1d5YdQ4xQNgWdpUTU8EZ0y [https://perma.cc/J94W-5DRG].

329. See Sullivan, supra note 164, at 41.

330. The odds of rolling a seven are 1/6. The odds of rolling six consecutive sevens are $(1/6)^6$. If the dice are good, the odds of rolling a seven on the next toss are 1/6.


332. Id. at 409. Although the Ninth Circuit does not describe the similarities, the district court opinion does. Miller v. Baldwin, No. 3:96-cv-00114-CL, 2016 WL 3951394 (D. Or. Apr. 7, 2016). The details are reminiscent of Felix Vail and his missing companions.

333. Miller, 723 F. App’x at 410.

334. Id. (citation omitted).
Note the recursive nature of this reasoning. The jury is being asked to infer that the uncharged disappearance of Wife A is a murder from the fact of the charged disappearance of Wife B. Having done this, the jury can now infer that Wife B’s disappearance was a murder. But if the defendant did not murder Wife A, her disappearance would not tend to prove that he murdered Wife B. In other words, the charged offense is being used to prove that the uncharged act is a crime so it can then be used to prove the defendant is guilty of the charged offense.

G. Conclusion

It should be clear that courts frequently admit other-acts evidence even when its probative value flows solely from a propensity inference, and often from a character-propensity inference. To be fair, in recent years a few courts of appeals—notably the Third, Fourth, and Seventh Circuits—have criticized this and sought to rein in the practice. But these circuits still fall outside the mainstream, and even they are not always consistent in recognizing when a character-propensity inference is at work.

335. Imwinkelried’s proposed jury instruction suffers from the same defect. See supra note 323.

336. This illustrates a related issue that crops up in many character-evidence-rule cases. The threshold level of proof for getting other-acts evidence before the jury is quite low. The Supreme Court has ruled that this is a conditional relevancy problem. Under Rule 104(b), that means the prosecution need only sufficient evidence from which a reasonable juror could find that the defendant did the other act. Huddleston v. United States, 485 U.S. 681, 689–90 (1988). Many states use a similarly low threshold standard. See 22B GRAHAM, supra note 34, at § 5257 (collecting state tests). Ironically, Louisiana departs from the norm and requires the prosecution to present clear and convincing evidence that the defendant committed the other acts. State v. Vail, 150 So.3d 576, 589 (La. App. 2014), cert. denied, 176 So. 3d 401 (La. 2015). The Vail court acknowledged the paucity of evidence that Vail killed the other two women, but perversely concluded that this supported the trial court’s decision to admit the evidence. Id. “Defendant’s apparent lack of direct culpability weighs in favor of admission because it minimizes impermissible negative inferences about his character.” Id.


339. See United States v. Gomez, 763 F.3d 845, 853–60 (7th Cir. 2014); United States v. Miller, 673 F.3d 688, 696 (7th Cir. 2012).

340. See generally Capra & Richter, supra note 34, at 787–96.

341. See, e.g., United States v. Garner, 961 F.3d 264, 273–74 (3d Cir. 2020) (upholding admission of 2007 conviction for sale of cocaine on street corner to prove that in 2016 defendant knew how to package, price, and purchase cocaine); United States v. Morgan, 929 F.3d 411, 427–29 (7th Cir. 2019) (upholding, in prosecution in which defendant conceded possession of methamphetamine but denied he intended to distribute it, admission that he distributed methamphetamine on other occasions; court simply asserts that this evidence “was clearly relevant for the non-propensity purpose of proving the required intent”); United States v. Torrez, 869 F.3d 291, 301–02 (4th Cir. 2017).
Rule 404(b) do not address the underlying causes that drive courts to sidestep Rule 404(b)’s command. Change can only be accomplished by confronting them. The first step is to come to an understanding of what character means. Any such understanding, however, first requires a brief examination of why we have the character-evidence rule.

IV. WHY CHARACTER EVIDENCE HAS TRADITIONALLY BEEN EXCLUDED

The character-evidence rule has long been rooted in the notion that the unfair prejudice associated with character evidence categorically outweighs its probative value. Like almost everything else associated with the character-evidence rule, nearly every proffered proposition is controversial.

A. The Probative Value of Character Evidence

Although most people frequently rely on character evidence in their daily life, a rich debate has long persisted about its probative value. Some commentators contend that character evidence is irrelevant to proving a person’s conduct; others claim it can be highly probative. To some extent, this disparity reflects the type of character evidence on which the author primarily focuses. Those who disparage character evidence tend to focus on

342. Some commentators have put forward other rationales for the character evidence rule. Professor Leonard posed a cathartic theory to explain why evidence law disregards psychological research that, in Leonard’s view, had undermined the validity of character evidence. David P. Leonard, The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence, 58 U. COLO. L. REV. 1 (1986–87). He argued that trials have an important cultural meaning and constitute a “social (even moral) drama calculated to reach acceptable conclusions” and that this requires jurors to hear evidence that they intuitively believe is valid. Id. at 41; see also Andrew E. Taslitz, Myself Alone: Individualizing Justice Through Psychological Character Evidence, 52 MD. L. REV. 1, 60–63 (1993) (endorsing cathartic function); cf. D. GRAHAM BURNETT, A TRIAL BY JURY 70–71, 175–76 (2001) (expressing frustration as juror at inability to hear evidence about defendant’s and victim’s background and describing reaction upon learning after trial about victim’s past act).

343. E.g., 22A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5239, at 261 (2012) (“The basic reason for the inadmissibility of evidence of other crimes, wrongs, or acts is that such evidence is irrelevant to prove the conduct in question.”); Leonard, supra note 342, at 31 (“[T]he rules governing the use of character evidence to prove conduct often allow the admission of evidence which fails the test of logical relevancy.”).

character at the most general level—for example, whether the person in question has an untruthful, violent, or careless disposition. Those who defend character evidence’s probative value are more likely to be thinking of specific acts that bear at least a moderate degree of similarity to the charged crime.

Typical of the former group are scholars who seized on a mid-twentieth century attack by some personality and social psychologists on character-trait theory. These psychologists rejected the then-prevailing wisdom that individuals possess character traits that lead them to behave consistently in diverse situations: that honest people, for example, will tend to behave honestly in a wide variety of circumstances. Spurred by studies that showed inconsistency in individuals’ cross-situational behavior, they argued that human behavior was situationally driven. Whether someone tells the truth is determined by circumstances, not by some character trait. Before too long, however, most psychologists—including the leading proponent of “situationism”—retreated from this rather extreme view to a more nuanced position, often referred to as interactionism. Human behavior in a given situation is determined by both a person’s innate characteristics and the

345. But see David A. Sonenshein, The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts, 45 CREIGHTON L. REV. 215, 254 (2011) (“Social science has now reached a consensus generally rejecting the logical relevance of offering prior similar acts to show that the defendant has the propensity to commit a criminal act or possesses the intent to do so.”).

346. Gordon Allport was the leading exponent of this theory. See GORDON W. ALLPORT, PERSONALITY—A PSYCHOLOGICAL INTERPRETATION (1937); Gordon W. Allport, Traits Revisited, 21 AM. PSYCH. 1 (1966); Leonard, supra note 342, at 26.

347. See, e.g., WALTER MISCHEL, PERSONALITY AND ASSESSMENT (1968); see also DONALD R. PETERSON, THE CLINICAL STUDY OF SOCIAL BEHAVIOR (1968); Kenneth S. Bowers, Situationism in Psychology: An Analysis and a Critique, 80 PSYCH. REV. 307, 308 (1973) (“The situationist assault on traits has by and large been quite successful.”).

348. A character in the movie Chinatown provides a ringing endorsement of situationism. Noah Cross, played by John Huston, justifies his incestuous relationship with his daughter to private detective Jake Gittes, played by Jack Nicholson: “I don’t blame myself. You see, Mr. Gittes, most people never have to face the fact that at the right time and the right place, they’re capable of ANYTHING.” CHINATOWN (PARAMOUNT PICTURES 1974), https://www.imdb.com/title/tt0071315/characters/nm0001379 [https://perma.cc/D8QW-D75N].


particulars of the situation. Under this view, one could predict a person’s response in a given situation, but only by knowing how that person had reacted in enough similar situations. For a group of legal scholars, these attacks on traditional character-trait theory demonstrated the futility of relying on character evidence. As one commentator put it, “[T]he theory of behavior that was so compatible with the law’s notions about character has ceased to have any scientific recognition.”

A strong pushback came from scholars who focused less on character-trait theory generally and more on whether other-acts evidence typically used in litigation had probative value. In an influential article, Susan Marlene Davies argued that past behavior may be highly probative of a defendant’s behavior in similar circumstances. Professor Roger Park, the most analytically rigorous of the commentators on the character-evidence rule, more thoroughly challenged the relevance to criminal trials of the personality and social psychologists’ attacks on character-trait theory. He argued that, when joined with evidence specific to the alleged crime that already points to a defendant’s guilt, proof that a defendant had engaged in a similar-type of low-base-rate conduct (such as murder) may be highly incriminating. Buttressing his arguments with references to recidivism data and other studies, he convincingly demonstrated that claims that character evidence was categorically unreliable

351. Wilson, supra note 350.


353. The traits typically studied by personality psychologists are far removed from the kind of evidence Rule 404(b) governs. See SAKS & SPELLMAN, supra note 60, at 151 (listing types of personality traits studied); John M. Digman, Personality Structure: Emergence of the Five-Factor Model, 41 ANN. REV. PSYCH. 417 (1990) (tracing history of development of five-factor personality model, which consists of extraversion, neuroticism, agreeableness, conscientiousness, and intellect, or some variant of each).

354. Davies, supra note 31, at 533; see Sanchirico, supra note 31, at 1240 n.29 (noting importance of Davies’s article).

355. Park, Character at the Crossroads, supra note 3, at 728–38.

356. Id. at 721–28.
were wildly exaggerated. The appropriate question for gauging the probative value of other-acts evidence is not whether it is accurate in predicting whether someone will again engage in similar behavior at some indeterminate time. It is whether—when viewed in the context of other evidence already pointing toward a defendant’s guilt—a defendant who has committed the other act is more likely to be guilty than if he had not committed the other act.

But establishing that some other-acts evidence may have substantial probative value does not resolve the admissibility question. Some other-acts evidence may have little probative value. More important, Rule 404(b) is based on a judgment about the balance between probative value and unfair prejudice of this type of evidence in the long run of cases. And every commentator concedes that this type of evidence poses the risk of unfair prejudice. How extensive this risk is, however, is much debated.

B. The Risk of Unfair Prejudice

Some prominent commentators still contend that the introduction of other-acts evidence against an accused almost invariably sounds a death knell for the defense. These claims are hyperbolic and can be refuted both anecdotally

---

357. *Id.* at 725–28. Park also argued that certain character traits, such as violence, may be more stable and, therefore, more probative than others. *Id.* at 735–36; see also Sanchirico, *supra* note 31, at 1241.


359. See Redmayne, *supra* note 344, at 692 (distinguishing between using character for predictive and historical purposes).

360. See Fed. R. Evid. 401(a) (defining relevance in terms of whether it “has any tendency to make a fact more or less probable than it would be without the evidence”); George F. James, *Relevancy, Probability and the Law,* 29 CAL. L. REV. 689, 699 (1941).

361. 1 IMWINKLREF, UNCHARGED MISCONDUCT EVIDENCE, *supra* note 24, § 1:2; Capra & Richter, *supra* note 34, at 772.

362. A dramatic example involves the 2003 murder trial in Galveston, Texas, of New York millionaire Robert Durst. The jury acquitted Durst of murder even though it learned that he had been posing in Galveston as a mute woman out of fear he was going to be indicted for murdering his wife in New York. See Gary Cartwright, The Verdict, Tex. Monthly (Feb. 2004), https://www.texasmonthly.com/articles/the-verdict-5/ [https://perma.cc/468R-HW9P]. Durst was later the subject of the HBO documentary *The Jinx: The Life and Deaths of Robert Durst,* which includes extensive coverage of this trial. *The Jinx: The Life and Deaths of Robert Durst* (HBO series
and systematically. Data from a study of 358 criminal trials in four jurisdictions from 2000 to 2001 showed that about 20% of defendants whose prior convictions were admitted into evidence were acquitted. This approximated the acquittal rate for defendants whose prior convictions were not admitted. Kalven and Zeisel’s classic study of the American jury showed that, in the great majority of cases in which a defendant’s prior record was elicited, jurors were no more likely to reach a guilty verdict than the presiding judge. This result has been replicated in two studies. Therefore, the introduction of other acts evidence certainly does not sound like an inevitable death knell for a defendant. But for several reasons it may still create a risk of unfair prejudice and result in too high a rate of conviction.

i. The Danger of Overestimation—Cognitive Error and the Like

Every commentator acknowledges the possibility that jurors may overvalue character evidence—that jurors will think the evidence is more probative than

---


365. Id. at 504. We should, however, hesitate to draw too much from this data. The data tells us nothing about the relative strength of the cases against the defendants in this study who had prior records and chose to go to trial as opposed to those without prior records who chose to go to trial. Moreover, the data indicates whether a defendant’s prior conviction was admitted, but not whether other acts evidence not involving a conviction was offered against a defendant. Laudan and Allen’s explanation for the similar conviction rates for defendants whose prior convictions were and were not admitted is unconvincing. They contend that jurors are somehow able to divine when a defendant has a prior conviction even when they are presented no such evidence. Id. at 522.

366. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 179, 215–18 (1966); Joseph L. Gastwirth & Michael D. Sinclair, A Re-examination of the 1966 Kalven-Zeisel Study of Judge-Jury Agreements and Disagreements and Their Causes, 3 LAW, PROBABILITY & RISK 169, 174–75 (2004). Of course, this may just mean that judges are as likely as jurors to be unfairly prejudiced by this type of evidence. This is a real possibility. See infra note 374.

it actually is. Scholars commonly invoke cognitive errors such as fundamental attribution error to support this claim. According to this view, people suffer from dispositional bias. They tend to overestimate the extent to which character traits cause people to act and undervalue the role of situational influences. Overvaluation of character evidence may also result from jurors employing a story-telling model, rather than Bayesian reasoning, to reach their verdicts. Jurors may well find it easier to fit evidence of a defendant’s other wrong-doing into a story of guilt than into one of innocence. Moreover, social psychologists contend that “motivated inculpation”—the inclination to punish people with bad character—further influences the way jurors judge evidence. Critics contend, however, that the link between people with bad character and the Psychology of Blame[

368. See, e.g., 1 Imwinkelried, UNCHARGED MISCONDUCT EVIDENCE, supra note 24, § 1:3; Leonard, The New Wigmore, supra note 37, § 1:2; Mueller & Kirkpatrick, supra note 34, § 4:30.


prey to a variety of cognitive errors buttress the case for taking seriously the case that real jurors overvalue other-acts evidence.374

ii. The Danger of Overestimation—Round Up the Usual Suspects

Virtually every writer agrees that some police practices provide another avenue that may lead jurors to place too much weight on other-acts evidence. Innocent people with criminal records are more likely to become suspects in an unsolved crime than those with an unblemished past. Confronted with a burglary in one part of town, police may quite naturally suspect someone they know has committed other burglaries in that part of town and seek to build a case against that person.375 A prior criminal record may also lead to a misidentification of the perpetrator. Crime victims often initially identify their assailants by looking at a photo array. These photo arrays are typically drawn from mug shots; that is, from pictures taken of people who have previously been arrested and booked. Moreover, the police may select for the photo array mug shots of those suspected or convicted of a crime similar to the one now being investigated376—the usual suspects.377 Given the high rate at which victims erroneously select the wrong person from photo arrays, a good number of innocent people wind up being tried simply because they had previously engaged in similar conduct.378 Yet jurors are unlikely to know that in such cases the defendant’s past conduct—rather than supplementing other proof of the defendant’s guilt—is in fact the reason the defendant was erroneously charged. This means the jurors are likely to overestimate the probative value of the other-acts evidence.379


375. LEMPERT, GROSS, LIEBMAN, BLUME, LANDSMAN & LEDERER, supra note 144, at 353; Park, Character at the Crossroads, supra note 3, at 772.

