COMMENT

WISCONSIN'S UNCHARGED MISCONDUCT
EVIDENCE RULE: AN ANALYSIS
OF SECTION 904.04(2)

I. INTRODUCTION

Wisconsin courts have uniformly held that evidence of uncharged misconduct is inadmissible to establish the defendant's general character, disposition or criminal propensity. Following the lead of the federal jurisdiction, the Wisconsin legislature adopted this fundamental principle and codified it in Wisconsin Statute Section 904.04(2). Section 904.04(2) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

1. The phrase "uncharged misconduct" denotes acts that are not charged in the indictment or information for which the defendant is currently on trial. Comment, Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b), 61 WASH. L. REV. 1213, 1213 n.4 (1986). "Uncharged misconduct" is more commonly known as "other crimes, wrongs, or acts." Since the phrase uncharged misconduct characterizes this evidence more accurately, this Comment will substitute the phrase "uncharged misconduct" for the phrase "other crimes, wrongs, or acts." Although this evidence is also admissible in civil cases, this Comment will focus on the admissibility of this evidence in criminal cases.


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

4. WIS. STAT. § 904.04(2) (1987-88) (effective January 1, 1974). Section 904.04(2) is virtually the same in meaning as Section 404(b) of the Federal Rules of Evidence. State v. Schindler, 146 Wis. 2d 47, 53, 429 N.W.2d 110, 113 (Ct. App. 1988). Federal Rules of Evidence Section 404(b) States:

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

FED. R. EVID. 404(b).
The doctrine of uncharged misconduct is the most litigated and frequently misapplied evidentiary doctrine. Although the character evidence rule appears clear on its face, its application has proven troublesome for Wisconsin courts. Section 904.04(2) prohibits the use of uncharged misconduct evidence to show that the defendant has conformed to his/her character on the particular occasion in question. In contrast, such evidence is admissible if the prosecutor offers it for a legitimate purpose; for example, to prove motive or intent.

In order for uncharged misconduct evidence to be admissible under current Wisconsin law, it must pass a two-prong test. In applying the first prong, the trial court must determine whether the evidence is introduced for a purpose other than to demonstrate character. The second prong requires the trial court to ascertain whether the probative value of the evidence substantially outweighs any danger of unfair prejudice to the defendant. Implicit in this test is the rule that the uncharged misconduct

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5. See J. Weinstein & M. Burger, supra note 2, ¶ 404[08]; Imwinkelried, The Plan Theory for Admitting Evidence of the Defendant's Uncharged Crimes: A Microcosm of the Flaws in the Uncharged Misconduct Doctrine, 50 Mo. L. Rev. 1, 2 (1985) ("The federal rule codifying the doctrine, Rule 404(b), has generated more reported decisions than any other subsection of the Federal Rules.").


7. For a discussion of the possible definitions of "character" or lack thereof, see J. Weinstein & M. Burger, supra note 2, ¶ 404[01]; 22 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5233 (1978); Blinka, Evidence of Character, Habit, and "Similar Acts" in Wisconsin Civil Litigation, 73 Marq. L. Rev. 285-89 (1989-90) (lack of a precise definition makes it exceedingly difficult to distinguish the permissible purposes for which uncharged misconduct evidence may be offered from the impermissible purposes).

8. It is possible that the language of the rule is too clear and simple. Perhaps this area of law is too complex for a rule of such simplicity.

9. Vanlue v. State, 96 Wis. 2d 81, 92-93, 291 N.W.2d 467, 472 (1980) (Abrahamson, J., dissenting). This Comment will focus on Wisconsin law even though most state and federal courts have similar problems. See supra notes 5 and 6 and accompanying text.


11. The language of Section 904.04(2) indicates that this is a rule of inclusion rather than a rule of exclusion. Thus, the terms listed in Section 904.04(2) are illustrative of the types of uses not prohibited by the general rule. However, courts typically phrase the rule as one of exclusion. For instance, the first prong of the court's two-prong test is generally couched in terms of whether the evidence fits within one of the "exceptions" listed in Section 904.04(2). See, e.g., Fishnick, 127 Wis. 2d at 254, 378 N.W.2d at 276; Pharr, 115 Wis. 2d at 343, 340 N.W.2d at 502; Alsteen, 108 Wis. 2d at 729, 324 N.W.2d at 429. Instead, the determination should rest on whether the evidence is offered for a purpose other than to demonstrate character. C. Wright & K. Graham, supra note 7, § 5240, at 470-71.

12. Fishnick, 127 Wis. 2d at 254, 378 N.W.2d at 276; Pharr, 115 Wis. 2d at 343, 340 N.W.2d at 502; Alsteen, 108 Wis. 2d at 729, 324 N.W.2d at 429. The judicial council committee's note to
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evidence must be relevant to an issue in the case. Unfortunately, it appears that some courts have admitted evidence that has failed the two-prong test. Thus, evidence of uncharged misconduct has been admitted even though: (1) it is not relevant to an issue in the case; (2) its only purpose is to prove the defendant’s character; and (3) its probative value is substantially outweighed by its unfair prejudice.

This Comment will explore the provisions of Section 904.04(2). Next, it will discuss Wisconsin case law concerning uncharged misconduct evidence and analyze the problems surrounding the doctrine. Finally, this Comment will advocate a change from the court’s two-prong test to a three-prong test, as well as formulate new standards for courts to follow when faced with uncharged misconduct evidence.

II. BACKGROUND

The admission of uncharged misconduct evidence is so potentially damaging to the defendant that this type of evidence is frequently referred to as

Section 904.04(2) states that evidence of uncharged misconduct is not automatically admissible and should be excluded if the danger of undue prejudice substantially outweighs the probative value under § 904.03. Wis. R. Evid., cited in 59 Wis. 2d R79 (1973); see also Fed. R. Evid. 404 advisory committee’s note, cited in 59 Wis. 2d R81 (1973).

13. Fishnick, 127 Wis. 2d at 254, 378 N.W.2d at 276; Pharr, 115 Wis. 2d at 344, 340 N.W.2d at 502; Alsteen, 108 Wis. 2d at 729, 324 N.W.2d at 429. This Comment will advocate a change from the court’s two-prong test to a three-prong test. In the proposed three-prong test, the first prong requires that the uncharged misconduct evidence be relevant to an issue in the case. The second prong requires the trial court to determine if the evidence is offered for a purpose other than to prove propensity. In applying the third prong, the trial court must determine if the danger of unfair prejudice substantially outweighs the probative value of the evidence.

Although this test is similar to the court’s two-prong test, its focus is different. In the two-prong test, the determination of relevancy was “implicit.” However, because the focus was not on the relevancy aspect, character evidence that was irrelevant has been analyzed and admitted under the two-prong test. See, e.g., State v. Evers, 139 Wis. 2d 424, 434 n.7, 407 N.W.2d 256, 261 n.6a (1987) (discussing the trial court’s analysis of the first prong of the two-prong test the court stated, “It is arguable that the prior crimes evidence at issue in this case was of such little relevance on the issue of Ever’s intent that it could have been excluded at this stage of the analysis”).

Instead of holding that relevancy is “implicit” in the test, the proposed three-prong test explicitly states that the evidence must be relevant. Since this forces the trial court to directly focus on the issue of relevancy at this stage, evidence that is irrelevant will be deemed inadmissible before further analysis under Section 904.04(2) is performed.

14. See generally infra notes 68-95 and accompanying text.

15. This is a serious problem in other jurisdictions as well. See generally S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL (4th ed. 1986).

16. This Comment will analyze cases that involve allegations of sexual misconduct and cases that do not. When determining the admissibility of character evidence in Wisconsin, these two types of cases are analyzed differently. Cases involving allegations of sexual misconduct are analyzed under a “greater latitude” standard. See infra notes 148-58 and 173-75 and accompanying text. This Comment will advocate the abolition of this standard.
the "prosecutor's delight." The admission of uncharged misconduct evidence can be the turning point in a trial. In fact, many experienced defense attorneys will change their entire trial strategy to prevent its introduction. This section will examine the purposes and scope of this powerful line of evidence.

A. Purpose of Section 904.04(2)

The purpose of the uncharged misconduct evidence rule is to prohibit the introduction of evidence solely to establish the defendant's criminal propensity. The rule therefore prevents the admission of uncharged misconduct evidence to show that the defendant acted in conformity therewith. The exclusion of this evidence is based on general relevancy principles, rational policy decisions and constitutional concerns.

1. Relevancy Concerns

One reason for the general exclusion of uncharged misconduct evidence is its minimal probative value in proving conduct in a particular instance. This exclusion is supported by psychological research which indicates that a person's character is a poor predictor of his/her behavior. Studies indicate that there is little correlation between a person's character and his/her conduct at a particular time. Thus, introducing uncharged misconduct evidence for the sole purpose of establishing that the defendant conformed to his/her character at the time in question is usually not probative of any fact in issue and must be excluded for failing the general test of relevancy. Even when the evidence is relevant, the inference is often weak.

18. E. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 1:02 (1989).
20. C. WRIGHT & K. GRAHAM, supra note 7, § 5239.
21. E. IMWINKELRIED, supra note 18, § 2:18; see also C. WRIGHT & K. GRAHAM, supra note 7, § 5239-40.
22. E. IMWINKELRIED, supra note 18, § 2:18.
23. See infra note 97 and accompanying text.
24. See, e.g., State v. Evers, 139 Wis. 2d 424, 434 n.7, 407 N.W.2d 256, 261 n.6a (1987) (evidence that the defendant had committed prior thefts introduced to prove that the defendant had the requisite intent to commit the charged theft probably of such little relevance that it should have been excluded).
2. Policy Concerns

There are also policy reasons for restricting the admission of uncharged misconduct evidence. It appears that it is difficult for jurors to confine this evidence to the legitimate purpose for which it is offered. The danger arises when the jury begins to make legally impermissible inferences from the evidence.25

The first inference inherent in this evidence is that because the defendant committed a prior act, s/he has the propensity to commit such acts.26 This induces the jury to focus on the defendant's character, which in turn tempts the jury to convict the defendant not because s/he is guilty of the charged crime, but because the defendant is a bad person and deserves punishment.27 For instance, if the defendant is charged with robbery and at trial the prosecution introduces evidence of other robberies the defendant has committed, the jury may infer that the defendant has the propensity to commit robbery. Thus, in the eyes of the jury, the defendant is a bad person and should be convicted regardless of the crime charged. Implicit in this inference is the possibility that the jury may decide to punish the defendant simply for escaping punishment in the past.28 Therefore, under the facts given above, the jury may conclude that since the defendant has the propensity to commit robbery, the defendant has committed other robberies that have gone undetected and must be punished for those crimes, regardless of the crime charged.29

The second inference which arises from the use of uncharged misconduct evidence is that because the defendant has a bad character or a propensity to commit such acts, the defendant committed the charged crime.30