376. LEMPERT, GROSS, LIEBMAN, BLUME, LANDSMAN & LEDERER, supra note 144, at 353.

377. Hence the term “round up the usual suspects,” which is frequently invoked in the literature. E.g., DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 17–20 (2012); LEMPERT, GROSS, LIEBMAN, BLUME, LANDSMAN & LEDERER, supra note 144, at 353; Park, Character at the Crossroads, supra note 3, at 749; Baker, supra note 112, at 581; Rothstein, supra note 288, at 1263. The term is an homage to the closing scene of the classic film Casablanca.

378. See infra note 409.

379. This adverse effect is likely exacerbated for racial minorities. See Am. Bar Ass’n, Policy 104D: Cross-Racial Identification, 37 Sw. L. REV. 917 (2008).
iii. Nullification

Apart from the danger that jurors will overvalue the evidence is the risk that hearing a defendant has committed other bad acts will incline jurors to convict even if the evidence fails to establish guilt on the charged crime. This may be a conscious decision by jurors. Wigmore wrote of the “deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught.”380 Additionally, a more subtle process may be at work. Knowledge of a defendant’s past wrongdoing may make jurors more prone to convict because it leads them to undervalue the cost of an erroneous conviction and so, even on an unconscious level, effectively lower the burden of proof standard.381 This nullification concern has been widely cited to justify the character-evidence rule382 and, for some, is the most cogent justification for the rule.383

C. Unfair Surprise and Waste of Time

Concerns of unfair surprise and judicial inefficiency have regularly been offered to support the character-evidence rule. Particularly in the era before notice requirements,384 but even afterwards,385 commentators have argued that it is unfair to expect a defendant to be able to anticipate and defend against charges of misconduct extrinsic to the charged crime. Some have also claimed that allowing such evidence would waste time and tend to confuse the issues.386 But these claims cannot remotely justify the categorical exclusion of character evidence. Unfair surprise can easily be addressed with adequate discovery and

380. WIGMORE, supra note 5, § 57. Wigmore also notes that jurors might convict solely because they believe the defendant managed to escape previous wrongdoing without punishment. Id. § 194.
381. LEMPERT, GROSS, LIEBMAN, BLUME, LANDSMAN & LEDERER, supra note 144, at 349–50; LAW COMMISSION CONSULTATION PAPER No. 141, CRIMINAL LAW, EVIDENCE IN CRIMINAL PROCEEDINGS: PREVIOUS MISCONDUCT OF A DEFENDANT 126 (1996).
382. E.g., IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, supra note 24, § 1:3; Davies, supra note 31, at 525; Leonard, In Defense, supra note 65, at 1184; see Michelson v. United States, 335 U.S. 469, 476 (1948) (noting that character evidence is ordinarily inadmissible because “it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record”).
383. E.g., Bryden & Park, supra note 62, at 565; Park, Character at the Crossroads, supra note 3, at 745.
385. E.g., MUELLER & KIRKPATRICK, supra note 34, § 4:22; Bryden & Park, supra note 62, at 565; Leonard, In Defense, supra note 65, at 1185–86.
notice requirements. Concerns that court time will be frittered away proving a defendant’s prior misdeeds carry little weight with regard to prior convictions, which can expeditiously be established through the record of conviction. More to the point, these arguments depend on underlying concerns about character evidence’s lack of probative value. If the evidence is strong enough, no one would say that it is inefficient to admit it. Indeed, Rule 404(b) authorizes the use of other-acts evidence when it is offered for a noncharacter-propensity purpose.

D. What Empirical Studies Tell Us

Over the past half-century, researchers have conducted numerous studies using mock jurors to study the impact of other-acts evidence. Unfortunately, they are not terribly helpful in guiding how the law of evidence should address other-acts evidence. Problems with these studies—at least in terms of their pertinence to law reform—are well documented. The mock jurors rarely are demographically representative of the jury population. They are typically given a barebones set of facts that are often designed more to produce interesting results for the researchers than to mirror what goes on in a

388. Sanchirico, supra note 31, at 1249; OFFICE OF LEGAL POLICY, REPORT, supra note 2, at 729–30; see FED. R. EVID. 803(22).
389. Studies that attempt to assess how mock jurors use convictions offered as impeachment evidence are more useful. The point of these studies is simply to determine whether mock jurors impermissibly use the evidence for substantive purposes and not just for their bearing on the witness’s credibility. See, e.g., Roselle L. Wissler & Michael J. Saks, On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt, 9 LAW & HUM. BEHAV. 37 (1985).
390. See, e.g., Sarah Tanford & Michele Cox, The Effects of Impeachment Evidence and Limiting Instructions on Individual and Group Decision Making, 12 LAW & HUM. BEHAV. 477, 480 (1988) (noting use of students as mock jurors). More recent online efforts reach beyond students but still appear to produce an unrepresentative group of participants. The participants in one recent study, see Sevier, supra note 5, at 466–67, are vastly more educated and liberal than the average adult. More than 90% of the participants in that study had at least some college education; nearly 60% were college graduates; and 47% self-identified as liberal (or very liberal). Id. In comparison, the national figures are 60% of all adults have at least some college education; only 32% are college graduates; and only 24% self-identify as liberal. U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2018 tbl. 1 (Feb. 21, 2019), https://www.census.gov/data/tables/2018/demo/education-attainment/cps-detailed-tables.html [https://perma.cc/95BK-NK5T]; Lydia Saad, The U.S. Remained Center-Right, Ideologically, in 2019, GALLUP (Jan. 9, 2020), https://news.gallup.com/poll/275792/remaining-center-right-ideologically-2019.aspx [https://perma.cc/SB8U-DKNQ]; cf. Robert J. MacCoun, Experimental Research on Jury Decision-Making, 30 JURIMETRICS J. 223, 224 (1990) (noting that “different studies have found mock jurors’ verdicts to be more lenient, less lenient, and no different from those of ‘actual’ jurors”).
Mock jurors do not deliberate in a way that captures how real jurors render verdicts. And the results of the studies are, in most respects, underwhelming. Most show an increase in mock jurors’ willingness to convict when they are told that the defendant has committed other similar crimes, but the magnitude of the effect varies. With regard to dissimilar convictions, some studies show an increased likelihood in mock jurors’ willingness to convict; some show no effect; and some show a decreased likelihood of conviction. Discrepancies in these findings should come as no surprise. Study designs can easily be manipulated to produce greater or lesser effects. The marginal impact of introducing a similar conviction is going to be greater where other evidence the mock jurors have been given creates a close case than when it already presents a very strong case against the defendant. Varying the recency and degree of similarity of the other bad acts is also going to affect the results. If mock jurors deciding a murder case can’t discriminate between the probative value of a recent attempted murder and a temporally

391. Laudan & Allen, supra note 364, at 501–02; MacCoun, supra note 390, at 224. For example, in one study participants were given a 400-word description of a case in which the defendant was on trial for breaking and entering. A. N. Doob and H. M. Kirshenbaum, Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act Upon an Accused, 15 CRIM. L.Q. 88 (1973). They were told that the defendant testified but did not give any important evidence. Id. They were then told that the defendant had five prior convictions for breaking and entering and two for possession of stolen property. Id.

392. David Alan Sklansky, Evidentiary Instructions and The Jury As Other, 65 STAN. L. REV. 407, 432–33 (2013); see, e.g., Thomas R. Carretta & Richard L. Moreland, The Direct and Indirect Effects of Inadmissible Evidence, 13 J. APPLIED SOC. PSYCH. 291, 295–96 (1983) (after spending ten minutes reading booklets detailing facts of case, mock-juror students individually completed a questionnaire and then were given thirty minutes to deliberate in six-person juries).

393. See JENNY MCEWAN, THE VERDICT OF THE COURT: PASSING JUDGMENT IN LAW AND PSYCHOLOGY 168 (2003) (results are “inconclusive”); Laudan & Allen, supra note 364, at 500 (results are “all over the map”).


395. See, e.g., Wissler & Saks, supra note 389, at 43–44 (increase); Lloyd-Bostock, supra note 394, at 743–45 (decrease); Cornish & Sealy, supra note 394, at 222 (decrease in some scenarios; no effect in others). See generally LAW COMMISSION CONSULTATION PAPER NO. 141, supra note 381, at 318–41 (summarizing British research).
distant, drunk-and-disorderly-conduct incident, as they were asked to do in a recent study,\textsuperscript{396} we might as well abandon the jury system. Most importantly, what these studies do not show—and cannot show—is whether the introduction of other-acts evidence increases or decreases the accuracy of jurors’ verdicts. The studies, after all, involve fictional scenarios with no right answer.\textsuperscript{397}

For the same reason, studies of real juries are largely unhelpful. Kalven and Zeisel’s landmark jury study attempts to explain why judges and juries disagree in about 20–25\% of cases.\textsuperscript{398} But Kalven and Zeisel make no effort to determine whose verdict was the correct one; nor could they. Later studies of real juries\textsuperscript{399} suffer from the same shortcoming.

\textit{E. Evaluating the Traditional Arguments}

What should be clear by now is that how to balance the categorical probative value and prejudicial impact of character evidence remains controversial and cannot be resolved with any certainty. Nevertheless, I believe that critics of the character-evidence rule—those who seek to robustly limit the admission of other-acts evidence—have underestimated its probative value and overemphasized its deficiencies relative to other types of evidence that are routinely admitted.

The analysis of Professor Park and some of the other scholars who focus pointedly on the probative value of other-acts evidence in the real-life setting of a trial\textsuperscript{400} is substantially more compelling than that of those who rely on psychologists’ attacks on character-trait theory or mock-jury studies.\textsuperscript{401} It is our common experience, however, that provides the strongest argument that

\textsuperscript{396} Sevier, \textit{supra} note 5, at 484–87. The mock jurors in this study were more likely to convict when (a) the prior other act was a murder rather than a drunk and disorderly conviction, (b) there were five prior violent acts rather than one, and (c) the prior acts occurred in the last year rather than five years ago. \textit{Id.} Based on these unremarkable results, the author concluded “jurors appear unlikely to overvalue propensity evidence.” \textit{Id.} at 488. But such a study cannot possibly support such a conclusion, and the author acknowledges this at the very end of the article. \textit{Id.} at 507.

\textsuperscript{397} Some studies use bowdlerized versions of real-life cases, see, \textit{e.g.}, Cornish & Sealy, \textit{supra} note 394, but these also lack a “right” answer. Some studies seek to discern mock jurors’ reasoning processes. They may, for example, try to show that an increase in mock jurors’ willingness to convict can be explained more by the change the other-acts evidence produced in their feelings about the mock defendant than in their evaluation of the strength of the substantive case. See, \textit{e.g.}, Alicke, \textit{supra} note 371; Hunt & Budesheim, \textit{supra} note 57, at 355. Again, because there is no “right” answer about how much probative value the other-acts evidence had, there is no way of telling whether introduction of the evidence led to better results through improper reasoning or worse results. Such studies may, however, add weight to fears about unfair prejudice through jury nullification.

\textsuperscript{398} KALVEN & ZEISEL, \textit{supra} note 366.

\textsuperscript{399} See \textit{supra} notes 363–67.

\textsuperscript{400} See \textit{supra} text accompanying notes 353–60.

\textsuperscript{401} See \textit{supra} text accompanying notes 346–52, 389–97.
other-acts evidence offered for a propensity inference is sufficiently probative to warrant admission in a wide range of cases. Anyone who reads even a fraction of the thousands and thousands of appellate cases addressing Rule 404(b) or its state equivalents understands that courts admit other-acts evidence in lots of cases. Thousands of judges over scores of years have concluded that the probative value of other-acts evidence outweighs the prejudicial impact of the evidence. And as I have argued, many of these cases involve courts’ turning a blind eye to the fact that the evidence was probative only through a propensity inference. These decisions reflect the kinds of judgments we routinely make in our daily lives. Who among us, when choosing between two otherwise equally attractive candidates to sublet our apartment, would pick the one we just discovered had trashed the last apartment he sublet? If, after hosting a small dinner party, you discovered that a small, valuable piece of silver was missing and learned that one of your dinner guests had three shoplifting convictions, who would you first suspect was the thief? It is commonly understood that relevance is typically a product of human experience, not scientific proof.


403. Some commentators contend that courts rarely exclude character evidence. E.g., Daniel D. Blinka, Character, Liberalism, and the Protean Culture of Evidence Law, 37 SEATTLE U. L. REV. 87, 110 (2013) (character evidence rule is “honored only in the breach”); Melilli, supra note 373, at 1548 (character-evidence rule “is more rhetoric than substance; the practice in American courts belies any real commitment to excluding character evidence”). These assertions are hyperbolic. See infra note 587.

404. This judgment is buttressed by the fact that many other legal systems are significantly less averse to character evidence. See Mirjan R. Damaska, Propensity Evidence in Continental Legal Systems, 70 CHI.-KENT L. REV. 55, 64 (1995); Imwinkelried, Reshaping, supra note 65, at 745; Morris, supra note 5, at 207.

405. The writers of the final episode of the long-running comedy series Seinfeld understood this well. The show’s four main characters were charged with violating a Good Samaritan law after they witnessed a mugging and mocked the victim rather than taking any action to help him. Seinfeld: The Finale (NBC television broadcast May 14, 1998). At their trial, the prosecution introduced a litany of other-acts evidence to establish the characters’ long history of callous and indifferent acts. Id.

406. See FED. R. EVID. 401 advisory committee’s note (1972) (citing James, supra note 360, at 696 n.15).
To be sure, our conventional wisdom may be flawed. Other-acts evidence is far from perfect. Cognitive error abounds. But that is true for most evidence that is routinely admitted. Critics of character evidence have held it to a far higher standard than lots of other types of evidence whose deficiencies have been much more thoroughly documented. The inaccuracy of eyewitness identifications and the risks they present to accurate factfinding are well established. The defects of human memory, including the extent to which it may be easily manipulated, have been widely demonstrated. The ability of jurors to consistently deduce from demeanor whether a person is telling the truth has been debunked. Yet these all remain central components of our trial system.

Moreover, while critics are correct to point out that jurors’ reasoning processes may induce them to overestimate the probative value of character evidence, that does not end the analysis. Almost invariably, jurors want to know something about the character of the persons whom they are judging. Absent character evidence, they are inevitably going to resort to other cues to make inferences about the characters in the drama that comprises their case.