27. Imwinkelried, supra note 5, at 3; see also Nevins, supra note 17, at 20; Patterson, Evidence of Prior Bad Acts: Admissibility Under the Federal Rules, 38 BAYLOR L. REV. 331, 333 (1986).
28. Whitty v. State, 34 Wis. 2d 278, 292, 149 N.W.2d 557, 563 (1967), cert. denied sub nom., Whitty v. Wisconsin, 390 U.S. 959 (1968). (“the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses”). This is particularly unsettling when the uncharged misconduct which triggers the jury hostility is a mere moral wrong. Id.
29. Likewise, the evidence may induce the jury to convict the defendant because the defendant escaped punishment for the uncharged crime. For example, if the prosecution introduces evidence of an uncharged crime which cannot be prosecuted for some reason (such as a theft barred from prosecution by the statute of limitations), the jury may unfairly convict the defendant because of the uncharged misconduct and not the crime charged.
30. State v. Tarrell, 74 Wis. 2d 647, 657, 247 N.W.2d 696, 702 (1976) (a jury may determine that since the defendant did it before, the defendant did it again); see also E. IMWINKELRIED, supra note 18, § 2:18; H. KALVEN, JR. & H. ZEISEL, THE AMERICAN JURY 390 n.9 (1966).
The Wisconsin Supreme Court has acknowledged that it is extremely difficult for juries to separate the permissible from the impermissible uses of uncharged misconduct evidence.\(^3\)

These inferences, in effect, destroy the presumption of innocence. This has prompted researchers to note that the presumption of innocence is only effective for defendants without prior criminal records.\(^3\) Because this evidence may effectively induce the jury to convict a defendant based on character rather than the specific crime charged, policy reasons support the restriction of uncharged misconduct evidence.\(^3\)

3. Constitutional Concerns

There are also constitutional concerns requiring strict limits on the admissibility of uncharged misconduct evidence. Scholars have noted that a number of constitutional protections are potentially jeopardized when uncharged misconduct evidence is introduced.\(^3\) Constitutional guarantees that may be violated include: the privilege against self-incrimination;\(^3\) the due process guarantee of fundamental fairness;\(^3\) the prohibition of double jeopardy;\(^3\) and the due process right requiring proof of guilt beyond a rea-

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31. Paulson v. State, 118 Wis. 89, 99-100, 94 N.W. 771, 774 (1903) ("[E]ven the trained judicial mind can hardly exclude the fact of previous bad character or criminal tendency, and prevent its having effect to swerve such mind toward accepting conclusion of guilt. Much less can it be expected that jurors can escape such effect."); see also Note, Evidence: Prior Crimes Used to Show Specific Intent and Identity, 50 MARQ. L. REV. 133 (1966).

32. H. Kalven, Jr. & H. Zeisel, supra note 30, at 179; see also State v. Evers, 139 Wis. 2d 424, 445, 407 N.W.2d 256, 265 (1987) ("a thief is to be held to different and higher standards on the guilt phase of a crime than is a person with an unblemished record").

33. See United States v. Foskey, 636 F.2d 517 (D.C. Cir. 1980). The federal court stated, "[i]t is fundamental to American jurisprudence that 'a defendant must be tried for what he did, not who he is.'" Id. at 523 (quoting United States v. Myers, 550 F.2d 1036, 1044 (5th Cir. 1977), cert. denied, 439 U.S. 847 (1978)).

34. See, e.g., C. Wright & K. Graham, supra note 7, § 5239; Patterson, supra note 27, at 336.

35. For an excellent analysis of the constitutional privileges placed in jeopardy by the introduction of uncharged misconduct evidence, see Patterson, supra note 27, at 336-39.

36. U.S. CONST. amend. V; U.S. CONST. amend. XIV; WIS. CONST. art. I, sec. 8; see also Payne, The Law Whose Life is Not Logic: Evidence of Other Crimes in Criminal Cases, 3 U. RICH. L. REV. 62, 68 (1968); Note, supra note 31, at 140. Self-incrimination can occur when the defendant is forced to take the stand to minimize or explain the uncharged misconduct. C. Wright & K. Graham, supra note 7, § 5239.

37. U.S. CONST. amend. V; U.S. CONST. amend. XIV; WIS. CONST. art. I, sec. 8; see also Umbaugh v. Hutto, 486 F.2d 904, 907 (8th Cir. 1973), cert. denied, 416 U.S. 960 (1974) (uncharged misconduct must be rationally connected to the charged crime in order to be consistent with due process requirements).

38. U.S. CONST. amend. V; U.S. CONST. amend. XIV; WIS. CONST. art. I, sec. 8; see also Comment, Exclusion of Prior Acquittals: An Attack on the "Prosecutor's Delight," 21 UCLA L.
sonable doubt. These constitutional provisions are fundamental to the American adversarial system and should not be jeopardized, particularly if based upon evidence that may have little probative value. Trial courts must recognize the constitutional considerations when deciding this issue.

It is important to note that, while sound reasons support the general exclusion of uncharged misconduct evidence, there are instances in which this evidence is admissible if offered for limited and legitimate purposes, such as those listed in Section 904.04(2). As a word of caution, it is imperative that trial courts consider the above interests when determining the admissibility of uncharged misconduct evidence.

B. Scope of Section 904.04(2)

Although sound reasons support the general exclusion of uncharged misconduct evidence, this evidence is admissible when offered for purposes other than to show character. Such purposes include proof of motive, opportunity, intent, plan, preparation, knowledge.
identity,49 or absence of mistake or accident.50 Wisconsin courts have held that this list is only illustrative.51

The scope of Section 904.04(2) is quite broad. Based on the phrase "other crimes, wrongs, or acts" used in Section 904.04(2), the Wisconsin Supreme Court has determined that the scope of the uncharged misconduct doctrine is not limited to other criminal acts.52 Thus, evidence will not be rejected simply because the uncharged misconduct is not defined as a crime.53 Instead, evidence of any act that meets the requirements of the

48. State v. Evers, 139 Wis. 2d 424, 436-37, 407 N.W.2d 256, 261-62 (1987) (evidence was admissible under the knowledge exception to rebut the defense that the defendant believed the property was abandoned).

49. See, e.g., Fishnick, 127 Wis. 2d at 260, 378 N.W.2d at 279 (the similarity between the defendant's uncharged misconduct and the charged crime identified defendant as the attacker); Hough v. State, 70 Wis. 2d 807, 814, 235 N.W.2d at 534, 537 (1975) (evidence that defendant preferred virgins was so similar to the attacker's preference for virgins that uncharged misconduct evidence identified the defendant as the attacker).

50. See, e.g., Barrera v. State, 99 Wis. 2d 269, 276, 298 N.W.2d 820, 823 (1980), cert. denied sub nom., Barrera v. Wisconsin, 451 U.S. 972 (1981) (evidence of subsequent shooting was relevant to rebut the defense that the charged shooting was an accident); Christianson v. Lease Ass., 87 Wis. 2d 123, 128-29, 273 N.W.2d 776, 779 (1978); State v. Johnson, 74 Wis. 2d 26, 42, 245 N.W.2d 687, 693 (1976) (uncharged misconduct evidence was admissible to negate the defense that defendant's failure to deposit withholding taxes was the result of mistake or accident).

51. State v. Shillcutt, 116 Wis. 2d 227, 236, 341 N.W.2d 716, 720 (Ct. App. 1983), aff'd, 119 Wis. 2d 788, 350 N.W.2d 886 (1984); see also C. Wright & K. Graham, supra note 7, § 5340. Courts have suggested several other permissible purposes. For example, uncharged misconduct evidence is admissible to "furnish part of the context of the crime or [when it] is necessary to a 'full presentation' of the case . . . ." Shillcutt, 116 Wis. 2d at 236, 341 N.W.2d at 720 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980) (footnote omitted)). It can be admitted for purposes of impeachment in accordance with Section 906.09 of the Wisconsin Statutes. Rutchik, 116 Wis. 2d at 76, 341 N.W.2d at 646; Wis. Stat. § 906.09 (1987-88). The Eighth Circuit has also held that evidence of uncharged misconduct is admissible to show the victim's fear. See United States v. Dennis, 625 F.2d 782, 800 (8th Cir. 1980).


53. See J. Weinstein & M. Burger, supra note 2, ¶ 404[08]. In Whitty, 34 Wis. 2d at 291, 149 N.W.2d at 564, the court rejected the argument that the acts must be proven beyond a reasonable doubt; however, it did not set forth the standard of proof for admissibility. In State v. Schindler, 146 Wis. 2d 47, 52, 429 N.W.2d 110, 112 (Ct. App. 1988), the Wisconsin Court of Appeals adopted the test used by the United States Supreme Court in Huddleston v. United States, 485 U.S. 681 (1988). This approach permits the use of uncharged misconduct evidence if the court, after examining all the evidence, concludes that a jury could reasonably find the uncharged act by the preponderance of the evidence. Schindler, 146 Wis. 2d at 54, 429 N.W.2d at 113.

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uncharged misconduct evidence rule is admissible. Moreover, the evidence is not limited to prior acts but also includes acts committed subsequent to the charged crime as well. Section 904.04(2) also allows the defendant to introduce evidence of a third party’s misconduct. It discusses evidence used “to prove the character of a person in order to show that he acted in conformity therewith.” The Wisconsin Court of Appeals has determined that the term “person” includes defendants, co-defendants, witnesses and third parties. Evidence introduced by the defendant is subject to the limitations set forth in Section 904.04(2).

Generally, uncharged misconduct evidence may be introduced in either the state’s case-in-chief or rebuttal. However, under certain circumstances, the prosecution may be precluded altogether from introducing this evidence. For example, the availability of other, less prejudicial evidence is a factor in determining the admissibility of uncharged misconduct evidence. If other evidence is available to the state, the uncharged miscon-

(supporting the use of the clear and convincing standard); Patterson, supra note 27, at 349-62 (highly critical of the preponderance of the evidence standard and advocating the clear and convincing standard).

54. See, e.g., State v. Brecht, 143 Wis. 2d 297, 320, 421 N.W.2d 96, 105 (1988) (prosecution introduced evidence of defendant’s homosexuality to suggest a motive for murder); Hough, 70 Wis. 2d at 812, 235 N.W.2d at 537 (prosecution introduced evidence that the defendant had made statements regarding his sexual preferences to show identity).

55. Pharr, 115 Wis. 2d at 346, 340 N.W.2d at 503 (evidence of a subsequent shooting was admissible to explain a previous shooting for which the defendant was standing trial).

There is a conflict among jurisdictions on this issue. One view is to exclude all subsequent acts. Another view is to allow proof of subsequent acts only if there is proof of prior acts as well. The third view, which is the view adopted by Wisconsin, is to admit evidence of subsequent acts when they are logically relevant. See, e.g., E. IMWINKELRIED, supra note 18, § 2:11 (of the three views, the third one is the soundest). The federal jurisdiction also follows the third view. See United States v. Manafzadeh, 592 F.2d 81, 86 (2d Cir. 1979).