408. SIMON, supra note 377, at 53 (“The single most important observation from the research on eyewitness identification is that it is substantially less accurate than generally believed.”). See generally Elizabeth F. Loftus, Eyewitness Testimony, 33 APPLIED COGNITIVE PSYCH. 498 (2019); ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1996).
409. Exoneration studies demonstrate that mistaken eyewitness identifications are the cause of a substantial percentage of mistaken convictions. The National Registry of Exonerations attributes more than one-quarter of the erroneous convictions in its database to mistaken witness identifications. % Exonerations by Contributing Factor, NAT’L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx [https://perma.cc/62VV-69J3]; see State v. Henderson, 27 A.3d 872, 885 (N.J. 2011) (“In 2006, this Court observed that eyewitness ‘[m]isidentification is widely recognized as the single greatest cause of wrongful convictions in this country.’” (quoting State v. Delgado, 902 A.2d 888 (2006)) (alteration in original)).
411. See, e.g., SIMON, supra note 377, at 125 (meta-analysis of studies shows that people perform only slightly better than coin-flip in determining accuracy from demeanor and are overconfident in their ability to do so); Bennett, supra note 410, at 1346–48; Olin Guy Wellborn III, Demeanor, 76 CORNELL L. REV. 1075, 1078–88 (1991) (reviewing studies).
412. See, e.g., BURNETT, supra note 342, at 70–71, 175–76.
Defense attorneys often clean up their clients’ appearance\textsuperscript{413} because studies show that jurors are biased by a defendant’s attractiveness.\textsuperscript{414} More perniciously, jurors may resort to racial, ethnic, religious, or gender biases to make judgments about a defendant’s character.\textsuperscript{415} The question, therefore, is not whether jurors are going to be affected by their views of the defendant’s character; it is whether the introduction of other-acts evidence exacerbates or mitigates this problem and to what extent\textsuperscript{416}.

In the end, there can be no certain resolution to the debate about the relative probative value of other-acts evidence and the risk it poses of unfair prejudice as a categorical matter. My sense is that other-acts evidence is more probative than the many critics of character evidence contend. But I also believe that we need to pay heed to the dangers of unfair prejudice. What should be absolutely clear is that character must be defined in a manner consistent with a judgment about when—categorically—the probative value of other-acts evidence outweighs its prejudicial effect.

\section{V. What is Character}

\subsection{A. Introduction}

As has often been observed, courts, commentators, and rule drafters have devoted surprisingly little effort to defining character.\textsuperscript{417} Expressions of despair

\footnotesize
\textsuperscript{413} LEMPERT, GROSS, LIEBMAN, BLUME, LANDSMAN \& LEDERER, supra note 144, at 349; Foster, supra note 352, at 36.


\textsuperscript{416} Professor Park argues that the admission of other-acts evidence is likely to impel jurors to make more accurate character attributions. Park, Character at the Crossroads, supra note 3, at 740–41. Drawing on the work of Ross and Nesbitt, he analogizes trials without character evidence to the “interview illusion,” the commonly-held and mistaken assumption that a brief admissions or employment interview with an applicant produces a good deal of information about the person that aids in projecting the applicant’s success. Id. at 740. An applicant’s personal history is a better predictor of success. See Lee Ross \& Richard E. Nisbett, The Person and the Situation: Perspectives of Social Psychology 136–38 (1991).

\textsuperscript{417} See, e.g., SAKS \& SPELMAN, supra note 60, at 143; 22B WRIGHT \& GRAHAM, supra note 6, § 5233, at 23; Barrett J. Anderson, Note, Recognizing Character: A New Perspective on Character Evidence, 121 Yale L.J. 1912, 1922–24 (2012); Blinka, supra note 403, at 139–40.
at the prospect of arriving at a clear definition seem to outnumber sustained efforts to produce one.\footnote{418}{See, e.g., Jonathan D. Kurland, \textit{Psychological Research on Character as a Process in Judgment and Decision-Making and Its Potential Implications for the Character Evidence Prohibition in Anglo-American Law} 5 (May 8, 2012), available at https://ssrn.com/abstract=2182702 \[https://perma.cc/WT4-YAH5\] or http://dx.doi.org/10.2139/ssrn.2182702 \[https://perma.cc/S7DV-EALL\] ("Arriving at a definitive definition of character as a construct is a fool’s errand."); Sevier, supra note 5, at 448 (noting that what constitutes character trait is sometimes “hotly contested”); United States v. Doe, 149 F.3d 634, 638 (7th Cir. 1998) ("We doubt that a fully satisfactory, comprehensive definition of ‘character evidence’ is possible . . . ."); State v. Williams, 874 P.2d 12, 25 (N.M. 1994) (Montgomery, C.J., concurring) ("I am unable to do what all the text-writers and other legal authorities have failed to do. I am unable to outline the contours of the term ‘character’ . . . .").

419. See, e.g., 22B GRAHAM, supra note 34, § 5233–5234; Anderson, supra note 417; Blinka, supra note 403; Park, \textit{Character at the Crossroads}, supra note 3, at 718–20.

420. This is not explicitly an other-acts evidence problem covered by Rule 404(b). Instead, the admissibility of evidence of broadly described attributes falls under Rule 404(a). But to the extent that an attribute simply represents the sum of a person’s other acts, it implicitly implicates Rule 404(b). See State v. Hirsch, 717 N.E.2d 789, 799 (Ohio Ct. App. 1998) (holding trial court erred under Rule 404(b) in admitting evidence that defendant was known as “Rambo” and “Psycho Johnny”); Logan v. State, No. 05-97-01291-CR., 2000 WL 254297 (Tex. Ct. App. Mar. 8, 2000) (rejecting defendant’s Rule 404(b) argument because he failed to timely object when prosecution offered evidence that his nickname was “Little Killer”); United States v. Burris, ARMY 20150047, 2018 WL 7286000, *4 (Army Ct. Crim. App. Dec. 7, 2018) (holding nickname “Beast” was not inadmissible character evidence under Rule 404(a) and was admissible as evidence of consciousness of guilt under Rule 404(b)).

The problem of defining character runs along two dimensions. The first focuses on broadly described attributes.\footnote{420}{This is not explicitly an other-acts evidence problem covered by Rule 404(b). Instead, the admissibility of evidence of broadly described attributes falls under Rule 404(a). But to the extent that an attribute simply represents the sum of a person’s other acts, it implicitly implicates Rule 404(b). See State v. Hirsch, 717 N.E.2d 789, 799 (Ohio Ct. App. 1998) (holding trial court erred under Rule 404(b) in admitting evidence that defendant was known as “Rambo” and “Psycho Johnny”); Logan v. State, No. 05-97-01291-CR., 2000 WL 254297 (Tex. Ct. App. Mar. 8, 2000) (rejecting defendant’s Rule 404(b) argument because he failed to timely object when prosecution offered evidence that his nickname was “Little Killer”); United States v. Burris, ARMY 20150047, 2018 WL 7286000, *4 (Army Ct. Crim. App. Dec. 7, 2018) (holding nickname “Beast” was not inadmissible character evidence under Rule 404(a) and was admissible as evidence of consciousness of guilt under Rule 404(b)). We might ascribe to a person any of a broad range of attributes: honest/dishonest, violent/peaceable, tall/short, modest/boastful, emotional/unemotional, careless/careful, intelligent/stupid, cautious/impulsive, compulsive/lackadaisical, racist/tolerant. Which of these should be considered character traits?

The second dimension concerns the specificity of the other-acts conduct and its match to the charged conduct. Other-acts evidence may manifest a defendant’s conduct at a fairly general level—for example, that the defendant has engaged in various types of conduct that all involve dishonesty, offered to prove the defendant committed fraud. Or such evidence may describe instances of a very specific type of conduct—for example, that the defendant courted a series of unmarried mothers who had life insurance and then attempted to collect the insurance proceeds when they mysteriously wound up dead—that matches the conduct for which the defendant is charged. Should these both be considered “character”?

The law of evidence fails to provide a clear answer to what character means as to either of these two dimensions. Although I believe that, for purposes of implementing Rule 404(b) in a coherent manner, the second dimension is more
important, the attempts to define character have thus far focused primarily on the first dimension. And they have not proved terribly helpful.

B. The Current State of the Law

Many definitions of character simply equate it with disposition. Some of these leave disposition wholly undefined, while others—tracking McCormick’s oft-quoted definition—provide a few illustrative examples that fail to provide much guidance. Some definitions equate character with personality or psychological bents. Wigmore and a good number of other commentators contend that character refers only to dispositions or traits that reflect a person’s moral fiber. The Model Code of Evidence defines character, but in a way that both reaches beyond moral considerations and is utterly unenlightening. The drafters of Rule 404 were somewhat enigmatic about the relationship between character and morals. In their Note to Rule 406, they quote McCormick’s definition, which hints at moral considerations, but in

---

421. E.g., Laprime v. Pallazzo, 100 F.3d 953 (5th Cir. 1996) (per curiam). The original Uniform Rules of Evidence simply substituted “disposition” for “character,” but made no attempt to define “disposition.” UNIF. R. EVID. 55 (1953). Professor Tillers offered a somewhat different take on character, contending that “it is far better to think of character as the ‘animating spirit’ or the ‘internal operating system’ of a human organism.” Peter Tillers, What Is Wrong with Character Evidence?, 49 HASTINGS L.J. 781, 782 (1998).

422. “Character is a generalized description of a person’s disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness.” MCCORMICK ON EVIDENCE, supra note 201, § 195, at 686.


424. E.g., United States v. Williams, 900 F.3d 486, 490 (7th Cir. 2018); United States v. Doe, 149 F.3d 634, 638 (7th Cir. 1998); United States v. Beechum, 582 F.2d 898, 921 (5th Cir. 1978) (Goldberg, J., dissenting).

425. Wigmore defined character as a person’s “actual moral or psychical disposition, or sum of traits.” WIGMORE, supra note 5, § 52, at 121. In later sections, Wigmore repeatedly referred to the moral dimension of character. See id. §§ 64, 67, 68.

426. See, e.g., 22B GRAHAM, supra note 34, § 5233.1; Anderson, supra note 417, at 1921; Kuhns, supra note 62, at 779; Leonard, Character and Motive, supra note 6, at 451; Rothstein, supra note 288, at 1264; Davis, supra note 266, at 624–26; David Torrance, Evidence of Character in Civil and Criminal Proceedings, 12 YALE L.J. 352, 352 (1903); cf. MUELLER & KIRKPATRICK, supra note 34, § 7.11 (distinguishing syndromes from character because they do not involve “appraising the personal qualities of a particular person”); LA. CODE EVID. ANN. art. 404(A) (2020) (providing that “[e]vidence of a person’s character or a trait of his character, such as a moral quality, is not admissible” (emphasis added)).

427. MODEL CODE OF EVIDENCE Rule 304 (AM. L. INST. 1942) (“Character . . . means the aggregate of a person’s traits, including those relating to care and skill and their opposites.”).

428. FED. R. EVID. 406 advisory committee’s note (1972).
their Note to Rule 405, they state that character usually, but not always, carries moral overtones.429

Agreement is easy to find at the extremes. Honesty/dishonesty, peaceableness/violence, and carelessness/carefulness are universally recognized as character traits for purposes of the character-evidence rule;430 height, intelligence, strength, and skill (and their opposites) are not.431 But what about attributes that may be considered more attitudinal? Is being racist, sexist, or ageist a character trait?432 Another set of questions revolves around what is sometimes called the medicalization of deviance.433 No one would consider epilepsy or schizophrenia a character trait;434 they are diseases. But alcoholism or drug addiction—now both considered diseases435—have traditionally been
treated by courts and commentators alike as a character trait whose admissibility is subject to the Rule 404(b). Judge Posner’s “firebug” may be a pyromaniac, Winona Ryder, a kleptomaniac, a mother who repeatedly visits illness upon her child might suffer from Munchausen Syndrome By Proxy, a serial assaulter, from intermittent explosive disorder. Then there is sexuality. Traditionally, a sexually-active woman was considered promiscuous, and courts treated promiscuity as a character trait—albeit one which, until the latter part of the twentieth century, they were all too willing to admit despite the character-evidence rule. Not that long ago, courts debated whether homosexuality should be treated as a character trait. Even for those

Nov. 21, 2017) (“While discussions of the admissibility of evidence of alcohol abuse and alcoholism have existed mainly in the context of character and habit evidence, there is reason for courts to understand alcoholism outside these bounds. Today, alcoholism is considered as much a disease as a reflection of character or habit.” (citation omitted)).

436. E.g., United States v. Kadouh, 768 F.2d 20, 21–22 (1st Cir. 1985) (treating cocaine addiction as character, but admissible to prove motive); Reyes v. Mo. Pac. R.R., 589 F.2d 791, 794 (5th Cir. 1979) (excluding evidence of “character trait of drinking to excess”); United States v. Tan, 254 F.3d 1204, 1208–14 (10th Cir. 2001) (holding evidence of defendant’s prior drunk driving offenses may be admissible to prove defendant’s awareness of risk, but remanding with instructions to conduct Rule 403 balancing); United States v. Fleming, 739 F.2d 945, 949 (4th Cir. 1984) (holding evidence of previous intoxication inadmissible to prove propensity, but admissible to prove defendant’s awareness of risk). Despite treating addiction as a character trait, courts often find evidence of a defendant’s addiction probative of motive and, therefore, admissible under Rule 404(b). See supra notes 265–66. See generally Davis, supra note 266, at 631–37.

437. See supra text accompanying notes 271–73 and infra text accompanying note 480.

438. See supra text accompanying notes 276–79 and infra text accompanying note 481.

439. See supra text accompanying notes 42–49 and infra text accompanying note 496.

440. See infra text accompanying notes 482, 487; Laprime v. Pallazzo, 100 F.3d 953, *1 (5th Cir. 1996) (per curiam) (upholding admission of evidence that defendant had anti-social personality disorder); State v. Ferguson, 803 P.2d 676, 685 (N.M. Ct. App. 1990) (rejecting claim that comment that defendant was “paranoid” violated character-evidence rule).

441. They also regarded its opposite—chastity—as a character trait. See Fed. R. Evid. 404(a) advisory committee’s note (1972).


443. See, e.g., Parisie v. Greer, 705 F.2d 882, 901 (7th Cir. 1983) (en banc) (Swygert, J., concurring in part and dissenting in part) (discussing whether “homosexuality is more like a medical condition than a character trait”); State v. Williams, 874 P.2d 12, 25 (N.M. 1994) (Montgomery, C.J., concurring) (concluding that “enjoyment of anal sex—even if described as a ‘disposition’ or a ‘propensity,’ is more like a physical or mental characteristic, testimony concerning which is not precluded by Rule 404, than it is like a generalized trait similar to honesty, temperament, or peacefulness’”); cf. Cohn v. Papke, 655 F.2d 191, 193 (9th Cir. 1981) (treating bisexuality as character). Until 1973, the American Psychiatric Association considered homosexuality a disease. Jack Drescher, Out of DSM: Depathologizing Homosexuality, 5 BEHAV. SCI. 565, 565 (2015).
who believe that character traits are limited to those with moral overtones, deciding which of these involve moral overtones is no easy task. Some mental illness may tend to foreclose moral judgment, but others—like some of the ones just mentioned—may well call forth moral condemnation. Depending on the situation, an attribute may elicit praise or condemnation. We laud the airline pilot who coolly and unemotionally responds to crisis and lands the plane, while decrying the family member who coolly and unemotionally responds to the death of a child. An understanding of what the character evidence rule covers demands resolution of what attributes count as character.