57. State v. Oberlander, 143 Wis. 2d 825, 833, 422 N.W.2d 881, 884 (Ct. App. 1988), rev’d on other grounds, 149 Wis. 2d 132, 438 N.W.2d 580 (1989). In Oberlander, the defendant attempted to introduce evidence of another party’s past acts in order to set up a third party defense. Id. at 836, 422 N.W.2d at 885. The trial court prohibited the introduction of the evidence and the appellate court reversed the decision. On review, the supreme court reversed the appellate court’s decision because it determined that the trial court did not abuse its discretion in finding that the uncharged misconduct evidence was irrelevant. State v. Oberlander, 149 Wis. 2d 132, 422 N.W.2d 881 (1989). Despite the fact that the supreme court reversed the appellate court’s decision, the supreme court case does not stand for the proposition that other acts committed by a third party are inadmissible.

58. Oberlander, 143 Wis. 2d at 832, 422 N.W.2d at 885.

59. Friedrich, 135 Wis. 2d at 17, 398 N.W.2d at 770; see also J. WEINSTEIN & M. BURGER, supra note 2, ¶ 404[09].

60. Harris, 123 Wis. 2d at 236, 365 N.W.2d at 925.
duct evidence may not be admissible. Furthermore, uncharged misconduct evidence must be used sparingly and only when reasonably necessary. In fact, the court has warned prosecutors, that "[p]iling on such evidence as a final ‘kick at the cat’ when sufficient evidence is already in the record runs the danger, if such evidence is admitted, of violating the defendant’s right to a fair trial . . . ." 62

Finally, there is nothing in Section 904.04(2) that limits the rule’s scope to criminal cases. Thus, uncharged misconduct evidence is also admissible in civil trials. This evidence may be especially instrumental in both tort and commercial law. Of course, the limitations found in criminal cases apply in civil cases as well.

C. Wisconsin Case Law

In almost every case involving uncharged misconduct, Wisconsin courts have restated their long standing commitment to the inadmissibility of character evidence to show criminal propensity. Nevertheless, a brief review of Wisconsin case law will demonstrate that a few courts have strayed from the underlying principles of this line of law evidence.

Wisconsin courts have been wrestling with the problem created by uncharged misconduct evidence for over 100 years. Prior to 1969, the test to admit uncharged misconduct evidence involved only the first prong of what

61. State v. Spraggin, 77 Wis. 2d 89, 103, 252 N.W.2d 94, 100 (1977) (quoting Whitty, 34 Wis. 2d at 297, 149 N.W.2d at 565-66).

62. Id.; see supra notes 34-39 and accompanying text.

63. This is consistent with the interpretation of Section 404(b) of the Federal Rules of Evidence. C. WRIGHT & K. GRAHAM, supra note 7, § 5239.

64. See Blinka, supra note 7, at 206; see also G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 168-71 (2d ed. 1987); S. SALTZBURG & K. REDDEN, supra note 15, at 188; J. WEINSTEIN & M. BURGER, supra note 2, ¶ 404[03]. Although uncharged misconduct evidence is also admissible in civil cases, this Comment will focus on the admissibility of this evidence in criminal cases.

65. In a products liability suit based on a design defect, a plaintiff may admit, under certain circumstances, evidence of other accidents caused by similarly designed products. E. IMWINKELRIED, supra note 18, § 1:01.

66. For example, a party may introduce evidence of previous contracts in a dispute regarding the actual formation of the contract. 2 J. WIGMORE, WIGMORE ON EVIDENCE § 371 (Chadbourn rev. 1979).

67. Id.

68. Boldt v. State, 72 Wis. 7, 14, 38 N.W. 177, 179 (1888). In 1903, Justice Dodge stated: [O]ne cannot be deemed to have had fairly tried before a jury the question of his guilt of the offense charged when their minds have been prejudiced by proof of bad character of accused or former misconduct, and thus diverted and perverted from a deliberate and impartial consideration of the question whether the real evidentiary facts fasten guilt upon him beyond a reasonable doubt. Paulson v. State, 118 Wis. 89, 99, 94 N.W. 771, 774 (1903).
is now known as the Wisconsin Supreme Court’s two-prong test. In other words, Wisconsin courts were only concerned with whether the evidence was offered for a purpose other than to show propensity as prohibited by the general rule. In 1967, the court decided *Whitty v. State*,\(^{70}\) which established a procedure to determine the admissibility of this evidence. First, the court listed six legitimate purposes for introducing uncharged misconduct evidence.\(^{71}\) Second, the court adopted the balancing test which is now the second prong of the court’s two-prong test.\(^{72}\) The balancing test requires the trial court to weigh the probative value of the evidence against its prejudicial nature.\(^{73}\) If the prejudicial nature of the evidence substantially outweighs its probative value, the evidence must be excluded.\(^{74}\) Seven years after *Whitty* was decided, Section 904.04(2) went into effect,\(^{75}\) basically adopting the fundamental principles announced in *Whitty*.\(^{76}\)

Although Section 904.04(2) and case law prohibit the introduction of uncharged misconduct evidence to establish criminal propensity, such evidence is still admitted for that purpose. For example, in *State v. Tarrell*,\(^{77}\) it appears that uncharged misconduct evidence was introduced for impermissible reasons. In *Tarrell*, the defendant was convicted of indecent behavior with a child.\(^{78}\) At trial, the state introduced other instances of the defendant’s prior crimes and bad acts: a 1969 conviction for enticing a child for immoral purposes; a 1973 incident in which the defendant unzipped his pants and masturbated in front of two young female hitchhikers; and a 1974 incident in which the defendant made an inappropriate statement to a girl.\(^{79}\) In affirming the trial court’s decision to introduce this evidence, the *Tarrell*

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70. 34 Wis. 2d 278, 149 N.W.2d 557 (1967), cert. denied sub nom., *Whitty v. Wisconsin*, 390 U.S. 959 (1968). In Wisconsin, the uncharged misconduct doctrine is frequently referred to as the *Whitty* rule. See, e.g., Hendrickson v. State, 61 Wis. 2d 275, 278, 212 N.W.2d 481, 482 (1973).

71. *Whitty*, 34 Wis. 2d at 292, 149 N.W.2d at 563. These purposes are elements of a specific crime charged, intent, identity, system of criminal activity, impeachment of credibility, and character (if put in issue by the defendant). *Id.*

72. *Id.* at 294, 149 N.W.2d at 564-65.

73. *See infra* notes 182-205 and accompanying text.

74. *Whitty*, 34 Wis. 2d at 294, 149 N.W.2d at 564-65. It should be noted that the court adopted Rule 303 of the American Law Institute, Model Code of Evidence. *Id.*


76. Wis. R. EVID. 904.04(2) judicial council committee’s note, cited in 59 Wis. 2d R79 (1973). Section 904.04(2) had little direct impact on subsequent case law since it simply codified the basic principles set forth in *Whitty*.

77. 74 Wis. 2d 647, 247 N.W.2d 696 (1976).

78. *Id.* at 649, 247 N.W.2d at 698.

79. *Id.* at 657, 247 N.W.2d at 702. The defendant was never convicted of the 1973 and 1974 incidents.
court stated: "the separate acts, ranging from inappropriate comments to a girl, to enticing a minor for immoral purposes, demonstrated [defendant's] propensity to act out his sexual desires with young girls and had a logical connection with the charged offense." The above emphasized language suggests that uncharged misconduct evidence may be used to establish the defendant's propensity to commit the charged crime. However, this practice is clearly prohibited by Section 904.04(2).

In Vanlue v. State, it appears that uncharged misconduct evidence was also introduced for impermissible reasons. Vanlue was convicted of possession of burglarious tools. The trial court permitted the state to introduce evidence of the defendant's two prior burglary convictions under the theory that the prior convictions proved that Vanlue possessed burglarious tools with the necessary intent.

Although intent was an issue in this case, there was a question as to whether the evidence was actually probative of intent. The court suggested that the previous convictions were probative of the element of intent because they proved the defendant had knowledge of what tools could be used in a burglary. However, as the dissent argued, knowledge of what tools could be used for a burglary does not prove that the defendant had the requisite intent to steal. In other words, one cannot infer that since the defendant had knowledge of what tools could be used in a burglary, the defendant had the requisite intent to steal without first inferring that the defendant has a bad disposition. This practice circumvents the first line of Section 904.04(2), which provides that evidence of uncharged misconduct is

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80. Id. at 658, 247 N.W.2d at 703 (emphasis added). This language was later withdrawn in State v. Fishnick, 127 Wis. 2d 247, 255, 378 N.W.2d 272, 277 (1985).
81. 96 Wis. 2d 81, 291 N.W.2d 467 (1980).
82. The burglary tools consisted of a crowbar, a penknife, a pillowcase and a pair of gloves. Id. at 83, 291 N.W.2d at 468.
83. Id. One burglary occurred in September of 1974, two years and six months prior to the charged crime. The other burglary occurred in January of 1975, two years and two months prior to the charged crime. Id. at 94, 291 N.W.2d at 473 (Abrahamson, J., dissenting).
85. Vanlue, 96 Wis. 2d at 87, 291 N.W.2d at 470.
86. Id. at 94, 291 N.W.2d at 473 (Abrahamson, J., dissenting). As the dissent stated, "[k]nowledge of what tools are useful for burglary is not the equivalent of intent to burglarize. I know what tools could be used in a burglary from reading the Wisconsin Reports." Id.; see also Vanlue v. State, 87 Wis. 2d 455, 459-60, 275 N.W.2d 115, 117-18 (Ct. App. 1978), rev'd, 96 Wis. 2d 81, 291 N.W.2d 467 (1980) (holding state's contention that evidence was admitted to show intent and not character was a fiction).
87. For a discussion of the legally impermissible inferences a jury may make from this type of evidence, see supra notes 25-33 and accompanying text.
not admissible to show the character of a person in order to demonstrate that s/he acted in conformity therewith.

In *State v. Fishnick*, the court withdrew the "propensity language" in *Tarrell* after discussing the possible effects it could have on the general rule that excludes uncharged misconduct evidence to prove criminal propensity. Though the court rejected this language, it reached the same result as in *Tarrell*.

In *Fishnick*, the defendant was convicted of first degree sexual assault. The defendant allegedly induced C.S., a three year old girl, into his trailer where he intentionally touched her vaginal area. At trial, the prosecution was permitted to introduce evidence that seven days prior to the charged incident with C.S., the defendant allegedly offered D.F., a thirteen year old girl, twenty dollars to go into his trailer and expose her vaginal area to him. This evidence was introduced, *inter alia*, to show motive.

Fishnick's defense to the charged crime was that the crime did not occur.

Under these circumstances, the jury was allowed to make legally impermissible inferences before reaching the conclusion that a crime did actually occur. The jury may have inferred from this evidence that the defendant had the propensity to commit the crime, and based on that inference, that he committed the alleged crime. If the jury made these impermissible inferences, the defendant was arguably denied a fair trial, thus violating his constitutional rights.