Regarding the second dimension, evidence law has long done little more than contrast character evidence with habit evidence. Habit is admissible to prove propensity, character is not. The distinction between habit and character rests on the specificity of the conduct. McCormick famously described character as “a generalized description of one’s disposition, or of one’s disposition in respect to a general trait”; habit, on the other hand, is “more specific” and “describes one’s regular response to a repeated specific event.”

444. In one of the few sustained efforts to define character, Barrett Anderson argues morality is the factor that distinguishes character from noncharacter propensities. Anderson, supra note 417, at 1936–45. His solution is to assign the trial judge the task of subjectively determining “whether, more likely than not, the average juror from the community would find morality implicated by the proof of a trait.” Id. at 1952 (footnote omitted). He quickly concedes, however, that, while some traits are easy to categorize, others are not, and offers little more than cursory guidance as to how a court should discharge its obligation. Id. at 1953–54.

445. The criminal law bases the insanity defense on lack of moral responsibility. WAYNE R. LAFAYE, CRIMINAL LAW § 7.1(a) (5th ed. 2010).

446. 22B WRIGHT & GRAHAM, supra note 6, § 5233, at 28.

447. See SULLY (Village Roadshow Pictures 2016).


449. FED. R. EVID. 406.

450. FED. R. EVID. 404.

451. Crawford v. Tribeca Lending Corp., 815 F.3d 121, 125 (2d Cir. 2016). The primary explanation for the different treatment of character and habit evidence is that habit evidence is substantially more probative of how a person behaved on a given occasion than is character. See FED. R. EVID. 406 advisory committee’s note (1972) (“Agreement is general that habit evidence is highly persuasive as proof of conduct on a particular occasion.”); MCCORMICK ON EVIDENCE, supra note 201, § 195. Another theme, however, is that habit evidence is less likely to be morally tinged, and, therefore, poses less risk of unfair prejudice. See MUELLER & KIRKPATRICK, supra note 34, § 4:21.
Honesty and peacefulness illustrate character; routinely going down a particular staircase two steps at a time illustrates habit. Most commentators, courts, and rule drafters have long been content to rely on this dichotomy. But generalized descriptions of disposition and habit describe two ends of a spectrum. A broad array of conduct falls between the two. Just because something doesn’t qualify as a habit doesn’t make it character. People may engage in fairly specific conduct but with insufficient regularity and frequency to qualify it as habit.

Courting a series of unmarried women with children who have life insurance and attempting to collect the insurance proceeds when they wind up dead may not qualify as habit evidence, but that doesn’t mean it is character evidence. The challenge is to recognize that much lies between generalized descriptions of disposition and habit and then to articulate how much of the spectrum should fall within the character-evidence rule.


455. Despite this, some of the definitions of character that have been offered are broad enough to embrace both character and habit. For example, one of the leading treatises for students defines character as “a person’s disposition or propensity to engage or not engage in various forms of conduct.” Christopher B. Mueller & Laird C. Kirkpatrick, Evidence: Practice Under the Rules § 4.11, at 191 (4th ed. 2012); see also State v. Dan, 20 P.3d 829, 831 (Or. Ct. App. 2001) (character means “a person’s disposition or propensity towards certain behavior” or “a person’s tendency to act in a certain way in all varying situations of life” (quoting State v. Carr, 725 P.2d 1287, 1290 (Or. 1986))).

456. Conduct must be engaged in both frequently and regularly to qualify as habit. See Goode & Wellborn, supra note 80, at 308.

457. More precisely, it is the relationship between the other-acts evidence and the charged conduct that determines whether a character-propensity inference is needed. Evidence that a person always gripped the handrail while going down a particular flight of steps would be admissible as habit evidence to prove the person gripped the handrail while going down that particular flight of steps on a particular occasion. But if offered to prove that the person drove cautiously on a particular occasion, the same evidence would be inadmissible character evidence. See Fed. R. Evid. 406 advisory committee’s note (1972).
Ultimately, we must acknowledge forthrightly that character—for purposes of Rule 404(b)—is purely a legal construct.Only someone who has gone to law school would think of “bank robber” as a character trait. But Rule 404(b) ordinarily precludes a prosecutor from offering evidence that a defendant on trial for bank robbery had previously committed two bank robberies. The paradigmatic example of inadmissible other-acts evidence is that the defendant has previously committed the same type of crime as the one for which he now stands charged. Therefore, we cannot simply turn to definitions of character that lexicographers provide us. Nor can philosophers provide guidance, even though they have been exploring the nature of character for thousands of years. Their quest to explicate moral virtue, ponder what constitutes the life well-lived, or discern right from wrong simply does not speak to how character should be defined for purposes of the character-evidence rule.

Likewise, social and personality psychologists’ study of generalized character traits yields little insight into how other-acts evidence should be treated. Rule 404(b) aims to help factfinders deduce what happened on a particular occasion. Its concern is whether information about a person’s “character” helps a jury

458. In contrast, Professor Graham contends that character “is most accurately conceived as a social and cultural construct.” 22B GRAHAM, supra note 34, § 5233.2. While that conception may be helpful in understanding how society generally views character, it ignores the underlying purpose of the character-evidence rule and sabotages his attempt to come to a meaningful definition of character for purposes of Rule 404(b). See also Blinka, supra note 403 (character must be understood as a social construct).

459. Roger Park described this as a Level Two propensity to distinguish it from more broadly described attributes. Park, Character at the Crossroads, supra note 3, at 718–19.

460. Even if we did, dictionary definitions of character are as ambiguous as those offered by courts and commentators. For example, the Oxford English Dictionary offers as its first relevant definition: “The sum of the moral and mental qualities which distinguish an individual or a people, viewed as a homogenous whole; a person’s or group’s individuality deriving from environment, culture, experience, etc.; mental or moral constitution, personality.” CHARACTER, OXFORD ENGLISH DICTIONARY (3d ed. 2014).


463. See supra note 353 and text accompanying notes 390–97.

464. Aside from lexicographers, philosophers, and social and personality psychologists, many others have assayed the nature of character. See generally MARJORIE GARBER, CHARACTER: THE HISTORY OF A CULTURAL OBSESSION (2020).
determine accurately the facts of the case. Character, therefore, must be defined in a way that corresponds to this underlying rationale for Rule 404(b).

C. Grappling with Character

i. Personal Attributes and Medical or Psychological Conditions

I first consider whether personal attributes that may be considered attitudinal should be considered character and then turn to attributes that can be described as a medical or psychological condition. I conclude that neither should be classified as character.

Evidence that a person is a racist, sexist, ageist, misogynist, or homophobe should not be categorically excluded by Rule 404(b). At the outset, these can more appropriately be described as comprising a constellation of beliefs rather than anything we would typically think of as character. If these are considered character, what about other attitudinal attributes, like being an atheist, cultist, anti-Zionist, or Islamaphobe? More important, treating attitudinal attributes as character conflicts with the accuracy concerns underlying Rule 404(b). The case for concluding that this type of evidence is categorically more prejudicial than probative is weak. To be sure, someone who is a racist does not always act in a discriminatory manner, and this type of evidence undoubtedly carries the risk of unfair prejudice. But classifying attitudes as character would result in their being categorically inadmissible for a propensity inference. In a prosecution for the murder of a gay victim, evidence that the defendant spouted homophobic vitriol would be inadmissible. Likewise, in a prosecution for bombing a mosque or a synagogue, evidence of the defendant’s anti-Muslim or anti-Semitic views would be categorically excluded. It is hard to imagine a world in which courts would categorically exclude such evidence, and they do not. But instead of simply stating that this is not character evidence, courts ignore the problem or invoke one or more of the permissible purposes listed

465. Of course, if the defendant were charged with a hate crime, the evidence would be admissible because the defendant’s hate-based motive would be an element of the crime. For that purpose, its probative value would not require a propensity inference. See United States v. Jenkins, 120 F. Supp. 3d 650, 658 n.8 (D. Ky. 2013) (noting that such evidence was admitted in hate-based-crime trial under 18 U.S.C. § 249). All but five states have hate-crime laws; about 30 states include crimes based on sexual orientation. State Scorecards, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/state-scorecards [https://perma.cc/DDR3-NKSF].

466. See Marshall, supra note 432, at 1072 (“Faced with a discrimination plaintiff offering proof, courts respond to the mandates of Rule 404 in one of two ways: They either ignore the Rule or misapply it.”).
in Rule 404(b), with motive as the preferred choice. But as explained earlier, this is pure propensity reasoning. To say that being a racist gives someone a motive for acting in a racist way is to fall prey to tautology.

Removing such attitudinal attributes from the class of character evidence does not mean that this type of evidence is freely admissible. It merely relegates its admissibility—at least in terms of probative value and prejudicial risk concerns—to case-by-case adjudication under Rule 403. A recent murder trial in Ohio illustrates how this works. Ray Tensing, a police officer at the University of Cincinnati, stopped Samuel DuBose for driving with a missing license plate. After a several minute exchange, DuBose, who was black and unarmed, suddenly started his car and began driving off. Tensing shot and killed DuBose. Charged with murder, Tensing claimed he shot DuBose because his arm was caught in the car and he was being dragged off. The entire incident was captured on the officer’s bodycam. At Tensing’s trial, the prosecution introduced evidence that, when he shot DuBose, Tensing was wearing, under his uniform, a T-shirt with a picture of a confederate flag. The jury hung. When the case was retried, the new trial judge excluded evidence that 80% of Tensing’s traffic stops involved black drivers. Cornwell, supra note 472.

---


468. See, e.g., Becker v. ARCO Chem. Co., 207 F.3d 176, 194 n.8 (3d Cir. 2000) (noting “numerous cases which have held that, as a general rule, evidence of a defendant’s prior discriminatory treatment of a plaintiff or other employees is relevant and admissible under the Federal Rules of Evidence to establish whether a defendant’s employment action against an employee was motivated by invidious discrimination”). But cf. United States v. Hazelwood, 979 F.3d 398, 408–11 (6th Cir. 2020) (treating defendant’s racist statements as character evidence but rejecting prosecution’s argument that evidence was admissible for non-character purpose).

469. See supra Part III.E.


471. Id.


473. Id.

474. Id.

475. Kevin Grasha & Sharon Coolidge, Trial Revelation: Tensing Wore Confederate Flag Shirt Under Uniform, ENQUIRER (Nov. 4, 2016, 6:29 AM), https://www.cincinnati.com/story/news/tensing/2016/11/04/what-expect-friday-tensing-murder-trial/93257366/ [https://perma.cc/WZU-MNLJ]. The reaction was predictable. The victim’s fiancée remarked, “It says a lot about the nature of his intent, and the person he is.” Id. A state senator, observing the trial, commented, “[I]t speaks to Tensing’s mindset.” Id. The prosecution also offered evidence that 80% of Tensing’s traffic stops involved black drivers. Cornwell, supra note 472.

476. Cornwell, supra note 472.
evidence of the T-shirt on Rule 403 grounds.\textsuperscript{477} Once again, the jury hung.\textsuperscript{478} Both the decision to admit and to exclude this evidence seem reasonable calls by the respective trial judges. The evidence was both probative and prejudicial, and reasonable minds could differ about the balance between the two. What does not seem reasonable is deciding that this type of evidence should be categorically excluded from the factfinding process.

Although diseases like epilepsy or schizophrenia have traditionally not fallen under the character umbrella, determining how to handle the wide array of mental disorders modern psychiatry recognizes is highly problematic. In addition to alcoholism and drug addiction,\textsuperscript{479} the American Psychiatric Association’s Diagnostic and Statistical Manual (DSM) includes a host of mental disorders that may well be offered to prove that a defendant committed a charged crime: pyromania,\textsuperscript{480} kleptomania,\textsuperscript{481} intermittent explosive disorder,\textsuperscript{482} a range of paraphilic disorders—including voyeurist,\textsuperscript{483} exhibitionist,\textsuperscript{484} and pedophilic disorders\textsuperscript{485)—and the highly general diagnosis of conduct disorder.\textsuperscript{486} What is troublesome about many of these is that their diagnostic criteria often seem to be dominated by the repeated occurrence of the behavior; that is, by the type of other-acts evidence that has traditionally been considered character evidence. Classifying a mental disorder (as opposed to the underlying conduct) as noncharacter, therefore, would give prosecutors an easy opportunity to circumvent Rule 404(b).

Consider, for example, intermittent explosive disorder (IED). A diagnosis of IED can be made when the following criteria are met: a person has three behavioral outbursts in one year that involve property damage or physical assault and that are neither premeditated nor designed to achieve some tangible objective; the level of aggressiveness displayed is grossly out of proportion to the provocation or to any precipitating psychosocial stressors; the outbursts are


\textsuperscript{478} Bidgood & Pérez-Peña, supra note 470.

\textsuperscript{479} DSM, supra note 44, at 481–590. In its chapter on substance-related and addictive disorders, DSM-5 includes alcoholism under alcohol-related disorders. \textit{Id.} at 490–503. This chapter also catalogs a number of different types of drug addictions, such as opioid-related disorders, \textit{id.} at 540–50, and stimulant-related disorders, \textit{id.} at 561–70.

\textsuperscript{480} \textit{Id.} at 476–77.

\textsuperscript{481} \textit{Id.} at 478–79.

\textsuperscript{482} \textit{Id.} at 466.

\textsuperscript{483} \textit{Id.} at 686–88.

\textsuperscript{484} \textit{Id.} at 689–91.

\textsuperscript{485} \textit{Id.} at 697–700.

\textsuperscript{486} \textit{Id.} at 469–71.
associated with financial or legal consequences; and the outbursts are not explained by or attributable to another mental disorder, medical condition, or the physiological effects of a substance.\textsuperscript{487}

Pedophilic disorder provides an even more dramatic example. For anyone over the age of eighteen, only two criteria must be met. First, in a six-month period, the person must have “recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children”; second, either the person must have acted on these sexual urges or the sexual urges or fantasies must have caused marked distress or interpersonal difficulty.\textsuperscript{488} But the DSM’s discussion of the diagnostic features of this disorder makes clear that the diagnosis may be made solely on the basis of recurrent behavior involving sexual activity with a child over at least a six-month period.\textsuperscript{489} In other words, evidence of a few other acts is enough to diagnose someone as suffering from pedophilic disorder.

These examples are sobering. It would seem to make little sense to categorically exclude evidence that a defendant engaged in the behaviors that comprise the mental disorder but allow an expert to testify that the defendant suffers from the mental disorder that the behaviors manifest. This would be especially problematic if the expert were allowed to relate the behaviors in explaining the basis for her opinion.\textsuperscript{490} Classifying mental disorders as noncharacter evidence would authorize courts to allow such testimony.