Although the Wisconsin cases involving uncharged misconduct evidence purport to adhere to the general character evidence rule, this brief analysis demonstrates that some courts, contrary to the general rule, appear to have permitted the state to introduce uncharged misconduct evidence to

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88. 127 Wis. 2d 247, 378 N.W.2d 272 (1985).
89. *See supra* note 80 and accompanying text.
90. *Fishnick*, 127 Wis. 2d at 255, 378 N.W.2d at 277.
91. *Id.* at 250, 378 N.W.2d at 274.
92. *Id.* The prosecution also called E.F., a twelve year old girl, who testified that eight days prior to the charged incident she saw the defendant stand nude in front of his window so that she could see his penis. *Id.* at 252, 378 N.W.2d at 275. On appeal, the prosecution conceded that the exposure testimony by E.F. was inadmissible because it was irrelevant to any issue in the case. However, the supreme court held that it was a harmless error. *Id.* at 266, 378 N.W.2d at 282. For an explanation of the harmless error doctrine, see State v. Dyess, 124 Wis. 2d 525, 370 N.W.2d 222 (1985).
93. *Fishnick*, 127 Wis. 2d at 252, 378 N.W.2d at 278.
94. *Id.* at 258, 378 N.W.2d at 278. The court also relied on the identity exception. *Id.* at 263, 378 N.W.2d at 280. For a discussion of the motive exception, see *infra* notes 159-76 and accompanying text.
show propensity.95 The next section of this Comment will examine how courts have analyzed uncharged misconduct evidence under each prong of the test, and will suggest how courts should resolve these issues in the future.

III. THE PROPOSED THREE-PRONG TEST

To ascertain whether uncharged misconduct evidence is admissible, the trial court should apply a three-prong test.96 The first prong would require the trial judge to determine if the evidence is relevant. If the evidence is not probative of an issue in the case, the evidence must be excluded and there is no need for the trial judge to analyze the evidence under the remaining two prongs. To satisfy the second prong, the trial judge should determine if the evidence is introduced for a purpose other than to show criminal propensity. If the only reason offered for admissibility is to demonstrate criminal propensity, the evidence must be excluded. The third prong consists of a balancing test. The trial judge should balance the probative value of the evidence against any unfair prejudice to the defendant. If the danger of unfair prejudice substantially outweighs the probative value, the evidence is inadmissible.

A. The First Prong - Relevancy

The first prong of the test involves the determination of relevancy. Trial judges should require prosecutors to articulate their theories of relevancy at this stage. Judges should require more from the prosecution than a recital of the buzzwords from Section 904.04(2). Prosecutors must explain why the evidence is probative and why it is of consequence. If the judge determines that the evidence is relevant, s/he must then make the appropriate findings under the second prong. If the judge deems the evidence irrelevant, further analysis is unwarranted. Forcing prosecutors to articulate their theories of relevancy also sets the record for any subsequent appeal.

The Wisconsin Legislature has defined relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."97 In other words, evidence is rele-
vant only if it (1) is of consequence to an issue in the case and (2) tends to prove or disprove the fact in issue. Once the evidence is deemed relevant, it is usually admissible.98

1. Fact of Consequence

Under general relevancy principles, the offeror of the uncharged misconduct evidence must first demonstrate that the evidence concerns a fact of consequence. For instance, if proof of a substantive crime requires the element of intent, intent is a fact of consequence. Moreover, the fact of consequence must be substantially in dispute.99 Suppose the defendant is charged with burglary. The defense asserts that although the defendant entered the building, s/he did not have the requisite intent to steal as defined by the statute. The element of intent is substantially disputed in this case. On the other hand, if the defendant denies being the actor, the defendant is acknowledging that the actor had the requisite intent.100 Hence, intent is not an issue in the case and evidence introduced to demonstrate intent is irrelevant.101 It is important to note that the defendant does not automatically place identity or intent in issue when the defendant enters a guilty plea.102

Accordingly, when the trial court determines the issue of relevancy, the initial focus should be on whether the uncharged misconduct evidence is introduced for the purpose of demonstrating a fact that is in substantial


99. Wis. R. Evid. 904.04(2) judicial council committee's note, cited in 59 Wis. 2d R79 (1973) (it should be excluded if the motive, opportunity, intent, etc., is not substantially disputed . . . ).


101. For other cases which found that uncharged misconduct evidence was irrelevant under the intent theory, see State v. Danforth, 129 Wis. 2d 187, 201, 385 N.W.2d 125, 131 (1986) (evidence to prove intent to cruelly maltreat was erroneously admitted since intent to cruelly maltreat was not an element of Wisconsin Statute Section 940.201 (1985-86)); Alsteen, 108 Wis. 2d at 730-31, 324 N.W.2d at 429-30 (court erred in admitting testimony regarding defendant's sexual misconduct to show intent when the question in the case was consent); State v. Goldsmith, 122 Wis. 2d 754, 757, 364 N.W.2d 178, 180 (Ct. App. 1985) (evidence of conversations regarding the defendant's offers to sell cocaine were irrelevant to the charged crime of delivering a controlled substance because identity was not in issue, knowledge or intent of what was delivered was not in issue; preparation was not in issue because conversations followed the deliveries and it was not relevant to show plan because evidence that a person is a drug dealer does not show plan).

102. See Nevin, supra note 17, at 21.
dispute. The trial court must be careful not to admit evidence that speaks to an element of the substantive crime without examining both the defense offered by the defendant, and other factors that would determine if the fact was in issue. Often an element of the substantive crime is not substantially disputed and is irrelevant to the case.

2. Probative Value

According to the general principles of relevancy, the trial court’s next inquiry is whether the evidence tends to make the fact of consequence more or less probable than without the evidence. Evidence is relevant if it has any tendency to increase the likelihood of a consequential fact proposition. If the evidence is offered to prove identity by showing that in a prior incident the defendant followed a modus operandi strikingly similar to the one followed by the actor in the charged crime, the probative worth of the evidence increases as the uniqueness or rareness increases. For example, offering evidence that several other victims murdered by the defendant were shot in the back near the fourth cervical vertebra is probative if the victim the defendant is accused of murdering was also shot in the back near the fourth cervical vertebra. However, introducing evidence that the defendant burglarized a house left vacant when the owners attended a funeral, is not probative of the defendant’s identity as the actor in another crime that occurred in the same fashion because this modus operandi is not unique.

Although uniqueness is required for the purpose of demonstrating the probative worth of identity, it is not required for all legitimate purposes. Uniqueness is generally not necessary to show that the defendant had the necessary intent. For instance, evidence that the defendant has previously stolen rented vehicles may be probative in the prosecution of the defendant for the theft of a rented vehicle, if the defense was that the defendant intended to return the vehicle, even though the defendant obtained the rented vehicle in a different manner. This is probative because it reflects the defendant’s mental state. The evidence increases the likelihood that the defendant had the requisite intent to steal. On the other hand, possession of marijuana is not probative of intentionally aiding and abetting the delivery of heroin. Possessing marijuana in the past does not make it more likely


104. G. Lilly, supra note 64, § 5.14, at 156.

105. State v. Spraggin, 77 Wis. 2d 89, 97 n.6, 252 N.W.2d 94, 97 n.6 (1977); see also United States v. Jones, 438 F.2d 461, 465 (7th Cir. 1971) (evidence of possession of marijuana not relevant to prove subsequent sale of cocaine); Enriquez v. United States, 314 F.2d 703, 716 (9th Cir.
that the defendant had the requisite intent to deliver heroin. It is only probative of the fact that the defendant may be a drug user. Since the evidence only shows character, it should be excluded.

However, when the prosecutor invokes the "doctrine of chances" to demonstrate intent, the acts, although not unique, must be similar. According to Professor Wigmore, this doctrine rests on the theory that the more often similar acts occur with similar results, the less likely the defendant acted with innocent intent.\(^\text{106}\) As Professor Wigmore suggests:

[If A while hunting with B hears the bullet from B's gun whistling past his head, he is willing to accept B's bad aim or B's accidental tripping as a conceivable explanation; but if shortly afterwards the same thing happens again, and if on the third occasion A receives B's bullet in his body, the immediate inference (i.e., as a probability, perhaps not a certainty) is that B shot at A deliberately; because the chances of an inadvertent shooting on three successive similar occasions are extremely small; or (to put it another way) because inadvertence or accident is only an abnormal or occasional explanation for the discharge of a gun at a given object, and therefore the recurrence of a similar result (i.e., discharge towards the same object, A) excludes the fair possibility of such an abnormal cause and points out the cause as probably a more natural and usual one, i.e., a deliberate discharge at A.\(^\text{107}\)" If the acts introduced are dissimilar the "inference of intent arises only if the inference of bad character is first drawn."\(^\text{108}\) In other words, the probative value is increased because it is improbable that the similar acts occurred by mere chance.\(^\text{109}\)

Furthermore, the probative value of the uncharged misconduct evidence depends on its nearness in time to the charged crime.\(^\text{110}\) If the uncharged

\(^{106}\) 2 J. Wigmore, supra note 66, § 300-02.


\(^{108}\) 2 J. Wigmore, supra note 66, § n.5.


\(^{110}\) See, e.g., Peasley v. State, 83 Wis. 2d at 224, 237 265 N.W.2d 506, 513 (1978) (Abrahamson, J., dissenting); Sanford v. State, 76 Wis. 2d 72, 81, 250 N.W.2d 348, 352 (1977); Whitty v. State, 34 Wis. 2d 278, 294, 149 N.W.2d 557, 564 (1967), cert. denied sub nom. Whitty v.
misconduct is so remote in time as to negate any rational connection between the two acts, the uncharged misconduct evidence is not probative of a fact in the charged crime. To determine whether the probative value of the evidence is eliminated by the time factor, trial courts must balance the element of remoteness against the uniqueness of the uncharged misconduct.

Courts have generally held that a time lapse of one to two years is not so remote as to eliminate the probative value of the evidence. Problems occur when courts determine that a period of several years is not too remote. Uniqueness is one explanation for such determinations. For example, the act of leaving a blue, initialed handkerchief at each jewel heist is fairly unique. In this case, the uniqueness may outweigh the fact that the acts occurred several years apart. In contrast, if the acts do not demonstrate such uniqueness or striking similarity, they must be deemed inadmissible. At times, courts have permitted the admission of other acts that had occurred years earlier because they were "similar" to the charged crime even though the crimes were not unique.