On the other hand, classifying mental disorders as character evidence would result in the exclusion of highly probative evidence of the type courts frequently allow.\textsuperscript{491} For example, if Battered Woman’s Syndrome (BWS)—a form of posttraumatic stress disorder\textsuperscript{492}—were considered a character trait, evidence that a woman suffered from it would ordinarily be inadmissible to prove how she acted on a particular occasion. But court acceptance of such evidence to

\textsuperscript{487} Id. at 466.
\textsuperscript{488} Id. at 697.
\textsuperscript{489} Regarding individuals who deny fantasies or urges involving children, or distress or interpersonal difficulty resulting therefrom, the DSM says: “Such individuals may still be diagnosed with pedophilic disorder . . . provided that there is evidence of recurrent behaviors persisting for 6 months . . . and evidence that the individual has acted on sexual urges . . . . Presence of multiple victims . . . is sufficient but not necessary for diagnosis . . . .” Id. at 698.
\textsuperscript{490} See Fed. R. Evid. 703.
\textsuperscript{491} The reference here is solely to situations where evidence of a mental disorder is being offered to prove that the person acted in accordance with that mental disorder on a particular occasion. Even if classified as character evidence, proof of a mental disorder would still be admissible when character was itself an essential element of a claim or defense, as is the case when a defendant raises an insanity defense.
\textsuperscript{492} See Andrew P. Levin, Stuart B. Kleinman & John S. Adler, DSM-5 and Posttraumatic Stress Disorder, 42 J. AM. ACAD. PSYCHIATRY & L. 146, 154 (2014).
prove that a woman acted in self-defense or under duress is widespread. Testimony that a victim suffered from posttraumatic stress disorder is also used to explain, for example, a child-victim’s failure to promptly report episodes of sexual abuse. Courts admit evidence that a defendant suffers from Munchausen Syndrome By Proxy to prove that the defendant injured a child as charged. Evidence of drug addiction and alcoholism is widely admitted.

493. Under an exception to Rule 404(a), criminal defendants may offer character evidence to prove they acted in accordance with their character on a particular occasion. Fed. R. Evid. 404(a)(2)(A). But in states like Washington, which does not permit opinion testimony to prove character, Wash. R. Evid. 405, expert testimony could not be admitted under this exception. To justify admitting BWS evidence, therefore, the Washington Supreme Court resorted to sleight of hand. It denied that the evidence was offered as character evidence, contending instead that it was used only to aid the jury in determining whether the defendant was reasonable in believing that she faced imminent serious bodily injury. State v. Kelly, 685 P.2d 564, 570 (Wash. 1984). Even in states where opinion evidence is permitted to prove character, many courts have sanctioned BWS evidence without invoking the Rule 404(a) exception or its state equivalent. For example, both the majority and concurring opinions in State v. Kelly, 478 A.2d 364 (N.J. 1984), one of the earliest cases to sanction admission of BWS evidence, discuss at length the relevancy of such evidence and whether it is a proper subject for expert testimony, but never mention that it involves character evidence. See also Ibn-Tamas v. United States, 407 A.2d 626 (D.C. Cir. 1979) (no mention of character evidence); State v. Anaya, 438 A.2d 892 (Me. 1981) (same). See generally Victoria M. Mather, The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony, 39 MERCER L. REV. 545 (1988) (extensively discussing admissibility issues and never mentioning character evidence or Rule 404). But see State v. Curley, 250 So.3d 230, 246–47 (La. 2018) (citing relevant exception to state character evidence rule).


496. In the DSM-5, Munchausen Syndrome By Proxy is now called Factitious Disorder Impersonated on Another. DSM, supra note 44, at 325.


498. Courts most often say it is being offered for a nonpropensity purpose, typically, to show motive, see supra note 436, or because the person’s drinking habits qualified as habit. See Loughan v. Firestone Tire & Rubber Co., 749 F.2d 1519, 1523–24 (11th Cir. 1985) (admitting evidence that defendant drank too much because it constituted habit, not character); Keltner v. Ford Motor Co., 748
and for good reason: the link between substance abuse and crime is strong.\textsuperscript{499} The case that the probative value of mental disorders taken as a whole is categorically outweighed by the danger of unfair prejudice cannot be sustained.

If evidence of at least some mental disorders should not be categorically excluded, two options are available. First, courts might pick and choose which mental disorders qualify as character and which do not. But it is hard to imagine how courts would do so in a principled way. Determining the categorical balance of probative value and prejudicial risk of one mental disorder as opposed to another would be a daunting task. Labeling, say, pedophilic disorder a character trait and Munchausen Syndrome By Proxy noncharacter (or vice-versa) would certainly perplex many an observer.\textsuperscript{500} Moreover, it is highly likely that different courts would reach different conclusions about a mental disorder; pedophilic disorder would be a character trait in some jurisdictions and not in others.\textsuperscript{501} In all probability, a court’s determination would more likely be affected by its view of the probative value of the disorder.


\textsuperscript{500} It is true that Rules 413–415, by exempting evidence of sexual assaults and child molestations from the ban on character evidence, manifest a determination by Congress that this type of evidence is categorically more probative than prejudicial. But that was a highly controversial decision and many states have resisted adopting similar provisions. See, e.g., 23 GRAHAM, supra note 34, § 5381 n. 36 (listing only a handful of states that have adopted version of Rule 413). Moreover, Congress did not declare that this was not character evidence. To the contrary, Federal Rules 413–415 provide that such evidence may be considered on any matter as to which it is relevant. \textit{Fed. R. Evid.} 413–415. See, e.g., United States v. Castillo, 140 F.3d 874, 879 (10th Cir. 1998) (noting that Rule 414 authorizes admission of defendant’s prior acts to prove “disposition of character”).

\textsuperscript{501} Nearly twenty years ago, Professor Leonard argued that whether a particular medical condition should be considered character evidence should turn on the degree of scientific consensus and whether jurors were likely to view the person as suffering from a medical condition or a character defect. Leonard, \textit{Character and Motive}, supra note 6, at 529–35. This view, however, focuses only on the unfair prejudice side of the balance. Likewise, Barrett Anderson concentrated primarily on the moral implications jurors would draw and the consequent dangers of unfair prejudice. Anderson, supra note 417, at 1951–55.
in the particular circumstances posed by the case of first impression rather than a judgment about the disorder’s categorical probative value.

The alternative is that all mental disorders should be considered noncharacter. This, too, is hardly an appealing option. It could certainly be argued that it cedes too much power to psychologists and psychiatrists to determine what is inadmissible character evidence and what is not. Nevertheless, it is the option I prefer. Casting all psychological diseases as character would render all such evidence inadmissible when offered for a propensity inference and thereby vest even more power in the therapeutic community. As I argued with respect to how to classify attitudinal attributes, treating diseases as noncharacter has the virtue of merely relegating admission decisions to case-by-case adjudications under Rule 403. Unfortunately, that is also its vice: trial judges have not been nearly as punctilious in excluding unreliable expert testimony in criminal cases as they have on the civil side of the docket.\footnote{See, e.g., Peter J. Neufeld, The (Near) Irrelevance of Daubert to Criminal Justice and Some Suggestions for Reform, 95 AM. J. PUB. HEALTH (SUPPLEMENT 1) 107, 109 (2005); Munia Jabbar, Note, Overcoming Daubert’s Shortcomings in Criminal Trials: Making the Error Rate the Primary Factor in Daubert’s Validity Inquiry, 85 N.Y.U. L. REV. 2034, 2046 (2010).}

Trial judges should be especially cautious in admitting testimony about a mental condition offered for a propensity inference. The more the diagnosis is simply based on otherwise inadmissible other acts, the more trial judges should hesitate to admit the evidence. Trial judges should also be especially attentive to the probative power of the evidence in the context of the case. A motion in limine hearing, for example, might reveal that a defendant’s posttraumatic stress syndrome typically manifests itself under certain circumstances. If those circumstances do not match well with the particulars of the case, the court should reject the testimony. If they do, the court might admit it. Even so, the court should be careful to limit the witness’s ability to testify about the instances of the person’s conduct that led the expert to the diagnosis.\footnote{See FED. R. EVID. 703 (“[i]f the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.”).}

Clearly this is not an ideal solution. The best argument I can make for it—and it is one I make with some trepidation—is that it is better than either the alternative approach or the status quo.

ii. Specific Propensity

It is time to examine how the specificity of other-acts conduct affects whether it should be considered character evidence. We can picture other-acts evidence offered for a propensity purpose as falling on a spectrum. The current state of Rule 404(b) law does little more than identify three points on this
spectrum. At the far left lies pure character-propensity evidence: proof that a defendant had committed other crimes that share nothing in common with the charged crime other than they manifest the same character trait. If a defendant were on trial for securities fraud, evidence that she had previously been convicted of perjury and of evidence tampering would be probative only because the other acts tend to show her dishonest character. At the far right of the spectrum lies habit evidence: highly specific conduct offered to prove the person behaved in that highly specific way on a particular occasion. Evidence that a defendant always stopped at a particular bar on his way home from work on Thursdays and had three martinis would be admissible to prove that he stopped at that bar and had three martinis on his way home from work on a given Thursday. Between these end points lies same-crime evidence: proof that a defendant had previously committed the same crime for which he now stands trial. As we have seen, this is a paradigmatic form of inadmissible character evidence.

It is the area of the spectrum between same-crime evidence and habit evidence that demands exploration. A few commentators have briefly noted that some other-acts evidence that falls short of habit might not constitute character evidence. In 1995, Professor Paul Rothstein proposed that some propensities are too specific to be called character but conceded that this was just a “tentative suggestion, admittedly somewhat incomplete.” It certainly was. He offered only two examples—a female who rubbed up against male victims to distract them while she stole their wallets and drowning wealthy spouses in the bathtub—and made no effort to provide any further guidance as to how to determine where character ends and specific propensity begins. Twenty years later, Rothstein briefly reprised this thought, but without advancing the ball. In the late-1990s, Professor Park likewise suggested that

505. Id. at 1264.
507. Rothstein, supra note 288, at 1264. Note that this is simply a gender-neutral “brides in the bath” example.
508. Paul F. Rothstein, Comment: The Doctrine of Chances, Brides of the Bath and a Reply to Sean Sullivan, 14 L. PROBABILITY & RISK 51, 61 (2015). Rothstein noted the difficulty of stating where the line should be drawn between general propensity and specific propensity. Id. The closest he came to articulating how this should be done was to list some of the acceptable uses for other-acts evidence set forth in Rule 404(b). “‘Pattern’, ‘plan’, ‘motive’, ‘design’, ‘modus operandi’, etc. are appropriate words to apply to this evidence . . . because they involve reasoning based on non-character-type propensity, i.e., specific propensity.” Id. at 62 (emphasis in original). This simply invites courts to continue to invoke these terms indiscriminately. See supra Part III. In his treatise,
if a propensity is sufficiently narrowly defined it is not a character propensity. But he too devoted little effort to articulating when propensity is sufficiently narrowly defined. Professor Richard Lempert and his co-authors have also argued that a character-propensity inference is absent when conduct reaches a certain level of specificity. Unlike Rothstein and Park, they offer a description of when this occurs. But, perhaps because they tie it to their reading of the conclusions of social and personality psychologists, their description is far too narrow. They say that other acts evidence should be admissible when (1) the evidence reveals a behavioral trait that is highly specific in time and place (or sufficiently habitual that it semi-
automatically appears across time and space) and manifests itself in only a limited range of actions; and (2) the action alleged in the lawsuit occurred at or in that particular time, place and manner.

This would not seem to cover, for example, evidence that a defendant had previously courted a series of single mothers, all of whom wound up dead after he convinced them to buy life insurance and name him as beneficiary, offered to prove that his last wife’s mysterious death was murder. It is hard to see how these actions reveal a behavioral trait that is highly specific in time and place.

Rothstein reverts to the traditional character/habit dichotomy. Rothstein, supra note 5, at practice cmt I.

509. Park, Character at the Crossroads, supra note 3, 718–20. Park offered some examples, but only two are apposite: robbing banks using poetic threats and—of course—drowning brides in the bath after insuring their lives. Id. at 719. In another article, he offered a third example: lurking in the back seat of empty cars in a shopping center before sexually assaulting the car owner. Park & Bryden, supra note 140, at 178. Another of Park’s examples—warning dental patients of the dangers of anesthetic—is easily classified as habit. See, e.g., Kornberg v. United States, 693 F. App’x 542, 544 (9th Cir. 2017) (holding that doctors’ regular practice of reviewing with patients the risks of surgery was admissible habit evidence); Jacob v. Kippax, 10 A.3d 1159, 1164 (Me. 2011) (holding admissible as habit evidence oral surgeon’s testimony about routine practices relating to tasks in issue); Dawkins v. Siwicki, 22 A.3d 1142, 1154–56 (R.I. 2011) (holding admissible doctor’s testimony about routine practice in dealing with patients with swelling or tenderness in snuffbox area of wrist). Finally, other examples he gave do not rely on a propensity inference for their probative value. For example, he listed abusing a particular spouse as an example of a sufficiently narrowly-defined propensity. Park, Character at the Crossroads, supra note 3, at 719. But when offered to prove the defendant spouse killed the victim spouse, evidence that the defendant had previously abused the victim speaks to the nature of the relationship between the two of them and the defendant’s motive to kill the victim. No propensity inference is needed. See supra note 239. In contrast, if the same evidence were offered to prove that the abuser had killed someone else, it would be classic inadmissible character evidence. Finally, he suggested the use of gambling debts to prove a motive to embezzle, Park, Character at the Crossroads, supra note 3, at 720, but this too requires no propensity inference. See supra note 265.

510. LEMPERT, GROSS, LIEBMAN, BLUME, LANDSMAN & LEDERER, supra note 144, at 384–86.

511. Id. at 384 nn.57–58; see supra Part IV.D.

512. LEMPERT, GROSS, LIEBMAN, BLUME, LANDSMAN & LEDERER, supra note 144, at 384 (emphasis in original).
or how the charged crime occurred at or in that “particular time, place and manner.” It is not clear how the other acts and the action alleged in the lawsuit could occur “at or in that particular time, place and manner.” By definition, other acts occur at different times and rarely in the same place.

514. Indeed, this description does not seem even to account for some of the examples of noncharacter-propensity inferences they give. They state that modus-operandi evidence falls within this heading. But modus-operandi behavior also appears “across time and space” and can hardly said to be a form of “semi-automatic” behavior.