Perhaps the most striking example of this appears in State v. Mink. Mink was found guilty of having sexual contact with his four year old grandson. The state introduced evidence of Mink’s alleged sexual contact with his stepsons that occurred over a period of thirteen to twenty-two years prior to the charged offense. The court of appeals held that since the trial court found the facts similar, the evidence was relevant even

111. Sanford, 76 Wis. 2d at 81, 250 N.W.2d at 352; see also State v. Sonnenburg, 117 Wis. 2d 159, 171, 344 N.W.2d 95, 101 (1984).
113. Vanlue v. State, 96 Wis. 2d 81, 90, 291 N.W.2d 467, 471 (1980) (uncharged act that took place one and one half years prior to the charged crime was not too remote); Sanford, 76 Wis. 2d at 82, 250 N.W.2d at 352 (incident that occurred more than one and one half years prior to the charged offense was not too remote); Hough, 70 Wis. 2d at 814-15, 235 N.W.2d at 538 (one year between acts was not too remote). But see Sonnenburg, 117 Wis. 2d at 174, 344 N.W.2d at 100 (uncharged incident that occurred fourteen months after the charged crime was sufficient to make the evidence suspect).
114. See, e.g., Friedrich, 135 Wis. 2d at 25, 398 N.W.2d at 773-74. In Friedrich, the court held that two alleged sexual assaults, occurring four and seven years prior to the charged offense, were not so remote in time as to eliminate the probative nature of the evidence because of the "marked similarity" of the acts. Id. at 25, 398 N.W.2d at 774. A close study of the facts reveals that the acts did not actually contain such "marked similarity." The crimes did not attain the requisite level of uniqueness to render the evidence probative despite the lapse in time. Thus, the evidence should have been excluded on the grounds that it lacked probative value.
115. 146 Wis. 2d 1, 429 N.W.2d 99 (Ct. App. 1988).
116. Id. at 16, 429 N.W.2d at 105.
though the incidents occurred between thirteen and twenty-two years earlier. The court of appeals did not discuss in what manner these crimes were unique nor why their uniqueness would overcome the time lapse of twenty-two years.

Simply labeling the charged and uncharged acts as "similar" should not automatically allow prosecutors to introduce evidence of those acts that occurred several years before the charged offense. Therefore, courts should require prosecutors to explain, on the record, why the charged act and the uncharged act are so unique that a span of several years between the acts would not render the evidence too remote in time. As with legitimate purposes, the term "similar" is not a magic password opening the door to any evidence the prosecutor offers. Courts should take a common sense approach to this problem and balance the uniqueness of the acts with the remoteness element. Most importantly, courts should ascertain whether the evidence is probative because of its uniqueness despite the lapse of time between the acts.

Before analyzing evidence under Section 904.04(2), the prosecution must articulate its theory of relevancy to the court. Once articulated, there are several steps the court should take when further analyzing the relevancy of the uncharged misconduct evidence. First, the court is required to determine if the purpose for which the evidence is offered is in substantial dispute. Courts cannot determine this exclusively by examining the substantive law; rather, it is necessary to consider the defense offered, as well as other factors before making their determination. Second, the evidence must be probative of the fact in issue, having a tendency to prove or disprove a fact that is in substantial dispute. Furthermore, it is essential that the time lapse between the uncharged act and the charged crime is not so great that it eliminates any probative value.

B. The Second Prong - Legitimate Purposes

Once the prosecution's theory of relevance has been carefully articulated and put on the record, the trial judge has the ability to determine whether the evidence is offered for a legitimate purpose. If, for example, the prosecution explains the theory of relevancy in terms of intent, but the uncharged misconduct evidence does not prove intent, only propensity, the evidence should be excluded.

117. Id.
118. See infra notes 119-20 and accompanying text.
It is imperative to note that a trial judge should not be misled by labels the prosecution attaches to evidence during a hearing for admissibility.\(^{119}\) The purpose offered for admission should not be treated as magic passwords whose mere utterance will allow in whatever evidence is offered.\(^{120}\) Instead, the trial judge must scrutinize the evidence to insure that the theory of admissibility is grounded upon more than simply a list of words that effect immediate admission of evidence.\(^{121}\) Because of the large number of legitimate purposes available, this Comment will concentrate on the two which appear particularly troublesome: plan and motive.

1. Plan

\(a\). Plan Theory in General

The reason for admitting evidence of uncharged misconduct to prove plan is that it does not merely involve an inference as to the defendant's character, but demonstrates that the defendant's conduct is caused by a conscious commitment to a larger goal of which the crime charged is only a part.\(^{122}\) Thus, this evidence is admitted to show the larger objective and not the defendant's criminal propensity.\(^{123}\) However, if this evidence is not carefully scrutinized, it can serve as a means to admit evidence which shows the defendant's criminal propensity rather than a planned course of action.

Since plan is generally not an element of the crime, the evidence establishing a plan must be relevant to an ultimate issue in the case.\(^{124}\) The plan may be useful to identify the actors who committed the crime.\(^{125}\) In this instance, the prosecution must show that the charged crime and the uncharged misconduct are so similar that they are idiosyncratic.\(^{126}\) For example, evidence that prior victims were shot from behind at close range near the fourth cervical vertebra may be admissible to identify the defendant as the murderer, where the victim in the charged crime was also shot from behind at close range near the fourth cervical vertebra.\(^{127}\)

\(^{119}\) C. WRIGHT & K. GRAHAM, supra note 7, § 5239.
\(^{120}\) Goodwin, 492 F.2d at 1155.
\(^{121}\) S. SALTZBURG & K. REDDEN, supra note 15, at 183.
\(^{122}\) C. WRIGHT & K. GRAHAM, supra note 7, § 5244.
\(^{123}\) See Slough, Other Vices, Other Crimes: An Evidentiary Dilemma, 20 KAN. L. REV. 411, 419 (1972); Slough & Knightly, Other Vices, Other Crimes, 41 IOWA L. REV. 325 (1956).
\(^{124}\) C. WRIGHT & K. GRAHAM, supra note 7, § 5244.
\(^{125}\) C. MCCORMICK, MCCORMICK ON EVIDENCE § 190, at 558-59 (3d ed. 1984).
\(^{126}\) Imwinkelried, supra note 5, at 12.
Furthermore, evidence of plan is admissible to show intent of the actor.\textsuperscript{128} For instance, evidence that the defendant possessed a number of credit cards, not in the defendant's name, may be relevant to show that the fraudulent statements that were made in procuring credit cards were part of a larger plan to use fake cards to swindle merchants.\textsuperscript{129} Finally, evidence of plan is also admissible to prove the completion of an act.\textsuperscript{130} For example, evidence that the defendant bribed a zoning board member to obtain a favorable variance may be admissible to show that other members of the board voting on the issue were also bribed.\textsuperscript{131} If the evidence is not probative of an ultimate issue in the case, the evidence must be rejected. Likewise, if identity, intent, or the commission of the crime is not in issue, the evidence cannot be admitted under plan.\textsuperscript{132}

\textbf{b. The Plan Theory in Wisconsin}

In Wisconsin, the term "plan" has been defined as:

[A] design or scheme formed to accomplish some particular purpose. . . . Evidence showing a plan establishes a definite prior design, plan, or scheme which includes the doing of the act charged. As Wigmore states, there must be "such a concurrence of common features that the various acts are materially to be explained as caused by a general plan of which they are the individual manifestations."\textsuperscript{133}

For uncharged misconduct evidence to be admissible under the plan theory, the other acts must be a step leading to the charged crime. If the other acts are separate incidents, not related steps in a plan, the evidence is inadmissible as a plan.\textsuperscript{134} In some cases it appears that the uncharged acts are not committed in furtherance of a plan. For example, in \textit{State v.} .

\begin{itemize}
\item \textsuperscript{128} C. McCormick, supra note 125, § 190, at 558-59; see also C. Wright & K. Graham, supra note 7, § 5244.
\item \textsuperscript{129} United States v. Matlock, 558 F.2d 1328, 1331-32 (8th Cir.), cert. denied, 434 U.S. 872 (1977); see also C. Wright & K. Graham, supra note 7, § 5244.
\item \textsuperscript{130} C. McCormick, supra note 125, § 190, at 558-59; C. Wright & K. Graham, supra note 7, § 5244.
\item \textsuperscript{131} Comment, A Proposed Analytical Method for the Determination of the Admissibility of Evidence of Other Offenses in California, 7 UCLA L. Rev. 463, 472-73 (1960); see also C. Wright & K. Graham, supra note 7, § 5244.
\item \textsuperscript{132} United States v. O'Connor, 580 F.2d 38, 42 (2d Cir. 1978).
\item \textsuperscript{133} State v. Balistrieri, 106 Wis. 2d 741, 756-57, 317 N.W.2d 493, 500 (1982) (quoting Spraggin, 77 Wis. 2d at 99, 252 N.W.2d at 98).
\item \textsuperscript{134} Id.; see also State v. Harris, 123 Wis. 2d 231, 239, 365 N.W.2d 922, 927 (Ct. App. 1985); Imwinkelried, supra note 5, at 22. When the prosecution's only evidence is proof of the commission of several similar crimes, the only plan established is a plan to commit a series of acts of the same kind. Imwinkelried, supra note 5, at 19.
\end{itemize}
Rutchik, the defendant was convicted of the burglary of a home left unoccupied while the owners attended a funeral. The trial court admitted evidence showing that three years prior to the incident, the defendant had been convicted of burglarizing a house left temporarily vacant while the owners were attending a funeral. The Supreme Court affirmed the trial court's decision, holding that it was admissible to show plan.

There are several problems with characterizing this evidence as admissible under the plan theory. First, the acts cannot be "explained as caused by a general plan of which they are individual manifestations." In order to satisfy this definition of plan, the first (uncharged) burglary would have to have been part of a scheme or design leading to the commission of the charged burglary. For example, if the defendant committed the first burglary as a trial run for a second, more difficult burglary, this would be a legitimate use of the plan theory. Instead, in Rutchik, the facts are separate, albeit similar, instances showing only the defendant's propensity to commit burglary.

Furthermore, the plan was not relevant to an ultimate issue in the case. Since plan in and of itself was not an ultimate issue, it must have been relevant to some ultimate issue such as identity, intent or the commission of an act. The court first argued that the evidence was relevant to the identity or *modus operandi* of the actor. It explained that the close factual similarities between the crime charged and the previous incident established a *modus operandi*. However, these two crimes do not exhibit the requisite degree of uniqueness necessary when using plan to establish the ultimate issue of identity. In order to use the plan theory to establish identity, it is imperative that the *modus operandi* in both crimes be either exceptional or idiosyncratic. In this case, the burglarizing of a house left temporarily vacant because the owners were attending a funeral was not so unique as to

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136. Id. at 64, 341 N.W.2d at 641. Although the deceased sister did not live in the home that had been burglarized, the obituary notice listed that address. Id. at 69 n.3, 341 N.W.2d at 643 n.3.
137. Id. at 65, 341 N.W.2d at 641.
138. Id. at 68, 341 N.W.2d at 643. The court also held that it was admissible to show identity as well as intent. Id.
139. Ballistreri, 106 Wis. 2d at 757, 317 N.W.2d at 500 (quoting Spraggin, 77 Wis. 2d at 99, 252 N.W.2d at 98).
140. See Rutchik, 116 Wis. 2d at 70, 341 N.W.2d at 644.
141. Here, the defendant has a goal that encompasses both the charged and uncharged crimes. See Imwinkelried, supra note 5, at 3.
142. Rutchik, 116 Wis. 2d at 70, 341 N.W.2d at 644.
143. Id. The similarity between the two crimes is simply that both houses were burglarized while the occupants were attending a funeral.
144. See supra note 126 and accompanying text.
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establish the identity of the actor.\textsuperscript{145} Given these facts, the plan evidence should not have been admitted to show identity.