515. LEMPERT, GROSS, LIEBMAN, BLUME, LANDSMAN & LEDERER, supra note 144, at 386.
committing other such crimes. Moreover, it is unlikely that anyone else would have employed the same distinctive methodology.\footnote{516}{Admittedly, the possibility of a copycat criminal exists. Discussions of copycat crimes, however, usually refer to crimes that were inspired by another’s criminal acts, real or fictional. See, e.g., Ryan Bort, Zach Schonfeld & Stan Ziv, Eight Horrible Real-Life Crimes That Were Inspired by a Movie (or Novel), NEWSWEEK (Apr. 14, 2017), https://www.newsweek.com/nine-horrible-real-life-crimes-were-inspired-movie-or-novel-583828 [https://perma.cc/E2GB-9QGX].}

But other acts committed without a “signature” methodology may still have sufficient specificity and match to escape characterization as character evidence. The circumstances under which a defendant commits the same type of crime may be sufficiently specific and similar—even if the defendant executes the crime by different methods—to warrant labeling the other acts as noncharacter evidence. Consider, for example, a defendant on trial for setting fire to an apartment building in a blighted neighborhood not long after he purchased it, announced he would renovate it, and insured it for an amount double the purchase price. Proof that he had previously destroyed apartment buildings in other blighted neighborhoods soon after he purchased them and insured them for double the purchase price should not be considered character evidence, even if the defendant employed a variety of destructive means.\footnote{517}{See, e.g., State v. Shindell, 486 A.2d 637, 639–42 (Conn. 1985) (involving destruction of buildings by hand and by fire); United States v. DeCicco, 370 F.3d 206, 209, 213 (1st Cir. 2004) (holding trial court erred in excluding evidence that defendant had previously twice tried to burn down same warehouse that was subject of charged arson).}

This is substantially more specific—and more probative—than offering evidence that a defendant had engaged in other acts of generic insurance fraud.\footnote{518}{Defendant’s other arsons in United States v. Pritchard, 964 F.3d 513 (6th Cir. 2020), for example, lack the requisite specificity and similarity. The charged crime involved arson of defendant’s own house to collect fire insurance. \textit{Id.} at 517–18. The other acts were setting fires to a close friend’s house and the defendant’s and a niece’s car, all to collect insurance. \textit{Id.} The Sixth Circuit, however, found that the evidence was admitted for a nonpropensity purpose. \textit{Id.} at 524. The defendant convinced his wife to join in his plan to burn down their house by telling her about the previous arsons. \textit{Id.}}

Courts must demand, however, that the similarities between the other acts and the charged crime are meaningful. Lawyers are especially skilled in highlighting similarities, even if they are meaningless. The way in which courts have admitted other-acts evidence to show modus operandi should read as a cautionary tale. The law is littered with cases in which the “distinctive” similarities between the other acts and the charged crime are either contrived or commonplace.\footnote{519}{See supra note 213 and text accompanying notes 219–33 and infra text accompanying notes 551–65.}
Beyond specificity and match, the frequency with which a defendant has engaged in the other-acts behavior may be an important, although not necessarily determinative, factor. We certainly want to allow evidence of conduct that fails to qualify as a habit only because it falls somewhat short of the frequency and regularity that habit evidence requires. Evidence that a defendant downs at least two stiff drinks five nights out of seven might not be sufficient to establish a habit. But it should be probative enough not to be categorically excluded as proof that she had been drinking on the night she allegedly killed a pedestrian in a hit-and-run accident. So should some other-acts evidence that occurs less frequently or regularly than near-miss habit evidence. Noncharacter evidence may include other acts that have occurred only a small number of times if sufficiently specific and similar. The Wet Bandits, for example, may have had time to stuff the sink drain and leave the water running in only three of twelve burglaries. That they did so those three times should be admissible to prove they committed the charged burglary, which involved a stuffed drain and running water.

The similarity of triggering circumstances and temporal proximity should also be considered. Evidence that a defendant drank five nights out of seven several years before when she was desperately unhappy says little about the defendant’s propensity to drink if the defendant was regularly attending Alcoholics Anonymous and in a good psychological state at the time of the alleged hit-and-run accident. Other acts that occurred in the distant past, especially if they have gone unrepeated in the intervening years, are likely to have little probative value in demonstrating a specific propensity to commit the charged conduct.

These factors all are aimed at identifying those types of other acts whose categorically high probative value tips the scales in favor of admissibility. On the prejudice side of the scales, however, there is little reason to believe that these types of other acts categorically involve additional danger of prejudicial effect. If anything, the danger that the jury will give too much weight to the evidence because of cognitive errors likely lessens as the other acts reflect a more specific propensity rather than a general disposition. Nor should the danger of nullification increase just because the defendant’s past criminality involved more specific means. And while a defendant’s specific modus

520. See Goode & Wellborn, supra note 80, at 308.

521. See United States v. Newman, 982 F.2d 665, 668 (1st Cir. 1992) (stating that two factors for determining “whether a behavior pattern has matured into a habit” are adequacy of sampling and uniformity of response).

operandi may increase the likelihood that the police arrested him because they “rounded up the usual suspect,” it does not increase the likelihood that an innocent person was arrested. To the contrary: if modus operandi is highly probative, the danger the jury will overestimate the value of the other-acts evidence because of the “round up the usual suspect” phenomenon diminishes.

Multi-factor tests like this one are easily and rightfully criticized as an invitation for courts to do what they want. This discussion, however, surfaces two additional data points that can be added to the general disposition-to-habit spectrum: near-miss habit and true modus-operandi evidence. These two additional points lie closer on the spectrum to habit than to same-crimes evidence. It is in this general area that I would locate the dividing line between character and noncharacter evidence. To qualify as noncharacter evidence, the other acts should be much more like near-miss habit and true modus-operandi evidence than same-crime evidence. I intend this to be a demanding standard for two reasons.

First, except for proving state of mind, which I address separately below, as a categorical matter there is less need for other-acts evidence than ever before. Prosecutors now have access to an array of evidence they could scarcely have dreamed of a few generations ago, much less when the character-evidence rule became entrenched. Crimes are more and more likely to be recorded, whether by increasingly prevalent surveillance cameras or a bystander’s phone. Suspects’ whereabouts can be traced through cell-phone pings, or apps that track a user’s location. Technology now affords criminals various options—of which they frequently avail themselves—for

---


524. See infra Part VI.


526. Mary D. Fan, Democratizing Proof: Pooling Public and Police Body-Camera Videos, 96 N.C. L. REV. 1639, 1671–72 (2018) (“Recordings by members of the public . . . are widely recognized by the police as valuable in investigations because they generate leads and evidence.”).


recording damning evidence in a manner that may be difficult to delete, such as text messages, Facebook or Instagram posts, or tweets. Sophisticated forensic tests, most notably DNA testing, provide prosecutors evidence of unmatched precision. Combined with accessible and robust databases, these forensic tools are used to solve cases, both current and cold, with increasing efficiency. At the very least, these developments significantly diminish—as a categorical matter—the need for other acts evidence to prove the actus reus of a crime. In comparison, when courts centuries ago declared character-propensity evidence inadmissible, forensic evidence was nonexistent and professional police forces were only just beginning. Without an eyewitness or confession, building a criminal case was no easy task. In retrospect, the


534. They are also used to expose erroneous convictions. See DNA Exonerations in the United States, INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states#:~:text=130%20DNA%20exonerations%20were%20wrongfully,75%25%20of%20these%20cases [https://perma.cc/265F-KRMJ].


courts’ traditional willingness to forswear other-acts evidence seems a bit startling. Of course, as the earlier discussion shows, courts did not entirely disown such evidence. Necessity impelled them to admit other-acts evidence, even when its probative value flowed solely from a propensity inference. That is what has led to our current state of affairs. The point here is that the character-evidence rule is a categorical one. And in deciding how to construe what is character and what is not, we should bear in mind that categorically there is less need for other-acts evidence than ever before. Its marginal probative value is categorically diminished.

Second, liberalizing the admissibility of other-acts evidence is likely to have a disparate racial impact.\(^{538}\) Non-whites are arrested and convicted at higher rates than whites—\(^{539}\)—even when they have similar baseline rates of criminality.\(^ {540}\) They are more likely to be swept up in a misdemeanor system that encourages the poor to plead guilty even when they are innocent.\(^{541}\)

---


539. Imprisonment rates for African-American men are almost six times greater than for white men; Hispanic men are imprisoned at two and one-half times the rate of white males. E. Ann Carlson, U.S. DEP’T OF JUST., PRISONERS IN 2018, at 16, tbl.10 (2020).


Consequently, not only are non-whites more likely to be the subjects of other-acts evidence, the other-acts evidence is less likely to be accurate. At the same time, other-acts evidence may tend to reinforce implicit biases that already exist among many factfinders. Therefore, the designation of other-acts evidence as noncharacter should be limited to the types that are especially probative.

It is time to put some flesh on the bones by giving examples of how I would apply the principles I have laid out. I start by revisiting two of the cases in which courts admitted other-acts evidence as proof of a defendant’s common plan or scheme. Under the scheme I propose, *State v. Roth*—the modern-day “brides in the bath” case—provides an easy example of other-acts evidence that should be classified as noncharacter. Recall that Roth was charged with murdering his fourth wife, a single mother who married him after a short courtship and upon whose life he purchased a substantial life insurance policy. Evidence that Roth had previously courted another single mother, married her, purchased an insurance policy, and collected on it when she plunged to her death, and that he had courted other single mothers and put similar schemes in motion is both highly specific and eerily similar to the charged conduct. It clearly falls in the vicinity of near-miss habit and true modus-operandi evidence.

In contrast, the other-acts evidence in *United States v. Kravchuk* presents a close case but should still be considered character evidence. Kravchuk was tried for stealing money from an automatic teller machine (ATM) in a convenience store. His other acts consisted of two previous ATM theft attempts within seven months, both involving the same co-participants. In one, they removed an ATM from a mall; in the other, they attempted, but failed, to remove an ATM from a different convenience store. While this is more specific than a generic theft and there are multiple acts temporally close to the charged crime, the evidence falls short of the specificity and similarity I would demand to declare it noncharacter. The two other acts involved an attempt to remove an ATM machine; the charged crime did not. The location of the crimes

---


543. I skip the cases discussed under the “intent” heading, see * supra* Part III.A, because I will deal with those cases under another change I propose to Rule 404(b). See * infra* Part VI.


545. See * supra* text accompanying notes 145–64.

546. 335 F.3d 1147 (10th Cir. 2003).

547. * Id. at 1151.

548. * Id. at 1152, 1156.

549. * Id. at 1156.
varied: two in a convenience store, one in a mall. This evidence falls outside the general vicinity of near-miss habit and true modus-operandi evidence.\textsuperscript{550}

*United States v. Henthorn*\textsuperscript{551} exemplifies the kind of other-acts evidence that courts strain to admit but would not be admissible under my proposal. Henthorn’s wife of twelve years died when she fell more than 100 feet off a cliff in a remote spot in Rocky Mountain National Park.\textsuperscript{552} Between three insurance policies on her life and an annuity, Henthorn stood to collect $4.7 million.\textsuperscript{553} The prosecution accumulated substantial evidence, detailed by the court, to prove that her fall was no accident.\textsuperscript{554} But the prosecution wanted more. It offered evidence that seventeen years before, Henthorn’s first wife had also died under questionable circumstances. While they were changing a flat tire on the side of a road in a remote and heavily forested spot, she was pinned under the car and died of internal injuries.\textsuperscript{555} Henthorn collected $600,000 in life insurance payments.\textsuperscript{556} Although his actions raised some suspicions, Henthorn was never prosecuted for this death.\textsuperscript{557} The trial court admitted the evidence to prove plan, intent, and lack of accident.\textsuperscript{558} The court of appeals affirmed, relying heavily on the similarities it discerned between the two deaths.\textsuperscript{559} Both occurred in a remote location, which impeded communication, delayed emergency responders, and reduced the chances of an accidental witness.\textsuperscript{560} After both deaths, Henthorn told inconsistent stories, collected significant insurance proceeds, and lied about the applicable insurance policies.\textsuperscript{561} And Henthorn quickly had both bodies cremated over family objections and spread the ashes on the same mountain.\textsuperscript{562} But these similarities

\textsuperscript{550}. I would easily classify the other-acts evidence in *United States v. Riepe*, 858 F.3d 552, 558 (8th Cir. 2017), the third case discussed in the Plan section, see supra text accompanying notes 172–88, as character evidence. But it would fall within the exception I propose for state of mind. See infra Part VI.

\textsuperscript{551}. 864 F.3d 1241 (10th Cir. 2017).
\textsuperscript{552}. Id. at 1245.
\textsuperscript{553}. Id. at 1247 n.5.
\textsuperscript{554}. Id. at 1245–47. This included what may have been a previous attempt by Henthorn to murder his wife. If it was, it would have tended to show the state of Henthorn’s feeling toward his wife and would have been probative without a propensity inference. See supra note 239.
\textsuperscript{555}. Id. at 1249.
\textsuperscript{556}. Id. at 1250.
\textsuperscript{557}. Id. Law enforcement briefly investigated the death, but concluded it was accidental. Id.
\textsuperscript{558}. Id. at 1248.
\textsuperscript{559}. Id. at 1249.
\textsuperscript{560}. Id. at 1251.
\textsuperscript{561}. Id.
\textsuperscript{562}. Id.
amount to little more than that the two deaths occurred in remote locations\textsuperscript{563} and Henthorn received substantial life insurance payments.\textsuperscript{564} Moreover, temporal proximity is absent—seventeen years separated the events.\textsuperscript{565} That Henthorn may have killed his first wife to collect insurance is far closer to the same-crime evidence that lies at the core of the ban on character-propensity-inference evidence than it is to the specificity and temporal proximity I would require to classify it as noncharacter evidence.

I argued that true modus-operandi evidence, exemplified by the Wet Bandits or a recent case\textsuperscript{566} in which the defendants—dressed as funk legend Rick James and movie character Youngblood Priest\textsuperscript{567} and wearing orange construction vests—robbed a series of cash-and-check stores, should not be considered character evidence. Nor should other highly specific ways of committing a crime that really do not qualify as unique modus-operandi evidence. Consider \textit{Davis v. State},\textsuperscript{568} a sexual assault case. The victim went to Davis’s house to smoke methamphetamine.\textsuperscript{569} Afterwards, she drank a wine cooler Davis gave her and blacked out.\textsuperscript{570} She testified that when she awoke she had memories of someone having sex with her.\textsuperscript{571} DNA testing identified Davis as her assailant, and a blood test revealed that she had very high levels of a common date-rape drug.\textsuperscript{572} To rebut Davis’s claim of consent, the prosecution offered evidence that he had sexually assaulted three other women within a year of the charged assault.\textsuperscript{573} In each instance, the victim went to Davis’s house to use methamphetamine.\textsuperscript{574} After each of the victims used drugs, he gave her an

\textsuperscript{563} \textit{Id.} The court’s recitation that in both instances communication was impeded, emergency response time slowed, etc. merely catalogs the consequences of being in a remote location. These are not additional similarities in any meaningful sense.

\textsuperscript{564} \textit{Id.} The court’s observation that Henthorn quickly had both bodies cremated and spread the ashes in the same place exemplifies the kind of false similarities that courts should avoid. Neither case involved a question about the physical cause of death. An autopsy would not have revealed whether Henthorn’s wife was pushed or accidentally fell off the cliff or whether the auto slipped or was pushed off the jack. The relevance of his spreading his deceased wives’ ashes in the same place is a mystery.

\textsuperscript{565} \textit{Id.} The court downplayed this temporal gap by noting that Henthorn’s first wife died after they had been married for twelve years and that his second wife died after they had been married for thirteen years. \textit{Id.} Perhaps the court considered a dozen years of marriage a triggering circumstance.

\textsuperscript{566} United States v. Jett, 908 F.3d 252, 259–62 (7th Cir. 2018).

\textsuperscript{567} \textit{See} \textit{SUPER FLY} (Superfly Ltd. 1972).

\textsuperscript{568} 581 S.W.3d 885 (Tex. Ct. App. 2019).

\textsuperscript{569} \textit{Id.} at 888.

\textsuperscript{570} \textit{Id.}

\textsuperscript{571} \textit{Id.}

\textsuperscript{572} \textit{Id.} at 888–90.

\textsuperscript{573} \textit{Id.} at 891–92.