The court also stated that the plan evidence was relevant to show intent.\textsuperscript{146} In Rutchik, the defendant denied that he committed the burglary; therefore, he implicitly conceded that the actual perpetrator had the requisite intent.\textsuperscript{147} Under these circumstances, intent is not an issue and the introduction of plan evidence to establish the ultimate issue of intent is not appropriate.

The evidence failed under the plan theory for two reasons: (1) there was no evidence indicating that the uncharged act was committed as a step towards or in furtherance of the charged crime; and (2) it was not probative of an ultimate issue in the case. Consequently, the uncharged misconduct evidence should not have been admitted.

To complicate matters further, Wisconsin has adopted a "greater latitude" approach in cases involving sexual offenses.\textsuperscript{148} The Wisconsin Supreme Court has stated that this greater latitude of proof is "not so much a matter of relaxing the general rule . . . as it is a matter of placing testimony concerning other acts or incidents within one of the well established exceptions to such rule."\textsuperscript{149} This doctrine permits exactly what the un-

\begin{enumerate}
\item See Rutchik, 116 Wis. 2d at 88-89, 341 N.W.2d at 652 (Abrahamson, J., dissenting).
\item But see id. at 81, 341 N.W.2d at 649 (Steinmetz, J., concurring). In his concurring opinion, Justice Steinmetz stated that even though this type of method of burglary occurs frequently, "it is a particularly stylized method of committing burglary" and therefore is probative of identity. \textit{Id.} at 81-82, 341 N.W.2d 648-49. However, if a number of people are committing crimes in this manner, how can it be probative in determining that this particular defendant was the one who committed the crime in this particular instance? A defendant cannot be identified as the actor of the charged crime by committing commonplace crimes except by reference to the prohibited inference of propensity. J. WEINSTEIN & M. BURGER, \textit{supra} note 2, ¶ 404[16].
\item Rutchik, 116 Wis. 2d at 70, 341 N.W.2d at 644. See Roth, \textit{supra} note 100, at 309-10.
\item Rutchik, 116 Wis. 2d at 89-90, 341 N.W.2d at 653 (Abrahamson, J., dissenting).
\item See Hendrickson v. State, 61 Wis. 2d 275, 277-79, 212 N.W.2d 481, 481-82 (1973). This approach first appeared in Proper v. State, 85 Wis. 615, 630, 55 N.W. 1035, 1040 (1893). \textit{See also Friedrich}, 135 Wis. 2d at 38, 398 N.W.2d at 780 (Heffernan, C.J., dissenting) (arguing that this proposition was extremely narrow in scope); State v. Tarrell, 74 Wis. 2d 647, 664-66, 247 N.W.2d 696, 705-06 (1976) (Abrahamson, J., dissenting). Courts have frequently utilized this doctrine to broaden the scope of this evidence to allow in character evidence. \textit{See, e.g., Friedrich}, 135 Wis. 2d at 19, 398 N.W.2d at 771; Day v. State, 92 Wis. 2d 392, 404, 284 N.W.2d 666, 672 (1979); \textit{Tarrell}, 74 Wis. 2d at 658, 247 N.W.2d at 703.
\item Hendrickson, 61 Wis. 2d at 279, 212 N.W.2d at 482. In Friedrich, the court rationalized broadening the exceptions by holding that due to the repulsive nature of these sexual offenses, the jury may not believe that anyone could commit such acts. \textit{Friedrich}, 135 Wis. 2d at 28, 398 N.W.2d at 775. Therefore, according to the supreme court, the only way the prosecution could convince the jury that the defendant committed the crime is to parade the past history of the defendant's "plans, schemes and motives." \textit{Id.}
\item If this evidence actually amounted to a plan, scheme or motive, the court would not need the "greater latitude" doctrine. Instead, the prosecution is really parading the defendant's past acts in
charged misconduct doctrine prohibits. One should not be allowed to circumvent the uncharged misconduct rule by expanding the definitions of the legitimate purposes for which this evidence may be introduced.\footnote{150}

In \textit{Hendrickson v. State},\footnote{151} the defendant was convicted of incest and taking indecent liberties with a child. At trial, the prosecutor was permitted to introduce evidence of other acts of intercourse the defendant had with the complaining witness-daughter and two other daughters.\footnote{152} The court held that given the greater latitude of proof allowed in sexual offenses, evidence of the uncharged misconduct was admissible under the plan theory.\footnote{153} The court failed to provide an analytical framework for its findings. However, it did quote an opinion of another jurisdiction which stated, "[t]he older sister's testimony is relevant to show . . . [a] general plan to use his daughters to gratify his lust, passion and sexual desires."\footnote{154}

Based on the facts of this case, there is no indication that the defendant had a "plan" to assault his daughter. There is nothing in the opinion that suggests the defendant assaulted one daughter as a step in a plan leading to the charged crime — the assault of the other daughter. Instead, the word plan was treated as a magic password to admit evidence which proved only propensity. A blanket statement that the evidence "fits" under the plan theory is not enough. There must be some evidence that the defendant committed the act in furtherance of a plan. These acts were not committed for the purpose of achieving some ultimate goal; rather, they were all single acts of the same kind.\footnote{155}

It is easy to understand how the "greater latitude" approach gained acceptance. Judges, outraged by the abhorrent nature of sexual offenses, have

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\footnote{150}{See J. \textit{Wigmore}, \textit{supra} note 66, § 62.2 (citing \textit{Hendrickson}, 61 Wis. 2d at 277, 212 N.W.2d at 482). Professor \textit{Wigmore} stated that courts that do not expressly recognize a sexual deviant character exception may effectively allow such an exception in sex offenses by expansively interpreting various well established exceptions to the character evidence rule. \textit{Id}.

\footnote{151}{61 Wis. 2d 275, 212 N.W.2d 481 (1973).}

\footnote{152}{\textit{Id}. at 276, 212 N.W.2d at 481.}

\footnote{153}{\textit{Id}. at 282, 212 N.W.2d at 484. The court also admitted this evidence under the motive and intent theories. \textit{Id}.


\footnote{155}{See also \textit{Friedrich}, 135 Wis. 2d at 24, 398 N.W.2d at 773.}
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admitted evidence establishing only criminal propensity under the guise of the "greater latitude" doctrine. However, outrage is not an acceptable basis for enlarging already broad definitions. Wisconsin should abolish the "greater latitude" approach, because arguments for admission of uncharged misconduct evidence to show propensity in sexual assault cases are no more persuasive than in any other case.

The interests protected by this rule are being violated to the same extent as nonsexual assault cases when evidence is introduced to show propensity in sexual assault cases. The relevancy problem does not change. Moreover, the jury may still make legally impermissible inferences from the evidence. In fact, given the nature of the act, the jury is more likely to make such impermissible inferences. Finally, there is still the possibility of violating the defendant's constitutionally protected rights. The categorical approach taken in this area is unwarranted. Admissibility of uncharged misconduct evidence in these cases should be determined by the same case by case assessment used in other cases.

Courts should also narrow the application of the plan theory in general. First, courts should find an overall objective tying the uncharged misconduct with the charged crime. In other words, the defendant must commit the uncharged act in furtherance of some larger scheme or goal. Second, the plan evidence must be relevant to an ultimate issue in the case. The best approach is for the trial court to insist that the prosecuting attorney explain, on the record, how the uncharged misconduct evidence furthers some larger goal, and why it is relevant to a specific ultimate issue. If these requirements are not met, the evidence does not establish a plan and should be excluded.

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156. See Comment, Other Crimes Evidence to Prove the Corpus Delicti of a Child Sexual Offense, 40 U. MIAMI L. REV. 217, 218 (1985). In Friedrich, 135 Wis.2d at 31-34, 398 N.W.2d at 776-78, the majority cited several reports and law review articles regarding the devastating effects sexual abuse has on children. There is little doubt that child abuse has become a serious problem in this country. However, when the legislature has spoken, as it has in Section 904.04(2), the court is bound by the legislature's decision. Consequently, the court is not in a position to admit character evidence under the unfounded belief that it is the solution to the nation's child abuse problem. It is the court's duty to strictly adhere to the principles of Section 904.04(2).

157. Commonwealth v. Boulden, 179 Pa. Super. 328, 342-46, 116 A.2d 867, 873-74 (1955) (Pennsylvania had a liberal policy of admitting evidence of uncharged misconduct in sexual offense cases); see also Friedrich, 135 Wis. 2d at 38, 398 N.W.2d at 779 (Heffeman, C.J., dissenting) ("[N]o reasons are ever given why evidence not otherwise admissible under the rules of evidence should be allowed in a sex crime case. No reasons are given because there are no reasons that withstand scrutiny."); Tarrell, 74 Wis. 2d at 667, 247 N.W.2d at 705-07 (Abrahamson, J., dissenting).

158. For a discussion of the interests protected by the uncharged misconduct rule, see supra notes 20-39 and accompanying text.
2. Motive

a. The Motive Theory in General

Motive is generally considered a state of mind or an emotion that causes a person to act in a certain way. Similar to plan, motive is not an ultimate issue in the case and must be probative of some element that is in issue. Motive evidence may be offered to prove identity, intent, or that a crime actually occurred.

If the prosecution uses motive evidence to prove identity, the motive must be peculiar to the defendant. If the prosecution introduces evidence of motive to show intent, the uncharged act may be dissimilar to the charged act. For instance, detection of an uncharged fraud may motivate the defendant to murder the person who detected the fraud. In this case, the uncharged act of fraud supplied the motive for the charged act of murder despite the dissimilarity of two acts. Furthermore, the ultimate issue for which this evidence is submitted must be in issue. If it is not in issue, the evidence is inadmissible because it is irrelevant.

b. The Motive Theory in Wisconsin

Motive is the "reason which leads the mind to desire the result of the act." However, it appears that this definition has been applied so broadly at times that it has become synonymous with the definition of propensity. Evidence of uncharged misconduct has been introduced even though it does

159. C. Wright & K. Graham, supra note 7, § 5240. Motive is not synonymous with intent even though some courts treat it as such. See, e.g., United States v. Scholle, 553 F.2d 1109, 1121 (8th Cir. 1977); United States v. Bland, 432 F.2d 96, 97 (5th Cir.), cert. denied, 401 U.S. 912 (1970).

160. C. Wright & K. Graham, supra note 7, § 5240.

161. E. Imwinkelried, supra note 18, § 3:16; C. McCormick, supra note 125, at 562; C. Wright & K. Graham, supra note 7, § 5240.

162. If the defendant is the only one who would entertain the motive, the evidence would be admissible to show identity. Unfortunately, this is rarely the case. The more common scenario concerns motive of the type shared by a large number of people. For example, evidence that the defendant is motivated to commit robbery because of a drug addiction is evidence of motive shared by many people. Because motives are rarely peculiar to one individual, motive evidence has proven to be troublesome. E. Imwinkelried, supra note 18, § 3:16; see also C. Wright & K. Graham, supra note 7, § 5240.

163. E. Imwinkelried, supra note 18, § 3:16.

164. State v. Fishnick, 127 Wis. 2d 247, 260, 378 N.W.2d 272, 279 (1985) (citing Baker v. State, 120 Wis. 135, 145-46, 97 N.W. 566, 570 (1903)). The Wisconsin Supreme Court has distinguished motive from plan by holding that motive explains why a person acted in a particular manner while plan explains the intentional steps taken by the person to reach the goal. Balistreri, 106 Wis. 2d at 756, 317 N.W.2d at 500.

165. See, e.g., Friedrich, 135 Wis. 2d at 51-52, 398 N.W.2d at 785 (Heffernan, C. J., dissenting); Fishnick, 127 Wis. 2d at 255, 378 N.W.2d at 277; Day v. State, 92 Wis. 2d at 392, 404, 284
not demonstrate a specific motivation but a generalized urge. This gen-
eralized urge is not probative of the ultimate issue of identity, intent, or that a
crime was actually committed. Instead, it shows character. This occurred in State v. Fishnick.\(^\text{166}\)

In Fishnick, the state introduced evidence claiming that the defendant offered D.F., a thirteen year old girl, twenty dollars to show him her vaginal area, to prove that the defendant had sexual conduct with C.S., a three year old girl, seven days later.\(^\text{167}\) On appeal, the court held that D.F.'s testimony was admissible to show motive,\(^\text{168}\) because the defendant's interactions with C.S. and D.F. were motivated by the need for sexual gratification.\(^\text{169}\) The court concluded that the uncharged misconduct with D.F. provided a motive for the alleged sexual contact with C.S.

The problem with characterizing this evidence as proof of motive is that it concludes Fishnick was motivated by a generalized urge — sexual gratification — to commit the charged crime. Scholars have raised doubts regarding the usefulness of a generalized urge to show that the defendant committed a crime.\(^\text{170}\) One author has suggested that simply because a person was motivated by a sexual urge does not prove that the defendant intended to satisfy those desires.\(^\text{171}\)

In Fishnick, the court determined that the defendant acted because he had a motivation to sexually gratify himself. From this determination, it was concluded that a crime was committed and that the defendant was the one who committed the crime. However, sexual gratification is nothing more than a generalized urge showing the defendant's propensity to commit sexually deviant acts. Thus, the chain of inferences was as follows: Because the defendant has made sexual advancements to a young girl in the past, he has the propensity to commit sexually deviant acts and therefore has com-

\(^{166}\) N.W.2d 666, 672 (1979); Tarrell, 74 Wis. 2d at 663, 247 N.W.2d at 705 (Abrahamson, J., dissenting).

\(^{167}\) 127 Wis. 2d 247, 378 N.W.2d 272 (1985). For a more in-depth discussion of the facts of this case, see supra notes 91-94 and accompanying text.

\(^{168}\) Fishnick, 127 Wis. 2d at 250, 378 N.W.2d at 275. The defense was that the crime did not occur. \textit{Id.} at 258, 378 N.W.2d at 278.

\(^{169}\) \textit{Id.} at 261, 378 N.W.2d at 280. It is important to note that the prosecution did not rely on the "greater latitude" standard expressed in Hendrickson. \textit{Id.} at 256, 378 N.W.2d at 277.

\(^{170}\) \textit{Id.} at 260, 378 N.W.2d at 279.

\(^{171}\) See, e.g., J. Weinstein & M. Burger, supra note 2, ¶ 404[08]; J. Wigmore, supra note 66, at 1349; C. Wright & K. Graham, supra note 7, ¶ 5240 (there are doubts when the supposed motivation is so general); see also E. Imwinkelried, supra note 18, ¶ 3:16 (motivation of sexual satisfaction has little, if any, probative value on the issue of identity).
mitted this sexually deviant act. To admit evidence of a generalized urge to show "motive," defeats the principle of Section 904.04(2).\footnote{172}

The motive definition becomes even broader when courts rely on the "greater latitude" standard invoked in cases involving sexual offenses.\footnote{173} This doctrine is used under the motive theory the same way it is used under the plan theory. The definition of motive is enlarged to allow the admission of inadmissible character evidence in sex offenses.\footnote{174}

In order to adhere to the letter and spirit of Section 904.04(2), the court abolish the "greater latitude" standard. As discussed above, there is no justification for evoking this doctrine.\footnote{175} Furthermore, the court should restrict evidence of uncharged acts in accordance with the definition of motive. Again, purposes for which the evidence is being offered cannot be treated as a magic password to admit otherwise prohibited character evidence. The uncharged misconduct evidence has to establish more than a generalized urge in order to explain why the person acted in a particular manner. Courts should find that the uncharged misconduct induced the defendant to commit the charged crime before allowing the evidence to come in under motive. That the defendant has committed an act in the past and therefore the defendant had the motivation to commit the charged act establishes only that the defendant has a propensity to commit the act. This type of manipulation elicits all the dangers Section 904.04(2) is designed to prevent. By masking character evidence as evidence of motive, the prosecution is introducing irrelevant evidence, inducing the jury to make impermissible inferences, and violating the defendant's constitutional rights.\footnote{176}

\footnote{172. Since Fishnick, courts have frequently used motive to introduce uncharged misconduct under the theory that the defendant's motivation was to obtain sexual gratification. See, e.g., Mink, 146 Wis. 2d at 16, 429 N.W.2d at 104-05 (evidence of the defendant's sexual contact with his stepsons approximately twenty years prior to the charged incident was admissible to show motive for the charged crime of sexual contact with his four year old grandson); State v. Conley, 141 Wis. 2d 384, 398, 416 N.W.2d 69, 75 (Ct. App. 1987), vacated on other grounds sub nom., Wisconsin v. Conley, 487 U.S. 1230 (1988) (evidence that the defendant had sexual intercourse with his daughter several times prior to the charged incident illuminated the defendant's motive for sexual gratification).

173. For a discussion of the "greater latitude" standard, see supra notes 148-55 and accompanying text.

174. See, e.g., Day v. State, 92 Wis. 2d 392, 404, 284 N.W.2d 666, 672-73 (1979) (applying the elements of the "greater latitude" standard to admit evidence that the defendant supplied minors with beer and marijuana and either had or sought to have sexual intercourse with other young girls demonstrated the defendant's "motive" of obtaining sexual gratification, which in turn proved that the defendant had intercourse with the girls in the charged crime).

175. See supra notes 156-58 and accompanying text.

176. See supra notes 20-39 and accompanying text.
3. The Smorgasbord Approach

The "smorgasbord" approach, according to Professors Wright and Graham, is not a traditional purpose for which uncharged misconduct evidence may be introduced. Rather, it is a technique used when a legitimate purpose for introducing the evidence is not present. The purposes listed in Section 904.04(2) are not mutually exclusive. At times, evidence may be admissible under more than one theory. However, the prosecution may not list several purposes in the hope that one may be appropriate. Instead, in situations in which there may be more than one legitimate reason for introducing the evidence, the trial court should direct the prosecuting attorney to articulate reasons why each purpose is appropriate.

This technique was used in State v. Rutchik. In Rutchik, the evidence was admitted to show preparation, plan, identity and intent. However, none of these theories legitimately applied to the case. Preparation did not apply because demonstrating that the defendant prepared for the charged crime by committing a similar crime in the past only proved criminal propensity. Likewise, plan was inappropriate because the evidence did not demonstrate that the uncharged act (the first burglary) was committed in furtherance of the charged crime. Furthermore, because the crimes were not unique, the evidence did not prove identity. Finally, intent was irrelevant because intent was not an issue in this case.

Courts should prohibit prosecutors from using the "smorgasbord" technique to introduce evidence of uncharged misconduct. Furthermore, appellate courts should demand that trial courts carefully analyze each theory before using it as a basis to admit such evidence. It is worth repeating that treating these purposes as magic passwords is strictly forbidden. In order to adhere to the principles of Section 904.04(2), courts may only admit evidence that is legitimately offered to prove something other than propensity.

177. Tarrell, 74 Wis. 2d at 662, 247 N.W.2d at 704 (Abrahamson, J., dissenting); see, e.g., Friedrich, 135 Wis. 2d at 24, 398 N.W.2d at 773 (motive and plan); Fishnick, 127 Wis. 2d at 261, 378 N.W.2d at 280 (motive and plan); Conley, 141 Wis. 2d at 400, 416 N.W.2d at 76 (motive and intent).
178. C. Wright & K. Graham, supra note 7, § 5240.
179. 116 Wis. 2d 61, 341 N.W.2d 639 (1984). For a discussion of the facts of this case, see supra notes 135-38 and accompanying text. For an excellent analysis of the "smorgasbord" approach in Wisconsin, see C. Wright & K. Graham, supra note 7, § 5240.
180. Rutchik, 116 Wis. 2d at 68, 341 N.W.2d at 643.
181. See supra notes 139-40 and accompanying text.
Because of the nature of uncharged misconduct evidence, its admission is often extremely prejudicial to the defendant. In fact, the Wisconsin Supreme Court has noted that such evidence may distract the jury, induce jurors to infer that the defendant has a propensity to commit such acts, and invite punishment of the defendant because the defendant is, for reasons other than the offense charged, a bad person. Since there is a danger that this evidence is unfairly prejudicial toward the defendant, the Wisconsin Legislature has adopted a balancing test which permits courts to exclude evidence though it is otherwise admissible.

This balancing test is the final step in the three-prong test. It requires the trial court to balance the probative value of the uncharged misconduct evidence against the danger of undue prejudice to the defendant. According to the judicial council committee’s notes, evidence of uncharged misconduct should be excluded if “under all the circumstances the danger of undue prejudice substantially outweighs the probative value under section 904.03.” Balancing the strength and necessity of the evidence against the likelihood that the jury would make impermissible inferences is a difficult task for trial judges. Time constraints serve to further hinder judges in this context. In order to properly analyze the uncharged misconduct evidence under the balancing test, courts should consider several factors relating to the nature and necessity of the evidence.

1. Balancing

When examining this evidence, trial courts need to determine if there is any less prejudicial evidence available to the state that would prove the same fact that the uncharged misconduct evidence is designed to prove. The state may not forego the use of less prejudicial evidence to utilize preju-

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182. State v. Poh, 116 Wis. 2d 510, 524, 343 N.W.2d 108, 116 (1984); see also Patterson, supra note 27, at 334 (juries tend to overvalue other crimes evidence). For an examination of the dangers involved in introducing evidence of uncharged misconduct, see supra notes 20-39 and accompanying text.

183. Wis. R. EVID. 904.04(2) judicial council committee’s note, cited in 59 Wis. 2d R79 (1973). Wisconsin Statute Section 904.03 states, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Wis. STAT. § 904.03 (1987-88). The federal jurisdiction has adopted the same balancing approach. See Fed. R. EVID. 404(b) federal advisory committee’s note, cited in 59 Wis. 2d R79 (1973).

Suppose the prosecution wants to prove that a particular rifle belonged to the defendant. The prosecution could introduce evidence that the defendant was convicted of reckless use of a weapon and that the conviction involved the same rifle. However, evidence that the rifle was registered to the defendant is as readily available and less prejudicial. Under these circumstances, the trial court should permit the prosecution to introduce only the firearm registration documents and not the reckless use of a weapon conviction.