\textsuperscript{574} \textit{Id.}
incapacitating alcoholic drink and sexually assaulted her.\textsuperscript{575} This is not modus-operandi evidence in the sense that the defendant committed the crime in a unique way that was unlikely to be used by anyone else. To the contrary: the use of date-rape drugs is all too common.\textsuperscript{576} Nevertheless, the other-acts evidence in Davis involved several other sexual assaults, committed in the same specific manner, which matched the charged crime.

Other evidence that courts have admitted under the modus operandi heading should be rejected. I discussed earlier the Lane case, where the court contrived to list an array of similarities between the charged crime—the kidnapping, sexual assault, and murder of an eight-year-old girl—and the extrinsic offense—the kidnapping, sexual assault, and murder of a nine-year-old girl ten years later in another state.\textsuperscript{577} The list of similarities primarily consisted of the type of facts that are common to a kidnapping, sexual assault, and murder. The two unique similarities noted by the court—the defendant participated in the search for both victims and took what the court referred to a trophy (the underwear of the victim)—fail to establish sufficient specificity and similarity between the two crimes.\textsuperscript{578} In addition to the temporal and physical distance between the two crimes, the court omits many details regarding how the crime was actually committed.\textsuperscript{579} Unfortunately, that evidence may not have been available, but it would still be critical in establishing that sufficient similarity existed between the two.

I would exclude the other-acts evidence in most of the cases discussed above in which courts admitted the evidence under the doctrine of chances. For example, the other acts in the Vail case—the disappearance of two other women associated with defendant—share neither specific similarity nor temporal proximity to the charged murder of his wife. His wife drowned in 1962; the prosecution had no idea how Vail might have engineered the deaths of the other two women eleven and twenty-two years later. In York, there was temporal

\textsuperscript{575} Id.


\textsuperscript{577} Lane v. State, 933 S.W.2d 504, 517 (Tex. Crim. App. 1996); see supra text accompanying notes 219–33.

\textsuperscript{578} Because I believe that recognized psychological conditions should not be considered character, see supra Part V.C.ii, evidence that the defendant possessed multiple sexual disorders, including pedophilia, however, would be admissible subject to Rule 403 balancing.

\textsuperscript{579} Another way of inflating the degree of similarity between the charged crime and other acts is to ignore relevant dissimilarities between the two. Obviously, courts should not do this.
proximity, but the charged crime—an arson caused by explosive devices that resulted in the death of York’s business partner—bore no particular resemblance to the death of his wife, who was shot through the temple. York did seek to collect insurance proceeds both times, but this simply puts the other-acts evidence on the same plane as the *Henthorn* case.

*Rex v. Smith*,\(^{580}\) the original Brides in the Bath case—presents a stronger case for admission. In less than thirty months, Smith was thrice widowed by bathtub drownings of women he had married. As Professor Sullivan admirably recounts, the deaths were similar “[i]n even minor details.”\(^{581}\) For example, he married each under a different name; each one executed a will in Smith’s favor within a week of her death; shortly before each wife’s death, Smith made other financial arrangements from which he would profit; and the bathrooms were all unlocked.\(^{582}\) These similarities are sufficiently specific and temporally related to warrant admissibility as noncharacter evidence. There is no need to resort to the doctrine of chances. The other-acts evidence in the infamous *Woods* case—where the defendant was prosecuted for suffocating to death her infant, adopted son—could likewise have been admitted without relying on the doctrine of chances. Inflicting upwards of seventeen cyanotic episodes on eight other children, six of whom died, is a highly specific way of acting. It falls close enough to the near-habit and true modus-operandi types of conduct to be considered noncharacter.\(^{583}\)

I harbor no illusions that the analysis I propose here offers easy solutions. Judgment calls are inevitable. In individual cases, other-acts evidence that I would continue to classify as character will be highly probative. *Henthorn* is one such example. Courts desiring to admit such evidence may well be tempted to define character more narrowly than I propose and become even more profligate in admitting other-acts evidence. But that is the inevitable consequence of a categorical rule of exclusion. And, as the recent attempt to amend Rule 404(b) proves, a categorical other-acts evidence rule is not going away.\(^{584}\) Moreover, I acknowledge that one should be cautious in basing a


\(^{582}\) *Id.*

\(^{583}\) Moreover, recently disclosed information indicates that Woods may have suffered from Munchausen Syndrome By Proxy, a condition that had yet to be described at the time. *See* DiMAIO & FRANSCHELL, *supra* note 311, at 83–86. If so, it would have been a disease, not a character trait, that provided the motive for Woods to act.

\(^{584}\) In an ideal world, I would propose replacing Rule 404(b)(2)’s nonexclusive list of permissible purposes with a simple statement that other-acts evidence may be admissible when offered for a noncharacter-propensity purpose. The Advisory Committee’s unwillingness to do anything more
proposal primarily on a reading of appellate decisions. After all, they represent only a tiny fraction of tried, much less filed, actions. In fact, jury studies show that in the great majority of criminal trials Rule 404(b) actually keeps juries from learning of a non-testifying defendant’s prior convictions. Introducing another avenue for circumventing the character-evidence rule might lead to more run-of-the-mill other-acts evidence being admitted. In the end, however, I do not believe this is likely to happen. A study of the admittedly skewed sample of criminal cases that comprise the appellate reports reveals a willingness of prosecutors to push the boundaries of Rule 404(b) that is nearly matched by trial courts’ willingness to accede. As things stand, the doctrinal tools available to trial courts to admit other-acts evidence are more than ample. The ability to define character should not result in other-acts evidence being admitted where currently it is excluded.

Giving form to the notion of character, however, would allow courts to admit other-acts evidence where its probative value flows from a propensity inference, but not a character-propensity one. In such cases, courts would no longer have to deny that a propensity inference is at work. This should have a modest spillover effect: it will be harder for courts to pretend in other cases that other-acts evidence is probative without a propensity inference. But especially in one area, the pressure to pretend will persist. Unless it is addressed head-on, courts will continue to dissemble, and the distorted view of propensity will continue unabated.

than tinker with Rule 404(b), however, makes clear that such a proposal would go nowhere. See supra text accompanying notes 7–8 and infra text accompanying note 632.

585. The vast majority of criminal cases are resolved by plea bargain. See Lindsey Devers, Bureau of Justice Assistance, Research Summary: Plea and Charge Bargaining 1 (2011), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf [https://perma.cc/KF5X-HJRB] (stating that scholars estimate that 90 to 95% of both federal and state cases are resolved through plea bargaining). And most cases resolved at trial are not appealed. See Theodore Eisenberg, Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes, 1 J. EMPIRICAL LEGAL STUD. 659, 663 (2004) (calculating 39.6% appeal rate of cases resolved after trial).

586. Most federal and state court rules allow a party impeaching a witness to attack the witness’s character for truthfulness by showing certain prior convictions. See Fed. R. Evid. 609; 28 VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE § 6131 (2d ed. 2020) (summarizing state rules). While these studies fail to indicate whether juries learned of other-acts evidence that did not involve a conviction, it is unlikely that including such data would change these results in a significant manner.

587. Kalven and Zeisel report that in 87% of the cases in which the accused had one or more prior convictions but did not testify, the jury did not learn of the convictions. Kalven & Zeisel, supra note 566, at 147. The corresponding figure in a study by the National Center for State Courts of criminal cases from four jurisdictions was 91.2%. Theodore Eisenberg & Valerie P. Hans, Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes, 94 CORNELL L. REV. 1353, 1375 (2009).
VI. A TRUE EXCEPTION FOR INTENT

Of all the permissible purposes Rule 404(b) lists for other-acts evidence, intent is the one most relied on by the courts.588 And, as discussed earlier, courts routinely admit other-acts evidence to prove intent even when it does so only through a character-propensity inference.589 Even courts of appeals that have demanded in recent years that prosecutors and courts articulate a propensity-free chain of inferences590 have exhibited a tendency to backslide when other-acts evidence is offered to prove intent.591 The character-propensity use of other-acts evidence to prove intent is hardly a new development.592 Wigmore first propounded his doctrine-of-chances theory in 1904 to explain why other-acts evidence should be admissible to prove intent.593 More than eighty years later, the Supreme Court emphasized the importance of other-acts evidence to prove intent.594

For good reason: Where intent is truly a controverted issue, Rule 404’s categorical judgment that the risk of unfair prejudice outweighs the probative value of other-acts evidence—even when it requires a character-propensity inference—is probably wrong. On the probative value side, when the actus reus is established and the only real issue in the case is the defendant’s state of mind, the inferential leap from the other-acts evidence to a conclusion about the defendant’s state of mind is relatively short.595 Moreover, the need for other-acts evidence is particularly acute when commission of the physical act may be accompanied by an innocent, or merely a lesser, state of mind than intent.596 Beechum illustrates this.597 Beechum conceded the actus reus—possession of a silver dollar that was not his; he contended only that he did not intend to steal it. Although a factfinder might not find Beechum’s story highly plausible, to avoid conviction he needed only to produce a reasonable doubt in the mind of one juror. Evidence that Beechum had stolen other items he was supposed to

588. See supra note 81.
589. See supra Part III.A.
590. See supra text accompanying notes 337–39.
591. See supra note 341.
592. See generally Reed, supra note 6.
593. WIGMORE, supra note 5, § 302.
594. Huddleston v. United States, 485 U.S. 681, 685 (1988) (“Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor’s state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.”).
595. MUELLER & KIRKPATRICK, supra note 34, § 4:34.
596. See 22B WRIGHT & GRAHAM, supra note 6, § 5239, at 106; Capra & Richter, supra note 34, at 807 (noting that “proof of state of mind is elusive”).
597. See supra text accompanying notes 95–106.
have delivered was both highly probative of his intent to steal and particularly needed to establish his state of mind. It is hard to imagine a legal system that would routinely preclude a jury from considering such evidence. In fact, ours does not. Courts invariably admit other-acts evidence to prove intent when it is the only truly contested issue.

The problem is that many courts admit other-acts evidence regardless of whether intent is really a contested issue. Many courts hold that a defendant puts intent in issue simply by pleading not guilty. This leads to cases like United States v. Smith. Smith was charged with, among other things, possession of cocaine with intent to distribute. According to the prosecution, a police officer stopped Smith for speeding. Believing that he smelled marijuana, the officer called for a K-9 unit to conduct a dog sniff around the car. As the K-9 unit approached, Smith sped off. The police tracked the car down, but not before Smith had abandoned it and fled on foot. A search of the car uncovered about two kilos of cocaine. Eighteen months later, Smith was finally arrested. At trial, his sole defense was mistaken identity; he claimed he was not the driver of the car. Despite this, the prosecution was allowed to introduce Smith’s eight-year-old conviction for possession of cocaine with intent to distribute. The Eighth Circuit affirmed, holding the

598. Professors Daniel Capra, the long-standing Reporter for the Advisory Committee on the Federal Rules of Evidence, and Liesa Richter, a consultant to the committee, have argued against a “wholesale ban” on propensity inferences because it may be appropriate to use other-acts evidence to prove intent even when such use requires a propensity inference. Capra & Richter, supra note 34, at 806–07.

599. See 1 IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, supra note 24, § 5:11 (noting that there are numerous cases admitting such evidence where defendant concedes doing the physical act but contends it was an accident, i.e., that defendant lacked required intent).

600. See, e.g., United States v. Shelledy, 961 F.3d 1014, 1022 (8th Cir. 2020); United States v. Frediani, 790 F.3d 1196, 1202 (11th Cir. 2015); United States v. Cockrell, 587 F.3d 674, 679 (5th Cir. 2009). See generally 1 IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, supra note 24, § 8:11; Capra & Richter, supra note 34, at 797.

601. 789 F.3d 923 (8th Cir. 2015).

602. Id. at 926.

603. Id.

604. Id.

605. Id.

606. Id.

607. Id. at 926–27.

608. Id. at 927–28. The prosecution had ample evidence to rebut this defense. Among other things, the driver gave the officer who stopped him a driver’s license that identified him as the defendant, and the search also yielded a wallet, cell phone, and prescription pill bottles all linked to the defendant. Id. at 926–27.
evidence was admissible to prove Smith’s “intent and knowledge.”\textsuperscript{609} It expressly rejected his argument that the evidence was inadmissible in light of his mistaken identity defense.\textsuperscript{610} By entering a general denial, Smith had placed his knowledge and intent in issue.\textsuperscript{611}

Other courts demand more than a not guilty plea—at least in some instances—to put intent in issue.\textsuperscript{612} For example, the Seventh Circuit distinguishes between specific and general intent crimes. Intent is “automatically” in issue when the charge involves a specific intent crime,\textsuperscript{613} but for general intent crimes the defendant must meaningfully place intent in issue.\textsuperscript{614} Exactly what this means, however, is less than clear: the specific/general intent distinction is famously an analytical muddle.\textsuperscript{615} Not surprisingly then, the Seventh Circuit’s explanation for its approach is hardly satisfying. According to the court, the key distinction is that “for general-intent crimes, the defendant’s intent can be inferred from the act itself, so intent is not ‘automatically’ at issue.”\textsuperscript{616} But some forms of murder are considered specific-
intent crimes although a murderer’s intent can often be inferred from the act of killing itself.

To be fair, the Seventh Circuit ultimately places little weight on this distinction. Even though intent is automatically at issue in a specific-intent crime, the Seventh Circuit requires a trial court to factor into its Rule 403 rulings the extent to which the defendant is actually contesting intent.\textsuperscript{618} \textit{United States v. Miller}\textsuperscript{619} illustrates this. Miller was charged, among other things, with possession of cocaine with intent to distribute. Police found the cocaine—packaged in bags, some with price tags—in a bedroom they claimed was Miller’s.\textsuperscript{620} His defense was that he was not staying in that bedroom and the drugs were not his.\textsuperscript{621} The Seventh Circuit ruled that, even though this was a specific-intent crime,\textsuperscript{622} the trial court erred in admitting Miller’s previous conviction for possession of cocaine with intent to distribute: intent was at issue in “only the most attenuated sense.”\textsuperscript{623}

Other courts reject outright the idea that a not-guilty plea automatically puts intent in issue\textsuperscript{624} and simply consider the extent to which intent is contested. For example, in \textit{United States v. Asher},\textsuperscript{625} a jailer was charged with assaulting an inmate and filing a false report to cover up the assault. Asher denied the assault.\textsuperscript{626} He contended the inmate’s severe injuries were caused by a slip and fall.\textsuperscript{627} The prosecution sought to prove Asher’s intent to assault by introducing evidence that Asher beat another inmate a few years before.\textsuperscript{628} Asher, however, contended that he was not disputing intent and offered to stipulate that if the jury found he beat the inmate he would concede he possessed the necessary intent.\textsuperscript{629} Despite this, the trial court admitted the other-acts evidence. The

\textsuperscript{617} See, e.g., Morgan v. Israel, 735 F.2d 1033, 1035 (7th Cir. 1984) (referring to first-degree murder as specific-intent offense).
\textsuperscript{618} Gomez, 763 F.3d at 857–61.
\textsuperscript{619} 673 F.3d 688 (7th Cir. 2012).
\textsuperscript{620} Id. at 694.
\textsuperscript{621} Id. at 696.
\textsuperscript{622} Id. at 697. This provides another illustration of the flawed distinction the Seventh Circuit draws between general and specific intent. Had Miller possessed the cocaine—packaged with price tags—the jury would have had little difficulty inferring his intent to distribute.
\textsuperscript{623} Id.
\textsuperscript{624} See, e.g., United States v. Sterling, 860 F.3d 233, 247 (4th Cir. 2017) (stating that not-guilty plea puts intent at issue, but court must determine whether “intent is at issue in a manner that allows Rule 404(b) evidence”); United States v. Siddiqui, 699 F.3d 690, 702 (2d Cir. 2012); cf. United States v. Kilmartin, 944 F.3d 315, 335 (1st Cir. 2019) (“[A] lack of dispute or concession of a central allegation may significantly reduce the probative value of particular evidence and, thus, call its admissibility into question.”).
\textsuperscript{625} 910 F.3d 854, 857 (6th Cir. 2018).
\textsuperscript{626} Id. at 858.
\textsuperscript{627} Id.
\textsuperscript{628} Id. at 857.
\textsuperscript{629} Id.
Sixth Circuit reversed, holding that, in light of the offer to stipulate, the danger of unfair prejudice substantially outweighed the probative value of the evidence.\textsuperscript{630} What we are left with is a mess. When intent actually is controverted, most courts readily admit other-acts evidence even if it proves intent only through a character-propensity inference. When intent is not actually controverted, some courts pretend that it is and admit the evidence; some resort to the muddled specific/general intent distinction, at least to discern initially whether intent is in issue; and some simply look at the facts of the case. If a court decides that intent is not actually controverted, it may factor that into its admissibility ruling.\textsuperscript{631} And in some cases the defendant’s posture may not be clear. Indeed, the Advisory Committee recently rejected a proposal to amend Rule 404(b) to require that other-acts evidence be admitted only when whatever purpose for which it was offered was actively contested by the evidence’s opponent.\textsuperscript{632} In a recent article, the reporter and academic consultant to the committee offered a number of reasons why they opposed such a requirement, including the difficulty of defining “active contest” and disagreement among courts about what constitutes controverting an issue.\textsuperscript{633}

\textsuperscript{630} Id. at 860–63; see also United States v. Hall, 858 F.3d 254, 259 (4th Cir. 2017) in which the defendant was charged with, among other things, possession of marijuana with intent to distribute. Police found about six kilos of marijuana inside a dead-bolt-locked bedroom. Hall, 858 F.3d at 259. Hall conceded that he knew the marijuana was there but claimed that he had no control over it. Id. at 263. The court of appeals concluded that because Hall neither contested that he knew of the drug’s presence or that it was to be distributed, the trial court erred in admitting evidence of Hall’s prior possession with intent to distribute. Id. at 276.

\textsuperscript{631} A court’s ability to do this may be circumscribed by the Supreme Court’s discussion in Old Chief v. United States, 519 U.S. 172 (1997) about the effect of a defendant’s offer to stipulate to an element of the offense. The Court rejected the notion that a defendant could, by stipulating to an element of the charge, foreclose the prosecution from proving that element in the way it best saw fit. Id. at 186–90. It exempted Old Chief from this general rule because of the relatively unique nature of his prosecution. Id. Old Chief was charged with being a felon in possession of a firearm. Id. at 174. His offer to stipulate to his legal status as a previously convicted felon provided the prosecution everything it needed to prove that element of the crime and did not in any way diminish the prosecution’s ability to tell the story of the events at issue. Id. at 189–90. Regarding Rule 404(b) issues in other types of cases, however, the Court stated that when the prosecution seeks to introduce other-acts evidence “on some issue other than status . . . Rule 404(b) guarantees the opportunity to seek its admission.” Id. at 190; see 1 I. M. Winkelried, Uncharged Misconduct Evidence, supra note 24, § 8:12 (“[F]or the most part the courts have been reluctant to read Old Chief broadly and extend its precedential value to other settings.”).


\textsuperscript{633} Capra & Richter, supra note 34, at 811–12. They also noted difficulty in deciding when a defendant would have to actively contest an issue as well concerns that an “active contest” requirement would undermine and obfuscate the meaning of Old Chief v. United States, 519 U.S. 172 (1997). Capra & Richter, supra note 34, at 811, 814.
I believe this problem should be met head-on. First, Rule 404(b) should be amended by creating a true exception for other-acts evidence that is offered to prove intent. Other-acts evidence should be admissible to prove intent through a character-propensity inference. But this exception should be limited to the set of cases where the probative value of the other-acts evidence categorically outweighs its prejudicial effect: where intent is controverted. This most clearly comprises those cases where the actus reus is established and the only real issue in the case is the defendant’s state of mind. It would also reach cases where the actus reus is controverted and the defendant is unwilling to concede that if the actus reus is established, the state of mind is also established.

To avoid controversy about whether intent is controverted, I propose a relatively simple standard. The defendant should bear the burden of establishing that intent is not controverted. A defendant must timely agree not to controvert state of mind by means of direct testimony, cross-examination, or argument to the jury. Under such an agreement, a defendant could contest the nonmental elements of the crime but would not be permitted to contend that

---

634. Because this proposal would authorize the use of character evidence to prove that a person acted in accordance with that character on a particular occasion, Rules 404(a) and 405 would also have to be amended. There are several ways to do this. A less desirable alternative would be to set forth the exception in a new rule, as was done in Rules 413 through 415. See infra note 637.

635. I say “true” exception because courts often carelessly refer to the Rule 404(b)(2) list of permissible (that is, noncharacter-propensity) purposes for which other-acts evidence may be offered as “exceptions” to the rule excluding other-acts evidence when offered for a character-propensity inference. See, e.g., United States v. Pritchard, 964 F.3d 513, 524 (6th Cir. 2020); United States v. Moore, 641 F.3d 812, 823 (7th Cir. 2011).

636. I use “intent” here, as Rule 404(b) does, see 22B GRAHAM, supra note 34, § 5250, as a short-hand for states of mind that are described by the sometimes bewildering array of terms used in federal statutes. See 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 119–20 (1970).

637. A similar judgment about the categorical balancing of probative value and prejudicial effect led to the creation of Rules 413 through 415, which operate as exceptions to the character-evidence rule for certain types of other-acts evidence. They authorize the admission of a defendant’s previous acts of sexual assault or child molestation to prove, through a character-propensity inference, that the defendant committed the charged sexual assault or child molestation. Fed. R. Evid. 413–415. See, e.g., United States v. Jones, 748 F.3d 64, 70 (1st Cir. 2014).

638. This exception would primarily be used to prove a defendant’s state of mind. But the exception would also apply when other-acts evidence is offered to prove a nondefendant’s state of mind, as it sometimes is now used in “reverse” Rule 404(b) cases. See, e.g., United States v. Montelongo, 420 F.3d 1169, 1172–75 (10th Cir. 2005). In such situations, it is the party against whom the other-acts evidence is offered who would have to controvert or concede the existence of the state of mind.

639. Again, I use “defendant” here as shorthand for the party opposing the use of the other-acts evidence.

640. This would effectively overrule, for this set of cases, Old Chief v. United States, 519 U.S. 172 (1997), where the Court severely limited a defendant’s ability to stipulate an issue out of the case. See supra note 631.
whoever did the actus reus lacked the required state of mind. I would allow the trial court to require the defendant to agree to a jury instruction that captures this agreement. A defendant would also be precluded from seeking a jury instruction on a lesser included offense that is inconsistent with the agreement. I would also leave it to the trial court to determine the timing of a defendant’s agreement. In a relatively simple case, the court might require the defendant to do this before trial, within a reasonable time after receiving the prosecution’s Rule 404(b) notice. In more complex cases, the court might provide the defendant additional time to make the declaration. The court, however, should not push back the deadline too far. It should not unduly impair the prosecution’s ability to present its other-acts evidence if the defendant ultimately declines to agree not to controvert state of mind.

Under this proposal, cases like Beechum will be easy to decide. Beechum was caught with the goods; his only possible defense was that he lacked the intent to steal. Evidence of his prior theft would be admissible to prove his intent to steal expressly through a character-propensity inference. There will no longer be a need to pretend that it is probative without such an inference. Likewise, in many drug cases where the defendant is caught holding the baggies, a character-propensity inference may be drawn from the defendant’s prior crimes to establish an intent to join the conspiracy or an intent to distribute. This proposal allows courts to do what they already frequently do, but in an intellectually honest way.

On the other hand, this proposal should put an end to cases like Smith. He could pursue his mistaken identity defense while agreeing that the driver—whoever it was—possessed the two kilos of cocaine found in the car with the intent to distribute it. Evidence of his previous conviction for the same offense would then be inadmissible to prove, through a character-propensity inference, his intent and knowledge. Putting the onus on the defendant to clearly agree not to contest intent should also make it easier for courts to identify whether intent is in issue. In United States v. Henry, for example, the defendant was charged with possession of crack cocaine with intent to distribute. To prove intent, the prosecution introduced evidence of Henry’s two-year-old conviction for the same crime. Henry’s primary defense was that he did not possess the

---

641. See infra text accompanying notes 644–50.
642. FED. R. EVID. 404(b)(3).
643. To be clear, this exception and a defendant’s corresponding ability to block admissibility by agreeing not to controvert state of mind apply only when the other-acts evidence is probative through a character-propensity inference. Rule 404 does not bar the admission of other-acts evidence that tends to prove intent without a character-propensity inference. See supra Part II. Such other-acts evidence is admissible without the proposed exception.
644. 848 F.3d 1 (1st Cir. 2017).
645. Id. at 6.
drugs. He argued on appeal that, because his intent was not in issue, the trial court should have excluded the other-act evidence. The court of appeals noted, however, that Henry’s defensive posture was somewhat ambiguous. He informed the court before trial that he would be contesting possession, but not intent, and his counsel’s opening statement reflected that approach. But he also submitted a proposed jury instruction that included the lesser included offense of simple possession, which indicated that he had not forsworn a contest about his intent to distribute.

This does not mean that other-acts evidence would automatically be admissible any time a defendant failed to agree not to contest state of mind. A defendant could invoke Rule 403 and argue that the probative value of the other-acts evidence, even through the permitted character-propensity inference, is substantially outweighed by the danger of unfair prejudice. Banks illustrates this point. Recall that Banks was charged with conspiracy to possess cocaine with intent to distribute, and the court admitted evidence of a ten-year-old marijuana possession conviction to prove his knowledge of and intent to join the conspiracy. Under my proposal, Banks’s ten-year-old conviction could be offered to prove his state of mind through a character-propensity inference. But its probative value for that purpose is low, and Banks could certainly argue that the danger of unfair prejudice was substantially greater.

This proposal would yield several benefits. First, it would square the text and application of the rule with its underlying purpose of promoting accurate factfinding. When offered to prove intent through a character-propensity inference, other-acts evidence should be admissible only when it is categorically more probative than prejudicial. This proposal would codify that this occurs only when the evidence is offered to prove a controverted state of mind. When a defendant, however, agrees not to controvert intent, such other-acts evidence categorically loses much of its probative value and should be inadmissible.

646. Id.
647. Id.
648. Id.
649. Id.
650. Id. at 9–10.
651. United States v. Banks, 706 F.3d 901 (8th Cir. 2013); see supra text accompanying notes 88–92.
652. Banks, 706 F.3d at 903–04.
653. Moran provides another example. Recall that the defendant there conceded that there was a rifle on the back seat of the car he was driving but claimed that he did not know it was there. See supra text accompanying notes 120–27. Moran’s ten-year-old felon-in-possession conviction could be offered for a character-propensity inference to prove that he knowingly possessed the rifle. But its probative value for that purpose is low, and Moran could successfully argue that the danger of unfair prejudice was substantially greater.
Second, it would clarify when courts may admit other-acts evidence under a related permissible purpose listed in Rule 404(b)(2): “lack of accident.” Prosecutors often reflexively invoke this permissible purpose in response to a defendant’s “accident” defense. Sometimes “accident” is about state of mind; other times, it is not. A murder defendant who admits shooting the victim, but claims it was an accident because he thought the gun was unloaded is controverting his intent.654 Other-acts evidence would be admissible under the proposed exception to prove the defendant did not act accidentally—that the defendant intended to kill the victim. But other-acts evidence would not be admissible to prove lack of accident in cases like Vail or Henthorn, where the accident defense is that the victim’s conduct was accidental. Both Vail and Henthorn denied doing the act that caused their wives’ deaths. Vail claimed that his wife accidentally fell out of their boat; Henthorn, that his wife accidentally fell off a cliff. In exchange for rendering other-acts evidence inadmissible, each would surely have readily agreed not to controvert intent if the jury found he had pushed his wife.

Finally, creating a true intent exception would obviate the need for courts to resort to the dissembling to which they now so frequently resort. Like giving form to the notion of character, this should have a spillover effect. If courts can honestly acknowledge when other-acts evidence is probative of intent only through a character-propensity inference, it will make it harder for courts to dissemble when other-acts evidence is offered for another purpose listed in Rule 404(b). Perhaps paradoxically, creating this exception should reduce the frequency with which courts admit other-acts evidence for a character-propensity purpose—not just when offered to prove intent, but also when offered under the guise of any of the other permitted purposes listed in Rule 404(b)(2).

VII. CONCLUSION

The specter of cases like State v. Vail hangs heavily over Rule 404(b). The rule is based on a categorical judgment about the relative probative value and unfair prejudice of other-acts evidence when it is offered for a character-propensity inference. Cases like Vail, which decidedly defy this categorical judgment, tempt courts to find ways to admit other-acts evidence even though its probative value flows only from the forbidden inference. And courts have often admitted such evidence by denying—expressly or implicitly—that a character-propensity inference was at work. This is the inevitable consequence

of a rule that applies a categorical judgment to such a broad range of evidence. Unfortunately, the body of case law that courts have created invites prosecutors to introduce precisely the type of low-probative-value other-acts evidence that Rule 404(b) was designed to exclude. The way to reverse this practice and to get courts to apply Rule 404(b) in a manner that aligns with its goal of furthering accurate factfinding is, paradoxically, to make it easier to allow courts to admit high-probative-value other-acts evidence.

I have suggested two ways of doing this. First, courts must confront an issue they have long avoided. They must grapple with the meaning of character. Abandoning the character/habit dichotomy and recognizing that, in addition to habit, there are types of other-acts evidence that should not be considered character is the first step. Courts can then admit these types of high-probative-value evidence even as they acknowledge that a propensity inference is required. Likewise, evidence of a person’s attitudes or psychological or medical conditions should not be considered character. Second, Rule 404(b) should be amended by adding a true exception that allows other-acts evidence to prove intent through a character-propensity inference. But this exception would also allow a defendant to block the admission of such evidence by agreeing not to controvert state of mind.

Because courts will be able to admit these categories of high-probative-value other-acts evidence even when the probative value flows from a propensity inference, they will no longer have to deny that a propensity inference is required. In time, a new body of case law should emerge that offers prosecutors fewer avenues for arguing that low-probative-value other-acts evidence should be admitted. I do not pretend this is a cure-all. Deciding which other-acts evidence bears sufficient indicia of specificity to qualify as noncharacter inevitably will involve contentious judgment calls. Beyond that, there will always be hard cases, like that of Felix Vail, where courts will all too likely embrace Oscar Wilde’s advice and yield to temptation.