Trial courts should also consider whether there is sufficient evidence on the record to prove the particular fact without introducing uncharged misconduct evidence. If there is ample evidence on the record which seems likely to convince the trier of fact on that point, the trial court should exclude the uncharged misconduct evidence because of the danger of unfair prejudice. As the court warned in Whitty, prosecutors cannot introduce uncharged misconduct evidence when sufficient evidence is already on the record without running a serious risk of violating the defendant's right to a fair trial.

Another factor trial courts must consider under the balancing prong is the nature of the uncharged act. When the uncharged act is more socially unacceptable than the charged crime, the trial court should favor excluding the evidence on the grounds that the prejudicial nature of the evidence substantially outweighs its probative value. For instance, evidence that the defendant, charged with robbery, had previously been convicted of a sexual offense, may be so substantially prejudicial compared to its probative nature.

185. See E. IMWINKELRIED, supra note 18, § 8:16; S. SALTZBURG & K. REDDEN, supra note 15, at 184; C. WRIGHT & K. GRAHAM, supra note 7, § 5250. For examples where reviewing courts have held evidence inadmissible because there was less prejudicial evidence available, see United States v. Reed, 376 F.2d 226, 228 (7th Cir. 1967) (use of prison "mug shot" of accused for purposes of identification held too prejudicial); People v. Ogunmola, 39 Cal. 3d 120, 701 P.2d 1173, 1176, 215 Cal. Rptr. 855, 858 (1985) (where the California Supreme Court held that the prosecution should have conducted physical demonstrations to prove that a step at the foot of a gynecologist's examining table did not make sexual contact impossible instead of introducing extremely prejudicial testimony from alleged victims of previous uncharged sexual assaults).

186. D. LOUISELL & C. MUELLER, supra note 103, § 140, at 203. See, e.g., Goodwin, 492 F.2d at 1152 (in view of the complete absence of need for the evidence, this case is a dramatic example of the kind of prejudice the uncharged misconduct rule was designed to protect).

187. Whitty, 34 Wis. 2d at 297, 149 N.W.2d at 565. The court held that admitting such evidence has a needless prejudicial effect. Id.

as to warrant exclusion.\textsuperscript{189} In contrast, when the evidence is a more acceptable act, the danger of prejudice is not as high.\textsuperscript{190} For example, the mere act of making a statement is not as likely to warrant exclusion.\textsuperscript{191} This does not mean that a "neutral act" can never be so prejudicial as to substantially outweigh its probative nature. Instead, neutral acts are less likely to be overly prejudicial compared to more socially unacceptable acts. Under either circumstance, trial courts should weigh the prejudicial nature of the evidence against its probative value according to the particular facts in the case.

Furthermore, trial courts should consider the strength of the uncharged misconduct evidence.\textsuperscript{192} If the evidence contains little probative value yet a high risk of prejudice, trial courts should not admit the evidence. For example, introducing evidence that the defendant had made sexual advances to an eighteen year old woman, to prove that the defendant sexually assaulted a fourteen year old girl, is substantially more prejudicial than probative.\textsuperscript{193} Here, the probative value of the evidence is negligible. Because of the slight probative value of the evidence, and the substantial danger of prejudice to the defendant, this evidence falls squarely on the prejudicial side of the balancing test. Therefore, this evidence should be held inadmissible.

Courts should not only evaluate the prejudicial nature of the evidence, they should also consider the other factors listed in Wisconsin Statute Section 904.03. For instance, uncharged misconduct evidence should not be admitted if there is a substantial danger of confusing the jury,\textsuperscript{194} or if its introduction would foster undue delays.\textsuperscript{195} If the trial court is not in a position to properly balance the evidence during the prosecution's case-in-

\textsuperscript{189} United States v. Cook, 538 F.2d 1000, 1005 (3d Cir. 1976) (when there is a need for uncharged misconduct evidence, courts should minimize the potential prejudice by excluding information regarding the nature of the felony or by using a less prejudicial offense).


\textsuperscript{191} See, e.g., Hough, 70 Wis. 2d at 815, 235 N.W.2d at 538.

\textsuperscript{192} E. IMWINKELRIED, supra note 18, § 8:24; C. WRIGHT & K. GRAHAM, supra note 7, § 5250.

\textsuperscript{193} Friedrich, 135 Wis. 2d at 26, 398 N.W.2d at 774; see also United States v. Hernandez, 780 F.2d 113, 118 (D.C. Cir. 1986) (evidence of defendant's "participation" in a fight was so tenuous that its slim probative value was overwhelmed by its prejudicial effect); Foskey, 636 F.2d at 524 (the uncharged act involved accompanying an individual carrying concealed narcotics).

\textsuperscript{194} See J. WIGMORE, supra note 66, at 1215; Sharpe, supra note 188, at 562 (presenting uncharged misconduct may be distracting to the jury).

\textsuperscript{195} Patterson, supra note 27, at 334.
chief, it should permit the prosecution to introduce uncharged act evidence only in its rebuttal.\textsuperscript{196}

2. Limiting Instructions

If the evidence is prejudicial but passes the third prong of the admissibility test, limiting instructions may be given. These instructions should direct the jury to only consider the uncharged misconduct evidence for the limited purpose for which it was introduced. Thus, the jury may not conclude that, given the defendant's bad character, the defendant must have committed the crime charged.\textsuperscript{197} Usually, if the defendant does not request a limiting instruction, the reviewing court will not find error in the trial court's failure to give one.\textsuperscript{198} However, if the trial court refuses to issue a limiting instruction after the defendant has requested one, there may be grounds for finding reversible error.\textsuperscript{199}

Limiting instructions are designed to cure any prejudicial effect surrounding the admission of uncharged misconduct evidence.\textsuperscript{200} In fact, there is a presumption that if the instructions are properly given, the jury will not use this evidence for illegitimate purposes.\textsuperscript{201} However, scholars have questioned this presumption.\textsuperscript{202} As Justice Jackson stated, "[t]he naive assumption that prejudicial effect can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigating fiction."\textsuperscript{203} Given the limited effectiveness these instructions have on the jury, courts should not admit extremely prejudicial evidence, relying solely on limiting instruc-

\textsuperscript{196} See United States v. Benedetto, 571 F.2d 1246, 1248-50 (2d Cir. 1978); United States v. Stanley, 411 F.2d 514, 516 (7th Cir.), cert. denied, 396 U.S. 959 (1969); Harris, 123 Wis. 2d at 237-38, 365 N.W.2d at 926 (quoting United States v. Danzey, 594 F.2d 905, 912 (2d Cir.), cert. denied, 441 U.S. 951 (1979)).

\textsuperscript{197} See, e.g., Wis. J.I. - Crim. 275 (1983).

\textsuperscript{198} See United States v. Cooper, 577 F.2d 1079, 1089 (6th Cir.), cert. denied, 439 U.S. 868 (1978). But see Spraggin, 77 Wis. 2d at 100-01, 525 N.W.2d at 99.

\textsuperscript{199} Wisconsin Statute Section 901.06 states that when the evidence is available for a limited purpose, the court shall give a limiting instruction upon request; Wis. STAT. § 901.06 (1987-88); see also United States v. Yopp, 577 F.2d 362, 366 (6th Cir. 1978); United States v. McFadyen-Snider, 552 F.2d 1178, 1184 (6th Cir. 1977), cert. denied, 435 U.S. 995 (1978); S. SALTZBURG & K. REDDEN, supra note 15, at 186-87.

\textsuperscript{200} See, e.g., Fishnick, 127 Wis. 2d at 262, 378 N.W.2d at 280; State v. Shillcutt, 116 Wis. 2d 227, 238, 341 N.W.2d 716, 721 (Ct. App. 1983), aff'd, 119 Wis. 2d 788, 350 N.W.2d 686 (1984) (limiting instructions given prior to uncharged misconduct testimony were sufficient to temper any prejudicial effect).

\textsuperscript{201} Shillcutt, 116 Wis. 2d at 238, 341 N.W.2d at 721.

\textsuperscript{202} See Proposed Rules, supra note 53, at 332 (the effectiveness of cautionary instructions is doubtful); Imwinkelried, supra note 6, at 263; Nevin, supra note 17, at 24.

\textsuperscript{203} Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (footnote omitted).
tions to cure its unfair effects. Courts need to evaluate this evidence in a realistic light. They should exercise great care in determining whether a limiting instruction could cure any prejudicial effect. If a jury is likely to make character inferences prohibited by Section 904.04(2), even with the limiting instruction, the evidence should be excluded.

Although the general rules of evidence favor admissibility in close cases, this bias has been called into question when the evidence pertains to uncharged misconduct. The drafters of the Proposed Rules of the American Bar Association advocate a change in the balancing test. Under the proposed plan, the prosecution is required to convince the court that the probative value of the evidence substantially outweighs the danger of unfair prejudice. This proposal puts the burden of proof squarely on the prosecution. It also makes admissibility more difficult. The need to strengthen the uncharged misconduct evidence rule is apparent when one examines the excessively prejudicial effect this evidence has on the defendant's case.

Currently, uncharged misconduct evidence is excluded under the third prong if its prejudicial nature substantially outweighs its probative value. To determine this, courts examine the nature and the necessity of the evidence. Evidence may also be excluded if the other factors listed in Section 904.03 apply. Furthermore, if the court determines that evidence is not substantially prejudicial, it should give a limiting instruction. However, courts should not treat limiting instructions as magical cures and should exclude the evidence if a limiting instruction would not be effective. Finally, even though general rules of relevancy favor admissibility, that bias has been questioned when it is applied to uncharged misconduct evidence. The new proposal from the American Bar Association Committee suggests that uncharged misconduct evidence be ruled admissible only when its probative value substantially outweighs its prejudicial nature.

IV. CONCLUSION

This Comment does not recommend a prohibition against the use of all uncharged misconduct evidence. It does, however, advocate narrowing the scope of the character evidence rule. There are strong policy reasons for strict adherence to this rule. Such factors include the need to prevent juries from hearing irrelevant evidence and making impermissible character inferences, and the need to prevent the violation of the defendant's constitutional rights.

204. Proposed Rules, supra note 53, at 331.
205. Id. at 333.
In order to ensure that the Wisconsin judiciary will adhere to the letter and spirit of Section 904.04(2), the Wisconsin Supreme Court should take affirmative action. It is imperative that the court hand down a decision that demonstrates strict compliance with Section 904.04(2). The first step that the court should take is to show that it will not tolerate admission of evidence that is not proven to be relevant. This includes all evidence that is not in substantial dispute, not probative, or is too remote in time. It is fundamental that if evidence is not relevant, it is inadmissible. Next, the court should narrowly define the legitimate purposes for which the evidence may be offered. The court should allow prosecutors to treat these purposes as magical passwords. If the prosecution utilizes the plan theory, it must demonstrate a plan. The mere utterance of the appropriate words should not engender admissibility. Finally, a more strict approach to the balancing test is needed. It is important to remember that the key to this prong is fairness. Finding that the evidence has some probative value does not end the inquiry. There are uncharged acts that are so prejudicial that it would be unfair to admit them even though they are probative.

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